Equity and Trusts

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Dedication

Dedicated to:

The memory of Professor Joseph Mutekanga Ngobi Igaga Founding ViceChancellor of Busoga University

Preface

This is another pioneering text on Equity and Trusts. Although trusts had been taught in the East African faculties of Law since the 1960s in conjunction with Succession Law, no attempt had been made to teach the principles of equity as a discipline separate from the various aspects of equity which are scattered throughout many of the legal courses which are taught at University. The introduction of Equity and Trusts as a course at Makerere University Faculty of Law in 1998 provided the spur for the development of this text. Apart from that, the increased concern about fairness, justice, gender and social equity in Uganda and the world, which aspects are embodied in the Constitution of Uganda, 1995, the Land act, 1998 and other legislation make an awareness of the principles of equity a prerequisite for both equitable administration of the law by the Courts and fair political and economic dispensation within our society.

The text provides an overview of equitable principles in Uganda and links this with the maxims of equity and the distinction between equitable and legal interests. This is followed by consideration of assignment of equitable interests and an analyses of the major equitable remedies including injunction, specific performance, rescission, rectification, order for an account and delivery up and cancellation of documents. Although of questionable relevance in modern times, the doctrines of equity which comprise election, satisfaction, performance and to a limited extent conversion are also examined.

The general treatment of equity is followed by specialist analyses of the concept of the trust, which is regarded as the largest manifestation of equity. The assessment covers the nature, creation and essentials of a trust as well as peculiar manifestations of the trust in the form of charitable, implied, resulting and constructive trusts. This is followed by consideration of the appointment retirement, removal and duties and powers of trustees, aspects of the execution of the trust. The consequences for a breach of trust are then considered.

The text winds up by examining aspects peculiar to estate planning namely the taxation of trust income and retirement and pension trusts.

The text will benefit students offering Equity and Trusts and Estate Planning in East African universities as well as legal practitioners, insurance, social security and corporate operators.

The law is stated as at 31 August 2006

D. J. Bakibinga
Office of the Head, Department of Commercial Law
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1st March, 2011

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Chapter 1

Overview of Equity in Uganda

A. Introduction

The past decade and a half in Uganda has witnessed both concern and interest in, as well as efforts to realise social equity among Uganda. This is evident in programmes earmarked by both the Government and Non-Government Organisations (NGOs) which are aimed at empowering women with a view to redressing their inequitable treatment; achieving universal primary education whose objective is to enable a large part of the population to attain literacy and thereby enable it to participate in the development process both for their benefit and that of the nation; bringing legal services in the form of legal aid to persons least able to afford them; catering for persons with disabilities and reforming the legal justice system with a view to realising speedy and equitable justice.

Underlying all these strategies is the notion or idea of equity. Yet this notion of equity appears not to be well understood both among ordinary citizens and legal professional persons in the course of discharging their duties.

This chapter considers the concept of equity, its historical development and its relationship with the common law and customary law.

B. Definition of Equity

1. Ordinary Meaning

The ordinary or popular meaning of equity refers to right doing, good faith, honest and ethical dealings in transactions or relationships between individuals. Put another way, equity refers to whatever is just and right in all human relationships and transactions. The ordinary conception of equity is, therefore, based on morality and is linked to

what is normally exhorted in churches, mosques and other religious establishments. It is also captured by Objective XI of the National Objectives and Directive Principles of State Policy contained in the Constitution of Uganda, 1995 which enjoins Government to take steps to realise balanced development of the diverse areas of Uganda and to pursue affirmative action in relation to the least developed areas.

The main shortcoming of the ordinary conception of equity is that it is fluid and moralistic and incapable of enforcement by the courts. Even within the constitutional context, the Objectives and Directive Principles of State Policy are not justiciable. Objective one of those objectives stresses that the objectives are mere guidelines to implementing persons and bodies in enforcing relevant laws.

2. Juristic Concept

It may, therefore, be asked what sort of equity is enforceable by the courts or is justiciable? In other words what is the legal meaning of equity?

Equity possesses a technical meaning which may be divided into two categories which complement each other and affects the administration of law and justice by the judiciary. These are the general juristic sense and the technical juridical sense which we examine here briefly.

a) General Juristic Concept

The first category is called the general juristic sense of equity. By this is meant that power to meet the moral standards of justice in a particular case, by a judicial body possessing the discretion to mitigate the rigid application of strict rules, in order to adapt the judicial relief to the peculiar circumstances of a case (McClintock, *Handbook of the Principles of Equity* (1948).

Put another away, equity in the general juristic sense means liberal and humane interpretation of law in general so far as that is possible without actual antagonism to the law itself (Allen *Law in the Making* (1964)).

Effectively, therefore, equity in the general juristic sense refers to a judicial body's power to administer the law justly taking into account the special facts of the particular case. This conception is recognised by our Constitution 1995 in Article 126(2)(e) which says:

> In adjudicating cases of both civil and criminal nature the courts shall, subject to the law, apply the following principles (e) substantive justice shall be administered without undue regard to technicalities.

In applying Article 126(2)(e) of the Constitution, the Supreme Court of Uganda in *Stephen Mabosi v. Uganda Revenue Authority* (1995) held that a Memorandum of Appeal which was filed out of time could not be rejected because the appellant could not file it before obtaining the official record of proceedings from the High Court which were released after the 60 day period required for filing the Memorandum of Appeal had elapsed.

b) Technical Juridical Concept of Equity

The second category of the technical meaning of equity is called the technical juridical sense of equity. By this is meant a special and peculiar department of the English legal system which was created, developed and administered in the Court of Chancery. Since the Judicature Acts of 18731875 of the United Kingdom, it is no longer accurate to define equity in that manner. The Judicature Acts combined all the superior courts into a Supreme Court of Judicature which was empowered to administer both the rules of equity and the rules of the common law. An identical position exists in Uganda whereby under Section 14(2)(b), (4) of the Judicature Act, Cap 13 and Section 11 of the Magistrate's Courts Act, 1970 the courts administer the rules of equity and those of the common law concurrently.

In view of the developments in Britain since the Judicature Act and the position existing in Uganda, the most accurate description of equity in the technical juridical sense is that body of rules administered by the English Courts, which, were it not for the Judicature Acts, would be administered only by those courts known as Courts of Equity.

C. Historical Outline of the Evolution of Equity

1. Rationale for Growth of Equity

The general juristic sense of equity lays emphasis on the basic principles of justice, and fair play in the administration of the law. This tendency arises from the fact that law at any point in time is not perfect or is defective. While it is conceded that the aim of the law is to maintain justice, this has not been achieved in practice. This explains the development of equity whose objective was to correct any injustice caused by the strict application of the law.

It may be asked why the law has been unable to achieve its principal aim of maintaining justice. The answer is that every disputed case presents different problems. Consequently, since law is a body of rules which apply to certain defined and factual situations and does not provide for changes or variation presented by peculiar circumstances, it is not surprising that it works injustice in certain unanticipated situations or cases. In other words, law tends to be uniformly and rigidly applied, thereby not catering for exceptional circumstances. It is those exceptional circumstances which equity tries to cater for or accommodate. In this vein, it has been observed[1] that the contemptuous disregard of the common law for human values aided the expansion of the Chancery Jurisdiction in Britain, in that the latter gave effect to the accepted elementary principles of social justice.

The role of equity in mitigating the rigidity of the application of the law has been variously articulated. Thus equity has been described[2] as a "kind of justice superior to legal justice a correction of law where it is defective owing to its generality". Courts also appear to have recognised this role of equity. Thus in Nigeria, in the interest of justice customary law and statute laws have been given

1. Jegede, *Principles of Equity* (Ethiopia Publishing Corporation Benin, Nigeria 1980) p.10
2. *Ross, D. Aristotle (Ethics)* p.215. See also Lloyd, *infra n.6, pp9192*

a liberal and humane interpretation.[3] Courts have also emphasized their equitable jurisdiction where strict application of the law would work injustice. Thus in *Apata Iamh of Akuku V. Freeman Ogbeki*[4], Stuart, J. stated that under customary law an assertion of ownership of land by strangers who have been permitted to settle thereon is sufficient misconduct to warrant their eviction. However, on grounds of equity and convenience such a right is rarely exercised. Furthermore, in *Ashogbon V. Oduntan*[5], Graham Paul, J. Indicated that where a native custom is invoked in support of a forfeiture of a right, this court will as a court of equity consider in the particular circumstances of each case whether forfeifuture or a suitable penalty would be the proper course. He added:

> I regard this court in its equity jurisdiction as..... the keeper of the conscience of native communities, in regard to the absolute enforcement of alleged native customs.

2. The Influence of Roman Law on the Growth of Equity

From the time of the early Greek Philosophers, there is the idea of equity in the general juristic sense as a supplement to law. The Greek conception of law was later relied upon by Roman Jurists to develop and widen Roman Law when the Roman Legal system appeared to be stagnating. The jurists based their appeal for law reform on the theory of natural law as a universal law of reason.[6] It is notable that Roman Law was not split up like English law into rules of common law and rules of equity. Roman law was an integral part of the Roman Legal System.

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3. *Robert Koney v. Union Trading Co Ltd*. (1934) 2 W.A.C.A.188
4. (195556) W.R.N.L.R73 at p.77
5. (1935) 12 N.L.R.7
6. Kagan, *Three Great Systems of Jurisprudence, p.171*. See also Lloyd, *Introduction to Jurisprudence* (Stevens, 3rd Ed.1972) Chap.3

While Roman Law contributed little to the development of English Equity[7], it had influence on the early development of English law and equity. For instance, the Praetor, who administered equity was similar to the Lord Chancellor and his equitable jurisdiction. Thus the Praetor's Edict which merged equity with the general law is similar and comparable to the manner in which common law and equity emerged to constitute the dual English System.[8]

It is also significant that English Chancery is extremely complex in its texture and owes its origin to materials from several heterogeneous sources. For instance, the early Chancellors, who were versed in Canon law contributed greatly to equity, while Chancery Judges borrowed extensively from Roman Law without acknowledging it.[9]

3. Origins of English Equity

From the time of the Norman conquest of England, English Common Law Courts (King's Bench, Common Pleas and Exchequer) applied principles of equity to cases before them. For two centuries, law and ethics were regarded as one. Consequently, equity in the general juristic sense was part of the law.

An important figure in the administration of justice was the Lord Chancellor who, in modern times, would be the equivalent of the Prime Minister. One of his functions was to issue *writs* which were necessary for starting every action at common law. Thus if a liti gant wanted redress from the Royal Court, he/she had firstly to obtain the correct writ from the Chancery. The writ had to bear the Royal Seal. The Court's power in this regard was linked to the Royal Prerogative to dispense justice. Hence the necessity for the Royal Seal.[10]

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7. *Kerly, A Historical sketch of the Equitable Jurisprudence, p.189*

8. Story, C*ommentaries on Equity Jurisprudence (3rd Ed) p.25*. See also Buckland, "Praetor and Chancellor" *13 Tiarlane L. Rev. 163 (1939);* Tudsbery "Equity and the Common Law" 29 *Law Q. Rev.* 154, 159 (1913)

9. Maine, *Ancient Law* (10th Ed. 1920) p.48

10. Story, *Commentaries on Equity Jurisprudence* (1886) Vol.1, p.35. See also Holdsworth, *History of English Law (*Vol.1) p.54

The power of the Chancellor to issue and also change writs enabled him to influence the development of the common law.

At this point in time, it appeared that a separate equity jurisdiction was unnecessary since the common law judges with their ecclesiastical background naturally exercised a lot of discretion in their judgments. In this regard, they were not restricted in their functions by statutes and the case law system. This was possible for two reasons. First, Parliament had not yet achieved its supreme law making power. Second, even if the case law system operated, it was not rigidly followed.

This system of law with its equitable flexibility and the King's power to dispense justice in accordance with what was fair and just would have continued. However, this trend of development was arrested by the conservative nature of common law judges, who generally, opposed new judicial developments. In particular they developed a practice of declaring new writs issued by the Lord Chancellor to be invalid.[11]

The growing rigidity and inflexibility in administering the common law by the common law judges was a result of certain political and judicial developments. First, the growing power of Parliament was a strong political influence. The view developed that only parliament could make laws and that the issuance of new writs without parliamentary approval infringed its power. Second, the judges placed more emphasis on forms. As a result, the merits of cases was relegated to a subsidiary or secondary position. Related to this was that common law courts could only handle cases where there were established remedies. Third, the element of legal positivism[12] became pronounced in English jurisprudence in that common law judges rigidly distinguished between law and ethics. Consequently, the law fell behind society's needs and expectations.[13]

11. Hodsworth, *ibid* p.449

12. See Lloyd, *supra* n.6, Chapter 4

13. *Ames "Law and Morals",* 22 Harv. Law Rev. 97, 102 (1908); Ames, "Specialty Contracts in Equitable Defences "9 *Harvard L. Rev.* 49, 54 (189596)

The backward judicial policy of the common law courts received statutory approval in the *Provisions of Oxford, 1258*, which provided that the power of the Chancery to issue a new writ was subject to the consent and approval of the King and his Council. This resulted into hardship to the litigants. *The Statute of Westminister I, 1285* tried to rectify the unsatisfactory situation. It gave power to Chancery to modify the existing writs in order to cater for new cases. This Statute was frustrated by the common law judges who assumed jurisdiction to decide on the validity of writs issued by the Chancery. Invariably, they cancelled any writ which was different from the existing writs.[14] Undoubtedly this resulted into more hardship and injustice for the litigants. First, many injuries could not be redressed because they did not fit within the existing writs or forms of action. Second, where common law remedies were given, they were inadequate and, therefore, did not fulfill the ends of justice. For instance, if rights were being violated, the common law could not prevent their violation by means of an injunction.

Towards the end for the thirteenth century the administration of the law by the common law courts was glaringly imperfect and deficient and was, therefore, not protective of the basic rights of the people. As a result, litigants begun to turn away from the common law courts and to send their petitions to the King In Council. There were two main reasons for this course of action by the litigants. First, the common law could not provide the remedy sought in accordance with justice. Second, the other party might unduly influence and pervert the course of justice through corruption.[15]

Initially, the petitions were handled by the KinginCouncil. Subsequently, owing to their numerous volume, they were transferred to the Lord Chancellor in his capacity as the Chief Executive of the King's Administration. This marked the beginning of the Lord Chancellor's judicial power.

14. Story on *Equity (*Randall 3rd Ed.) P.24

15. Maitland, *Equity* (Brunyate Ed.1949) pp45

4. Chancery Jurisdiction

It is significant that the power of the Chancery Court to grant reliefs was based on the King's prerogative and power to administer justice among the citizens. Consequently, reliefs were granted in the name of the King.

How then did the Chancery exercise its jurisdiction? In the first instance, the justice administered by the Chancery Court was based on common law rules. However, the rules were administered in a more liberal and humane way in order to achieve justice.

It's notable that many of the early petitions in the Chancery Court were in respect of assaults, batteries and imprisonments which wrongs were peculiar to a feudal society.[16] Although such wrongs could be handled by the common law courts, they were taken to the Chancery Court for two reasons. First, as we have already seen, common law courts were inflexible in regard to the use of writs. Second, in certain respects, it was difficult for commoners and poor people to obtain justice from the common law courts.

Second, the Chancery Court's jurisdiction in granting reliefs to petitions was based on reason, conscience and justice in the administration of the law. In this respect, equity in the general juristic sense was influential in the Chancery Court's administration of the common law rules.

It is significant that the equity of the early Chancery Court was not a special department of the law. It was exercised in the form of a discretionary power to modify the common law rules.[17]

Given the restrictive approach of the Common Law Courts in insisting on legal actions being crafted within recognised writs and providing inadequate redress to litigant's grievances, it became clear particularly in the early sixteenth century that their relevance in the

16. Story on *Equity supra* n.14, p.24; Maitland, *ibid*.pp.56

17. Tudsbery, *supra* n.8, p.158

administration of justice was similarly restricted. This provided scope for the expansion of equity jurisdiction to fill those evident gaps.[18]

5. Expansion and Development of Equity Jurisdiction

Prior to the seventeenth century, Chancery Jurisdiction tended to be elastic and vague or unclear and was characterised by five factors. First, the petitioners could appeal to the King's "grace, charity and conscience" and since the early Lord Chancellors were church people trained in Canon and Roman Law they would respond to these appeals and grant appropriate relief. Second, there was a wide variety of reliefs sought to which the Chancery responded. Third, reports of equity decisions were few and irregular, thereby affecting the development of the system of decisions based on precedent.[19] Fourth, the early Chan cellors were not bound by previous decisions especially since no definite rules had been formulated.[20] Fifth, being non-lawyers the Chancellors exercised equity jurisdiction based on principles of conscience and natural justice.[21]

Gradually, during the mid 17th Century, Chancery Jurisdiction lost its flexibility and adopted the common law system of precedent. Three reasons explain this development. First, the principles of conscience on which Chancery Jurisdiction was based were so vague and uncertain that they could lead to the individual and autocratic discretion of the particular Chancellor.[22] Second, some common law judges later presided over Chancery and influenced its adoption of the system of precedent. Third, there was an improved system of law reporting of equity cases. As a result, equitable rules became fixed and systematized just like the common law and decisions of Chancery depended on precedent.[23]

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18. Ames "Law and Morals", *supra* n.13, pp1089
19. Maitland, *supra,* n.15, p.8
20. Winder, "Precedent in Equity" 47 *Law Q.Rev.* 245 (1941)
21. Story *supra* n.10, pp.1819
22. Maitland, *supra* n.15, p.3; *Gee V. Pritchard* (1818) 2 Swants 402, 4141 where the court disapproved of "equity of this court varying like the Chancellor's foot"; Tudsbery, *supra* n.8, p.158.
23. Blackstone; *Commentaries* Vol.3, 432, 432

It should be stressed that although, in theory, equitable remedies are discretionary, the discretion must be exercised subject to clearly ascertainable and established principles.[24]

D. Content of Equity

Historically in England, equity developed to mitigate the rigidity of the application of the common law and to provide reliefs or remedies which the common law could not avail to litigants. Equity became popularised by the Court of Chancery which was headed by the Lord Chancellor and to which many litigants resorted after being frustrated by the Common Law Courts in terms of rigid procedure and availability of suitable remedies.

The most apt description of the content of equity in the technical juridical sense was provided by Story in his book, *Equity*. According to Story, equity jurisdiction may be divided into three categories namely *exclusive jurisdiction or the creation of new rights, concurrent jurisdiction or the creation of new remedies and auxiliary jurisdiction or the creation of new procedure.*

Each of these is examined briefly.

1. Exclusive Jurisdiction: Creation of New Rights

The exclusive jurisdiction of equity covers those situations in which rights *could* be recognised and enforced at common law by the common law courts. Nevertheless, owing to the inflexibility of those courts and their adherence to the doctrine of precedent, such rights were neither recognised nor protected at common law. The Chancery Court, however, recognised and protected such rights.

Exclusive jurisdiction could be divided into two categories. First that aspect which depended on the subject matter as in the

24. Keeton, *An Introduction to Equity* (6th Ed, 1965) p.5

25. (1917) 7 E.A.L.R.14. See also Harvey *Introduction to the Legal System In East Africa* (1975) pp 518521. The *Amkeyo* case was followed in *Mohammed V. R.* [1963] EA.188, Harvey *supra*, pp.521522

case of *trusts* and second the one which depended on the type of remedy which was to be administered; examples being equitable reliefs against *penalties* disguised as *liquidated damages* for instance in hire purchase contracts and the moderation by equity of provisions in tenancy or lease agreements relating to *forfeitures* for breaches of conditions or covenants.

2. Concurrent Jurisdiction, Creation of New Remedies

The exercise of concurrent jurisdiction depended on rights which the common law recognised and enforced.

However, the problem was that in some cases the remedies given by the Common Law Courts in enforcing those rights were inadequate. Equity intervened to provide adequate and just remedies than those available at common law. In this vein, equity could order *specific performance* of a contract whose subject matter was unique or grant an *injunction* to restrain the commission of a continuing trespass or other injury. It could also *order for an account*.

However, equitable remedies were conditional upon the breach being of a *legally enforceable right* and the *remedy at law being inadequate*. These conditions still apply to the grant of equitable remedies in Uganda. The grant of an injunction by the Court is specifically provided for in Section 38 of the Judicature Act, Cap 13.

3. Auxiliary Jurisdiction, Creation of New Procedures

Equity's auxiliary jurisdiction was exercised in order to assist the defective procedure at common law with a view to common law courts giving better and effective justice. This jurisdiction led to the development of new procedures including the administration of interrogatories and discovery of documents now provided for in Order 10 of the Civil Procedure Rules cap.65; and perpetuation of testimony. Nevertheless, the exercise of this jurisdiction depended on legal principles (See Order 10 CPR).

The examination of the content of equity paves the way for a discussion of two important aspects affecting the administration of

equity. These are the relationship between equity and customary law on the one hand and the relationship between equity and common law, on the other.

E. Relationship Between Equity and Customary Law

In spite of the introduction of English Law into Uganda (see now *Judicature Act S.14(2)(b)(i); Magistrates' Courts Act, S.11)*, the courts are still enjoined to observe or enforce the observance of any existing custom which is not repugnant to natural justice, equity and good conscience and not incompatible with any written law (*Judicature Act*, Section 15; *Magistrates' Courts Act , S.10(1))*.

Essentially, an existing custom can only be enforced if it does not infringe natural justice, equity and good conscience.

Some writers argue that "natural justice equity and good conscience" have all one meaning , that is, to achieve social justice in the administration of the law." Consequently, it is necessary to look at the result of the application of a custom before determining whether it is contrary to natural justice equity and good conscience (Jegede, *Principles of Equity* (1980)). In this vein it is contended that the basic idea behind the introduction of the repugnancy doctrine is that the Court, in the process of ascertaining and applying an alleged rule of customary law, should recognise and apply equity in its broad sense, that is, giving a humane and liberal interpretation to any alleged rule of customary law (*Jegede ibid p.6)*.

The approach here is that the expression "natural justice, equity and good conscience" refers to equity in the general juristic sense. Consequently, a custom should be given a liberal and humane interpretation. To do otherwise as suggested by some writers (*Park, Sources of Nigerian Law, p.73)* would be to judge African customs by standards of equity developed in Britain. This would practically nullify all customs. In other words, Uganda customs should not be judged relative to equity in the technical juridical sense.

A few illustrations indicate the dilemma of judging indigenous customs by British standards of equity. In *Rex V. Amkeyo*, [25] the court

presided over by a British judge held that "the so called" marriage by native custom of wife purchase is not a marriage within the meaning of Article 122 of the Indian Evidence Act and that a party to such a union cannot claim the protection granted by the Section "[of a wife not being a compellable witness to proceedings to which a spouse is a party]". The indigenous custom was clearly judged by the British concept of a monogamous marriage unaccompanied by dowry. Similarly, in *Koykoy Jatta V. Menna Camera & Anors*[26], it was held that it is repugnant to natural justice, equity and good conscience to import the custom of female circumcision into a group that did not practice it, although this was the custom of the place where the act of circumcision occurred. In *Omwoyo Mairura V. Bosire Anginde*[27], after deserting her husband with whom she was married under Roman Catholic rites, the wife subsequently had eight children by other men. The applicant claimed the children as his under customary law and sought the return of his wife and the eight children on the ground that the marriage subsisted. The court held that in applying natural justice to the relevant customary law "it would certainly be contrary to natural justice that the children of the respondent and his wife should belong to the former husband". Similarly, in *Maurono Onchoke V. Kerebi d/o Ondieki*[28], while recognising the applicant's claim to his wife's illegitimate children under customary law, the court nevertheless held that the applicant's conduct in not pressing his claims for many years, and doing so now only to realise bride price amounts to an abuse of customary law and is repugnant to natural justice".

This case appears to have been decided on the premise that delay defeats equity and in the circumstances a restriction on customary rights, although there is authority to the effect that the doctrine of delay or laches is alien to customary law.[29]

26. Gambia Supreme Court Civil Suit No.64/60; J.A.L.35 (1964); Harvey, *ibid* p.517
27. 6 *Court for Review* Reports 4 (1958); Harvey, *ibid*, p.517
28. 6 *Court of Review Reports* 2 (1958); Harvey, *ibid*
29. Harvey *ibid* p.524. See also *Lewis v. Bankole* (1908) 1 N.L.R.81

In *Timina Olenja v. Elam Kaya*,[30] it was held that it was not in the interest of the child to be compelled to leave her mother and siblings and go to her mother's husband who was not her father, although under customary law the husband was entitled to legal custody but not physical custody of the child. He was ordered to pay school expenses for the child which would entitle him to claim bride price when she married.

In *R V. Luke Marangula*[31], the court held a custom of parading the deceased's coffin through the town to discover who had caused the death to be *"repugnant to justice…… as we people in England see it"* (emphasis added). However, in *Ole Oloso v. Nalulus Ole Kidoki*[32], it was held that the Masai custom that a Moran who wishes to leave his tribe may not weaken the wealth of his tribe by taking cattle with him was not in any way repugnant to justice or morality.

The decisions considered above are inconsistent in terms of the criteria used to judge customs. As has been put by Professor Harvey.[33]

The decisions applying the repugnancy clauses in the main reflect little empirical investigation of the origins or effects of the customary norms in question and little detailed discussion of the processes by which they are assessed. The Judicial style is conclusory; the standard is self evidence to the particular judge.

Generally, though, decisions have invalidated customs for being repugnant to natural justice, equity and good conscience where there is lack of fair hearing in terms of evidence adduced, inability to call witnesses, lack of charge and presiding over a cause in which one has an interest.[34] Additionally, customs which promote slavery,[35] inequity

30. 10 *Court of Review Reports* 8(1961); Harvey, *ibid,* p.517
31. (194954) *Law Reports of Northern Rhodesia* 140; Harvey *ibid*. P.518
32. (1915) 5 E.A.L.R.210 (High Court of Kenya); Harvey, *ibid*
33. *ibid,* p.523. See also Nekam "The Study of Foreign Law in an Interdependent World" 57 *Northwestern University L. Rev* 271, 272 (1962)
34. *Gwawobin Kilimo V. Kisunda bin lfuti* (1938) 1T.L.R.(Rev) 403; Harvey, *op.cit*. pp.50811
35. *Kweku Kodieh V. Kwami Afram* (1930) 1 W.A.C.A.12; Harvey, *op.cit* pp.50608

within family relationships or marriage[36], witchcraft or sorcery[37] or overlook vigilance in pursuing rights[38] have been invalidated.

It has been questioned whether repugnancy clauses which subject customary law to natural justice, equity and good conscience are desirable in independent African countries. Thus Professor Harvey states:[39]

> Since repugnancy clauses served as the vehicles by which the dominant colonial power condemned and rejected customary African norms, it would not be surprising if they had been repealed promptly when new, independent African governments succeeded to power.

F. Relation Between Equity and Common Law

Section 14(4) of the Judicature Act, Cap.13 and Magistrates' Courts Act, Section 11(1)(3) provide that the rules of equity and the rules of common law shall be administered *concurrently; and where there is a conflict or variance* between the rules of equity and the rules of common law with reference to the same subject the rules of equity shall prevail.

These provisions which are in essence a reproduction of Section 25(11) of the British Judicature Act 1873 arose from the resolution of the conflict between the Common Law Courts and the Chancery Court by King James I in the *Earl of Oxford' case* (1615) in favour of the precedence of equitable rules.

A few illustrations will demonstrate how courts have resolved conflicts between rules of the common law and rules of equity in their adjudication of disputes.

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36. See Cases Considered *supra*. See also *Karuru v. Njeru* [1968] E.A.351; Harvey, *ibid* pp5156
37. *R V Luke Marangula* supra .31
38. *Ashiemoa V. Bani* [1959] G.L.R.130; Harvey, *op.cit. P.524*
39. Harvey, *op.cit p.524*. Such clauses were repealed in Ghana and Tanzania but retained in Uganda and Kenya.

However, before we look at those situations it is apposite to reflect on the historical antagonism between common law courts and the Chancery Court where the conflict was eventually resolved in favour of equity.

With the development of equity jurisdiction, it was inevitable that there would either be a working arrangement between the Court of Chancery and the Common Law Courts or that there would be a conflict between them.

With the explicit creation of the Court of Chancery at the end of the fourteenth century separate from the KinginCouncil, opposition to its extraordinary jurisdiction came from both the Parliament and the Common Law Courts. With respect to the Parliament, the main reason was that at that time the Parliament had become separated from the King and his Council in its law making function. Consequently, Parliament did not look kindly to the extraordinary jurisdiction performed by the Chancery. This was because this jurisdiction had no support either from statutes or the common law of the land. With regard to the Common Law Courts, these Courts opposed the Chancery jurisdiction on two grounds. First, that the Chancery jurisdiction was unknown to the Common Law of the land. Second, that it was eroding or undermining the Common Law Courts, jurisdiction because of its progressive and realistic nature.

1. The Conflict Between Chief Justice Coke and Lord Chancellor Ellesmere

During the second part of the sixteenth century, the rivalry between the Common Law Courts and the Chancery became intensive. This was largely because of the Chancery's power to issue the *Common injunction* to restrain the enforcement of common law courts' judgments.[40]

40. Maitland, *supra* n.15, pp69

The decisive stage of the conflict arose when Coke became Chief Justice of the King's Bench division of the High Court. Coke was totally opposed to Chancery jurisdiction. He claimed that the Common Law Courts possessed the power to issue *a writ of prohibition* against Chancery jurisdiction for any interference with the judgsments or decisions of the common law courts.

The conflict between the Common Law Courts and the Chancery Court crystallised in the *Earl of Oxford's Case*[41]. In that case, the then Lord Chancellor, Ellesmere contended that he had power to set aside common law judgments on grounds of equity and good conscience. Chief Justice Coke of the Common Law Courts insisted that the Chancery had no right either by statute or by any law of the land, to set aside common law judgments and that he would issue a writ of prohibition against Chancery interference with common law judgments. The controversy came before King James I, who, after considering legal advice from several lawyers including Bacon (a future Lord Chancellor), decided in favour of Chancery jurisdiction. From that time, equity rules became supreme over the common law rules in the English Legal System.

2. Effect of King James's Decision

King James's decision had a twofold effect. First the Chancery Court's jurisdiction became more extensive and attracted a lot of litigants. As a result, the Court became overburdened due to poor staffing, organisation and a complex and inefficient procedure[42] in administering justice. Second, officials of the court became corrupt and incompetent and the course of justice was, thereby, perverted owing to the delays. Inevitably, there were calls for the reform of the Chancery jurisdiction and procedure.

41. *(1615) 1 Rep.Ch.1*

42. Keeton, *supra* n.24, p.53

3. Reforms

The reforms advocated for affected firstly the outdated and unsatisfactory procedure and organisation of the court and secondly the area of jurisdiction within which the common law courts and Chancery Courts operated was not clearly defined.[43]

a) Minor Reforms

There were minor attempts at reform to rectify those shortcomings. First, common law courts applied rules of equity to cases brought before them whenever those rules conflicted or differed from common law rules. The aim here was to prevent separate proceedings, one in equity and the other at common law from being started in respect of the same cause of action. This would save litigants time and expense.

Second, the *Common Law Procedure Acts* of 1852, 1854 and 1860 gave the common law courts power to exercise certain jurisdiction which were originally reserved for Chancery. For instance, the common law courts could order discovery of documents and interrogatories in certain cases. They were also empowered to grant an injunction and other equitable reliefs. Similarly the Chancery Amendment Act, 1852, gave the Courts of Chancery power to exercise certain common law powers. For instance, in an equity suit a relevant common law matter could be decided by the Chancery Court. Before the Act, such matters would have been referred to the Common Law Courts. Additionally the Court of Chancery could also take evidence orally and in open court as opposed to presenting it by bill and in written form. Furthermore, Lord Cairn's Act, 1858 empowered the Court in cases of contracts and torts to award damages in addition to or in lieu of injunction, specific performance or other equitable remedy.

43. *Marquis of Waterford V. Knight (1844)* 11 C.1&F.653; 8E.R.1250; See also Keeton, *supra* n.24 p.54

The above Acts did not achieve very much in dealing with the shortcomings in the dual system of administering justice.[44] The Royal Commission on the Administration of Justice[45], therefore, recommended the complete fusion of the administration of justice by means of the consolidation of all superior courts of law and equity into one Supreme Court possessing the jurisdiction of all the courts so consolidated.

b) Judicature Acts 18731875

The recommendations of the Royal Commission were enacted as the Judicature Acts 1873 to 1875. These Acts abolished all the then existing superior courts and in their place set up a Supreme court of Judicature consisting of the High Court of Justice and the Court of Appeal. The High Court of Justice was to consist of three divisions; the King's Bench Division, the Chancery Division and Probate, Divorce and Admiralty Division.

The Judicature Acts effectively abolished the dual administration of justice as between the Common Law Courts and the Chancery Court. Second, the High Courts of Justice were given power to administer both equity and law concurrently or together. Third, all claims, obligations and defences were recognised and enforced by all the three divisions of the High Court of Justice. Fourth, the common injunction exercised by the Chancery Court was abolished since it was no longer necessary.

4. Equity in the Uganda Legal System

The dual administration of law and equity in England before the Judicature Acts 18731875 of Britain does not exist in the Uganda system.

By the Uganda Orders In Council, 1902 and 1911, which received English law into Uganda law and equity were to be

44. *Report of the Royal Commission on the Administration of Justice, 1867*
45. *Ibid*

administered concurrently and where there was conflict or variance between rules of equity and rules of the common law with reference to the same subject matter, the rules of equity would prevail[46]. This provision is now reflected in Section 14(2) and (4) of the Judicature Act which governs the law to be applied by the High Court and Superior Courts of Judicature and Section 11(1)(3) of the Magistrates' Courts Act, Cap.16 which deals with the law to be applied by the Magistrates' Courts.

It is now apposite to examine how courts have resolved the conflict between the application of rules of equity and rules of the common law to issues before them.

a) Liability of An Executor for Assets

Prior to the Judicature Act, 1873 of Britain, the common law rule was that an executor was liable for the loss of his testator's assets once he took possession of them. It was immaterial whether the loss was accidental or arose from willful default.[47] However, in equity, an executor could only be liable for the loss of the testator's assets if there was willful default on his or her part. These conflicting positions at law and equity were considered in *Job v. Job*[48].

Thus Jessel M.R. (applying Section 25(11) of the Judicature Act 1873)[49] stated:

> The rule at law and equity now is that an executor or administrator is in the position of a gratuitous bailee who cannot be charged with the loss of his testator's assets without willful default.

In essence the rule of equity prevailed over the common law rule by virtue of the Judicature Act 1873.

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46. Seidman, "The Reception of English Law In Colonial Africa Revisited" Vol.2 *Eastern Africa Law Review* 47, 5660 (1969). See also *Transbridge Co.Ltd.v.Survey International Ltd* [1986] 4 N.W.L.R.56
47. *Crosse v. Smith* (1806) 7 East 246
48. (1877) 6 Ch.D.562
49. In *parimateria* with Judicature Act, Cap.13, s.14(4) (Uganda)

b) Agreement for a Lease

The expression, *"Conflict or Variance"* in Section 25(11) of the Judicature Act 1873[50] was considered in the case of *Walsh V. Lonsdale*[51]. In that case, the landlord (defendant) agreed in writing to grant the tenant (plaintiff) a lease of a mill for seven (7) years. The agreement provided that the rent was payable in advance on demand. There was no grant of lease by deed as required by the common law. The plaintiff took possession of the mill and paid rent quarterly in arrears. Subsequently, the landlord, based on the agreement, demanded one year's rent in advance. The tenant failed to pay and the landlord distrained. The tenant sued for damages for illegal distress. The action failed on the ground that although the distress was illegal at common law because a sevenyear lease had not been granted and the yearly tenancy which arose from the tenant's entry into possession did not provide for rent payment in advance, in equity the agreement for a lease was as good as a lease. Consequently, the tenant was liable to pay a year's rent in advance.

It is significant that in this case, the conflict between the common law and equity as to the nature of the agreement for a lease was resolved in favour of the equitable principle that an agreement for a lease is as good as a lease. Such an agreement can be decreed to be specifically performed by a court exercising its equitable jurisdiction thereby converting a written lease into a formal lease.[52]

c) Joint Undertaking

At common law, if two or more people became sureties of a debt and one of them became bankrupt, the solvent sureties were not liable for the bankrupt surety's share of the liability for the debt. However, the position at equity is that solvent sureties are liable for the share

50. *Ibid*

51. (1882) 21 Ch.D.9 See also *Savage v. Sarrough* (1937) 13N.L.R.141; *Chidiak v.Coker* (1954) 14W.A.C.A.506; *Ibeziako v. Chinekwe* (1972) 2 E.C.S.L.R.71, 79

52. *Ibid*

of the insolvent surety in addition to their own share of liability. The conflicting principles were considered in *Lowe v. Dixon*[53] where it was held that the equitable rule superseded the common law one in line with the Judicature Act.

d) Variation of Deed

In *Berry v. Berry*[54], under a deed of separation, a husband covenanted to pay his wife an allowance. Later the parties concluded a written agreement which was *not under seal,* reducing the allowance. The wife sued the husband on the original deed claiming arrears of the allowance agreed upon. The action failed. While accepting the plaintiff's contention that at common law a covenant in a deed could only be varied by another deed[55] in equity, a simple contract varying a deed is a good defence to an action based on the deed[56]. Furthermore, in view of the Judicature Act, Section 25(11)[57], the equitable principle prevailed.

e) Fusion of Law and Equity?

The issue arises as to whether the Judicature Acts in regard to the relationship between law and equity and common law merged to form one rule. There are two schools of thought on this issue. First, is the view that there is no significant conflict and consequently Section 25(11) of the Judicature Act 1873[58] is superfluous or unnecessary[59]. In this vein, Maitland maintained that the conflict, if any, between law and equity was simply jurisdictional and that equity came not to destroy the law but to fulfill it.

53. (1885) 16 Q.B.D.455, 458
54. [1929] 2 K.B.316
55. *West v. Blakeway* (1841) 10 L.J.(C.P.)173, 177
56. See also *High Trees* Case [1947] K.B.130 and *Ajayi v. Briscoe* [1964] 3 All E.R.556
57. *Equivalent to Judicature Act, Cap.13, s.14(4) (Uganda)*
58. *bid*
59. Maitland, *supra* n.15, pp 1618, 153

The second school of thought is that[60] there is a definite conflict between rules of the common law and those of equity. Hence the relevance of the conflict resolution clause.[61].

f) Fusion of Rules or Fusion of Administration

Finally is the controversy as to whether the Judicature Acts 18731875 simply fused rules of or the administration of equity and law. One view is that the Acts achieved a fusion of both the administration of justice and fusion of the common law and equitable rules with the result that there is now one common rule[62]. The second opposing view is that the effect of the Acts was only to create a common court for the administration of law and equity and not a fusion of law and equity. Where there is a conflict between the two, those of equity prevail[63]. This is supported by the prevailing distinction between the equitable ownership of a beneficiary and the legal ownership of a trustee under a trust and the maxim that where the equities are equal to the law prevails.[64]

60. Hohefield, "Fundamental Legal Conceptions The Relations Between Equity and Law" 11 *Michigan L.Rev*.537 (1913); Justice Stone, Book Review 18 *Columbia L. Rev.9*7 (1918)

61. *Judicature Act 1873, S.25(11) (UK); Judicature Act, Cap.13, s.14(4) (Uganda)*

62. *Nelson v. Larholt* [1948] 1 K.B.339, 443 per Denning J; *HighTrees Case Supra* n.56 per Denning, L.J; *Errington v. Errington* [1952] 1 K.B.290

63. *Pugh v. Heath* (1882) 7 App.Cas.235, 237;

64. *Joseph v. Lyons* (1883) 15 Q.B.D.280, 286 Lindley L.J.

Chapter 2

Maxims of Equity and Equitable Defences

A. Introduction

Underlying the application of equity are certain principles which guide the courts. These principles or *maxims* not only help to explain the essence of equity but indicate situations in which equitable rules would or would not be applied as well as the relationship between law and equity.

While the categories of equitable *maxims* are no closed, twelve broad *maxims* of equity are recognised. These will be considered briefly in this Chapter.

1. Equity will not suffer a wrong to be without a remedy

The *maxim,* equity will not suffer a wrong to be without a remedy "underlies" the equitable, jurisdiction. As we have seen[1], where the common law did not recognise or enforce a right or failed to provide a remedy, equity stepped in or intervened to provide a suitable remedy.

This maxim is illustrated by the exclusive, concurrent and auxilliary jurisdiction which as we have already seen[2] was aimed at filling in gaps which existed in the common law.

It is notable, though, that there may be situations where equity cannot provide a remedy, for instance in situations of unfair trade competition or in contracts requiring constant supervision or those involving personal services. In those situations, the Court may be unable to order specific performance even where damages

1. Chapter 1 *supra*
2. *Ibid*

are inadequate.[3] It can, therefore, be concluded that this maxim is subject to what is realistic, practicable and convenient for the court.

2. Equity follows the Law

The maxim "equity follows the law" means that equity supplements the law or is based on the law. This can be illustrated as follows.

First, under a trust, although the beneficiaries are regarded as the equitable owners, equity does not deny the legal title of the trustee.[4] Second, equity recognised the common law doctrine of estates. Consequently, an estate or interest which was recognised at law could exist as an equitable interest under a trust. Third, equitable interests devolve or pass on intestacy in the same way as the legal estate. Fourth, equity follows the common law rules on joint tenancies[5]. Finally, equity follows the common law rules affecting mistake. It only supplements them by providing, equitable remedies[6].

Nevertheless, if the rules of the common law are too rigid, ancient or archaic, equity will not follow them.

3. Where there is Equal Equity, the Law shall Prevail

Where the claims of the parties are equally fair and deserve merit, preference, is given to the legal interest.[7] An example from land law may illustrate the principle. If *X* obtains an *equitable charge* over a piece of land, *L* valued at shs 20 million as security for a loan of shs 8 million. Subsequently *Y* takes a *legal mortgage* of *L* to secure *a loan* of shs 8 million. *Y* had no knowledge of *X's equitable charge* when he lent the money. The value of the land drops to shs 10 million.

In this case, Y will be entitled to be paid the full amount of his loan of shs 8 million, when the land is sold, from the proceeds of

3. See Bakibinga, *Law of Contract in Uganda* (1996) pp 196200, 379
4. Jegede, *Principles of Equity* (Ethiopie Publishing Corporation, Benin) p.31
5. See discussion *infra* under the *maxim*, "Equality is Equity"
6. *Bakibinga, supra* n.3, pp.112116
7. *Olashade v. Duroshola* [1961] 1 All N.L.R.87

sale. He will only be entitled to the remaining shs 2 million. The reason for this is that Y's legal estate takes priority over X's equitable interest.[8]

However, if Y had notice of X's prior equitable charge, then he would not have priority because then the equity is not equal. In that case X will have priority.

4. Where Equities are Equal the First in Time Prevails

The maxim, "where equities are equal, the first in time prevails" deals with priority where there is a conflict between two competing equitable interests in property.

The general rule is that equitable interests in property take priority according to the order in which they are created. Thus in *Cave v. Cave*[9], a trustee in breach of trust, used trust money to buy land which was then transferred to his brother. The brother then mortgaged the land to X by way of legal mortgage and then to Y by means of an equitable mortgage. Both X and Y had no knowledge or notice of the trust. It was held firstly that X's legal mortgage took priority over the equitable interests of the beneficiaries. However, the interests of the beneficiaries under the trust had priority over Y's mortgage since they were earlier in time.

However, there may be instances where equities are not equal as where the holder of the first equitable interest in guilty of fraud or gross negligence. In such a case his or her interest will be postponed to a subsequent equitable interest. Thus in *Rice v. Rice*[10] a vendor (seller of land) transferred land to the buyer without receiving payment for it. However, he signed the conveyance which contained a receipt for the money. It was held that the vendor's equitable lien for the unpaid purchase money was postponed to the interests of the subsequent equitable mortgagee with whom to purchaser deposited the title deeds since the mortgagee had no notice of the lien.

8. See also *Bailey v. Barnes* [1894] 1 Ch.25, 36; *Ajose V. Harworth* (1925) 6 N.L.R.98
9. (1880) 15 Ch.D.639
10. (1853) 2 Drewry 73; 61 E.R.646

Nevertheless, the maxim does not apply to a situation where there are successive assignments or mortgages of the equitable interest. Thus the rule in *Dearle v. Hall*[11] is to the effect that priority is determined not by the order in which the assignments are created but by the order in which successive assignees give notice of their assignments to the debtor or trustee or other person who is liable to pay. In that case, B was a beneficiary under F's will which created a trust for sale. B assigned his will interest under the trust to D. The executor of the will had no notice of the assignment. Later B assigned the same interest to C and proceeded to sell this same interest to H who had no notice of previous dealings. H gave notice of his purchase to the executor trustees. Subsequently, the executortrustees had notice of the previous dealings. It was held that H had priority over the prior assignees, be ing the first to give notice, notwithstanding that his interest was last in order of creation.

5. She/He Who Seeks Equity Must Do Equity

Under the maxim "he who seeks equity must do equity", essentially a person seeking an equitable relief or remedy must himself or herself act fairly.

The maxim can be illustrated through the following arrangements.

a) Doctrine of Election

Under the doctrine of election[12], if a person under a deed gives his property to X and in the same document gives X's property to Y, X will not be able to claim the gift until he has allowed the gift to Y to take effect.

b) Notice of Redeem Mortgage

If a mortgagor wants to exercise the equitable right of redemption he or she must give reasonable notice to the mortgagee of his or her intention to do so.

11. (1828) 3 Russ; 38 E.R.479. See also *Merchant v. Morton* [1901] 2K.B.829

12. Discussed in more detail, *infra* chapter 8

c) Consolidation of Mortgages

Consolidation of mortgages refers to the right of a person who holds two or more mortgages to refuse to allow one mortgage to be redeemed unless the others are also redeemed. For instance, A makes two loans of shs 4 million each to B. The first loan is secured by a mortgage of B's land at Ntinda worth shs 6 million. The second loan is secured by a mortgage of B's land at Muyenga worth shs 6 million. If the value of B's land at Ntinda falls to shs 2 million and that at Muyenga increases to shs 7 million, B would be required to redeem both plots of land. In this instance equity allows A to consolidate the mortgages and to prevent B from redeeming the land at Muyenga without that at Ntinda.

d) Illegal Loans

The application of the maxim she/he who comes to equity must do equity" may be further illustrated with reference to illegal loans. Thus in *Lodge v. National Union Investment Co*[13], A borrowed money from B, a moneylender. He mortgaged certain securities to B. The contract was illegal and void for non-registration under the Moneylender's Act 1900 of the United Kingdom. A sued B to recover the securities. It was held that the order for delivery up of securities would only be made if A was prepared to "do equity" by repaying the loan to B.

The approach in *Lodge's* case may be contrasted with that in *Kasumu V. BabaEgba*[14]. In that case, the plaintiff mortgaged leasehold land to the defendant, a licensed money sender as security for a loan. The moneylender did not keep a record of the transaction as required by the Nigerian Moneylender's Act Section 19[15]. The agreement was, therefore, unenforceable under the Section. The plaintiff sued the defendant, claiming the possession of his property, cancellation of the mortgage and delivery up of the title deeds. It was

13. [1907] 1 Ch.300. See also *Earl of Aylesbury v. Morris* (1873) 8 Ch.App.484
14. [1956] A.C.539 (Privy Council)
15. See also Moneylenders Act Cap. 273 (Uganda); Bakibinga, *supra* n.3, pp1856

held that the action failed because *Lodge's* case[16], which was cited to the Court, did not apply to a transaction which was unenforceable under Section 19 of the Moneylenders Act and a lender could not recover on a transaction which violated a statute. Consequently, the plaintiff was entitled to recover his property and title deeds without having to repay the loan.

It appears that the Court here operated under the impression that equity follows the law. However the dividing line between a contract void for non-registration on the one hand and one void for non-recording is thin, unless the Privy Council was in effect overruling the *Lodge* case.

6. He/She Who Comes to Equity Must Come With Clean Hands

Anybody praying for an equitable relief over a particular matter should show that she/he has behaved honestly and fairly in regard to that matter. This maxim is distinguishable from the maxim that "she/he who seeks equity must do equity". The present maxim refers to conduct before the suit for relief, while the previous maxim deals with future conduct of the plaintiff.

A few examples will illustrate this maxim.[17]

First, if a tenant has lost a lease because of nonpayment of rent, she/he will not be able to get an equitable relief if she/he has previously been using the premises for immoral purposes.[18] Second, in *Coatsworth v. Johnson*[19], it was held that a tenant with an equitable inter est under a lease agreement could not get a decree of specific performance of the legal lease because he was in breach of the covenants under lease. Third, in *Loughran V. Loughran*[20], an infant beneficiary falsely represented himself to be of majority age to the trustees of money to which he was entitled. As a result, the trustees

16. *Supra* n.13
17. See also Bakibinga, *supra* n.3, p.202
18. *Gill v. Lewis* [1956] 2 Q.B.1, 13, 14, 17
19. (1886) 54 L.T.520
20. 292 US.216

paid him. He was not entitled to this money until he became of age. Subsequently, when he came of age, he sued the trustees for the same amount of money. It was held that neither he or his assignees could recover the money again. Fourth, in *Craig v. Craig*[21], W. sought the dissolution of her marriage with H on the ground of H's adultery and cruelty. W had been guilty of adultery herself but did not confess this in her petition and the court found that the neglect to do so was a deliberate suppression of the truth. H, in a counter petition based on W's adultery, admitted he had been guilty of adultery and prayed the court to exercise its discretion in her favour. It was held in the circumstances, the petitioner's action must be dismissed because of her inequitable conduct and that the Court should exercise its discretion in favour of H and H's counter petition was granted. Fifth in a case with similar facts, *Kellogg v. Kellogg*[22], W. sued for divorce on the ground of extreme cruelty and H crosspetitioned on the ground of extreme cruelty and adultery. Justice Stone in dismissing both petitions, said:[23]

> Divorce is a remedy for the innocent as against the guilty, and should not be granted where both parties are at fault. *This is no more than the application of the equitable rule that one who invokes the aid of a court must come into it with a clear conscience and clean hands.* ***(Emphasis added)***

It is submitted that this was an extreme use of the doctrine which was likely to perpetuate a relationship which was detrimental to both parties and the public. Nevertheless, the case shows the flexible character of the maxim.[24]

It is notable that what amounts to dirty hands must be related to the transaction involved in the action before the court. In *Eshugbayi V. Dawuda*[25], Pennington J. Observed[26] that a person seeking to enforce

21. (1942) 16 N.L.R.
22. 171 Mich.518 (1912); 137 N.W.249 (1912)
23. *Ibid* 171 Mich.518 at p.520 (1912)
24. See also Jegede, *supra* n.4, p.254
25. (1909) 1 N.L.R.7. See also *Dering v. Winshelsea* (1787) 1 Cox Eq.318, 319, *Loughran's Case supra n.20*
26. *Ibid* p.62

native law and custom in respect of one transaction must himself have carried out native law and custom relating to that transaction; otherwise his claim may be denied on the basis of the "clean hands doctrine".

For the inequitable conduct to amount to unclean hands, it need not be illegal strictly as required by the law. It is sufficient if the conduct is unconscionable and morally reprehensible and need to have been to the other party to the action/suit. For instance, in *Gascoigne v. Gascoigne*,[27] a husband conveyed property to his wife so as to protect it from his creditors. An action by the husband to claim the property back may be denied on the ground of his inequitable conduct to his creditors. The same principle applies where a partner in crime brought an action seeking the aid of the court to compel his copartner to account for the proceeds of their criminal activities.[28]

7. Delay Defeats Equities/Doctrine of Laches

The essence of the doctrine of laches is that an equitable relief will not be given if the applicant has unduly delayed in bringing the action.[29]

The doctrine does not apply to situations which are governed by the statutes of limitation. For instance the Limitation Act, Cap.80 prescribes periods within which suits or actions should be instituted in court. Six years is prescribed, for actions based on contract or tort other than those where the claim relates to personal injuries, in which case the action must be brought within three years of the date on which the cause of action arose.[30] Furthermore tortious and contractual actions against the government must be instituted within two year and three years respectively of the date of the cause of action[31], while those related to recovery of land or claim to the

27. [1918] 1 K.B.223

28. *Highwayman's case* (1893) 9 *Law Q. Rev.*197

29. *Smith v. Clay* (1767) 23 Broc. C. 639; *Lindsay Petroleum Co. V. Hurd* (1874) L.R.5P.C.221 *Nwakobi v. Nzekwu* [1964] 1 WLR 1019

30. Limitation Act Cap.80 S.3(1)

31. Civil Procedure and Limitation (Miscellanous Provisions) Act Cap.72, S.3(1),(2)

personal estate of a deceased or under a mortgage must be instituted within twelve years of the date on which the claim accrued.[32] Where fraud is alleged, there is no limitation period.[33]

By way of illustration of the application of the doctrine of laches, in *Fagbemi V. Aluko*[34], it was stated that in considering the doctrine of laches, the court acts on three factors. First, the delay by the plaintiff. Second, acquiescence by the plaintiff in the delay. Third, change in the position of the defendant. Furthermore, the doctrine will apply if the plaintiff behaves in a way which makes the defendant alter his position in the belief that the plaintiff's claim has been abandoned or the delay amounts to evidence of an agreement by the plaintiff to abandon his right.[35]

Apart from the application of the doctrine to the equitable remedies of specific performance and rescission of contracts, it also applies to the grant of letters of administration. An application for letters of administration or challenge thereof must be made without delay; otherwise, it may be refused. Thus in *Ephraim v. Asuquo*[36], the plaintiff applied have the grant of letters of administration set aside. It was held that since two years had passed since the grant and the administrator had probably completed the distribution of the estate, the doctrine of laches applied and the plaintiff's claim could not succeed.

There are three basic defences to the invocation of the doctrine of laches. First, the plaintiff's ignorance of the facts on which the claim is based. Second the infancy or other disability of the plaintiff and finally fraud on the part of the defendant.[37] In those circumstances delay will not be permitted to bar a claim.

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32. *Ibid*. Ss.5, 18, 20. See also *Oitamong v. Olinga* [1985] H.C.B.86
33. Limitation Act S.20(1); *Mubiru & Anor V. Byensiba* [1985] H.C.B.106, *Uganda Spinning Hills Ltd. V. Iga* [19881890] HCB 144
34. [1968] 1 All N.L.R.233
35. *Aganran v. Olushi* (1907) 1 NLR 66; *Ibeziako v. Abutu* (1954) 3 E.N.L.R.24
36. *(1923) 4 N.L.R. 98*
37. *Limitation Act, Cap.80, Ss.2, 21, 25*

8. Equality Is Equity

The maxim, "equality is equity" basically applies in three broad circumstances namely, the presumption of tenancy in common, severance of joint tenancy and the principle of equal division. Each of these will be considered briefly.

a) Presumption of TenancyinCommon

The basic rule is that equity operates against joint tenancies. It will be recalled that in joint tenancies there is a right of survivorship or *jus accrescendi*. This means that in a situation where A and B are joint tenants, if A dies, then B takes the whole property which is the subject of the joint tenancy. The estate of A takes nothing. In such a case equity operates against the *right of survivorship* and presumes a tenancy in common.

In a tenancyincommon, the share of the deceased tenant passes to those who are entitled to his or her property under his or her will or under the rules of intestacy[38]. The reason for equity's approach is that a tenantincommon has an identifiable share in the property which she/he is entitled to dispose off.

Three main situations are mentioned where equity treats joint tenants at common law as tenantsincommon of the beneficial interest. The effect of this is that while at common law the survivor is entitled to the whole property, in equity, the survivor is regarded as a trustee of the deceased's share for the benefit of the deceased's beneficiaries under a will or intestacy.

i) Where Property of the Parties is Bought in Unequal Shares

In a situation where property is bought by A and B with A contributing 2/3 of the purchase price and B contributes 1/3 of the price and the property is transferred to them as joint tenants if A dies, at common law, B would be entitled to the whole property. However, at equity, B would be regards as a trustee for A's estate of

38. See Succession Act Cap 162, S.27

the share of the property in this instance 2/3 of the property. B will only be entitled to his share of 1/3 of the property.

However, where the purchase money has been advanced in equal shares by A and B, B will be entitled to the whole property both at common law and equity. The reason given is that it is assumed that where two people have contributed equally to the purchase price, the intention is that the right of survivorship should operate.[39]

ii) Loan on Mortgage

Where A and B advance a loan jointly to C and C mortgages his property to them jointly as security for the loan, equity presumes a tenancyincommon. The effect is that if A dies then B, the survivor becomes the trustee for the estate of A of his share on the sum lent out. Therefore, if A contributed 60 percent of the loan, then his estate would be entitled to 60 percent of the proceeds of the mortgaged property when it is sold.

iii) Partnerships

At equity, the presumption is that property acquired by partners in business is held by them as beneficial tenants in common. Where the partnership deed does not specify the shares of the partners, the Partnership Act[40] applies with the result that each partner is entitled to an equal share of the assets and liabilities of the partnership.

b) Severance of Joint Tenancy

It is possible to convert a joint tenancy into a tenancyincommon by process called "severance".

As we have already seen,[41] where joint buyers advance equal amounts, there is a joint tenancy both at law and equity. However, in such a case, equity treats the joint tenancy as severed that is, as

39. *Lake v. Gibson* (1729) 1 Eq. Ca.Abr.290
40. Cap.114, S.27(a)
41. See note 39 *supra* and text thereof

translated into a tenancyincommon. The effect is that the right of survivorship is excluded.

Examples in which severance occurs is when a joint tenant alienates his or her interest through sale, bequest or mortgage. An agreement to alienate also results into severance[42]

In *Ipaye v. Aribisala*[43], the issue was whether an equitable mortgage of his interest by a joint tenant can result into severance. The Court answered the issue affirmatively. In this case, a title deed on settlement had been deposited with the plaintiff as security for a loan. It is notable that mere deposit of title deeds with the lender as security for a loan amounts to an equitable mortgage of the subject matter of the title deeds.

c) Equal Division

The principle of equal division states that where there is no basis for distributing property between two or more rival claimants, the court may apply the maximum "equality is equity" to divide the property equally.[44]

The application of this principle can be illustrated in four instances. The first situation is where the trustees are unable to exercise a trust power to divide property, the court may divide the trust property equally among all the members of the class of beneficiaries.

Second, in the case, *Re Bower's Settlement Trusts*[45] it has been established that if there is a settlement to the effect (i) that a fund should be held in trust for certain people in unequal shares and (i) that any share which fails to vest shall accrue to the other shares by way of addition, then the accruer will be in equal shares and not in the proportions laid down for the original shares. Thus if property

42. *Brown V. Raindle* (1796) 3 Ves.256

43. (1930) 10 N.L.R.10

44. See also Partnership Act, Cap.114 S.27(a); Bakibinga, *Partnership Law In Uganda* (Professional Books Publishers, 1992, Second Impression, 1997) pp.8284

45. [1942] Ch.197

is left to a trustee for the benefit of beneficiaries in the following proportions: 20 percent to A; 40 percent to B and 40 percent to C and for some reason C's share does not vest, C's share will be divided equally among A and B with each getting an additional 10 percent.

The third situation is when a husband and wife divorce or separate but have each contributed to the purchase of the matrimonial home and operation of a bank account. In such a case, the court will divide, the property equally between them irrespective of their contributions.[46]

Finally, where a parent has died leaving many children, the presumption in equity is that they should all share equally in the property. This is based on the doctrine of satisfaction.[47]

9. Equity Looks at the Substance Rather Than the Form

We have seen[48] that before the advent of equity, the common law attached a lot of importance to the use of correct forms or procedures in relation to an act. Failure to comply with such forms invalidated actions whether these were suits or agreements. Equity developed with the aim of achieving justice rather than sticking strictly to forms. This approach to technicalities has constitutional backing which requires courts to administer justice without undue regard to technicalities[49] It is intended to examine instances where equity has intervened to ensure that the substance is upheld over formalities.

a) Time Clauses

In a contract for the sale of land, if a party failed to complete a conveyance or transfer on a date given in the agreement, she would be in breach of contract at common law entitling the other party to

46. *Jones v. Maynard* [1951] 1 Ch.572
47. Considered *infra* Chap.8
48. *Supra* Chap.1
49. Constitution of Uganda 1995 Article 126 (2)(e) approved and applied in *Uganda Revenue Authority V. Stephen Mabosi* (1995) Supreme Court of Uganda (Unreported)

repudiate or cancel the contract. However, in equity, time is not of the essence of the contract. Consequently, breach of the time clause is not a ground for repudiation by the other party (unless of course it is expressly stated to be of the essence of the contract)[50]. What is required is that the delaying party should be able to complete within a reasonable time.

b) Covenants

In form, a covenant may be positive. However, equity may regard it as negative in substance. Thus in *Catt v. Tourle*[51], the owner of a public house (bar) agreed with a brewery that the brewery should be the sole supplier to him of beer. This is known as a "tied house" covenant. It was held that in equity an injunction could be granted to enforce that covenant by preventing the pub owner from obtaining supplies of beer from other places.

c) Mortgages

There may be cases where certain documents appear to convey land to other people. Equity will admit parole or oral evidence to show that what appears like a conveyance is in fact a mortgage.

Similarly, if at common law, a mortgagor failed to repay a loan on the date fixed by the mortgage agreement, she/he lost the right to redeem the property. In equity, a mortgage is regarded as mere security and the date for repayment, a mere formality. Thus a mortgagor could redeem the property even after the redemption date had passed.

d) Instrument of Repossession

In *Jaffer Bros Ltd. V. Hajj Bagalaaliwo*[52], the appellant sued the respondent to recover a house located at Kololo, Kampala which it had repossessed under the Expropriated Properties Act, 1982

50. See Sale of Goods Act, Cap.82, S.11
51. (1869) 4 Ch.App.654
52. Civil Appeal No.43 of 1997 (Court of Appeal Uganda)

(now Cap.87). The respondent opposed the appellant's action on the ground that the appellant was not issued with a certificate of repossession as required by the Act. He had instead been issued with a letter of repossession by the Minister of State for Finance in charge of the Departed Asians Property Custodian Board. It was held by the Court of Appeal (Okello JCA) that since the relevant letter was issued by the competent authority, there was valid repossession by the Appellant.

In essence the court looked at the substance of the action of the Minister rather than the form of the instrument required under the Expropriated Properties Act.

e) Penalties and Forfeitures

In order to establish whether a clause in a contract is a penality or forfeiture, equity examines the intention of the parties, rather than the form of the words used. For instance, the expression "liquidated damages" which is normally used in hire purchase contracts to compel hirers to perform the contract may be found on close scrutiny to be a penalty. The court will then reduce the amount involved to that of actual loss.

Equity will also grant relief to a tenant who has forfeited a lease due to nonpayment of rent.[53] The section requires that a valid assignment must be (i) in writing; (i) absolute and (ii) notice in writing should be given to the debtor or trustee.[54] However, equity recognises an assignment which is not in the statutory form and emphasises that the predominant consideration is whether there is an intention to assign.[55]

53. See now Supreme Court Act 1981, S.49 (UK). This particular provision has been held to be applicable in Uganda: *Ambalale & Co v. Durga Das Bawa* 23 E.A.C.A.68. See also (1956) 4E.A.C.A.16

54. For detailed discussion see chapter 4 *infra*

55. *Brandt's sons & Co. V. Dunlop Rubber Co* [1905] A.C.454, 462

g. Deeds

At common law, a promise under seal is enforceable even if it is not supported by consideration. However, equity would refuse specific performance of a purely voluntary agreement though made by deed on the basis that equity does not assist a volunteer.[56]

10. Equity looks at that as done which ought to be done

This maxim is illustrated by the principle that an agreement for a lease is as good as a lease[57], which we considered in relation to the resolution of the conflict between equity and the common law[58]. It is further illustrated by the doctrine of conversion which basically says that if a trustee is under a duty to sell land and convert it into money or invest money in the purchase of land, equity treats property or money as converted from the time the duty arises.[59]

11. Equity Imputes an Intention to Fulfill an Obligation

Where a person who is under duty to do an act, does an act amounting to the performance of the duty, in equity she/he will be deemed to have executed the duty. For instance, if a husband agrees with his wife that he will buy property at Mukono for the benefit of his wife. He then buys property in his name and then dies. Equity will regard the property as subject to the agreement between the wife and husband.

The doctrines of performance and satisfaction[60] are based on this maxim.

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56. *Jefferys v. Jefferys* (1841) Cr & Ph.138. See also *National & Grindlays Bank Ltd v. Dharamshi Vallabhji* [1966] E.A.186
57. *Walsh v. Lonsdale* (1882) 21 Ch.D.9; *Grosvenor v. Rogan Kamper* [1974] EA 446
58. *Supra* Chap.1
59. See also *Afolabi v. Government of Oyo State* [1985] 2 N.W.L.R.73 (SC. Nigeria)
60. Discussed *infra* chap.8

12. Equity Acts in Personam

The decrees or orders of the Old Court of Chancery were given *"in personam"* that is against the defendant personally. They were enforceable against the conscience of specified persons. This was a characteristic of the fabric of early equity jurisdiction.[61] It followed that even in matters peculiar to property, where a person refused to convey property to another under a decree, the Court would act against the person by committing him or her to prison.

It should be clarified that decrees in *personam* were against the person, while decrees in *rem* were against the property or subject matter of a contract.

a) Writs of Assistance

During the middle of the seventeenth century, equity introduced writs of assistance. In this regard, the court of equity would allow its sheriff to put the plaintiff into possession of the disputed property[62]. The aim here was to get at the *specific res*, that is, the subject matter of the dispute. By trying to deprive the defendant of the *res* for the benefit of the plaintiff, it is argued that the equitable relief here ceased to be a right *in personam*[63]

b) Writ of Sequestration

Where after being committed to prison by the Court of Chancery, the defendant continued to be stubborn, the court would issue a writ of sequestration, that is, it would appoint a sequestrator to take possession of the defendant's property until the defendant complied with the court's decree. Again, in this instance the equitable rights in respect of the disputed property ceased to be mere rights *in personam*[64].

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61. *Ewing v. Orr Ewing* (1883) 9 App Cas.34, 40. See also *Hart V. Sansom* (1884) 110 U.S.151,154
62. *Vanlore v. Lidall* (1624), Equity Cases & Materials Chaffee & Re (1958) 4th Ed. P.41
63. Cook, "The Powers, of Courts of Equity" *15 Columbia L. Rev*.37
64. *Ibid* pp.114115

Presently, if the defendant fails to comply with a decree of specific performance, the court may appoint another person to execute the transfer in respect of the disputed property.[65] Alternatively, the court may make a vesting order[66]. The effect of this is to transfer the property from one person to another without *a formal conveyance.*

The above developments have undermined the maxim that equity acts *in personam*. However, the maxim is still important in the sense that it still underlies the rule that a court may make an equitable decree relating to property which is outside its jurisdiction. This is in exception to the rule that the courts in Uganda normally entertain only matters within its jurisdiction[67]. For instance, the court may enforce a trust relating to land situated abroad if the trustees are present within its jurisdiction.[68] Furthermore, in *Penn v. Lord Baltimore*[69], it was held that an English Court could order specific performance of a contract to sell land in the United Stated because the defendant was within its jurisdiction. The court reasoned that:

> The conscience of the party was bound by this agreement; and being within the jurisdiction of the court, which acts *in personam*, the court may properly decree it as an agreement.

Additionally, in *Bata Shoe Co. V. Melikan*[70], the Nigerian Federal Supreme Court held that the High Court of Lagos had power to order specific performance of a contract to assign a lease of land situated at Aba in Eastern Nigeria, which was outside its jurisdiction because the defendant resided in Lagos.

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65. Civil Procedure Act, Cap.71, S.52; Civil Procedure Rules Order 19 Rule 13. See also Judicature Act, Cap13, S.45

66. Civil Procedure Act *ibid*, Trustees Act Cap.164, S.45.

67. Civil Procedure Rules, Cap 65, Order VI Rule 1 (f); *eliso Emosing oit V. Ibunyat* [1985] HCB 89; *Jadesola V. Akinol*a [1932] 11 N.L.R.108, 109 per Webber, J. Civil Procedure Act, Cap 71, S.11

68. *Rochefoucauld v. Boustead* [1897] 1 Ch.196. See lso *Ewing v. Ewing* (1883) 9 App Cas 34

69. 1750 1 Ves.Sen 444; 27E.R.847

70. (1956) 1 F.S.C.100; See also *Nig. Ports Authority v. World Transport Nig. Ltd* (1974) UILR89 *Ayinule V. Abimbola* [1957] L.L.R.41

Chapter 3

Nature of Equitable Rights and Interests and The Doctrine of Notice

A. Introduction

Following the historical, philosophical and conceptual examination of equity in the previous chapters, it is now apposite to discuss the nature of equitable rights and interests which are an offspring of equitable jurisdiction. In so doing, it is intended to discuss, as well, the doctrine of notice which has implications for the holder of equitable rights or interest. This is based on the realization that the doctrine of notice is one of those instances in which equity lays emphasis on substance in the face of form and technicalities regarding legal ownership except where statutory guidance is evident.[1]

B. Relevance of Maxim, Equity Acts in Personam and the Rights of a Beneficiary

It has been observed[2] that the early development of equity jurisdiction owes much to the maxim *equity acts in personam***.** In this vein, it has been stated thus:[3]

> Of all the maxims, none has a more interesting history, none speaks more eloquently of the vortex of jealousy, antagonism and rivalry in which chancery first formulated its doctrines, than "e*quity acts in personam"*. The influence of this maxim upon commentators on equity has been profound. It is the *cornerstone for the theory which treats equitable interests as purely personam;* naturally Armes regarded it as the key to the mastery of equity (*emphasis added).*

1. *Ware v. Egmot* (1854) 4 De G.M&G 460 per Lord Cranworth
2. Jegede, *Principles of Equity* (Ethiopie Publishing Corporation, Benin 1981) p.33
3. Barbour "TheExtraTerritorial Effect of the Equitable Decree" 17 *Mich L. Rev.* 527, 52728 (191819). See also discussion *supra* Chap.2

The maxim was employed by Chancellors to operate on the conscience of litigants in the exercise of their common law rights with the aim of *ensuring* that common law rights were not exercised in an unconscionable manner.

In this regard the issue arises as to whether a beneficiary's right under a trust is a right in *personam* or *in rem*[4]. As has been observed, a right in *personam* is enforceable against determinate person(s) while a right *in rem* is enforceable against indeterminate number of persons relative to the subject matter.[5] It is argued that a beneficiary's right under a trust is more than a right *in personam* because the beneficiary can also trace property or its proceeds and recover it. In this respect, the right to trace is similar to a right *in rem* which attaches to the property.[6] However, it is not a full right *in rem* because the beneficiary cannot trace against a *bonafide* purchaser of value without notice of the trust.[7] Nevertheless, there is judicial authority to the effect that the beneficiary's right under a trust is more than a mere right *in personam*.

Thus in *Williams V. Cole*[8], it was held that the beneficiaries of a trust have a better right to the possession of the trust property against the trustee's successors in title. Furthermore, under the rule in *Saunders V. Vautier*[9], a beneficiary who is *sui juris* and absolutely entitled under the trust, can put an end to the trust by demanding the immediate transfer of the *corpus* of the trust either to himself/herself or according to his/her direction. Addition ally, for income tax purposes, the beneficiary may also be regarded as the owner of the property.[10]

4. Scott, "the Nature of the Rights of *Cestuique Trust*" 17 *Col Law Rev* 269 (1917) Cook "Powers of Courts of Equity". 15 *Col L.Rev.* 37 (1915); Maitland, *Equity* (Brunyate Ed) pp.110116 (1949) Harlan Stone "The nature of the Rights of *Cestuique Trust* 17 *Col L. Rev.* 467; Hanbury, "The Fiedl of Modern Equity *45 Law Q.Rev.* 196 (1929)

5. See *supra* chap 2; Nathan & Marshall, *A Casebook of Trusts* (5th Ed) p.1

6. *Sinclair v. Brougham* [1914] A.C.855

7. Maitland, *supra* n.4; *NPA v. Panalpina World Transport Nig Ltd. (1974)* UILR89

8. (1952) 14 W.A.C.A.129

9. (1841) L.J.Ch.354; See also *Jones V. Nicholas* 918380 4 W.A.C..A.58

10. Income Tax Act Cap.340, S.72(1)(2); *Baker v. Archer Shee* [1927] A.C.844. See also *Senior v. Bladen* 295 U.S.422, 79 L.Ed. 1520; *Blair V. Commissioner of Internal Revenue* 300 U.S.5

In addition to the doctrine of *bona fide* purchaser for value which may infringe upon the beneficiary's interest, there are a few cases which deny the beneficiary of the claim to proprietary ownership of the *trust res.* Thus in *Schalit V. Nadler*[11], it was held that a beneficiary of trust property cannot sue or distrain for rent due from a tenant to whom a lease or tenancy of the trust property has been granted by the trustee. The trustee is the only person who can take such action and his right to do so arises from the fact that he alone is the les sor. Similarly, a beneficiary cannot maintain an action for an account against the debtor of a trust estate. His/her remedy was to compel the trustee under the will to pay legacies due to him/her under the will[12]. In this respect, a beneficiary may file a bill against the trustee for the execution of the trust in accordance with the trust instruments if the trustee defaults to enforce a claim due to the trust property.[13]

C. Nature of Equitable Rights/Interests

The rights over property which were recognised and enforced by the Court of Chancery are known as equitable rights or interests. They fall into two categories. First, those which were based on the common law rights and second those which were exclusively created by equity. Each is examined briefly before looking at examples of such rights.

1. Rights/Interests Based on Common Law

Under a trust, the trustee possesses legal title to the trust property or estate while the beneficiaries have equitable interests. The beneficiary's rights are based on the common law because equity followed the common law concept of estates.The effect of this is that the beneficial interests may be estates in fee simple or freehold. For instance, where under a will, the testator/testatrix has left property

11. [1933] 2 K.B.79
12. *Ojikutu v. Fela* (1954) 14 W.A.C.A.628
13. *Ibid* p.630

to a trustee to hold for the benefit of X for life, to Y remainder in tail that is with his/her successors and to Z remainder in fee simple or absolutely X, Y and Z would possess equitable interests. Before 1873, the common law did not recognize the equitable interests of X, Y and Z. However, equity regarded X, Y, Z as the real owners of the estate with the trustee being only a custodian of the property for them. Since the Judicature Acts of 187375, equitable interests can be enforced in any court. This approach is also evident in Uganda under the Judicature Statute 1996, Section 14(2)(a)(i) and the Magistrate's courts Act, Section 11.

2. Equitable Interests Exclusively Created by Equity

The following interests, to mention a few, were exclusively created by equity: the mortgagor's equity of redemption, restrictive covenants and the vendor's equitable lien. There were others which were not recognised by the common law because the correct formality was not followed. Examples of these are estate contracts and equitable mortgages.

3. Distinction Between Legal and Equitable Interests

The issue arises as to whether there is any significant difference between legal and equitable interests.

a) Legal Interest

It is generally recognised that a legal interest is valid and enforceable against the whole world.[14] This means that if, subsequently, a person obtains a legal or equitable interest in the same property, his or her interest is subject to the interest of the first legal owner. For instance where X is the owner of land over which P has a right of way or legal easement, and X sells the land to Y, Y takes the land subject to P's legal interest. It does not matter whether or not Y was aware of P's interest when he bought the property.

14. Nathan & Marshall *supra* n.5, p.1

b) Equitable Interest

Assuming, however, that P has an equitable charge over X's land. If X transfers his legal freehold or absolute title to Y who has no notice of P's equitable charge then P's equitable interest will be invalid against Y. The reason is that Y is a *bona fide* purchaser of value without notice of P's interest. Y, therefore, gets the legal estate of the property free from P's interest. Similarly if property has been transferred to a trustee for the benefit of A and B; and the trustee sells the property to Y, who has no notice of the trust, Y will take the legal estate of the property free from the equitable interests of the beneficiaries. However, if Y has notice of the trust, then he/she will take the property subject to the equitable interests of the beneficiaries. Thus in *Lwanga V. Registrar of Titles*[15], Galiwango bought land from Mukasa in 1920 but died before registering it in his names. By a forged agreement dated 30 September, 1952 Katemba purported to have obtained the land from Galiwango as a gift. On 5 February, 1953, Katemba forged a transfer of the said land into his names and was duly registered as the proprietor thereof. By a transfer dated 8th February 1955, Katemba sold the land to Salongo who thereby became the registered proprietor thereof. The applicant, a son of Galiwango (deceased) brought the application to compel the Registrar of Titles to register the land into the names of Galiwango. Salongo testified that he was ignorant of the fraud perpetrated by Katemba. It was held[16] by Odoki Ag. J. as he then was, that according to Section 189 of the Registration of Title Act, the title of a *bona fide* purchaser for value could not be impeached since a person who was registered through fraud could pass a good title to a *bona fide* purchaser who was not privy or party to the fraud. Consequently, Salongo was a *bona fide* purchaser for value and his title could not be impeached.

15. [1980] H.C.B.23

16. *Ibid* p.24 following *Gibbs V. Masser* [1891] A.C.248. See also *Kazzora V. Rukuba* [1992] II *Kampala Law Reports* 51 (Supreme Court of Uganda); *Musisi V. Grindlays Bank (U)* [1983] H.C.B.39

4. Types of Equitable Interests

a) Estate Contracts

An Estate Contract is an agreement for the sale or lease of land. At common law, if a vendor or lessor failed to transfer or execute a lease of property, the buyer's or lessee's remedy was damages for breach of contract. However, at equity specific performance of the contract would be decreed. The effect of this is that the vendor or lessor would be ordered to transfer or execute a lease of the property. This would be in line with the principle in *Walsh V. Lonsdale*[17] that an agreement for the sale or lease of land is as good as a sale or lease. Consequently, as soon as the contract is concluded, the buyer or lessee obtains an equitable interest in the property which is the subject of the agreement. Such an interest is valid against the whole world except a *bona fide* purchaser for value of the legal interest without notice of the equitable interest.[18] Thus if X sells land to Y under an agreement of sale and later X sells the same land to Z who has no knowledge or notice of the first sale, Z will take the land free from Y's equitable interest. Y can only recover damages for breach of contract from X. However, if Z has notice of the agreement of sale between X and Y, then Y's equitable interest prevails and Z does not get title to the land.

A significant feature in Uganda as in other parts of Africa is that land is held by families according to native law or custom. Under customary law, a buyer can acquire title to land without its being formally conveyed to him, that is, under a deed or document of transfer.[19] Difficulties may arise where the land sold without a formal conveyance is later sold to other buyers. For instance, X may sell land to P under customary law and then later sell the same land to Q according to the statutory system of conveyance.[20] It is

17. (1882) 21 Ch.D.9 considered ***supra*** Chap.1
18. *Lwanga V. Registrar of Title, supra* n.15
19. For a good example see *Ogunbambi V. Abowba* (1951) 13W.A.C.A.222, 225 per Verity J.
20. Registration of Titles Act, Cap.230

suggested that if the sale to P is evidenced by a receipt, then P's interest is equitable and is equivalent to an estate contract which can be converted into a legal estate by means of a decree of specific performance. Thus in *Ogunbambi V. Abowba*[21], in 1927, members of the Oloto Chieftaincy family sold a plot for their land to P's predecessor in title and were paid. They issued a receipt and allowed the buyer to take possession. In 1948, the family sold and executed a formal conveyance of the same land to Q. A dispute arose between P and Q. Q argued that he was a buyer of the legal estate in the land without notice of P's interest. It was held that P had good title to the land according to customary law. Furthermore, that although the purchase receipt could not be admitted into evidence as proof of title, not having been registered in accordance with the Land Registration Act, it raised a presumption that P's predecessor in title entered into possession of the land under an agreement of sale, which, taken together with actual possession created an equitable interest was capable of being converted into a legal estate by a decree of specific performance. Finally, since Q had constructive notice of P's interest, he could not claim to be a *bona fide purchaser* for value of the legal estate without notice. In contrast, in *Orasanmi V. Idowu*[22], the appellant acquired an equitable interest in land by obtaining receipts and entering into possession. Twenty (20) years later, the same land was sold under a deed of conveyance.

The appellant, unlike the situation in *Ogunbambi* case did not remain in continuous possession. It was held that the principle in the *Ogunbambi* case could only be applied if the claimant remained in continuous possession of the land. It is presumably only then that a later purchaser under a deed could have constructive notice of the claimant's interest.

21. *Supra* n.19. See also *Olowu V. Oshinubi* 91958) L.L.R.21 (High Court of Lagos, Nigeria) *Obijuru V. Ozims* [1985] 2 N.W.L.R.167 (Supreme Court of Nigeria)

22. (1959) 4 F.S.C. 40, 42 (Federal Supreme Court, Nigeria)

b) Restrictive Covenants

A restrictive covenant is normally a clause in an agreement relating to a lease of land which restricts the use of the land to certain purposes. For instance, it may be provided that the land shall only be used for private residence and not for business. In equity such a restriction runs with the land, that is, it binds the original party to the agreement and future owners of the land except a *bona fide* purchaser of the legal estate for value without notice of the restriction.[23]

c) Mortgagor's Equity of Redemption

The mortgagor's equity of redemption has already been considered under the maxim that "equity looks at the substance rather than the form.[24] However, essentially, equity allowed the mortgagor to redeem the mortgage even after the specified date had passed.

d) Equitable Mortgage

i) Mortgage of Equitable Interest

A mortgagor who has only an equitable interest in a piece of property can only create an equitable mortgage over it when he borrows money and uses that interest as security. Similarly, a beneficiary under a trust can only create an equitable mortgage over his equitable interest under the trust if he/she uses it as security for a loan advanced to him/ her. Furthermore, a mortgagor who has created a legal mortgage over a piece of land or property, retains an equitable interest in the land which he can subsequently mortgage to subsequent mortgagees.

i) Agreement to Create a Mortgage

A court's decree of specific performance converts the equitable mortgage created under an agreement into a legal mortgage.[25]

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23. *Tulk V. Moxhay* (1848) 2 Ph.774
24. See *supra* Chap.2
25. Applying the principle in *Walsh V. Lonsdale* (1882) 21 Ch.D.9; *Ogunbambi V. Abowba Supra* n.21

ii) Deposit of Title Deeds

The deposit of property title deeds with someone as security for a loan creates an equitable mortgage. However, it is necessary to show that the deposit of title deeds is with the intention of making the property security for the loan. When the deposit in accompanied by a memorandum of deposit, this effectively creates an equitable mortgage by deed. The effect of this is that the mortgagee is empowered to sell the land and also appoint a receiver under Section 129 of the Registration of Titles Act[26] and Mortgage Act, Cap.229, S.4.

iv) Equitable Charge

Land may be treated as security for a loan without an agreement to create a legal mortgage or the deposit of title deeds. This type of arrangement is called an equitable charge which can be enforced against everybody except a *bona fide* purchaser of the legal estate without notice of the charge.

v) Equitable Lien

Where a seller of land transfers it to the buyer before he has been paid she/he entitled to an equitable lien on the property for the outstanding price. The lien can be enforced by selling the property under a court order. The equitable lien is enforceable against everybody except a *bona fide* purchaser for value of the legal estate without notice of the lien. Thus in *Ayorinde V. Scott*[27], the plaintiff sold and transferred a plot of land in Lagos to Ayorinde, who at the time of the transfer paid 4,000 *nairas* out of the purchase price of 12,000 *nairas.* He agreed in writing to pay the balance within 30 days. The transfer deed contained a receipt which mistakenly stated that the full purchase price had been paid. Ayorinde failed to pay the balance and later sold the land to the defendant. The plaintiff asked the court for an order of sale to satisfy his equitable lien for the unpaid price. It was held that the plaintiff's claim could not succeed

26. Cap.230 See also Conveyancing Act, 1881, S.19 (UK)

27. CCHCJ/2/72, p.49 (High Court of Lagos, Nigeria)

28. *Buckland v. Gibbins* (1863) 32 L.J.Ch.391, 395 per Lord Westbury L.C.

because the defendant was a *bonafide* purchaser for value without notice of the plaintiff's interest.

D. The Doctrine of Notice

1. Rationale

The purpose of the doctrine of notice is to prevent a buyer of a superior title from setting it up against prior or earlier owners of inferior interests which affect the property.[28] The effect of this is that the buyer of the legal estate with notice of prior equitable interests affecting the estate takes it subject to those prior equitable interests.[29] The doctrine of notice is one of the instances where equity looks at the substance rather than the form of a transaction in order to arrive at a just result.

2. Concept of Notice

Notice simply means knowledge of an existing fact. This may be divided into three catego ries: actual, constructive and imputed notice. Each of these is examined briefly.

a) Actual Notice

Actual notice is a situation where the buyer of an estate has actual or express notice of a prior interest at the time when he or she made the purchase or at any time before the purchase was completed.[30]

Actual notice consists of personal knowledge of the prior equitable interest affecting the property which the buyer intends to buy.[31] What is important is to show that the buyer had actual notice of the equitable interest before she/he acquires his or her superior title. However, a buyer is not bound by notice whose source is unreliable such as rumours.

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29. *Assaf V Ovinloye* (1951) 20 N.L.R.1

30. *Perham V. Kempster* [1907] 1 Ch.373, 379; *Human Ajoke V. A.U.Oba* (1958) W.N.L.R.208, 210. See also Registration of Titles Act Cap. 230, S.64

31. *Lawton V. Gordon* (1869) 37 Cal 202, 206; *Lloyd V. Banks* (1868) 3Ch.App.488; *Ogunbambi V.Abowba, supra* n.21

b) Constructive Notice

i) Definition

> Constructive notice was defined by Salden , J. *In Williamson V.Brown* thus:[32] Where a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right or to have been guilty of a degree of negligence equally fatal to his claim.

It is notable that this is a mere *presumption* which may be disproved by showing that the buyer failed to discover the prior right after exercising due diligence. The essence of constructive notice is that the buyer should make reasonable inquiry relating to the circumstances of the transaction. For instance, when purchasing a piece of land, inquiry should be made to appropriate authorities such as chiefs, elders, local council officials or the Registry of Land Titles to find out whether the land is subject to encumbrances or claims.[33] If the inquiry is not carried out, equity will assume that this is due to bad faith or gross negligence and thereby affects the buyer's *bonafides* that is she/he ceases to be a *bona fide* purchaser.

i) Nature of Inquiry

The buyer of land should investigate the title of the seller. If she/he fails to do so, she/he will be regarded as having notice of all the incumbrances affecting the title.[34] The effect of the failure to investigate is that the purchaser of the legal estate cannot claim priority over an earlier equitable interest.[35] In *Labinjoh V. Olufunmise*[36], the plaintiff was a beneficiary under a trust. The trustees of the trust sold, in breach of trust, the trust property situated in Lagos, to the

32. [1857] 15 N.Y.354, 362

33. See also *Orasanmi V. Idowu supra* n.22

34. *Wilson v. Hart* (1866) L.R.I Ch.463, 467 per Turner, L.J.

35. *Oliver V. Hinton* [1988] 2 Ch.264; *Akingbade V. Elemesho* [1964]1 All N.L.R.154 (Supreme Court of Nigeria); *Obijuru V. Ozims* [1985] 2 NWLR 167, 181 (Supreme Court of Nigeria)

36. No L.D./355/68 Unreported

defendant. The defendant claimed that he was a *bonafide* purchaser for value of the legal estate without notice. The defendant admitted, in cross-examination that he did not carry out any inquiries to find out whether the property was subject to other interests. It was held that under Section 3(1) of the Conveyancing Act, 1882 of the United Kingdom, (which was applicable), the defendant had constructive notice of the plaintiff's prior equitable interest. He was, therefore, not a *bonafide* purchaser and took the property subject to the plaintiff's interests. He was, therefore, a constructive trustee of the legal estate for the plaintiff's benefit.

In this regard it is significant that Section 64 of the Registration of Titles Act,[37] provides that all dealings on the registered title "shall be noted in the Register Book and on instruments filed thereunder as will allow the title to be traced either downwards from or upwards to the original certificate of title. It is submitted that the effect of this provision is to facilitate inquiry by prospective purchasers or other dealers in relation to the property.

Where it is shown that there is evidence showing that the buyer of the legal estate knew facts which would enable him/her to get notice of the prior equitable interest, she/he will be deemed to have notice.[38] For this purpose, if the land is occupied by a person other than the seller, this is regarded as notice to the buyer.[39] This is because the buyer of the land should inspect the land she/he wants to buy to see if there is an occupier and find out the right or interests which such a person possesses in the land.[40] If the buyer fails to inspect the land or make inquiries as to the title, he will take the land subject to the prior equitable interests.[41]

Constructive notice extends to the contents of the instrument under which a prior tenant occupies the property. Thus in *Crayem V.*

37. Cap.230

38. *Ogunbambi V. Abowab Supra* n.21; *Obijuru V. Ozims, Supra* n.35

39. *Kabba & Anor. V. D.S. Young* (1944) 10 W.A.C.A.135

40. *Hunt V. Luck* [1902] 1 Ch.428

41. *Olowu v. Oshinubi* (1958) L.L.R.21; *Sanusi Imam V. Sauni Dawoudu* (1960) W.N.L.R.150

Consolidated African Selection Trust Ltd[42], the plaintiffs took a lease of land which was subject to an equitable lease of the defendant who was in possession. The defendant tried to exercise the option. The plaintiffs sued him arguing that they had no notice of the defendant's option to renew. They relied on information given to them by the lessor. It was held that the plaintiff/appellant had such constructive notice of the option to renew which they could have discovered upon reasonable inspection of the defendant/respondent's lease.

c) Imputed Notice

Notice which is neither actual or constructive may be imputed to the buyer through the actual or constructive notice or his or her agent. It is established in agency law[43] that notice to an agent is notice to the principal. Such notice will only be imputed to the buyer through his *bona fide* agent[44]. In this regard, a buyer who instructed his agent to buy property at an auction sale was taken to be affected by notice of an equity which came to his knowledge in the course of the transactions[45]. However, a vendor is not an agent of the buyer. Consequently, notice to the vendor is not imputed to the buyer[46].

Solicitors are normally agents of the buyers in land transactions[47]. Consequently, notice of information acquired by a solicitor in a transaction used to affect his principal in a later transaction[48]

However, because of the hardship of this rule, it was modified in *Mountford v. Scott*[49] to the effect that information acquired by a solicitor in one transaction cannot affect, through the doctrine of imputed notice his principal in subsequent transactions. Thus it has

42. (1949) 12 W.A.C.A.443
43. Bakibinga, *Law of Contract in Uganda* (1st ed. 1996) chap.12
44. *Orasanmi V. Idowu supra* n.22
45. *G.B. Ollivant Ltd. V. Alakija* (1950) 13 W.A.C.A.63, 67
46. *Omosanya V. Anifowoshe* (1959) 4 f.s.c.94, 99
47. *Rolland v. Hart* (1871) L.R.6ch.678; *Jared V. Clements* [1903] 1 Ch.428
48. *Okunubi V. Assaf* (1951) 13 W.A.C.A.226
49. 37 E.R.1105 (1823). See also Conveyancing Act, 1882, S.3(I) (ii); *In Re Cousins* (1886) 31 Ch.D.671

been held[50] that knowledge of a solicitor in a previous transaction cannot be imputed to a buyer in a later transaction. The solicitor for this purpose, is not under a duty to pass his knowledge in a previous transaction to the buyer when he later becomes his client. However, if the solicitor acts for both parties to a transaction, any notice which he acquires is imputed to both parties.[51] However, if it is shown that the solicitor conspired to the detriment of the other, then the aggrieved party will be protected by the doctrine of *bonafide* purchaser without notice.[52]

3. The Impact of Registration Legislation on the Doctrine of Notice

Section 54 of the Registration of Titles Act[53] requires registration of instruments affecting land and stresses that:

> No instrument until registered in the manner herein provided shall be affectual to pass any estate or interest in any land under the operation of this Act or to render such land liable to any mortgage....

An instrument is defined[54] to include any document in pursuance of which an entry is made in the register. For this purpose entries are meant to allow the title to be traced either downwards from or upwards to the original certificate of title.[55] It is, therefore, apparent that the purpose of the Registration of Titles Act (RTA) is to inform an intending buyer, mortgagee or other person involved in a transaction relating to the land of transactions affecting the land.

Furthermore, Section 48 of the RTA states:

> Every instrument (excepting a transfer) presented for registration may be made in duplicate and shall be registered in the order of and as from the time at which the same is produced for that purpose; and instruments

50. *Okunubi v. Assaf supra* n.48
51. *Ibid.231*
52. *Sharpe v. Foy* (1868) 4 Ch.App.35
53. Cap.230 Laws of Uganda 2000 Edn
54. *Ibid* S.1
55. *Ibid* S.64

> purporting to affect the same estate or interest shall, not withstanding any actual or constructive notice, be entitled to priority as between themselves according to the date of registration and not according to the date of the instrument.

For that purpose every memorial entered in the Register Book is required to state the nature of the instrument to which it relates, the time of the production of such instrument for registration and the name of the party to whom the same is given and shall be signed by the Registrar[56]. Such memorial is also required to be entered on the duplicate certificate of title issued to the Registered Proprietor.[57]

The effect of the sections mentioned above is that every instrument registered under the RTA supersedes other instruments affecting the land from the date of its registration. Thus in *Amankra V. Zankley*,[58] the plaintiff instituted an action for a declaration of title in his favour over a disputed piece of land. The same vendor of land transferred the disputed land to two people, the plaintiff and the defendant. The plaintiff alleged that the land was transferred to him on 29 August, 1957. A defendant contended that the land was transferred to him on 16 May, 1957 by deed which was registered on 17 March, 1960. The plaintiff argued that by virtue of Section 16 of the Land Registration Act Cap 39 of Nigeria[59], the defendant had lost priority. The defendant argued that since the land was transferred to him in May 1957, the same land could not be transferred to the plaintiff in August, 1957. The plaintiff's action was upheld on the ground that under Section 28 of the Land Registration Act[60], the defendant had lost priority. The defendant could have searched the register before registering the conveyance to him and would have discovered the plaintiff's registered interest. Furthermore, it was indicated that the purpose of section 28 is to prevent fraud. Consequently, only a person who has registered his

56. *Ibid* S.48. See also Ss.49, 50 in relation to transfers of mortgages and leases and trusts
57. *ibid* S.52
58. [1963] 1 All N.L.R.304 (Supreme court of Nigeria)
59. Equivalent to R.T.A. S.48 (Uganda)
60. *Ibid* S.64

or her transfer can plead it in evidence. If there are two competing registered instruments then the first one to be registered takes priority. In *Ricketts v. Shotte*[61], registered transfers were held to be sufficient notice to the defendant if he had bothered to carry out a search of the register. Furthermore, in *Balogun v. Salami*[62], it was held that a *bona fide* purchaser for value is only affected by notice of the registered estate of the previous owner. However, it appears that a subsequent owner who is not a purchaser for value takes the estate subject to any unregistered estate affecting the estate of a previous registered owner, while a first registered owner who is affected by notice of the prior unregistered interest takes subject to such interest.[63]

61. S.C.46/1/61 of 4th April 1963 (unreported) (Supreme Court of Nigeria). See also *Akingbade V. Elemesho* [1964] 1 All N.L.R 154; *Oshimi V. Oke* SC 296/62 of 19/10/1966 (unreported)

62. [1963] All N.L.R.129, 138. Confirming S.48 R.T.A. (Uganda)

63. *Johnson v. Onisiwo (1943) 9 W.A.C.A. 189*

Chapter 4

Assignment*

The benefit of a contract can be transferred to a third party by a process known as assignment. This is a transaction between the person entitled to the benefit of the contract (called the creditor or assignor) and the third party (called the assignee) as a result of which the assignee becomes entitled to sue the person liable under the contract (called the debtor). The debtor is not a party to the transaction and his consent is not necessary for its validity.

A. Assignment at Common Law

The common law refused to give effect to assignments of "choses in action" that is rights which could only be enforced by bringing an action and not by taking possession of a physical thing. Examples of these are debts, shares, debentures, copyrights and insur ance policies. The early lawyers found it difficult to comprehend the transfer of something intangible like a contractual right[1]. The rule was based on the fear that assignments of choses in action could lead to maintenance or unnecessary litigation[2].

However, the common law enforced three types of transactions which in effect amounted to assignment.

1. Novation[3]

Novation is a contract between the debtor, creditor and a third party that the debt owed by the debtor shall from that point on be owed to a third party. This is not an assignment because the consent of all

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* See also *Marshall, Assignment of Chose in Action, Bailey* 47L.Q.R.248, 547

1. Pollack and Maitland, *History f English Law*, Vol.I, p.226
2. *Johnson v. Collings* (1880) 1 East 98; *Fitzroy v. Cave* [1905] 2KB 364,372; *Wilson v. Coupland* (1821) 5B&Ald.228, 232
3. Ames, *Lectures*, p.298

three parties[4], including that of the debtor, is necessary and because the original debt is not strictly transferred. The third party's rights against the debtor are based on the new contract between him and the debtor.[5] Consequently, the third party will fail if no consideration moves from him for the debtor's promise to pay him.[6]

2. Acknowledgement[7]

If a creditor asks his debtor to pay a third party and the debtor agrees to do so and notifies the third party of the agreement, then the third party is entitled to sue the debtor.[8] The issue arose as to whether such a transaction had to be supported by consideration from the third party. Originally, the view was that consideration was in general necessary but that it was not necessary where the debtor actually had in his hands (e.g. as banker) a fund belonging to the creditor.[9] Such a distinction has been disregarded in the relatively more recent case of *Shamia v. Joory*.[10]

The defendant owed some One Thousand, Two Hundred Pounds to his agent Youssuf, who asked him to pay Five Hundred Pounds of this to the plaintiff, Youssuf's brother. The defendant agreed to pay and notified the plaintiff of this. It was held that the plaintiff could sue the defendant for the Five Hundred Pounds, though no consideration moved from him. If this decision is right[11] acknowledgement is in one respect more advantageous than assignment since certain types of assignment have to be supported by consideration[12]. However, it is less advantageous than assignment since it requires the consent of the debtor.

4. *The Aktion* [1987], 1 Lloyd's Rep.283, 309
5. *Rasbora Ltd v. J.C.L.Marine Ltd* [1977] 1 Lloyd's Rep.645
6. *Tatlock v. Harris* (1789) 3 T.R.174, 180
7. Davis, 75 L.Q.R.220
8. *Wilson v. Coupland*, *supra* n.2
9. *Liversidge v. Broadbent* (1859) 4H&N.603, 612
10. [1958] 1 Q.B.448
11. For critique see Goff & Jones, *The Law of Restitution* (3rd Ed.)pp.518521
12. Trietel, *Law of Contract* (International Student Edition, 8th Ed.1991), pp577, 585592. See also *infra* notes 7074, 1067 and text thereof

3. Power of Attorney

A creditor gives a third party a power of attorney authorising him to sue for a debt in the creditor's name without liability to account to the creditor. This is not helpful, though, to the assignee because the creditor can at any time revoke the power and this is automatically done at his death.[13]

B. Equitable Assignments

Equity regarded choses in action as property.[14] which could be transferred.[15] Enforcement of such assignment of a choseinaction depended on their nature which could be legal or equitable.

A legal choseinaction is one which could only be sued for in a common law court e.g. a contract debt. An equitable chose is one which could only be sued for in the Court of Chancery, e.g. interest in a trust fund.

1. Legal Chose

The issue arises as to why a person could only sue for a legal chose in a common law court. Four reasons have been given[16]. First, equity did not enforce purely legal debts. Second, a debtor may suffer if he were sued again for the same debt by the original debtor at common law. He would have to take separate proceedings in Chancery to make good his defence. Third, the assignor may retain some interest in the debt, e.g. he might only assign part of it. Consequently, it was desirable for the action to go before the Common Law Court so that the rights of all parties could be determined in one action. Fourth, the assignor might challenge the validity of the assignment. In such a case it was better for him to appear before a Common Law Court.

13. *Ibid,* p.651
14. *Cf.Alloway v. Phillips (Inspector of Taxes)* [1980] 1 W.L.R.888, 893
15. *Crouch v. Martin* (1707) 2 Vern 595
16. Treitel, *supra* n.12, p.578

All these problems were solved by allowing the assignee to sue the debtor at common law in the name of the assignor. If the assignor was uncooperative, equity could compel him to do so. Now that the common law and equity are administered in the same courts, the first two reasons have been discarded. However, the third and fourth reasons are still important and make it necessary to have all the parties before the Court, where there is a dispute.[17]

However, the action against the debtor does not have to be brought in the name of the assignor[18]. He is merely joined as co plaintiff if he cooperates with the assignee, and as codefendant if he does not, for instance where he challenges the validity of the assignment. Nevertheless, the machinery for joining the assignor as a party to the action may break down if the assignor ceases to exist e.g. where the assignor, being a company, is dissolved.[19] Where, however, the assignor is a natural person and has died , it appears possible for the assignee to sue, by joining the assignor's legal personal representative.[20]

2. Equitable Choses

The assignees of an equitable chose could in his own name sue the trustee in the Court of Chancery.[21] Since the chose was equitable, the trustee was not exposed to the danger of a later action in the Common Law Court by the assignor. It was only necessary to make the assignor a party to the proceedings if he retained some interest in the property. If he wished to dispute the validity of the assignment, he could take separate proceedings for that purpose.[22]

17. *The Ailos* [1983] 2 Lloyd's Rep.25, 33
18. *Weddel v. J.A.Pearce & Major* [1988] Ch.26, 40
19. *M.H.Smith (Plant Hire) Ltd. V. D.L.Mainwaring (TIA Onshore) Ltd*. [1986] 2 Lloyd's Rep.244
20. *Cator v. Croydon Canal Co* (1841) 44 &C.405, 593, *Donaldson v. Donaldson* (1854) Kay 711
21. Treitel, *supra* n.12, pp.578579
22. *Bridge v. Bridge* (1852) 16 Beav.315

C. Statutory Assignments

Certain specific contracts such as life and marine insurance policies and bills of lading were made assignable by statute during the nineteenth century in Britain.[23]

A more general provision was made by the Judicature Act, 1873 which fused the Courts of Common Law and equity.[24] The effect of this was to render obsolete the reasons (supra) for the old method of enforcement of legal choses. In addition, an assignee could sue in any division of the High Court. Furthermore, a debtor who had been successfully sued by the assignee no longer had to engage in separate proceedings if sued again by the assignor, he could simply rely on his payment to the assignee as a defence against the second action. Consequently, it was no longer necessary to have the assignor before court unless he retained an interest in the subject matter or wished to dispute the validity of the assignment.

Section 25(6) of the Judicature Act [24a.] provides that an absolute assignment in writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor or trustee, is effectual in law to pass the legal right to the debt or thing in action to the assignee. The effect of this is to enable the assignee to sue the debtor in his own name, and to sue alone, i.e. without joining the assignor as a party to the action.

The subsection also makes provision for enabling the assignor to dispute the validity of the assignment; if he does so, the debtor can drop out of the proceedings and leave the dispute to be fought out between assignor and assignee.

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23. Bills of Lading Act, 1855, S.1; Policies of Assurance Act 1867 (Life Insurance)' Marine Insurance Act 1868 (now 1906 Act.S.50(1)).

24. For Uganda see the Judicature Cap.13, S.14(2). See also *Ambalal & Co.v. Durgo Das Bowry* 23 E.A.C.A. 68 per Briggs Ag.V.P. which suggests that the principles relating to absolute assignment as developed in England apply to Uganda.

24a. Now of historical interest in view of Section 14(2), Judicature Act, Cap.13. See also *Uganda Motors Ltd. v. Wavah Holdings Ltd***.** Civil Appeal No.19/91 (Supreme Court), but see n.24 *ibid*.

1. Absolute Assignment

The assignee can only sue alone if the assignment is absolute; this excludes cases where the assignor retains an interest in the subject matter so that it is desirable to have him before the Court. Absolute assignments should, therefore, be contrasted with the following:

a) Assignments by way of Charge

In *Durham Bros. V. Robertson*[25] £1080 was due to a builder under a building contract. He borrowed money and assigned the One Thousand and Eighty Pounds to the lender as security for the loan, "until the money (lent) be repaid". It was held that this was an assignment by way of charge. This was because the builder did not assign the One Thousand and Eighty Pounds absolutely to the lender. He only charged that sum with repayment of money borrowed. However, an assignment may be absolute although it may be made by way of mortgage and does not transfer the subject matter absolutely. Thus in the ***Tancred case***[26], a debt was assigned as security for loan of money, with the proviso that if the assignor repaid the loan, the debt should be reassigned to him. This was held to be an absolute assignment.[27]

b) Assignments of Part of A Debt

An assignment of part of a debt (e.g.shs 50,000/= out of the shs.100,000/= which X owes me or half of what X owes me) is not absolute.[28]

In such a case, a debtor who wants to pay may know perfectly well how much to pay to whom. To hold such assignment to be absolute might cause hardship to a debtor who wished to dispute the

25. [1898] 1 Q.B.75 c.f. *Tancred v. Delagoa Bay* (1889) 23 Q.B.D.239

26. *ibid*

27. For an explanation of the rationale for the distinction between the *Durham Bros* and the *Tancred Cases* see Treitel, *supra* n.25, p.580. See also in this respect *The Halcyon The Great* (1984) 1 Lloyd's Rep.283 *Bank of Liverpool v. Holland* [1926] 43 T.L.R.29

28. *Foster v. Baker* [1910] 2K.B.636; *Re Steel Wing Co.* [1921] 1 Ch.349 *Williams v. Atlantic Assurance Co. Ltd* [1933] 1 K.B.81, 100.

debt. To protect the debtor against numerous actions where the debt has been assigned to many parties, it may be necessary to have all the interested parties before court. Similarly, an assignor of part of a debt cannot sue for the part he retains without joining the assignee as a party to the action.[29] This reasoning does not apply to an assignment of the *balance* of a debt. Suppose A owes B shs.100,000 /= and pays off shs 25,000/= of the debt. An assignment of the remaining shs 75,000/= would be absolute as it would be an assignment of B's remaining interest in the debt.[30]

c) Conditional Assignments

Section 25(6) of the Judicature Act, 1873 contrasts absolute assignments with assignments by way of charge. However, some judgments also distinguish between absolute and conditional assignments.[31] A conditional assignment is not absolute. For instance if A assigns rent due under a lease "to my daughter until she marries". It is necessary in this case for A to be party to an action brought by his daughter against the tenant for rent. If the daughter could sue without A, she might be able to prove that she was unmarried, and so entitled to the rent. However, this would not prevent A in a subsequent action against the ten ant, from proving that the court in the first action had made a mistake in finding that the daughter was unmarried, so that the tenant would have to pay over again. What matters to the tenant is not whether the daughter is married but the question should be decided, one way or the other, so as to bind both A and the daughter.[32]

2. Debt or Other Thing In Action

Section 25(6) of the Judicature Act 1873[33] refers to "debt" as a sum certain due under contract or otherwise[34]. The phrase "other legal

29. *Walter & Sullivan Ltd. V.J. Murphy & Sons Ltd.* [1955] 2 Q.B.584
30. *Harding v. Harding* (1886) 17 Q.B.D.442
31. *Durham Bros v. Robertson [1898]* 1Q.B.765, 773
32. *c.f. The Aiolos* [1983] 2 Lloyd's Rep.25, 33
33. See *supra* n.24a.
34. E.g. under Statute: *Dawson v. Great Northern & City Ry.*[1905] 1 K.B.260

thing in action" has been interpreted to mean any "debt or right which the common law looks on as not assignable by reason of its being a chose in action but which a court of equity deals with as being assignable"[35]. The phrase includes equitable choses in action,[36] though this point is of little practical importance since the assignment of an equitable chose is no more as effective under the statute than in equity. The phrase also includes a debt not yet due but accruing due[37], and the benefit of an obligation to do something other than to pay cash[38] or to forebear from doing something.[39] It does not include choses in action which can only be transferred by complying with some other statute. Thus shares in a company cannot be assigned by statutory assignment under Section 25(6), but only in the manner prescribed by the articles of association of the company.[40]

D. Requirements for Valid Assignment

1. Formalities

As already seen (supra) the statutory assignment must be in writing and signed by the assignor. Assignment which does not satisfy this requirements may take effect as an equitable assignment. For instance, while an oral assignment cannot take effect under the statute, it may be valid in equity.[41] Consequently, the statute merely provides an alternative method of assignment, it does not destroy the old method.

A disposition of an equitable interest must be in writing and signed by the assignor or his agent.[42] Consequently, an oral assignment of an equitable chose is void.[43]

35. *Torkington v. Magee* [1902] 2K.B.427, 430
36. *Re Pain* [1919] 1 Ch.38, 44
37. *Brice v. Bannister* (1878) 3 Q.B.D.569, 574
38. *Torkington v. Magee supra n.35*
39. *Jacoby v. Whitmore* (1883) 49 L.T.335
40. Companies Act Cap.110, S.75, Articles 2227 Table A
41. Treitel, *supra* n.12 pp.585, 591
42. Contract Act Cap.73, S.3(1)
43. *Oughtred v. I.R.C.* [1960] A.C.206; c.f. *Grey v. I.R.C.* [1960] A.C..1

Although writing is not necessary for an equitable assignment of a legal chose in action, the contract may provide that rights under it shall only be assigned by use of a certain form, such as writing. Consequently, an attempt to assign without using the stipulated form may be ineffective as an assignment, although it may amount to a contract to assign.[44]

2. Intention to Assign

It is necessary to establish an intention to assign. Thus in *William Brandts Sons & Co. V. Dunlop Rubber Co.*[45] Lord Macnaghten stated thus:[46]

> An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person.

It should be observed that simply because a creditor has asked a debtor to pay a third party does not mean that he has assigned the debt. Thus in *Exp Hall*[47], a landlord authorised his tenant to pay rent to his bank to his credit. It was held that this was not an assignment but authority to the tenant to bank. Such a mandate does not give the third party any rights against the debtor. Similarly, a person who draws a cheque on his bank in favour of a third person does not thereby assign part of his bank balance.[48]

44. Treitel, *supra* n.12, p.582
45. [1905] A.C.454
46. *Ibid* at p.462
47. (1878) 10 Ch.D.615
48. Bills of Exchange Act, Cap.68, S.52

3. Communication to Assignee

An assignment is not effective, unless it is communicated to the assignee[49], by the assignor, or someone with his authority,[50] unless it is made pursuant to a prior agreement between the assignor and assignee. While the reason for the requirement is not immediately obvious some person can have property transferred to him without his knowledge, subject to a right to repudiate when he learns of it[51], the requirement may be regarded as evidence of intention to assign[52], although such an intention could equally be proved by other evidence. The other explanation for requiring communication to the assignee is that it is equivalent of the delivery which is necessary to perfect a gift of a chattel made otherwise than by deed.[53] Finally, the requirement is based on the nature of assignment as a transaction between assignor and assignee.

4. Notice to Debtor

a) Form of Notice

Notice of an equitable assignment may be oral.[54] **However, if the chose assigned is equitable, oral** notice is seldom effective between successive assignees.[55] Notice of a statutory assignment must be in writing[56]. It need not be given by the assignor, nor at the time of the assignment; it may be given by the assignee and is effective so long as it is brought before the action is brought.[57] No

49. *Alexander v. Steinhardt, Walter &Co* [1903] 2 K.B.208 where posting was held to be suffcient communication, though doubted in *Timpson's Executors v. Yerbury* [1936] 1K.B.645, 657
50. *Burn v. Carvalfio* (1939) 4 My & Cr.690
51. *Standing v. Bowring* (1885) 31 Ch.D.282
52. *Re Hamilton* (1921) 124 L.T.737
53. *Treitel, supra* n.12, pp584, 589
54. *Ex.p.Agra Bank* (1868) L.R.3 Ch.App.555
55. Treitel, *supra* n.12, pp.584, 585
56. Judicature Act, 1873, S.25(6)
57. *Walker v. Bradford Old Bank* (1884) 12 Q.B.D.511

particular form of words is necessary,[58] but the notice must clearly and unconditionally[59], tell the debtor to pay a third party as assignee, and not merely as agent for the creditor.[60] A notice which incorrectly states the date of the assignment or, it seems, the amount of the debt, is invalid.[61] However, a notice which says nothing at all about these particulars would appear to be valid so long as it describes the debt with sufficient certainty. A notice will be valid although it inaccurately states that another notice had been previously given.[62]

A notice sent through the post takes effect when it is received by the debtor.[63] However, where there is a dispute between successive assignees, it is fair that the first to post should have priority over any other assignee who has not yet posted his notice (or otherwise com municated to the debtor) when the first notice was posted.

b) Effect of the Notice

Notice may affect the relative rights of the assignor and assignee, of assignee and debtor, and a number of successive assignees.

i) Between Assignor and Assignee

The rights of these parties may depend on whether the assignment is statutory[64] and it can only have this character if notice is given. In the absence of notice, the assignment may take effect in equity.[65] It is significant that notice to the debtor is not necessary to perfect the rights of an equitable assignee against the assignor.[66]

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58. *Snutg v. Ss."Zigurds" Owners* [1934] A.C.209
59. *The Bolder London* [1980] 2 Lloyd's Rep.489. 495
60. *James Talcott Ltd. v. John Lewis & Co.Ltd* [1904] 3 All E.R.592
61. *Stanley v. English Fibres Industries Ltd.* (1889) 68 L.J.Q.B.839; *W.F.Harrisson & Co. Ltd. V. Burke* [1956] 1 W.L.R.419. Criticised: R.E.M.72 *L.Q.R.*321
62. *Van Lynn Developments Ltd. V. Pelias Construction Ltd.* (1969) 1 Q.B.607
63. *Holt v. Heatherfield Trust Ltd.* [1942] 2 K.B.1,6
64. *Judicature Act*, 1873 S.25(6)
65. *Holt v. Heatherfield Trust Ltd. Supra* n.63
66. *Gorridge v. Irewell India Rubber co. Etc. Works* (1886) 34 Ch.D.128 *Re Trytel* (1952) 2 T.L.R.32

i) Between Assignee & Debtor

Notice is necessary to perfect the title of an equitable assignee against the debtor,[67] because without such notice the debtor is entitled to assume that he remains liable to his original creditor (assignor) and that he will get a good discharge by paying the assignor.[68] Notice may also turn the assignment into a statutory assignment, in which case the debtor is liable to be sued by the assignee alone; he can no longer insist that the assignor be made a party to the action.

ii) Between Successive Assignees

A chose in action may be successively assigned by an insolvent assignor to several persons for more than it is worth. It is then necessary to decide in which order the assignees are to be paid. The rule is that successive assignments taken in good faith rank in the order in which notice is given to the debtor. Consequently, a later assignee may gain priority over an earlier one by giving notice first.[69] Notice of the assignment of an equitable chose should be in writing, since oral notice of an assignment of such a chose does not give priority over later assignees in good faith for value.

E. Consideration

The issue arises as to whether an assignment must be supported by consideration between assignor and assignee. It is suggested[70] that this issue is restricted to the relative rights of assignor and assignee. Consequently, the debtor cannot refuse to pay the assignee on the ground that the assignment was gratuitous[71]; he is liable to pay the debt in any event and his only interest is to see that all possible claimants are before court so that he does not run the risk of having to pay twice over. It follows that once the possibility of prejudice to the debtor is removed by the joinder of all appropriate parties, it

67. *Warner Bros Records Inc. V. Rollgreen Ltd* (1976) Q.B.430; [1975] 2 All E.R.105
68. *Stocks v. Dobson* (1853) 4 D.M. & G.11
69. *Dearle v. Hall* (1828) 3 Russ.1
70. Treitel, *supra* n.12 p.586
71. *Walker v. Bradford Old Bank (1884)* 12 Q.B.D.511

is only the assignor who can raise an issue as to the validity of the assignment on the ground that no consideration was given for it. In fact the only reason for this course of action is to enable the assignor to claim payment of the debt for himself.

A statutory assignment, whether of a legal or of an equitable chosen action, is effective, although it is made without consideration.[72]

With regard to equitable assignments, the requirement of consideration is restricted to uncompleted transactions,[73] although if a donor has done all he needs to do to transfer the property, the gift is complete even though further steps to vest the property in the donee have to be taken by a third party.[74]

F. Rights Which Are Not Assignable

1. Contracts Expressed Not to be Assignable

A contract may expressly provide that the rights arising under it shall not be assigned. If assignment is nevertheless, made, the assignee cannot enforce the rights under the contract.[75]

2. Personal Contracts

The benefit of a contract cannot be assigned if it is clear that the debtor is only willing to perform in favour of a particular creditor and if it is unjust to force the debtor to perform in favour of another. In such cases the personal nature of the contract prevents assignments. For instance an employer cannot assign the benefit of an employee's promise to serve.[76] Similarly, a publisher cannot assign the benefit of an author's contract to write a book if the author relied on the

72. *Harding v. Harding* (1886) 17 Q.B.D.442; *Re Westerton* [1919] 2 Ch.104

73. *Harding's Case ibid*. See also *Milroy v. Lord* (1862) 4 D.F.& J.264 discussed *infra* Chap.10

74. *Re Rose* [1952] Ch.499; *Re Rose* [1949] Ch.78. See also *Kekewich v. Manning* (1851) 1 D.M.&G.176 discussed *infra* chap.10

75. *Helstoan Securities Ltd v. Hertfordshire C.C.* [1978] 3 All E.R.262. Munday [1979] *C.L.J.50;* Alcock [1983] *C.L.J.*328; *United Dominion Trust ltd. V. Parkway Motors* [1955] 1 W.L.R.719 [1955] 2 All E.R.557

76. *Nokes v. Doncaster Amalgameted Collieries Ltd* [1940] A.C.1014

publisher's skill and judgment as a publisher.[77] Furthermore, the holder of a motor insurance policy cannot assign it since the insurer relies on the holder's skill and record as driver and on the principle of disclosure based on utmost good faith.[78]

Exceptionally the above principle may apply to contracts for the sale of goods where the buyer is relying on the peculiar business experience of the seller.[79]

3. Mere Rights of Action

An assignment of a mere right of action such as a bare right to sue for breach of contract cannot be assigned because this could lead to maintenance or champerty.[80] The rule also applies to claims in tort,[81] although exceptionally a right of action can be assigned to an insurance company which has compensated the victim of the tort[82] based on the principle of subrogation. The principle also applies to a right to claim unliquidated damages following a breach of contract.

Where there is difficulty in determining whether a right of action is assignable the criterion should be whether the assignment savours of maintenance or champerty.[83]

4. Public Policy

a) Public Officers

In law, an assignment of wages or salary is generally valid, so long as it does not deprive the employee of his sole means of support.[84]

77. *Stevens v. Benning (1854)* 1 K&J 168; *Griffths v. Tower Publishing Co*[1897] 1 Ch.21
78. *Peters v. G.A.F.L.A.C.*[1937] 4 All E.R. .628
79. *Cooper v. Micklefield Coal & Lime Co. Ltd* (1912) 107 L.T.457 (sale of coal) *Kemp v. Baerselman* [1906] 2K.B.604 (supply of eggs by a farmer to a company).
80. *Rees v. De Bernardy* (1896) 2 Ch.437; *Laurent v. Sale & Co* [1963] 1 W.L.R.829
81. *Defries v. Milne* [1913] 1 Ch.98
82. *King v. Victoria Insurance Co.* [1896] A.C.250; *Hobbs v. Marlowe* [1978] A.C.16:37; [1977] 2 All E.R.241; *Rahemtulla v. Singh* 14 K.L.R.91
83. *May v. Lane* (1894) 64 L.J.Q.B.236 *Dody v. Nandha* [1971) E.A.58
84. *King v. Michael Foroday & Partners Ltd* [1939] 2K.B.753

However the public officer cannot assign his salary.[85] The rule is rationalised on two grounds. First, it was thought that a public officer should not be deprived of the means to maintain the dignity of his office, although this argument now has little force except perhaps in the case of ambassadors. Second, it was thought that public officers must have the means to pay damages for wrongs committed by them or by their order; but this is no longer important since the injured party can now sue Government.[86] Arguably such assignments could lead to corruption among public officers although this is regarded as a remote contingency.[87]

b) Maintenance and Payment to a Wife

Maintenance and other payments following matrimonial proceedings cannot be assigned since they would leave the wife destitute.[88]

5. Mere Expectancies

There can be no assignment of rights which do not yet exist or belong to the assignor. These are called expectancies or future property. An attempt to assign future property may operate as an agreement to assign which must be supported by consideration if it is to be binding.[89]

G. Assignment by Operation of Law

1. Death

On the death of a contracting party, his rights generally pass to his/her personal representatives,[90] who can recover any sums due under the contract or damages for its breach.

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85. *Liverpool Corporation v. Wright* (1859) 29 L.J.Ch.868
86. Under the Government Proceedings Act, Cap.77; Civil Procedure (Miscellanous Provisions Act, Cap.72
87. Treitel, *supra* n.12 p.601
88. *Watkins v. Watkins* [1896], p.222; Bromley & Lowe, *Family Law* (7th Ed)p.657
89. *Taiby v. Official Receiver* (1888) 13 App.Cas.523; *Glegg v. Bromley* [1912] 3K.B.474
90. *Anguilla v. Estate & Trust Agencies* [1938] .A.C.624; Law Reform (Miscellaneous Provisions) Act Cap.79

However, contracts which involve personal considerations terminate on the death of the parties. An example is a contract of agency or one which involves reliance on the skill, judgement and confidence of another. This is true of a contract of employment.

2. Bankruptcy

When a person becomes bankrupt his things in action forming part of his estate at the commencement of the bankruptcy are deemed to have been assigned to his trustee in bankruptcy.[91] Consequently, the trustee can recover debts, due to a bankrupt and claim damages for breach of any contract with the bankrupt from the other party. However, certain "personal" rights do not pass to the trustee. These include a right to claim damages for injury to reputation.[92], a right to personal treatment[93], and where the contracting party relies on the skill and judgement of the bankrupt.[94]

A trustee in bankruptcy is in a less favourable position than an ordinary assignee in that he cannot gain priority over a previous assignee for value being the first to give notice to the debtor.[95]

H. Negotiability

There are specific rules which apply to the assignment of certain written contracts called negotiable instruments. The most important of these are bills of exchange, cheques and promissory notes, which are regulated by the Bills of Exchange Act.[96]

A bill of exchange is a written order made by one person (the drawer) requiring another (the drawee) to pay a sum of money

91. Bankruptcy Act Cap.67, S.51(4)

92. *Wilson v. United Counties Bank* [1920] A.C.102

93. *Beckham v. Drake* (1849) 2 H.L.C.579, 627

94. *Knight v. Burgess (1864) 33 L.J.Ch. 727; Oliphant v. Wadling (18750 1 Q.B.D. 145; Exp. shine [1892]* 1 Q.B.522

95. *Re Wallis* [1902] 1K.B.719. The rule is not affected by the Bankruptcy Act, Cap.67,S.51(4)

96. Cap.68 Laws of Uganda 2000 Edn.

either to the drawer or to a third party or simply to bearer.[97] The request may be to pay money on demand or at some stated future time. If the drawee accepts the request he becomes liable as acceptor of the bill. A cheque is a bill of exchange drawn on banker payable on demand.[98] A promissory note is an unconditional promise in writing to pay a person a sum of money[99]. The categories of negotiable instruments are not closed, so that instruments can still become negotiable by mercantile custom i.e. by being so treated by businessmen.[100]

The transfer of a negotiable instrument differs from the assignment of an ordinary chose in action in the following ways.

i) Transfer by Delivery

A negotiable instrument may be transferred by mere delivery. A bill of exchange payable to bearer can be transferred by handing it to the transferee. If the bill of exchange is payable to A, he can transfer it by indorsing it i.e. by signing his name on it and then handing it to the transferee. Notice of transfer need not be given to the person liable on the instrument.

2) Defects of Title

While an ordinary assignee takes "subject to equities" (i.e. with all defects to the title) negotiable instruments are like cash. The transferee of a negotiable instrument takes it free from certain defects in title of the previous holders[101] and from defences available among them if he is a "holder in due course".[102] Such a holder is a person who has in good faith given value for the instrument provided that it is complete and regular on its face, not overdue and that it has not

97. *Ibid* S.2
98. Ibid, S.72
99. *Ibid* S.82(1). A promissory note should be distinguished from an IOU, which is only evidence of a debt.
100. *Crouch v. Credit Foncier of England Ltd*. (1873) L.R.8 Q.B.374
101. Bills of Exchange Act, Cap.68, S.37(b)
102. *Ibid* S.28.

to his knowledge been dishonoured. Every holder is presumed to be a holder in due course,[103] unless the instrument is affected by duress, fraud or illegality.[104]

3. Consideration

The holder of a bill of exchange is deemed to be a holder for value if consideration[105] has at any time [106] been given for the bill. Consequently, he can enforce it against (for example) the acceptor (bank) even if he himself has given no consideration for it. This rule should be distinguished from the additional rule that consideration is not necessary for the validity of a transfer of a negotiable instrument.[107] For instance if A draws a bill of exchange on B who accepts it. If A transfers the bill to C, neither A nor B can deny the validity of the transfer on the ground that it was gratuitous, and that C gave no consideration for the transfer.

While lack of consideration may enable the acceptor to resist an action on the bill, it does not entitle the transferor to deny the validity of the transfer.

103. *Ibid,* S.29(2)

104. *Ibid*

105. An antecedent debt or liability is sufficient by way of exception to the rule that consideration must not be past: Bills of Exchange Act, Cap.68, S.26(1)(b)

106. *Ibid* S.26(2)

107. *Easton v. Practhett* (1835) 1 Cr.M&R 798, 808

CHAPTER 5

INJUNCTION

A. INTRODUCTION

An injunction is an order by the Court directed to a party to the suit to the effect that she/he do or refrain from doing a particular act.[1] Previously, only the Chancery Court in Britain could grant an injunction. In 1854, the Common Law Procedure Act 1854, gave Common Law Courts power to grant injunctions in certain cases.[2]

The jurisdiction to grant an injunction in Uganda is now governed by the Judicature Act, Cap.13.

Section 38(1) thereof provides that:

> The High Court shall have power to grant an injunction to restrain any person from doing any act as may be specified by the High Court.

Similarly, Magistrates' Courts, by virtue of their Civil Jurisdiction[3] have power to grant injunctions based on their power to grant remedies or reliefs "whether interlocutory or final, to which any of the parties to the cause or matter may be entitled in respect of any legal or equitable claim.....[4]

An interlocutory order is one which is made before the final judgment in a suit.[5] In addition to the power to grant an injunction where it appears just and convenient do so, such power must be exercised according to sufficient legal reasons or on settled legal principles[6]. It was also stressed that the jurisdiction must be just and convenient.[7]

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1. Judicature Act, Cap13, S.38(1)
2. Discussed *supra,* Chap.1
3. Magistrate's Courts Act, Cap.16, S.219
4. *Ibid* S.11(2). See also Judicature Act. Cap.13, S.33
5. See also Civil Procedure Rules Order 37 Rules 1 and 2
6. *Beddow V. Beddow* (1878) 9 Ch.D.89, 93 per Jessel M.R.
7. *Day v. Brownrigg* (1878) 10 Ch.D.294, 307 per Jessel M.R.

B. Types of Injunctions

There are broadly five types of injunctions: prohibitory and mandatory injunction; perpetual and interlocutory injunctions; *exparte* injunctions, interim injunctions and *quia timet* injunctions. Each type will be examined briefly at this stage and in more detail later.

1. Prohibitory and Mandatory Injunctions

The most common and natural form of injunction is one which is prohibitory or restrictive. Where an unlawful act has been done, the order restraining its commission will be meaningless. Therefore, justice will be achieved by issuing a mandatory injunction ordering the act to be undone. For instance, if while X is away, Y builds a wall which obstructs his view, the Court may order Y to pull down the wall. Previously, an injunction was required to be framed in a negative form. For instance, if as in the example above, the Court wanted the wall to be pulled down, the order would be that he should refrain from permitting the wall to remain on the land. However, such injunction could have a positive effect. Thus in *Sky Petroleum Ltd. V.V.I.P. Petroleum Ltd*[8], the court ordered an injunction restraining the defendant from withholding supplies of petrol. The effect of this was the specific performance of the contract.

At the moment, an injunction may be positively framed although in that instance it may be difficult to get.[9] Thus in *Attorney General v. Colchester Corporation*[10], the Court refused to issue an injunction compelling a ferry owner to run a ferry at a loss. However, in *Pride of Derby Angling Association v. British Celenese*[11], a local authority was compelled to comply with a mandatory injunction. This was so despite the fact that the authority had to borrow money in order to comply with the injunction.

8. [1974] 1 W.L.R.576
9. *Jackson V. Normandy Brick Co* [1899] 1 Ch.438
10. *[1955] 2 Q.B.207*
11. *[1953] Ch.149*

2. Perpetual and Interlocutory Injunctions

a) Perpetual Injunction

Prohibitory or mandatory injunctions may be perpetual or interlocutory. A perpetual in junction is one whose effect is to finally settle the existing dispute between the parties,[12] although this does not mean that the injunction lasts forever. Thus in *Babumba v. Bunju*[13], it was held that where a grant of a temporary injunction would decide the whole suit, that grant would not usually be made. However, whether a grant of a temporary injunction would prematurely dispose of the whole case depends on the facts of each case.

b) Interlocutory Injunction

An interlocutory injunction is one which is given until the commencement of the trial. Both parties are present when the order is given. Normally after a suit has been filed in the court, the plaintiff may realise that there would be delay before the case is heard and he may in the process suffer damage. Therefore, he or she applies to court for an interlocutory injunction to restrain the defendant from dealing with the subject matter of the dispute until the case is determined.[14]

3. Exparte Injunctions

A situation may arise which is so urgent that the plaintiff cannot wait for the day when notices of motion are heard. In such a case, he may apply for an *exparte* injunction, that is on his own without serving the defendant. This would be in force until when the application on motion is heard. However, courts, even before the amendment

12. *Odunuwa v. Uduaga* (1952) 14 W.A.C.A.187

13. [198890] H.C.B.179 at 120 per Okello, J.

14. *Ibid*. See also *Jones v. Pacaya Rubber & Produce Co* [1911] 1K.B.455; Civil Procedure Rules O.XXVI R.1; *Musoke v. Kezaala* [1987] HCB81*; Laximidas v. Shell & B.P.(U) Ltd* [1971] HCB 225

of the Civil Procedure Rules to require service on the other party of an application for an injunction[15], have frowned upon *exparte* injunctions and normally require the other party to the suit to be informed of an application for an injunction.[16]

4. Interim Injunctions

An interim injunction is one which restrains the defendant, not until the trial but until a given date. An interim injunction used normally to be *exparte.* For instance, where notice was served on the defendant but she/he was not given sufficient time to prepare his or her case, then an interim injunction would be granted until the motion day.[17]

5. Quia Timet Injunctions

A *quia timet* injunction is an injunction which is issued to prevent the infringement of the plaintiff's rights where the infringement is threatened but has not yet occurred. This exists in respect of both perpetual and interlocutory as well as prohibitory and mandatory injunctions. However, the court is normally very careful in issuing such injunction. The plaintiff must show the probability of future infringement and that the ensuing damage would be of a serious nature.[18]

C. Principles Applicable to The Issue of Injunctions

1. General Principles

a) Discretionary Remedy

An injunction is a discretionary remedy based on the inadequacy of common law remedies. It is also a remedy *in personam* similar to

15. C.P.R.O. XXXVI Rule 3 as amended by S.I 217 of 1994
16. *Yeseri Mugenyi v. Wandera* [1987] H.C.B.78, *Wasswa v. Kakooza* [1987] HCB 79
17. *Fenwick v. East London Ry* (1875) 20 Eq.544
18. *Fletcher v. Bealey* (1885) 28 Ch.D.688

the equitable remedy of specific performance[19]. Damages may be awarded either in lieu of or in addition to an injunction.[20]

b) Noncompliance with Injunction

A person who disobeys or disregards the Court's order of injunction commits contempt of court and may result into the property of the culprit being attached or the culprit being committed to civil prison for a period of up to six months[21]. In *Arrow (Automation Ltd. V. Rex Chainbelt Inc.*[22], it was held that a party who aids and abets the breach of an injunction is also in contempt of court. An injunction may issue against him or her. It is not a defence for such a person to claim that he acted under the directions of another, for such directions are unlawful.

c) Government Proceedings

One of the disadvantages of the remedy of injunction is that it is rarely issued against government. The only remedy available is normally a declaration, which may be useless where an interlocutory injunction is required[23]. However, it appears that an injunction may be granted against a Government Statutory Corporation.[24]

d) Protection of Rights

i) Locus Standi

It is established law that the Court only grants an injunction of the suit of a private individual to support a legal right.[25] In *Adam*

19. *Araba v. Eleba* [1986] 1 Nig. W.L.R.33, see also Chaps 2 and 3 for the discussion of a remedy *in personam*
20. *Chancery Amendment Act, S.2(U.K); Judicature Act, Cap.13, Ss.14(2)(a),33, 35 Magistrate's Courts Act,* Cap.16, S.11(2) *(Uganda)*
21. Civil Procedure Rules, Cap.71, O.37 Rule 2(3), (4) (hereinafter "CPR")
22. [1971] 1 WLR 1676
23. Government Proceedings Act Cap.77, S.14(1)(a); *Matovu & Ors V. Attorney General* [1991] HCB 88
24. *Danze Enterprises Ltd. V. Commissioner General of URA* H.C.C.S. No.115 of 1997; CPR 0.37 Rule 4
25. CPR *ibid; Thorne v. B.B.C.* [1957] 1 W.L.R. 1104*; Re Theresa Kaddu* [1980] HCB 115.

v. Duke[26], Webber, J. stated that there must be a violation, real and substantial violation of some right before an injunction is granted. Furthermore, the right must be in the Plaintiff. In this regard, the Attorney General as the protector of public rights may obtain an injunction in such cases. These include breaches of law and where a statutory remedy is inadequate[27]. It is notable in this respect that the Constitution of Uganda, 1995 widens the category of persons who have *locus standi*.

Article 50(2) provides:

> Any person or organisation may bring an action against the violation of another person's or group's human rights.

However, apart from that exception, which appears to be restricted to the violation of fundamental or other human right or freedom protected by the constitution[28], the act sought to be restrained by an injunction must constitute an infringement of a legally enforceable right[29]. In this respect, an injunction will not be granted if it is not shown, that the defendant has infringed or threatened to infringe a right. Thus in *Wey v. L.E.D.B.*[30], the plaintiff applied for an interlocutory injunction to restrain the defendants from pulling down the plaintiffs' houses and ejecting them or occupiers therefrom. The plaintiffs contended that the defendant had threatened to pull down their houses. It was held that an injunction could not be granted because the allegations of threats were based on bare word of the plaintiffs which was not supported by any evidence. It was also indicated that even if there were any threats, they were only in prospect, that is anticipated. However, even if the right to be protected is not clear, it will be enforced once it is established. Thus in *Umana v. Ewa*[31], the plaintiff was an occupier or a piece of land.

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26. *(1927) 8 NLR (Nigeria)*
27. *A.G.v. Sharp* [1931] 1 Ch.121; *A.G.v. Bastow* [1957] 1 Q.B.514
28. Constitution, 1995, Article 50(1)
29. *Day v. Brownrigg* (1878) 10 Ch.D.294, discussed *infra; Braide v. Adoki* (1931) 10N.L.R.15
30. (1957) L.L.R.20
31. (1932) 5N.L.R.25

He applied to the court for an injunction to restrain the defendant for an unlawful interference with the plaintiff's use and enjoyment of the land. It was held by the trial court that the plaintiff's right to the use and enjoyment of the land had been established under the native law and custom and would be enforced and protected by an order of injunction. This decision was upheld on appeal.

Apart from establishing the right, the rights to be protected must be certain. Thus in *Karama v. Aselemi*[32], the plaintiff applied for a declaration of title to land and an injunction to restrain the defendants, their successors, heirs and servants from any further interference with the land. The trial judge found that part of the disputed land belonged to the plaintiffs. However, he refused to grant the declaration sought on the ground that the boundaries of parts of the land claimed by the plaintiffs were not clearly defined. However, he granted the injunction. On appeal, the defendants challenged the grant of the injunction on the ground that the boundaries of the land were not clear and this contention was accepted by Appeal Court. It is evident that the injunction should be clear as to the rights being asserted or protected.[33] In *Ayoola v. Ogunjimi*[34], the Supreme Court of Nigeria refused to grant an injunction in relation to a piece of land whose plan was not clearly delineated. It follows then that when the rights sought to be protected are not clear, an injunction will normally not be granted.[35]

Sufficient Interest

Where the Attorney General does not act, then a member of the public with the Attorney General's consent may institute a *relator* action. Thus in *A. G. v. Exrel McWhirter v. IBA,*[36] the Attorney General refused to give his consent to a member of the public to institute

32. (1938) 4 W.A.C.A.150
33. *Cother v. Midland Rly* (1848) 2 Ph.470, 41E.R.1025
34. [1964] 1 All N.L.R.188
35. *Ifie v. Gedi* (1965) N.M.L.R.457, 460 (Nigeria), *Inyang v. Udo* (1944);10 W.A.C.A.40
36. *[1973] Q.B.629 C.A. See also Constitution of Uganda Article 50(2); discussed* ***supra*** n.28*; Akerele v. Awolowo* (1962) WNLRA 220

an action. The English court of Appeal stated that if the Attorney General improperly or unrea sonably refused to act or if there was not sufficient time to approach, him, then a member of the public with "sufficient interest" could apply for an injunction, if necessary joining the Attorney General as defendant where no other remedy was available.

ii) Legal and Equitable Rights

The right which is to be protected by an injunction must be one which is known to the law and equity. It must not be one which is only recognised by ecclesiastical or religious law.[37] In *Day v. Brownrigg*[38], the plaintiff lived in a house that had been called "Ashford Lodge" for 60 years. The defendant lived in a smaller neighbouring house called "Ashford Villa". The defendant later started to call his house "Ashford Lodge". The plaintiff applied for an injunction to restrain the defendant from doing so. The Court of Appeal held that no injunction could be granted because there was no violation of a legal or equitable right in the plaintiff.

It should be stressed that the legal or equitable right does not have to be based on property. For instance a court could decree an injunction to restrain libel although this is rare.[39] Similarly, an injunction can be granted to restrain the unlawful expulsion form a club or association. The jurisdiction to order an injunction in this instance depends on the mutual and implied contractual rights of the parties. Furthermore, in *South Carolina Insurance Co. V. Assurantie Maatschappij "De Zeven Provincien"*[40]. Lord Goff stated:

> I am reluctant to accept the proposition that the power of the court to grant, injunctions is restricted to certain exclusive categories. That power is unfettered by statute; and it is impossible for us now to foresee every circumstances in which it may be thought right to make the remedy available.

37. *A.G. v. Dean & Chapter of Ripon Cathedral* [1945] Ch.239
38. (1878) 10 Ch.D.294 C.A.(UK)
39. *Hermann Loog v. Bean (1884) 26 Ch.D.306*
40. [1987] A.C.24, 40 Per Lord Goff (House of Lords, England)

iii) Confidential Information

An injunction can also be granted to restrain the defendant from revealing or distributing information or other material obtained in confidence. Thus in *Prince Albert v. Strange*[41], an injunction was granted to restrain the distribution of copies of drawings made by Prince Albert and Queen Victoria. This jurisdiction is based on the obligation of confidence existing from the circumstances. It does not depend on the property idea or contract[42]

Other examples of the obligation of confidence include communication between husband and wife. Thus an injunction will be granted in respect of a husband or wife or threatened publication of such communication to third parties.[43] However, the plaintiff must show interest in preventing the disclosure.[44] Secondly, confidential commercial information will be restrained from publication.[45]

2. Perpetual Injunctions

The jurisdiction to grant an injunction is discretionary. However, the court considers a number of factors depending on the type of injunction and the circumstances of the case. These are considered herebelow.

a) Prohibitory Injunction

The court will not grant an injunction where an award of damages is sufficient[46]. Damages are inadequate if they are not quantifiable or money would not properly compensate the plaintiff. This is especially so in situations of nuisance or continuous or repeated injuries requiring a series of actions for damages or where a remedy is ineffective because the defendant is a pauper.

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41. (1849) 1 H&T.1
42. *Argyll v. Argyll* [1967] Ch.302. See also the *South Carolina Insurance Co. Case supra* n.40
43. *Ashburton v. Pape* [1913] 2 Ch.469; *Argyll Case ibid*
44. *Fraser v. Evans [1969] 1 Q.B.349*
45. *Sattman Engineering Co. Ltd. V. Campbell Engineering Ltd [1963]3 All E.R. 413*
46. *Doreen Kalema v. National Housing Corp. [1987] H.C.B. 73; Wasswa v. Kakooza* [1987] 79 HCB *Devani v. Badressa* [1972] E.A.22; *Farah Alli v. Mayambaza* [1991] HCB 97

Actual loss need not be proved before an injunction is granted in respect of trespass[47]. However, an injunction will be refused if the infringement is temporary, occasional or trivial.[48] Thus in *Armstrong v. Shepard & Short*[49],the plaintiff misled the court when applying for an injunction. He did not in fact suffer any damage. The injunction was refused. Similarly, an injunction was refused to restrain the public from using tracks on the plaintiff's land on an unfrequented part of the coast which caused no damage to the plaintiff[50]. Furthermore, even where the plaintiff's rights have been infringed, an injunction may still be refused, even when there is no other suitable remedy, but the court thinks the plaintiff has suffered no injustice. Thus in *Gylnn v. Keele University*[51], a student was dismissed from the campus without being heard for being in breach of rules of natural justice, after participating in an incident. Pennycuick V.C. stated that the judicial discretion to refuse an injunction should be exercised rarely, where there has been an injustice. However, as the student admitted the offence, the infringement of his rights in this case did not cause him injustice. The injunction was, therefore, refused.

An injunction will also be refused where the defendant undertakes not to do the act complained of.[52]

b) Mandatory Injunctions

Mandatory injunctions are governed by the same principles as prohibitory injunctions, out lined above. However, they are difficult to enforce and supervise and, therefore, very rarely granted.

There are two types of mandatory injunctions; the restorative injunction requiring the defendant to undo a wrongful act and

47. *Goodson v. Richardson* (1874) L.R.9.Ch.App*; Odunuwe v. Uduaga* (1952) 14 W.A.C.A.187
48. *Barber v. Penley* (1893) 2 Ch.447
49. [1959] 2 Q.B.384
50. *Behrens v. Richards* [1905] 2 Ch.614
51. [1971] 1WLR 487
52. *Jenkins v. Hope* [1896] 1 Ch.278*; De Facto Works v. Odumotun Trading Co* (1959) LLR 33

the mandatory injunction compelling the defendant to carry out a positive obligation.

Normally, an injunction is not given in cases involving the continuous performance of a positive act, in which case damages are awarded. Thus in *Dowry Boulton Paul Ltd. V. Wolverhampton Corporation*[53], the plaintiff corporation applied for an injunction to compel the defendant corporation to maintain land as an airfield. The court refused to grant the injunction because this would impose on the defendant a positive duty to be observed for a period of over 60 years. Damages were awarded instead. Pennycuick, V.C. observed that in this respect there was no difference between specific performance and mandatory injunctions.

Similar to prohibitory injunctions, before a mandatory injunction is granted, it is not necessary for the plaintiff to show grave damage or inconvenience. Thus in *Kelsen v. Imperial Tobacco Co. Ltd*.[54], a mandatory injunction was granted to remove a sign which trespassed the airspace above the plaintiff's premises. This was despite the fact that the sign caused no real damage to the plaintiff.

The court may consider the issue of hardship to the defendant in granting an injunction. In *Charrington v. Simons & Co. Ltd*[55], Buckley J. indicated that the criterion for the grant of a mandatory injunction was a fair result. The court should consider *inter alia* the ben efit which the injunction confers on the plaintiff and the detriment which the injunction would cause the defendant. However, an injunction should not be refused solely because of its disadvantage to the defendant. At the same time it should not be detrimental to the plaintiff. However, in *Wrotham Park Estate v. Parkside Homes Ltd*[56], the defendant constructed houses in breach of a restrictive covenant which he thought was unenforceable. The houses were sold to purchasers who went into occupation. The plaintiffs applied

53. [1971] 1 WLR 204

54. [1957] Q.B.334; See also *Odunuwe v. Udeaga, Supra* n.47

55. [1970] 1 WLR 725. The Court of Appeal doubted the fair result test as suggested by Buckley, *J. See also UCB v. General Parts (U) Ltd* [19921993] HCB 210

56. [1971] 1 WLR 798

for an injunction to demolish the houses. The injunction was refused because it would result in unpardonable waste of needed houses. Damages were awarded instead under Lord Cairns Act, 1858.

c) Suspension of Injunctions

Where it is difficult for the defendant to comply at once with an injunction, it will be granted but suspended for a reasonable period, provided this does not lead to financial damage to the plaintiff. Where the injunction is suspended, the defendant may be required to undertake to pay damages to the plaintiff if any loss is suffered by him or her. Suspension is common where a local authority is involved in order to enable it make alternative arrangements for carrying out its duties. Thus in *Pride of Derby Angling Association v. British Celanese*[57], an injunction was granted against a local authority to prevent the pollution of a river. It was not a defence that the authority was performing a public service of sewage disposal. However, the injunction was suspended for a reasonable time with possible further extension if the circumstances so required. The aim of the suspension was to give the defendant time within which to comply with the injunction.

An injunction may also be suspended where there is no substantial injury to the plaintiff. Thus in *Wollerton & Wilson Ltd. V. Richard Costain Ltd*[58], the defendant company's crane used to swing over the plaintiff's premises without causing any actual danger or damage. This aerial trespass was unavoidable if the defendant was to complete the work in a year's time, that is November, 1970. The court granted the injunction to restrain the trespass but was postponed to November, 1970 when the crane would no longer be needed. This was on the grounds that there was no threat of the trespass continuing indefinitely and the defendant had acted reasonably and offered GBP250 to the plaintiff for the right to continue.

57. [1953] Ch.149. This approach is now doubted. *Jaggard v. Sawyer* [1995] 1 W.L.R.911; Hayton & Marshal, *supra* n.65, pp.911918

58. [1970] 1 W.L.R..411. This case was doubted in *Charrington v. Simons & Co, supra* n.55 where the English Court of Appeal deleted the suspension of an *injunction*.

3. Interlocutory Injunctions

a) General

i) Status Quo

The aim of an interlocutory injunction is to preserve the *status quo* while rights are established.[59]. As already discussed, an interlocutory injunction may be prohibitory, mandatory or *quia timet*. The injunction normally remains in force until the trial of the action. However, an interim injunction may be given which lasts a specified shorter period.

ii) ExParte Procedure

Normally, the plaintiff should give at least two clear days notice so that when the motion is heard, the defendant can oppose it. However, in exceptional cases an injunction may be given *exparte* without serving notice on the defendant if the matter is so urgent that irreparable damage would be suffered by the plaintiff if she/he had to go through the normal procedure. The *exparte* injunction is usually an interim injunction valid until the next motion day for which notice to the defendant can be given. However, since 1994 in Uganda, it is a requirement that notice is given to the defendant or opposite party in *all cases* before an injunction is granted by the court.[60]

This requirement effectively abolished the use of the *exparte* procedure which was previously applicable.[61]

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59. *Waisswa v. Kakooza* [1987] HCB79*; Musoke v. Kezaala* [1987] HCB 81; *Farah Alli v. Mayambaza* [1991] HCB97*; UCB v. General Parts (U)* [19921993] HCB 210*; Kalema v. National Housing & Construction Corporation* [987] HCB 73

60. CPR 0.37 Rule 3 as amended by Statutory Instrument No.217 of 1994

61. *Dorren Kalema v. N.H.C.C., supra* n.58*; Mugenyi v. Wandera* [1987] HCB 78; *Wasswa v. Kakooza, supra* n.58. See also *Re N(No.2)* [1967] Ch.512*; Bates v. Lord Hailsham of St. Marylebone [1972] 1 WLR 1373; Anton Pillar K.G. v. Manufacturing Processes Ltd* [1976] 2 W.L.R.162

iii) Discontinuation of Interlocutory Injunction

An interlocutory injunction may be discontinued if it was based on a wrong application of the law. Thus in *Regent Oil Co v. J.T. Leavesley*[62], the court discharged an interlocutory injunction which was granted to restrain the breach of a 7½ years solus agreement because the agreement was void for being an unreasonable restraint of trade. The discharge, varia tion or setting aside of an injunction is made upon an application made by the dissatisfied party with the order of injunction.[63]

iv) Complete Relief

An interlocutory injunction may provide the complete relief sought, although courts have tried to avoid this effect.[64] Nevertheless, whether an interlocutory injunction would dispose of the matter depends on the circumstances of the case. Thus in *Woodford v. Smith*[65], an interlocutory injunction was granted to restrain a residents association from breaking its contract by holding a meeting without permitting the plaintiff members to attend and vote. This constituted a complete relief. Similarly, in *Evans v. BBC and IBA*[66], a mandatory interlocutory injunction was granted to enforce the Welsh Nationalist Party's contractual right to a Party Political Broadcast on television before an election. The injunction was a complete relief making it unnecessary to continue with the case.

v) Ineffective Injunction

Since equity does not act in vain, an interlocutory injunction would not be granted if it is of no effect. Thus in *Bentley Stevens v. Jones*[67], a director was removed in the course of irregular proceedings which

62. [1966] 1 WLR 1210

63. CPR 0.37 R.4

64. *Babumba v. Bunju supra* n.13*; Bahemuka v. Anwyar infra* n.68

65. *[1970] 1 W.L.R. 806*

66. The *Times* Newspaper (London) February 26, 1974. See also Hayton & Marshall, *Commentary and Cases on the Law of Trusts and Equitable Remedies* (10th Ed. 1996 Sweet & Maxwell, London) p.898

67. [1974] 1 WLR 638

were convened without notice being served on him. The court declined to grant the injunction sought because the irregularity could be cured by going through the proper processes and serving a valid notice. The result would be the same. Similarly, in *Bahemuka v. Anywar*[68], the court declined to grant conjunction to restrain the respondents from entering the suit premises on the ground that this would be futile since the respondents were already in the suit premises.

b) Principles Governing the Issue of an Interlocutory Injunction

The basic principles for the grant of an interlocutory injunction are that the applicant must establish a *prima facie* case and possibility of success in the main suit, show that she/he is likely to suffer substantial and irreparable injury and that the balance of convenience favours the grant of an injunction.[69]

Each of those principles will be discussed briefly below.

i) Prima Facie Case

The plaintiff must show a strong *prima facie* case that his or her right exists and has been infringed. In *UCB v. General Parts (U) Ltd*[70], the defendant applied under Order 37 rule 9 of the Civil Procedure Rules for a temporary injunction to restrain the respondent/plaintiff from disposing of the applicant's property until the disposal of the main suit. While admitting that a loan agreement existed between the parties, the applicant contended that the plaintiff/respondent had breached it by delaying the processing of letters of credit in favour of the applicant leading to delay in the delivery of the applicant's goods which in turn necessitated the renegotiation of a new loan from the plaintiff. The applicant/defend and, therefore, disputed the claims. Kireju, J. held that the first condition for the grant of an injunction i.e. establishment of a *prima facie* case and the possibility of success in the main suit was satisfied. The facts showed

68. [1987] HCB 71

69. For a good summary see *UCB v. General Parts (U) Ltd., supra* n.58

70. *Ibid*. See also the Nigerian Cases *Amushan v. Amora* [1962] L.L.R.149*; Landunni v. Kukoyi* [1972] 1 All N.L.R.133

that there were some questions to be investigated in the main suit where there was a probability that the applicant might succeed in the main suit. However, in *Kaggwa v. Katende*[71], the court disapproved of the requirement to show a good case and that *prima facie* case did not necessarily mean a good case.

ii) Substantial and Irreparable Injury

The plaintiff or applicant must show that if an interlocutory injunction is not granted, she/he would suffer substantial and irreparable injury[72], which could not be compensated by the payment of damages at the termination of the trial.[73] In *UCB v. General Parts (U) Ltd*[74], Kireju, J. held that the second condition for the grant of an interlocutory injunction i.e. irreparable injury which is so material that it cannot be adequately compensated for in damages, was satisfied in that on the facts it was possible that if the properties were sold, the applicant was likely to suffer irreparable damage which could not be adequately compensated for in damages.

Examples of irreparable loss include the distribution of dividends to shareholders based on erroneous calculations,[75] loss of trade when members of the public picket the plaintiff's business,[76] the publication of confidential material[77]; the loss of a job with good prospects[78], the construction of structures on land which may not be to the applicant's desire.[79]

71. [1985] HCB 43
72. *Wollerton* Case *supra* n.58
73. *Hoffman La Roche (F) & Co v. Secretary of State for Trade & Industry* [1975] A.C. 295*; American Cynamid Co v. Ethicon Ltd, infra n.82*
74. ***Supra,*** n.59, 69, 70. See also *Mugenyi v. Wandera, supr* n.61*; Wasswa v. Kakooza, supra n.59; Musoke v. Kezaala, supra* n.59*; Akinlose v. A.I.T.Ltd* (1961) W.N.L.R.116
75. *Bloxam v. Metropolitan Rly* (1868) L.R.3 Ch.App.337
76. *Hubbard v. Pitt* [1975] 3 WLR 201
77. *Attorney General v. Times Newspaper Ltd* The Times of London 27 June, 1975
78. *Fellows & Son v. Fisher* [1975] 3 WLR 184
79. *Musoke v. Kezaala, supra* n.59

iii) Balance of Convenience

The plaintiff must show that the balance of convenience favours the issue of an interlocutory injunction. Thus in *UCB V. General Parts (U) Ltd*[80] Kireju, J. dealt with the issue of balance of convenience and concluded that the applicant as a small company compared with the respondent was likely to be more inconvenienced if its property was sold. Balance of convenience, therefore, refers to the relative inconvenience of the parties if the injunction is granted or not. The court, therefore, takes into account the injury to be suffered by the defendant if the injunction is given and the injury likely to be suffered by the plaintiff or applicant if the injunction is not granted[81]

In England, the three principles outlined above for the grant of an interlocutory injunction appear to have been modified by the case of *American Cynamid Co. v. Ethicon Ltd*.[82] In that case an application was made for a *quiatimet* interlocutory injunction to restrain the infringement of a patent. It was held that there was no rule requiring the plaintiff to establish a *prima facie* case. Lord Diplock stated[83] that the rule is that the court must be satisfied that the plaintiff's case is not frivolous or vexatious and that there is a serious question to be tried. Once that is established then the governing consideration is the balance of convenience. The court should not embark on anything resembling a trial of the action. At the interlocutory stage, it is not the court's function to resolve conflicts of evidence on affidavit nor to resolve difficult questions of cases. These are matters for the trial. At the interlocutory stage, facts may be disputed and the evidence is incomplete and there is no cross examination. The court's discretion would be hampered if on untested and incom plete evidence it could only grant the injunction if the plaintiff had shown more than fifty percent (50%) likely chances to succeed at the trial.

80. *Supra* n.59, 69, 70. See also *Landunni v. Kukoyi, supra* n.70

81. *UCB v. General Parts (U) Ltd ibid. Akinlose* case *supra* n.74

82. *[*1975] A.C.396 H.L. See also *Cambridge Nutrition Ltd. V. B.B.C.* [1990] 3 All E.R.523; *Software v. Clarke* [1996] [1996] 1 All E.R.853, Hayton & Marshall *supra n.66,* pp.924931

83. See also the extract of the judgment in Hayton & Marshal*, ibid* pp918921.

With regard to the balance of convenience[84], although this is the governing consideration, the inadequacy of damages to each party is a significant factor in assessing it. The court must first of all consider the adequacy of damages to each party. If that does not provide an answer, then the other aspects of the balance of convenience may be considered. If the balance of convenience does not favour either party, then the preservation of the *status quo* is decisive . Only as a last resort will it be proper to consider the relative strength of both parties. Other special factors may be considered in individual cases.[85]

iv) Conditions and Undertaking

In cases where an interlocutory injunction is granted, the plaintiff is usually required to give an undertaking as to damages in case the injunction is discharged at the trial.[86] This may be because the injunction was granted without good cause. The defendant may also be put on certain terms where the injunction is not granted. However, an undertaking by the plaintiff may benefit the defendant, but is not a contract with the defendant. The undertaking is given to the court. If the plaintiff fails to comply with it, this amounts to contempt of court and not a breach of contract. If the plaintiff, is unsuccessful at the trial, he has to pay damages. She/he will be unsuccessful if she/he cannot establish his or her case or if the grant of the interlocutory injunction was erroneous.

Additionally, the plaintiff may be required to give security or to pay money into court.[87] The damages are assessed on the same basis as damages for breach of contract. Thus in *Hoffman La Roche (F) & Co. V. Secretary of State for Trade Industry*[88], the issue was whether the Crown (Government) should be required to give an undertaking as a condition for the grant of an interlocutory injunction. In that case, the Secretary of State applied for an interlocutory injunction to

84. Hayton & Marshall, *ibid* p.920

85. See also *Fellowes v. Fisher* [1975] 3 WLR 184*; Hubbard v. Pitt* [1975] 3 WLR 201

86. *American Cyanamid Co v. Ethicon Ltd, supra* n.82; CPR 0.37 Rule2(2)

87. *Ibid; Jones v.Pacaya Rubber Co.* [1911] 1 K.B.455 C.A.(E)

88. *Supra* n.73

restrain the company from charging prices of drugs which exceeded those contained in a government order. However, the Secretary of State was not prepared to make the undertaking as to damages in case the company's argument that the order was *ultra vires* succeeded at the trial.

It was held by the House of Lords that in this case an undertaking from the Crown was not required for the grant of an injunction since the government was trying to enforce the law. Nevertheless, Lord Diplock clarified that there was no rigid rule as to the requirements of an undertaking. The Court has discretion to require it even in law enforcement cases.

4. Quia Timet Injunctions

A quia timet injunction is given where the injury to the plaintiff's rights has not yet occurred but is feared or threatened. This type of injunction has statutory backing. Thus Section 38(3) of the Judicature Act provides:

> Where before or at the hearing of any case or matter, an application is made for an injunction to prevent a threatened or apprehended waste or trespass, an injunction may be granted, if the High Court thinks fit:
>
> a) whether or not the person against whom the injunction is sought is in possession under any claim of title or claims a right to do the act sought to be restrained under any colour of title.
>
> b) whether the estates claimed by the parties are legal or equitable.

Section 40(3)(b) is an exception to the general principle for the grant of an injunction that the applicant must establish a legal or equitable interest in the subject matter of the suit.

A quia timet injunction may be perpetual, interlocutory, prohibitory or mandatory.

The main conditions or requirements for the grant of a *quia timet* injunction are that there must be a strong case of probability, proof of imminent danger and proof of probable or substantial damage.

The principle governing the grant of a mandatory *quia timet* injunction were more specifically laid down by the House of Lords of England in *Redland Bricks Ltd v. Morris*[89]. In that case, the defendant company's digging activities caused land slips on the plaintiff's adjoining property, which they used as a market garden. The plaintiff's land of which a tenth of an acre was affected was worth about £12,000. However, the cost of repairing the land slips was about £30,000. At the trial, the plaintiffs were awarded damages; a prohibitory injunction to restrain further withdrawal of support, and a mandatory injunction that the defendants "take all necessary steps to restore support within six months". On appeal the House of Lords allowed the defendant's appeal against the mandatory injunction on the ground that it did not specify what the defendant company had to do. In the course of delivering his judgment, Lord Upjohn set out[90] the following principles for the grant of *quia timet* injunction. The plaintiff must: Firstly, show very strong probability that grave damage will accrue to him or her in future; secondly that damages will not be an adequate remedy if such damage does happen. Thirdly, the court must consider the cost to the defendant in performing the work to prevent or lessen the likelihood of a future apprehended wrong. In this regard, if the defendant has acted wantonly or unreasonably in relation to his/her neighbour, he/she may be ordered to do positive work at his/her expense to benefit the plaintiff even if disproportionately. Where the defendant has acted reasonably, though wrongly, the court may order works which may not remedy the wrong but will lessen the likelihood of further injury. Fourthly, if a mandatory injunction is granted, the court must ensure that the defendant knows exactly in fact what to do or is required of him or her.

D. Defences to Grant of Perpetual and Interlocutory Injunctions

There are about four main defences to the grant of injunctions namely, delay and acquiescence on the part of the plaintiff or applicant,

89. [1970] A.C.652

90. *Ibid* p.665

hardship to either party using the balance of convenience formula[91] and the conduct of the plaintiff or applicant for an injunction. Each of these will be discussed briefly.

1. DELAY[92]

Delay or laches may be raised as a defence to the grant of an injunction even though the plaintiff's rights have not yet become statute barred.[93]

It is significant that a smaller degree of delay will defeat an application for an *interlocutory* injunction than that for a *perpetual* injunction. This is because if an interlocutory claim is dismissed, the plaintiff will not be very much prejudiced. She/he can still bring an action for a perpetual injunction. However, the refusal of a perpetual injunction is more serious.

The plaintiff or applicant for an injunction must act quickly in the case of an *exparte* injunction. If she/he delays this means that the matter is not urgent.[94] In *Shepherd Homes Ltd. V. Sandham*[95], there was delay of five months in applying for an interlocutory, injunction. The injunction was refused. Megarry, J. said that if the injunction sought is mandatory, delay means that if it is granted it would disturb rather than preserve the *status quo*. Nevertheless, if the delay can be explained, an injunction would be granted[96].

With respect to the effect of delay on the grant of a perpetual injunction the cases are conflicting. In *Kelsen v. Imperial Tobacco Co*[97], a mandatory injunction was granted to restrain trespass even though it appeared that this state of affairs had existed for seven years. In

91. See *supra* notes 80 to 85 and text thereof.
92. See also discussion of the maxim Delay Defeats Equity in Chap.*2 supra*
93. See Limitation Act,Cap.80 (Laws of Uganda 2000 Edn)
94. *Bates v. Lord Hailsham of St. Marylebone*
95. [1971] Ch.340. See also *Oitamong v. Olinga* [1985] HCB 86
96. *Texaco Ltd v. Mulbery Filling Station Ltd*. [1972] 1 WLR 814
97. [1957] 2Q.B.334

Fullwood v. Fullwood[98], it was held that the delay of two or three years was no defence to the grant of an injunction because the mere passage of time which is not accompanied by acquiescence is not a bar to the grant of an injunction unless the legal right itself is barred. In *H.P.Bullmer Ltd. Bollinger S.A.*[99], an injunction was granted to restrain the appellant from describing their products as "champagne" which they had done to the respondent's knowledge for 60 years. This was because this was a continuing wrong and delay was held not to be relevant. Secondly, there was no acquiescence.

A compromising view on this issue is to be found in *Erlanger v. New Sombrero Phosphate*[100]. It was held that a plaintiff or an applicant will be barred from obtaining a final injunction if, with knowledge of the facts, she/he has delayed unreasonably and for a substantial period and the circumstances are such that it would be unjust to grant it in view of the delay. The issue of delay may also be considered. The plaintiff who has delayed may be awarded damages under Lord Cairns Act instead of an injunction.[101]

2. Acquiescence

Delay is normally considered as indicating acquiescence and both usually overlap. Similar to delay, a greater degree of acquiescence is needed in order to defeat a claim for a final injunction than with an interlocutory injunction. Thus in *Richard v. Revitt*[102], it was indicated that the fact that the plaintiff had previously overlooked trivial breaches of covenant does not prevent him, on the ground of acquiescence, from acting on a serious breach.

In *Sayers v. Collyer*[103] , a house was used as a beer shop in breach of covenant. It was held that the plaintiff could not obtain an

98. (1878) 9Ch.D.176
99. The *Times* Newspaper of London May 19th, 1975; [1977] C.M.L.R.625
100. (1878) 3 App.Cas.1218, 127980
101. See also Judicature Cap.13, S.33, Magistrates Courts Act, Cap.16, S.11(2)
102. (1877) 7 Ch.D.224, 226
103. (1885) 28 Ch.D.103 C.A.(E)

injunction because he had known of the breach for three years and had even bought beer there. Fry L.J. indicated that if the degree of acqui escence is not sufficient to bar the action, it may be a reason for giving damages in lieu of injunction under Lord Cairn's Act.[104] In this case the acquiescence by the plaintiff was sufficient to bar any remedy.

3. Hardship

Hardship may be a defence to the grant of an injunction.[105] The issue of hardship is more important in cases of interlocutory injunction and specifically mandatory injunction. In such situations, the benefit of the plaintiff is balanced against the detriment to the defendant, in awarding the injunction. An injunction may also be refused if its effect is to prejudice an innocent third party.[106]

4. Conduct of the Plaintiff/Applicant

The applicant for an injunction must come to equity with clean hands. Consequently if she/he is in breach of his or her obligations in relation to the matter, this may prevent the grant of an injunction.[107] Second, before an injunction is granted, the applicant will be subjected to the maxim that she/he who comes to equity must do equity.[108] Therefore, if the plaintiff is unwilling to carry out his or her future obligations, the injunction will not be granted.

The defence of "clean hands" must be related to the subject matter of the dispute and not to the plaintiff's or applicant's general conduct. Thus in *Argyll v. Argyll*[109], the fact that the wife's conduct had caused the divorce was not a defence to her claim for an injunction to restrain the breach of by her husband. It was

104. See also *supra* n.101
105. Considered *supra* notes 80 to 85 and text thereof
106. *Maythorn v. Palmer* (1864) 11 L.T.261
107. See discussion on this maxim, *supra* Chap.2
108. *Ibid*
109. [1967] Ch.302 110. *Ibid*, p.333

stated[110] that her adultery did not license the husband " to broadcast unchecked the most intimate confidences of her earlier and happy days". However, in *Hubbard v. Vosper,*[111] an interlocutory injunction was refused because the plaintiff did not come with clean hands. He protected his secrets by deplorable means. He had a private criminal code for dealing with the "enemies" of scientology.

An injunction will also be refused if the court is unimpressed with the plaintiff on the merits. Some writers[112] categorise this as distinct defence from those already considered above, and describe it as a situation where equity will not act in vain.

5. Equity will not act in vain

In *Attorney General v. Observer Ltd*[113], the House of Lords refused a final injunction against a newspaper the aim of which was to preserve the confidentiality in certain information which the newspaper desired to publish. The information had already been published abroad and was widely available, in book form, in the United Kingdom.

6. Adequacy of Common Law Remedies

The adequacy of a legal remedy may bar the grant of an injunction.[114]

E. Damages in Lieu of Injunction

1. Nature

The Chancery Amendment Act 1858 (Lord Cairn's act) of Britain allows damages to be awarded in lieu of or in addition to an injunction or specific performance. Though not applicable to Uganda, the principles enshrined in that legislation which are equitable may be applied in Uganda by virtue of the Judicature Act,

111. [1972] 2 Q.B.84

112. Hayton & Marshall *supra* n.66, pp.901902

113. [1990] 1 A.C.109. See also *Woo key v. Woo key* [1991] Fam 121 where the injunction was refused because the defendant, a youth could not be imprisoned.

114. See notes 73 to 79 and text thereof, *supra*

Cap 13 and Magistrates' Courts Act, Cap 16 , which give the Courts Jurisdiction to "grant..... all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim....."[115]

The damages awarded under Lord Cairn's Act are not common law damages. They are awarded in the following main instances. First, where *a quia timet* injunction has been refused. At common law damages would not be awarded in this instance because no legal injury had occurred. Second, where the damage occurred but may continue in the future. Damages are awarded to cover the future loss.[116] Third, where the plaintiff's right is equitable, for instance a breach of restrictive covenant.

The principle underlying the award of damages, is that they would not be awarded if they are inadequate to protect the plaintiff's right The principles governing the award of damages under Lord Cairn's Act were laid down in *Shelfer v. City of London Lighting Co*[117], Smith L.J. said that damages should only be awarded in lieu of an equitable remedy if the following conditions are satisfied. First the injury to the plaintiff is small. Second, the injury is capable of being estimated in monetary terms. Third, the injury would adequately be compensated by a small payment. Fourth, that it would be oppressive to grant an injunction. Lindley L.J. further stated that an injunction should not be refused just because it would not greatly benefit the plaintiff. This is because a court is not a tribunal for legalising wrongful acts where the wrongdoer is able and willing to pay. In this regard, damages are not substituted in a case of nuisance unless it is a trivial or occasional nuisance or vexatious case if the plaintiff shows that he only wants money. Where damages are awarded in the case of continuing wrong, they should include a sum for the future and the past.

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115. Judicature Cap.13, S.33; Magistrates' Courts Act, Cap16, S.11(2); *Betts v. Neilson* (1868) L.R.3 Ch.App.409, 411

116. *Wollerton & Wilson Ltd. V. Richard Costain Ltd, supra* n.58; *Jaggard v. Sawyer supra* n.58

117. [1895] 1 Ch.287, C.A.(E). See also *Jaggard v. Sawyer, ibid*, *Ibenwelu v. Lawal* [1971] All N.L.R.23; *Amusa Alagbede v. Amusa Kasali* s.No.FCA/L/173/83. The *Guardian* Newspaper (Lagos) 6 December, 1985, p.14

Even where the four principles are satisfied, an injunction may be granted if the defendant has acted in reckless disregard of the plaintiff's rights. Such conduct include the defendant acting in a high handed manner, tries to steal a march on the plaintiff and evades the jurisdiction of the court.[118] However, the four principles would not always be accepted in the cases of rights to light and trespass[119].

In *Jaggard v. Sawyer*[120] Millett, L.J. observed of the four principle thus:[121]

> Laid down just 100 years ago, A.L.Smith L.J.'s check list has stood the test of time; but it needs to be remembered that it is only a working rule and does not purport to be an exhaustive statement of the circumstances in which damages may be awarded instead of an injunction..... The outcome of any particular case usually turns on the question: would it in all the circumstances be oppressive to the defendant to grant the injunction to which the plaintiff is *prima facie* entitled?

2. Measure of Damages

It is possible for greater damages to be awarded under Lord Cairn's Act than would be available under the common law. Thus in *Leeds Industrial Cooperative Society v. Slack*[122], Lord Sumner thus stated:[123]

> No money awarded in substitution can be justly awarded, unless it is at any rate designed to be preferable or equivalent to an injunction and therefore an adequate substitution for it.

It follows from the statement by Lord Sumner that it may be possible for damages to be recovered under Lord Cairn's Act where the common law would award none. Nevertheless, generally, equity follows the law[124] and, therefore, if a case is one where the law

118. See also *Redland Bricks Ltd. V. Morris, supra* n.89
119. *Fishender v. Higghs & Hill Ltd* [1935] [1935] 153 L.T.128 (light); *Kelsen v. Imperial Tobacco Co. Ltd supra* n.97 (trespass). *Wollerton v. Richard Costain supra* n.58
120. *Supra*, n.58
121. Hayton & Marshall (extract) *supra n.66, p.915*
122. [1924] A.C.851 H.E.(E). See also *Jaggard v. Sawyer, supra* n.58
123. *Ibid*, p.870
124. See Chap.2 *supra*

would award nominal damages, then equity will also award nominal damages.

F. Injunctions in Particular Situations

Injunctions are awarded in a variety of cases which come before the courts for adjudication. Basically, these fall into about nine categories, namely: where there has been a breach of contract or equitable obligation; commission of a tort; a company acting *ultra vires,* family matters; trade unions, clubs and colleges, judicial proceedings and finally *Mareva and Anton Piller* situations. Each of these will be discussed briefly below.

1. Restraint of Breach of Contract

a) Contract Wholly Negative

An injunction is usually given to restrain a breach of a negative undertaking in a contract. In this instance, an injunction is similar to the remedy of specific performance in regard to the enforcement of positive undertakings. In *Martin v. Nutkin*[125], an injunction was granted to restrain the ringing of a church bell. The plaintiff had put a clock in the church on the understanding that the bell should not be rung at 5.00a.m. Furthermore, in *Doherty v. Allman & Dowden*[126], Lord Cairns, L.C. suggested that where an injunction is granted to enforce a negative provision in a contract, the court is doing no more than giving sanction to that which already is a contract between the parties.

b) Contract Containing Positive and Negative Terms

The general principle is that an injunction will not be granted if this would amount to indirect specific performance of the positive terms of a contract. However, an injunction in this case may be granted where special circumstances exist. Thus in *Hill v. C.A. Parsons &*

125. (1724) 2 P.wms 266. See also *Catt v. Tourle* (1869) 4 Ch.App.654
126. (1878) 3 App.Cas.209

Co. Ltd.[127], an employer was reluctantly forced to terminate the employment of a senior engineer, who refused to join a trade union which operated a closed shop principle. The court granted the engineer an interim injunction to restrain the termination.

c) Contracts for Personal Services

Contracts for personal services are usually not enforced either by specific performance or injunction. Nevertheless, there are exceptions to this general approach. First, if the contract is fair, it may be enforced.[128] Second, a contract may be enforced under the principle in the case of *Lumley v. Wagner*[129]. In that case, Miss Wagner was a well known opera star who agreed with Lumley that she would sing at Her Majesty's Theatre during a certain period and would not sing elsewhere without his written permission. She entered into another agreement with Gye to sing at Convent Garden and abandoned her previous engagement to Lumley. Lumley applied for an injunction to restrain her from singing for Gye. It was held that an injunction should be granted, to restrain the breach of the negative stipulation. This effectively forced her to sing for Lumley. Similarly, in *Warner Bros v. Nelson*,[130] Bette Davis, a well known actress agreed not to work as a film actress for any other film company for the period of her contract "or to be engaged in any other occupation". This was not an unjustifiable restriction.

The issue was whether an injunction was the proper remedy. It was held that an injunction could be granted to prevent the defendant, without the consent of the plaintiff, from rendering services for or in any motion picture or stage production other than for the plaintiffs. It was indicated that Miss Davis could still earn a living in other ways.

127. [1972] 1 Ch.305. See also *Sky Petroleum Ltd v. VI.P. Petroleum Ltd* [1974] W.L.R.576
128. *A Schroeder Music Publishing Co. V. Macaulay* [1974] 1 W.L.R.1308
129. (1852) 1 De G.M.& G.604
130. [1937] 1.KB.209

d) Contracts Without Express Negative Stipulation

Even where a contract does not contain a negative stipulation, it may be construed to contain one which is enforceable by in injunction[131]. In *Metropolitan Ship Canal v. Manchester Racecourse Co*[132], the defendant applied for the supply of electricity on terms which provided that the defendant agreed to take all the electricity required by his premises from the defendant for a given period. The plaintiff was not bound to supply and the defendant was not bound to take the electricity. It was held that the contract could be construed as an undertaking not to take electricity, from any other persons. Consequently, the defendant was restrained by an injunction from doing so. This approach may also be applied to contracts affecting the use of land (restrictive covenants)[133], and contractual licences (permitting a licensee to occupy premises) which are positively framed. Thus in *Jones (James) & Sons v. Earl of Tankerville*[134], the plaintiff was entitled under a contract to enter the defend ant's land to cut and take timber. This was a licence which was specifically enforceable. It was held that this was a contract to sell future cut timber. An injunction was, therefore, granted to restrain the defendant from interfering with the plaintiff in enjoying his rights under the contract.

2. Restraint of Breach of Trust or Equitable Obligation

a) Trustees

An injunction may be granted to restrain trustees from distributing property otherwise than as directed by the trust instrument.[135] In *Dance v. Goldingham*[136],an attempt was made to sell trust property in breach of trust. A beneficiary under the trust applied for an

131. *Wolverhampton & Walsall Rly Co. V. L.N.W.Rly Ltd* (1873) L.R.16 Eq.433
132. [1901] 2 Ch.37. See also *Sky Petroleum Case supra* n.128
133. See *Tulk v. Moxhay* (1848) 2 Ph.774
134. [1909] 2Ch.440
135. *Fox v. Fox* (1870) L.R.11 Eq.142
136. (1873) 8Ch.App.Cas.902

injunction to restrain the trustees from completing the transaction. The injunction was granted. Similarly, in *Fregene v. Aweshika* [137] the defendants were the trustees of the Omateye Family Trust Fund. The trust instrument vested property in the fund in the trustees for the pur poses set out in the fund. The plaintiffs, who were beneficiaries under the trust, applied for an injunction to restrain the defendants from dealing with the property on the grounds that they had mismanaged the fund and had attempted to exhaust the trust fund during the suit. The injunction was granted.

b) Breach of Confidence

An injunction may be granted to restrain the breach of confidence by a party.[138]

c) Publication

An injunction may be granted to restrain the publication by students of the unpublished lectures of a university professor.[139a]

d) Disposal by Company of Funds in Favour of Employees

An injunction may be granted to restrain a company from disposing of a large sum of money for the benefit of employees[139].

It is notable that the categories of acts in breach of an equitable obligation which can be restrained by an injunction remains open. What is given here are simply a few examples.

3. Restraint of Commission or Continuance of a Tort

Where an injunction is issued to restrain the commission of a tort, equity exercises concurrent jurisdiction. The wrong is determined

137. (1957) W.N.L.R.156 (Nigeria)

138. *Argyll v. Argyll Supra* n.109; *Hubbard v. Vosper supra* n.111; *Series 5 Software V.Clarke* [1996) 1 All E.R.853. *Thomas Marshall (Exporters) Ltd v. Guinle* [1979] 1 Ch.227 discussed *infra* n.156

139a. *Caird v. Sime* (1887) 12 App. Cas.326

139. *Parke v. Daily News* [1961] 1 WLR 493. Overruled by Companies act, 1980, S.74 (U.K.) (Now Companies Act, 1985, S.359)

by the law while the remedy is provided by equity. The rules for granting an injunction vary with the nature of the tort. A few of such torts will be briefly discussed.

a) Nuisance

The act complained of must be a nuisance recognised at common law. The interference should be sufficient to give rise to a claim for damages. An injunction will not be issued for trivial interference. Furthermore, damages may be awarded in lieu of an injunction under Lord Cairn's Act[140]. It is notable that in most cases of nuisance an injunction is not granted[141].

b) Trespass

An injunction may be granted to restrain a threatened or existing trespass.[142] Where the trespass is minor damages may be awarded instead. While it was previously thought[143] that only a person in lawful possession of the property, the subject of trespass, could apply for an injunction against trespass, legislation permits such an application irrespective of possession.[144]

c) Libel and Slander

An interlocutory injunction is usually granted to restrain libel or slander of a person. However, before the grant, the plaintiff should satisfy the court that the statements are false or if they are privileged that they have been made maliciously. In other words, the statements must be defamatory. In *Fraser v. Evans*[145]. Lord Denning stated that the court will not restrain the publication of an article even though it is defamatory, when the defendant intends to justify it or to make a fair

140. See discussion *supra* text at notes 115 to 125

141. *Halsey v. Esso Petroleum Co. Ltd* [1961] 1 W.L.R.683

142. *Kelsen v. Imperial Tobacco Co. Supra* n.97; *Wollerton & Wilson Ltd. V. Richard Costern supra* n.58

143. *Orku Sowa v. Amachree* (1933) 11NLR 82 (Nigeria)

144. Judicature Act, Cap.13, S.38(3)

145. [1969] 1 Q.B.349, 360 See also *Sarah Kanabo v. Editor, Ngabo Newspaper* C.A.No.39 0f 1993 S.C.(Uganda)

comment on a matter of public interest. In *Bonnard v. Perryman,*[146] it was suggested that the working rule is that an interlocutory injunction ought not to be granted except in the clearest cases in which, if a jury did not find a matter complained of to be libellous, the court would set aside the verdict as unreasonable. In *Hubbard v. Pitt*[147], the court upheld the grant of an interlocutory injunction to restrain *inter alia* the display of libellous placards outside the plaintiff's business premises. The court stated that the necessity of preserving the freedoms of speech, assembly and demonstration[148] should not constrain the court to refuse a plaintiff an injunction to prevent the defendants exercising these liberties in the front garden.[149]

In *Monson v. Tussaud's*[150], the plaintiff who had been tried in Scotland for murder, where the jury returned a verdict of "not proven" complained of the exhibition of a figure of himself in a room next to the Chamber of Horrors at Madam Tussaud's (a plastic museum of persons both famous and notorious). The injunction, sought, was refused because it appeared that there might be a question at the trial as to whether the plaintiff agreed to the publication.

d) Passing Off

i) Protection of Property Title

An injunction may also be available to restrain the tort of passing off. This is based on the principle that no person has a right to represent his or her goods as the goods of another person.[151] The

146. [1891] 2Ch.269. See also *Neudegger v. The Telecast Newspaper &Others* [198890] H.C.B.155, *Kibedi v. FAD Publication H.C.C.S.* No 869 of 1987 Unreported; *Abu Mayanja* v. *Mulengera Newspaper* H.C.C.S. No.459 of 1990; *Kahigiriza v. Financial Times (U) Ltd* [1991] HCB52; *Onama v. Uganda Argus Ltd* [1969] E.A.92; *Kisaasi Coffee Growers & Processors Ltd v. U*.C.B. [199293] HCB 112; *Wavamunno v. Teddy Sseezi Cheeye* [199293]. H.C.B.173

147. [1975] 3 W.L.R.201 C.A. (England)

148. Constitution of Uganda Article 29

149. See also *ibid*. Article 43

150. [1874] 1 Q.B.671

151. *Leather Cloth Co. V. American Leather Cloth Co.* (1865) H.L.Cas.523

person alleging passing off must show that the name or trade mark has become peculiarly attached to his or her own manufacture or commodity and not to others.[152]

ii) Protection of Business Name

An injunction may be granted to protect a business name. The plaintiff or applicant must show that the defendant/respondent is using his or her name or similar name and this is likely to cause injury to him or her in his or her business by leading to the confusion of the people to think that the defendant's business is the same as that of the plaintiff or is connected with the plaintiff's.[153]

iii) Protection of Trade Marks

The court may issue an injunction to restrain the infringement of a trade mark registered under the Trade Marks Act[154]. It is a defence to an injunction for the defendant to show that the use to which the plaintiff is complaining is not likely to deceive or cause confusion. In such case, an injunction will not be granted. In *Thomas Marshall v. Guinle*,[155] Megarry, V.C. refused to grant an injunction to restrain the defendant Managing Director from *using any* confidential information or trade secrets of the company. The Vice Chancellor held that while under the agreement between the defendant and the company, the defensdant could be restrained from disclosing confidential information and trade secrets of the company, he could not be prevented from *using* that information as such restriction would lead to "remarkable" and "odd" results. He stated thus:[156]

152. *De Facto Works Ltd Odumotun Trading Co* [1959] L.L.R.33. See also Jegede, *Principles of Equity* (Ethiopie Publishing Corp, Benin Nigeria, 1980) p.88.

153. Business Names Registration Act Cap.109,Ss.15,16; *Ewing v. Buttercup Margarine Co. Ltd*. [1917] 2Ch.1; *Ayinule v. Abimbola* [1957] L.L.R.41; *Niger Chemists Ltd. V. Niger Chemists* [1961] All N.L.R. 171. See also Fabunmi; *Equity & Trusts in Nigeria* (1986) p.212

154. Trade Marks Act Cap.217, Ss. 8,14

155. [1959] 1 Ch.227

156. *Ibid* p.247

> I think "disclosed" means what it says, and does not extend to "use". Of course, I can conceive of methods of use which would amount to disclosure. If an employee were to use his secret knowledge in such away as to make it plain to others what the secret process or information was, that might well amount to disclosure. The mode and circumstances of use maybe so ostentatious that they plainly constitute disclosure. But apart from such cases, I do not think a prohibition on disclosure prevents use.

iv) Protection of Patents and Designs

A patent which is registered under the Patents Act[157] confers rights on the owner thereof. The infringement of such rights may be challenged in court by the owner. For this purpose, the injunction may be granted to restrain such infringement.

v) Copyright

The plaintiff or applicant may obtain an injunction to restrain the infringement of his or her copyright which is registered under the Copyright Act.[158].

4. Restraint of a Company from Acting Ultra Vires

The powers of the company are governed by the Companies Act[159], and the company's memorandum and articles of association. If the company's agents (normally directors) act beyond the powers conferred on the company by those instruments, an interested person (who may be a director or shareholder), whose rights are affected by the illegal act may apply for an injunction to restrain the company from committing or continuing to commit the wrongful act.[160]

157. Cap.216, Ss.25, 26(2), 27

158. Cap.215, Ss.11(1),(2)

159. Cap.110, S.4; First Schedule Table A Art.80

160. *Pulbrook v. Richamond Consolidated Mining Co.*(1878) 9 Ch.610; *Moseley v. Koffyfontein Mines ltd* [1911] 1 Ch.D.73; *Simpson v.Westminister Palace Hotel* (1860) 8 H.L.Cas. 712. See also Bakibinga, *Company Law in Uganda,* Chap.4

5. Injunction and Family Matters

An injunction may be granted to regulate the relations between spouses or the protection of infants.

a) Occupation of Matrimonial Home

An injunction may be granted to regulate the use or occupation of a matrimonial home by either of the spouses.[161] The effect of such an injunction is to protect the applicant from molestation of her property rights in the matrimonial home. The court only grants the injunction if this is necessary to protect the applicant's person and property.[162] For this purpose courts have issued injunctions to: restrain a husband from installing his mistress in the matrimonial home[163]; restrain the husband from evicting his wife from the matrimonial home unless he provided her with alternative suitable accommodation and maintenance;[164] exclude a husband from his home[165] and to exclude an adult child from his parents' home due to his assaults or threats of assaults.[166]

It is notable that the jurisdiction to grant such injunctions is exercised by the Courts consciously.

b) Protection of Minors

An injunction may also be issued with a view of protecting minors or infants. Thus courts have granted injunctions to: retrain a wife from passing on to a child a letter which she had written;[167] restrain persons who had enticed a girl aged 16 away from her father from continuously to keep her[168].

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161. *Symond v. Hallett* (1883) 24 Ch.D.346; *Jones v. Jones* (1959) L.L.R.69
162. *Des Salles d'Epinoix v. Des Salles de'Epinoix* [1967] 1 W.L.R.553
163. *Pinckney v. Pinckney* [1966] 1 All E.R.121
164. *Lee v Lee* [1952] 2Q.B.489
165. *Hall v. Hall* [1971] 1 W.L.R.404
166. *Egan v. Egan* [1975] Ch.218
167. *R.v.R&I* [1961] 1 W.L.R.1334
168. *Lough v. Ward* [1945] 2 All E.R.338. See also *Practice Direction* [1974] 1 W.L.R.936

6. Injunction and Trade Unions, Clubs and Colleges

An injunction may be issued in relation to the activities and rights of persons connected to trade unions, clubs and colleges.

a) Trade Unions

An injunction may be granted to restrain the expulsion of a member by his own union, if the expulsion is contrary to the rules of the union.[169] The other reason for such an injunction is normally to prevent the trade union member from losing his source of livelihood.[170]

b) Clubs

An injunction may be issued to restrain the expulsion of a member from a social club in a way which is contrary to the rules of the club or natural justice. Thus in *Labouchere v. Earl of Wharncliffe*[171], a general meeting of the club which was summoned without proper notice expelled the plaintiff without a full inquiry and without giving him notice of any definite charge and by a resolution which was passed by an insufficient majority. The plaintiff applied for an injunction to restrain such expulsion and it was granted.

c) Colleges

Where a student is expelled from a University without fair hearing and in breach of the rules of natural justice, she/he may seek an injunction to restrain the University authorities from acting on the dismissal[172]. However, it is suggested in this respect in that the jurisdiction of the visitor or chancellor in such matters should not be ignored.[173]

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169. *Osborne v. Amalgamated Society of Railway Servants* [1911] 1 Ch.540
170. *Lee v. Showmen's Guild* [1952] 2Q.B.329
171. (1879) 13 Ch.D.346
172. *Glynn v. Keele University* [1971] 1W.L.R.487. For facts see *supra* n.51 and text thereof.
173. *Herring v. Templeman* [1973] 3 All E.R.569; *R v. Senate of the University of Aston exp. Roffey* [1969] 2Q.B.538

7. Judicial Proceedings

Historically English Courts were empowered to issue an injunction to restrain the initiation of judicial proceedings in all cases in which it appeared to the court to be just and convenient.[174] Although there is no direct provision in Ugandan law; it appears that Ugandan Courts possess such jurisdiction under Section 33 of the Judicature Act, Cap.13 and Section 11(2) of the Magistrates' Court Act. Substantially such jurisdiction can be exercised to stay a suit, the substantial issue of which have already been determined by a court[175] under the principle of *res judicata*[176] or where the suit is barred[177] or the matter has been determined by a foreign court[178] or is the subject of arbitration between the parties.[179]

In the exercise of the Court's jurisdiction, judicial proceedings in foreign courts, inferior courts, administrative tribunals and private prosecutions may be restrained. The initiation of proceedings in the High Court may also be restrained. However, once proceedings have started in the High Court they cannot be restrained. Apparently they can only be stayed.[180] It is notable that any interference with court proceedings amounts to contempt of court.

8. The Mareva Injunction

A court may grant an interlocutory injunction to restrain a party to any proceedings from leaving the jurisdiction of the court or otherwise dealing with, assets located within that jurisdiction. Such jurisdiction is exercisable in cases where the party is, as well as cases

174. Judicature Act 1873, S.25(8)

175. Civil Procedure Act Cap.71, Ss.6, 7

176. *Ibid*, s.7; *Nakiridde v. Hotel International Ltd* [1987] H.C.B.85

177. *Ibid*, S.8; *Nabanoba v. Sekanwagi* [199293] HCB 114

178. *Ibid* S.9

179. Arbitration and Conciliation Act, Cap.4, S.6; *Farmland Industries Ltd. V. Globe Exports Ltd* [1991] HCB 78

180. *Ibid*

where she/he is not domiciled, resident or present within that jurisdiction.[181]

This type of injunction derives its name from the case, *Mareva Compania Naveira S.A. v. International Bulkcarriers S.A.*[182], although it was first granted in the case of *Nippon Yusen Kaisha v. Karageorgis*[183]. The requirements for obtaining a *Mareva* injunction are[184] that first there must be a good arguable case, in which case, the court must consider the merits of the case; second it must be shown that there is a risk that judgment will go unsatisfied by reason of the disposal by the defendant of his assets, unless she/he is restrained by court order from disposing of them; thirdly, it should be just and convenient in all the circum stances of the case to grant the relief sought. With regard to the first requirement, it has been said that this amounts to:[185]

> One of which is more than barely capable of serious argument but not necessarily one which the judge considers would have a better than 50 percent chance of success.

The second requirement involves an objective risk that there will be dissipation of assets by the defendant making it likely that the result of his or her dissipation will be that the judgment goes unsatisfied.[186] The third requirement is not a mere formula but justifies the approach in *Polly Peck International v. Nadir* (No.2)[187], concerning banks whose business, de pending on the confidence of their investors, might be destroyed at a stroke: the plaintiff's cross undertaking in damages would be of little consolation or use. In *Allen v. Jumbo Holding Co.*[188a]

181. See Supreme Court Act, 1981 S.37(1),(3)(UK). Such jurisdiction may be exercised by Ugandan Courts; Judicature Act, Cap.13, S.33; Magistrates Courts Act, Cap.16, S.11(2).

182. [1975] 2 Lloyd's Rep.509

183. [1935] 1W.L.R.1093

184. Hayton & Marshall, *supra* n.65, p.908. See also *Mugimu v. Basabosa* [1991] H.C.B.70

185. *Ninemia Corporation v.Trave Schifarhtsgessellschaft GmBH* [1983] 2 Lloyd's Rep.600, 605 per Mustill J.

186. *Derby & Co. Ltd v.Weldon* [1990] Ch.80

187. [1992] 2 All E.R.769

188a [1980] 2 All E.R.502

the plaintiffs were the widow, children and executor of X, who was killed when he was hit by a propeller of the aircraft he was about to board. The aircraft was owned by a Nigerian company and at the time of the accident was in England for servicing. The plaintiff intended to make a fatal accident claim against both the pilot and the Nigerian company as his employers. The Nigerian company had no assets in England. When it appeared that the aircraft was about to return to Nigeria, the plaintiffs issued a writ and immediately sought and were granted a *Mareva* injunction preventing the aircraft from being moved out of the jurisdiction. The issue, during the hearing of an application to discharge the injunction were (i) whether a *Mareva* injunction could be granted in a personal injury action or was confined to commercial actions and (i) whether the injunction should be refused because the plaintiffs could give satisfactory undertaking as to damages if their anticipated action failed. It was held that there was no difference in principle between commercial actions and actions for personal injuries in regard to the issue of a *Mareva* injunction. Secondly the court held that the issue of a *Mareva* injunction is not determined solely by the plaintiff's financial standing. In each case the issue of an injunction depends on the balance of justice and convenience and on the facts of the case, the injunction ought to be continued until the Nigerian company provided satisfactory security to ensure any award of damages against them would be met. In *Establishement International Anstalt v. Central Bank of Nigeria,* [188] it was held that a *Mareva* injunction is only granted where there was a danger of the money being taken out of the jurisdiction so that if the plaintiffs succeed, they were not likely to get this money. In this case it would not be right to say that the defendants and the Government of Nigeria would not meet their obligation if the judgment was given against them. This is why the *Mareva* injunction could not be granted. The court further opined that another ground for not granting a *Mareva* injunction was that on the material before it, there were many doubts in the plaintiff's claim and there was so much defence to be raised against it that it

188. [1989] 1 Lloyd's Rep.445

could not be a case where the plaintiffs had a really good arguable case to succeed and a novel part of the law did arise in regard to the effect of fraudulent conduct of the beneficiary, under a letter of credit upon the continued existence of the letter of credit on which there was no authority.

The scope of the *Mareva* injunction may be further limited by its effect on a third party especially in regard to what constitutes "disposing or dealing" with the defendant's property. In the *Law Society v. Shanks*[189], it was held that merely paying a sum over to the defendant (unless with the purpose of assisting him to dissipate the sum paid over) was not caught by the order and could not place the party in contempt.

The injunction is available both before and after judgment and may restrict dealings with *all* assets of the defendant, although it may be inappropriate in matrimonial cases. However, the order gives the plaintiff no right *in rem* or security or priority over the defendant's creditors (of which the plaintiff has not yet shown herself or himself to be one).[190] With regard to property or funds held by the defendant and a third party jointly the order may apply only when the plaintiff shows that she/he has a tracing claim to the "contents" of an account which are solely beneficially owned by the defendant, in which case the third party's share will be released to him or her.[191]

9. The Anton Piller Injunction

The *Anton Piller* injunction, which is also interlocutory arose from the case of *Anton Piller K.G. v. Manufacturing Process Ltd.*[192] The action was for the infringement of certain registered trademarks. The plaintiffs sought an order *ex parte* to compel the defendants to allow the plaintiffs' solicitors to inspect the matters in issue in the suit and to produce them upon oath. The plaintiffs argued that if the

189. [1988] 1 F.L.R.504

190. *Ghoth v. Ghoth* [1992] 2 All E.R.920

191. *S.S.f. V. MISRI* [1985] 1 W.L.R..876 Hayton & Marshall, *supra* n.66, p.909

192. [1976] 1 Ch.55 C.A.(E)

defendants were given notice of the application, relevant evidence would disappear. Consequently, the application was heard *ex parte* and *in camera*. It was held that the injunction be granted on the ground that it was in the interest of justice to make the order sought. In the course of judgment Ormrod LJ. laid down [193] three conditions for the award of the *Antons Piller* injunction. First, there must be an extremely strong *prima facie* case. Second, the damage, potential or actual must be serious for the applicant. Third, there must be clear evidence that the defendants have in their possession incriminating documents or things and that there is a real probability that they may destroy such material before any application *inter partes* can be made.

However, even where all the conditions have been met, the court must be satisfied that the need for the order outweighs the injustice of making an order against the defendant without him or her having been heard.[194] This means that ordinarily the order would not be made against a person of good standing.[195] It will also be rarely be given in matrimonial proceedings unless there is strong evidence.[196]

193. *Ibid* p.62
194. Hayton & Marshall, *supra* n.66, p.910
195. E.g. Advocates and their clerks. *Randolph M. Fields v. Watts (*1985) 129S.J.67
196. *Emmanuel v. Emmanuel* [1982] 1W.L.R.669

Chapter 6

Specific Performance

A. Definition and Nature

1. Definition

A decree of specific performance is an order of the court[1] compelling the defendant personally to do what she/he promised to do. Specific performance is an equitable remedy and is governed by three main principles. Thus similar to an injunction[2], the remedy of specific performance will only be ordered (i) where common law remedies are inadequate; (i) as a matter of the court's discretion and (ii) if the court is satisfied that it will be observed in line with the maxim that "equity does not act in vain".

In contrast with an injunction, specific performance is only given to enforce positive contractual obligations. However, as already seen, positive contractual obligations can also be enforced by means of an injunction. The main advantage of seeking an injunction is that it can be given at an interlocutory stage, that is, before trial whereas specific performance cannot.[3]

2. Discretionary Nature of Remedy and Principle: Equity Will Not Act In Vain

The discretion to order specific performance by a Court is exercised in accordance with settled principles. It is not arbitrary[4]. The remedy will also only be ordered where the defendant can comply with

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1. Courts have such jurisdiction under Judicature Act, Cap.13 S.33 and Magistrates' Courts Act, Cap.16, S.11(2)
2. Discussed *supra* Chap.5
3. But see *Sky Petroleum Ltd v. VIP Petroleum Ltd* [1974] 1 W.L.R.576; *Hill v. C.A. Parsons & Co. Ltd* [1972] Ch.305 where injunctions which were in essence specific performance were given at an interlocutory stage.
4. *Serunjogi v. Katabira* [1988-90] HCB 148

the order. Thus in *Jones v. Lipman*[5], the defendant concluded a binding contract to sell some land to the plaintiff. After the date of the contract, the de fendant changed his mind and tried to avoid specific performance by selling the land to a company acquired by himself for that purpose. It was held that the defendant could not resist the order of specific performance as he was still in a position to complete the contract. Russel J. stated that the company was:

> the creature of the vendor, a device and a shame, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.

The court, therefore, ordered specific performance against the vendor and the company.

Although specific performance is a remedy in respect of a breach of contract it may, in certain circumstances, be obtained before the time for performance has arrived. Thus in *Marks v. Lilley*[6], the plaintiff issued a writ of specific performance of a contract of sale without first having served a notice making time of the essence of the contract. It was held that the action was not premature, as the equitable right to specific performance had already accrued.

The Court thus stated:

> a cause of action for specific performance is not one of breach of contract but the defendant's equitable duty to perform his contract. However, while the breach of contract is not an essential element, the court will not normally interfere, in its absence and a premature plaintiff may be penalised in costs.

Similarly, in *Hasham v. Zenab*[7], a decree of specific performance to complete the contract was granted before the date fixed for the completion of the contract for sale of land. The court reasoned that the defendant was guilty of anticipatory breach in that she had torn

5. [1962] 1 W.L.R.832. See also *Scott v. Alvarez* [1895] 2 Ch.603 C.A.(E); *Williams v. Smith* (1948) 19 N.L.R.21 (Nigeria)

6. [1959] 1 W.L.R.749. See also *Barclays Bank D.C.O. V. Hassan* [1961] 1 All N.L.R.836 (Nigeria)

7. [1960] A.C.316

up the contract almost as soon as she had signed it on the ground that she never intended to sell so large a plot of land. The decree was to take effect on the date fixed in the contract for completion.

3. Inadequacy of Common Law Remedy

There are certain classes of contract which a promisee can expect almost as of right to have specifically enforced. These include contracts for the disposition of an estate or interest in land,[8] for the sale of chattels of unique value, beauty or rarity[9] and shares in a private company.

a) Contracts for the Disposition of Interest in Land

Each piece of land or real estate is regarded as unique and, therefore, damages is an inadequate remedy for a purchaser in that damages would not enable him or her to buy a replacement in the market. Similarly, though damages are clearly an adequate remedy for a vendor (who wants only money) a decree will lie against a purchaser on grounds of mutuality. [10]

b) Chattels of Unique Value

The Court of Chancery had always claimed jurisdiction to order the return of a specific chattel wrongly detained by another.[11] But as explained by Lord Eldon[12], its justification in that regard was that such chattels possessed *pretium affectionis* which could not be estimated in damages. Goulding J. extended that reasoning in *Sky Petroleum v. VIP Petroleum Ltd*[13], by holding that the court had jurisdiction to

8. *Hall v. Warren* (1804) 9 Ves.605; *Adderley v. Dixon* (1824) 1 Sim & St.607; *Verall v. Great Yarmouth Borough Council* [1981] 1 Q.B.202 where the Court of Appeal confirmed the grant of specific performance to enforce a contractual licence to occupy premises, there being no alternative premises.

9. *Falckey v. Gray* (1859)4 Dr.651; *Thorn v. Commissioners of Public Works* (1863)32 Beav.490 (stones from Old Westminister Bridge); *Phillips v. Lamdin* [1949] 2 K.B.33 (ornate Adam door)

10. *Hope v. Walter* [1900] 1 Ch.257, 258. See also discussion *infra* on mutuality

11. *Pusey v. Pusey* (1684) 1 Vern 273 (an ancient horn, the gift of Canute)

12. *Nutbrown v. Thornton* (1804) 10 Ves.160,163

13. *Supra* n.3

order specific performance of a contract to sell nonspecific chattels in a case where the remedy of damages would be inadequate. It is notable in this regard, that Section 51 of the Sale of Goods Act [13a] enables the Court to decree specific performance of contracts for the sale of "specific or ascertained goods", that is, those identified and agreed upon when the contract is made. [14]

c) Shares in a Private Limited Company

Since there is no readily available market for shares in a private company because of the restriction on their transferability[15], damages will normally be an inadequate remedy.

4. A Remedy in Personam

The order of specific performance is normally issued against the individual defendant. If the defendant is within the jurisdiction of the court she/he can be compelled personally by the court to execute his or her obligation. The order may be issued even if the subject matter of the contract is outside the court's jurisdiction.[16]

B. Specific Performance in Particular Situations

The general rule is that specific performance is not granted if the plaintiff would be adequately compensated by the common law remedy of damages.[17]

It is intended to examine the particular instances in which specific performance may be granted bearing in mind the principles underlying such jurisdiction. Eleven such instances relating to contracts of: sale of land, sale of personal property, payment of money, a voluntary nature, a supervisory nature, personal service, for

13a. Cap.82 Laws of Uganda (2000 Edn)

14. For a specific decision on this see *Bushari v. Vitaform Uganda ltd* [1991] HCB 107 per Berko J.

15. Companies Act, Cap.110, S.27

16. *Bata Shoe Co v. Melikian* 91956) 1 F.S.C.100 (Nigeria), discussed *supra* Chap.2; *Ayinule v. Abimbola* [1957] L.L.R.41

17. *Haji Lutakome v. Sentogo* [1988-90] H.C.B95 per Mukanza, Ag.J.

the creation of terminable interests, a testamentary nature, transfer of goodwill, reference to arbitration, partial performance, are examined below.

1. Contracts for Sale of Land

As already discussed, courts normally grant the order of specific performance to enforce contracts to convey or create a legal estate in land such as a sale of land or lease. The remedy is subject to the discretion of the court and is not granted as of right. This is because a piece of land is unique and it is generally accepted that the award of damages is not an adequate compensation for the purchaser or lessee. Consequently, the court would order specific performance for the purchaser or lessee even when monetary payment is adequate. Where the vendor fails to comply with the order the purchaser may apply to the court for an order nominating some person to execute a conveyance in the vendor's name.[18]

2. Contracts for the Sale of Personal Property

Chattels, stocks and shares do not usually possess such unique character as land except, if they are shares in a private company.[19] Consequently, most contracts for the purchase of government stock will not be ordered to be specifically performed, and damages are awarded instead.[20] However, specific performance will be ordered where the chattel is unique or of special value because of its individuality, beauty or rarity.[21] Additionally, by Section 51 of the Sale of Goods Act.[22], a Court has power to decree specific performance of a contract for the sale of specific or ascertained goods. The decree may be absolute or on terms relating to damages or payment of the price as the court may think just.

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18. See discussion *supra* chap.2 under the maxim that Equity acts *in personam*
19. See *supra* n.15 and text thereof
20. *Dominion Coal Co. v. Dominion Iron & Steel Co.* [1909] A.C.293
21. *Falckey v. Gray, supra* n.9 and accompanying cases thereat
22. *Supra* n.13a

A few cases may illustrate the use of specific performance in relation to the sale of goods. Thus in *Cohen v. Roche*[23], the plaintiff agreed to buy from the defendants a set of 8 Hepple white chairs. This was a contract for the sale of specific goods. However, the court refused to order specific performance because the chairs were "ordinary articles of commerce of no special value or interest". In contrast, in *Behnke v. Bede Shipping Co.*[24], the Court ordered specific performance of a contract for the sale of a ship. Wright J. stated that he was satisfied that the ship was of "peculiar and practically unique value to the plaintiff." Furthermore, in *Sky Petroleum Ltd v. VIP Petroleum Ltd*.[25] a contract was entered into whereby the plaintiff company bought all the petrol needed for its garages from the defendant company. The defendant company supplied the plaintiff with all its requirements. The defendant alleged breach of and purported to terminate the contract in November, 1973 at a time when petrol supplies were limited so that there was little prospect of finding an alternative source. An interlocutory injunction was granted to restrain the withholding of supplies. Gulding, J. observed that this amounted to specific performance, the matter being one of substance rather than form. It was held that the court had jurisdiction to order the specific performance of a contract to sell chattels although they were not specific or ascertained, where damages were inadequate.

3. Contracts to Pay Money

Contracts to pay money are not specifically enforceable, normally. However, there are exceptions to this rule. First, where the contract is to pay money to a third party so that if damages are awarded they would be nominal. Second, where the contract is for the payment of an annuity or periodical sums. Thus in *Beswick v. Beswick*[26], Peter, a

23. [1927] 1 K.B.169

24. [1927] 1K.B.649

25. [1974] 1 W.L.R.576

26. [1968] A.C.58; Hayton & Marshall, *Commentary & Cases on the Law of Trusts and Equitable Remedies (*10th Ed Sweet & Maxwell, 1996) pp.963966

local merchant concluded a written contract with his nephew, John, whereby Peter sold his business to John. The contract provided that after Peter's death, the nephew should pay the widow (who was not a party to the agreement) an annuity of £5 per week. Peter died and the nephew refused to pay the widow. It was held firstly, that the widow was entitled to the amount as administratrix of Peter's estate and, secondly that she could not, however, enforce the obligation in her personal capacity as she was not party to the contract. The main reasons for ordering specific performance in respect of an annuity are firstly that this remedy avoids the inconvenience of a series of actions for damages every time payment is not made. Secondly, even if substantial damages are available, the common law remedy is still inadequate as the amount payable under an annuity may not be easily determinable.

The third exception to ordering specific performance to pay money is in relation to a contract with a company to take up and pay for debentures[27]. Fourth, in a contract for a se cured loan specific performance may be granted to enforce the execution of a mortgage if the money has already been lent[28]. In such a case the remedy of damages would obviously be inadequate. Fifth, equity would order an indemnifying party to pay a debt if that is the true construction of the contract.

4. Volunteers

Specific performance is not granted to a party to a contract under which he has not supplied consideration.[29] Specific performance may be exceptionally granted where the plaintiff is in possession of the land as a volunteer in circumstances in which it would be unjust to deprive him or her of the legal estate.

27. Companies Act, Cap.110, S.94
28. *Ashton v. Corrigan* (1871) L.R.13 Eq.76
29. *Re Pryce* [1917] 1 Ch.234, 241 per Eve J.

5. Contracts requiring Supervision

It is settled law that a court will not order specific performance where the decree will require constant supervision by the court. Thus in *Ryan v. Mutual Tontine Westminister Chambers Association*[30], a lease of a flat in a block of flats contained an agreement by the les sors to keep a resident porter who should be in constant attendance and to perform certain specified duties. They appointed a person who got his work done by deputies and who absented himself for hours at a time as a chef at a neighbouring club. It was held that the court could not order specific performance of such an agreement against a lessor at the request of the lessee because supervision was impracticable and equity does not act in vain.

Decrees are normally granted to specifically perform contracts relating to land. If the vendor is uncooperative, the Court appoints somebody in his or her place to execute the con tract. Therefore, specific performance in such a case is usually effective. The principle with regard to supervision has also been relaxed.[31] Thus in *Cooperative Insurance Society Ltd v. Argyll Stores Ltd*[32], the Court of Appeal held by a majority that a tenant's covenant to keep demised premises open for retail trade during normal hours was specifically enforceable. Legatt and Roch L.JJ. indicated that there was no rule or invariable practice requiring the court to refuse a decree simply because the act decreed would not be one off act and might require supervision. Consequently, since there was no uncertainty as to the meaning of the clause as to render it void at law, damages were an inadequate remedy for the landlord's true loss and there was nothing in the landlord's behaviour to disentitle them to a decree, the covenant would be specifically enforced.

The relaxation of the rule is also evident in construction cases. The general rule is that the court, does not usually order specific

30. [1893] 1 Ch.116

31. *Beswick* Case, *supra* n.26; *Sky Petroleum Case Supra* n.25

32. [1996] E.G.128. See also *Retail Parks Investments Ltd v. Royal Bank of Scotland Plc, The Times* Newspaper (London), April 22, 1996

performance of a contract to build or repair. However, specific performance will be ordered if three conditions are satisfied.[33] First, the building work sought to be enforced is defined by the contract i.e. the particulars of the work are so definitely ascertained that the court can see the exact nature of the work of which it is asked to order specific performance. Second, the plaintiff has substantial interest in having the contract performed, which is of such nature that he cannot be adequately compensated for breach thereof by damages. Third, the defendant has, by the contract, obtained possession of the land on which the work is contracted to be done.

The facts in the *Wolverhanmpton* case were that a plot of land was sold by the plaintiffs, who were an urban sanitary authority pursuant to a scheme of sanitary improvement, to the defendant. The defendant agreed to erect buildings thereon and went into possession. Another agreement provided for the erection in accordance with detailed plans.

The Court of Appeal of England ordered specific performance. The principle in the *Wolverhampton* case has been extended to cover the landlord's covenants to repair. Thus in *Jeune V. Queen Cross Properties Ltd*[34], a lease agreement contained a covenant to repair a balcony which did not form part of the leasehold premises. The conditions stipulated in the *Wolverhampton* case[35] were satisfied in that the landlord was in possession, the work involved was specific and there was a breach of covenant affecting the plaintiff. The court was satisfied that the order to repair was more convenient than an award of damages. However this decision does not apply to a tenant's repairing covenant.[35a]

33. *Wolverhampton Corpn v. Emmons* [1901] 1 K.B.515 per Romer L.J.

34. [1974] Ch.97

35. *Supra* n.33

35a *Hill v. Barclays* (1810) 16 Ves.402, now overruled in Britain by S.17 Landlord & Tenant Act, 1985

6. Contracts for Personal Services

The general rule is that contracts of a personal nature or which involve the performance of personal services will not be specifically enforced.[36] This is because such a contract would require constant supervision of the court and it would be contrary to public policy for a court to continue an association which the two parties cannot sustain on their own.[37] However as already noted[38] some contracts containing elements of personal or continuous service have been ordered to be specifically performed.

7. Contracts for The Creation of Transient or Terminable Interests

Since equity does not act in vain, specific performance will not be ordered of an agreement for a lease which has expired at the time of the hearing of the case.[39] Similarly an agreement for a tenancy at will or partnership at will, will not be ordered to be specifically performed.[40] However, the more recent case of *Verall v. Great Yarmouth Borough Council*[41] has clarified that the authorities of the nineteenth century on transient interests[42] are suspect and an agreement to occupy premises for two days is, other things being equal, specifically enforceable.

36. *Lumley v. Wagner* (1852) 1 De G.M.&G604. Discussed *supra* Chap.5; *Udeaja v. Lawson* (1966) 10 E.N.L.R.252 (Nigeria); Fry *Specific Performance* (5th Ed) pp.5051

37. *De Francesco v. Barnum* (1890) 45 Ch.D.430

38. *Supra* notes 3134 and text thereof. See also *Beswick v. Beswirk, supra* n.26; *Hill v. C.A. Persons & Co, supra* n.3 (closed shop); *Giles (C.H.) & Co. Ltd v. Morris* [1972] 1 WLR307

39. *Turner v. Clowes* (1869) 20 L.T.214

40. *Hercy v. Birch* (1804) 9 Ves.357

41. [1981] Q.B.202, 220

42. *Lavery v. Pursell* (1888) 39 Ch.D.508 where the remedy was refused to enforce a one year contract for a lease on the ground that it was not possible to obtain a decree within a year and therefore the decree of specific performance would be in vain.

8. Contracts to Leave Property by Will

The normal remedy for breach of a contract to leave property by will is damages. Any other remedy would amount to interference with testamentary freedom. However, there are exceptions. Thus in *Synge v. Synge*[43], in consideration of marriage, the defendant promised to leave by his will certain real property to his wife for life. The property was later conveyed, in breach of this contract, to a third party. The wife sued for damages only, which were granted. However, the Court of Appeal expressed the view, *obiter* that where a written agreement is made to induce a marriage and the marriage takes place on the faith of it, then the court has power to order a conveyance of a defined piece of real property after the death of the contracting party against those who have acquired it as volunteers. While the court could not order the defendant to make a will in any particular form or terms, it could order the executor or devisee to convey it.[44] However, specific performance would not be ordered of a contract by a donee of a testamentary power of appointment to exercise the power in favour of the plaintiff.[45]

9. Contracts to Transfer Goodwill

A contract to transfer the goodwill of a business is not on its own specifically enforceable because the subject matter is uncertain. However, specific performance can be ordered for the transfer of goodwill *and* the premises or assets of the business.[46]

10. Contracts to Refer to Arbitration

A contract to refer to arbitration is not specifically enforceable.[47] However, it is notable that Section 6 of the Arbitration and

43. [1894] 1 Q.B.466 C.A.(E). See also *Schafer v. Schumann* [1972] A.C.572P.C..
44. This appears to be a modified application of the doctrine of performance, discussed *infra* Chap.8
45. *Re Parkin* [1972] A.C.572
46. *Darbey v. Whitaker* (1857) 4 Drew 134
47. *Re Smith* (1890) 45 Ch.D

Conciliation Act, 2000 provides that if the plaintiff sues on a contract which includes an arbitration provision, the defendant may ask the court for a stay of proceedings so that the plaintiff should proceed with the arbitration or go without a remedy.[48] Nevertheless, the court will enforce the arbitrator's award.[49]

11. Complete Contract Only Enforceable

The Court will not decree specific performance of any part of a contract unless it is in a position to order the specific performance of the whole contract. Thus in *Ogden v. Fossick*[50], the agreement between the parties provided that the defendant would grant to the plaintiff a lease of a coal wharf and that the defendant should be appointed Managing Director. The plaintiff applied for the specific performance of the agreement to grant the lease. It was held that specific performance could not be granted because that part of the contract of employment which could not be enforced. Nevertheless, exceptionally, a contract may be construed to contain several parts which are enforceable on their own,[51] for instance where several plots of land are sold under an agreement. The issue would then be whether the contract is one of the sale of several lots or several sales of the lots.

12. The Mutuality Principle

Specific performance may be obtained under the principle of mutuality even where damages are adequate compensation. For instance, where equity decrees specific performance in favour of a purchaser or lessee, the remedy will be equally available to the vendor or lessor. However, where mutuality is lacking, specific performance will not be ordered. Thus in *Flight v. Bolland*[52], a minor

48. *Interfreight Panalpina v. Sietco* H.C.C.S. No. Per Byamugisha J.
49. *Wood v. Griffith* (1818) 36 E.R.291; Arbitration and Conciliation Act, Cap.4, S.36
50. (1862) 4 De G.F.& J.426
51. *Beswick v. Beswick, supra* n.26
52. (1823) 4 Russ 298. See also *Chidiak v. Coker* (1954) W.A.C.A.506 (Nigeria)

failed to get an order of specific performance because a suit for specific performance could not be maintained against him. Leach M.R.stated that specific performance is only granted when the remedy is mutual.

The issue arises as at what point mutuality should arise in order for specific performance to accrue. It has been held that the defence of want of mutuality is judged on the facts and circumstances as they exist at the hearing or judgment and not at the time the contract is entered into.[53]

There are three exceptions to the requirement of mutuality. First, the holder of an option to purchase may obtain specific performance even though the other party may have no such right against him/her.[54] The reason is that specific performance accrues after the exercise of the option and not before.[55] Second, mutuality is unnecessary for specific performance to be ordered, in relation to compensation. This is a special variant of the remedy limited to cases of misdescription in a contract of the sale of land, whether the misdescription relates to the title or the quantity or quality of the land. It will be available where the vendor is unable to transfer to the purchaser property exactly corresponding to that which he has contracted to convey.[56] Third, under Section 17 of the Landlord and Tenant Act, 1985(U.K) there is no need for mutuality where the tenant of a dwelling house sues the landlord for the breach of a repairing covenant.

C. Defences to Specific Performance

Even where the reasons discussed above for declining specific performance do not exist, a defendant may still have one of the following defences to the grant of the remedy.

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53. *Prince v. Strange* [1977] 3 All ER 371, 383, 392 per Goff, J and Buckley L.JJ overruling Spy, *Specific Performance (6th Ed) p.222*

54. *McCarthy & Stone Ltd v. Julian Hodge & Co Ltd*. [1971] 2 All E.R.973, 980 per Foster J.

55. Pettit, *Equity and The Law of Trusts* (Butterworths 7th Ed. 1993) p.626

56. *Ibid* pp.626627. See also Fry, *supra* n.53, pp.566 *et seq*.; Harpum (1981) CLJ47; *Rutherford v. Action Adams* [1915] A.C.866

1. Mistake, and Misrepresentation[57]

Mistake and misrepresentation are grounds on which the specific performance of a contract will be refused even through the contract is not rescinded. Thus in *Webster v. Cecil*[58], A in a letter offered to sell property to B. He intended to offer it at £2,250 but by mistake wrote down £1,250. A immediately gave notice of the error. It was held that A would not be compelled to carry out the sale. However, in *Tamplin v. Jones,* an inn was offered for sale. It was correctly described by reference to plans. Behind the inn was a piece of land which did not belong to the vendors. These were not included in the sale although they had commonly been occupied with the inn. The defendant knew the premises but did not consult the plans. He agreed to buy believing that he was buying both the inn and the land at the back. Specific performance was ordered against him. In contrast, in *Malins v. Freeman*[59], an estate was bought at an auction and the defendant did under a mistake as to the plot put up for sale. Specific performance was refused although the mistake was due to the defendant's fault and not that of the vendor.

2. Conduct of the Plaintiff

The conduct of the plaintiff may disqualify him or her from entitlement to specific performance, which, being an equitable remedy requires that the plaintiff comes to equity with clean hands and must be prepared to do equity.[60] Practically, the plaintiff must have been performed his part of the contract or tendered performance and be prepared to perform his obligations in future.[61]

57. Considered in more detail *infra* Chap.7

58. (1861) 30 Beav.62

59. See discussion of these maxims in Chap.2 *supra* and the effect of conduct on the remedy of injunction, *supra* chap.5

60. (1837) 2 Keen 25

61. *Australian Hardwoods Pty Ltd v. Railways Commissioner* [1961] 1 All E.R.737, 742 P.C.; *Chappel v. Times Newspaper Ltd* [1975] 2 All E.R.233

3. Laches and Acquiescence

Laches and acquiescence on the part of the plaintiff in bringing the action for specific performance may bar the grant of the remedy.[62]

4. Hardship

Specific performance may be refused if the hardship will be caused to either of the parties or a third party.[63] In *Wroth v. Tyler*[64], the defendant contracted to sell property to the plaintiffs for £6,000. The next day, the defendant's wife registered a charge against the property under the Matrimonial Homes Act, 1967, which gave her the right not to be evicted or excluded from the property. She refused to remove the charge and the defendant told the plaintiffs that he could not complete. The plaintiffs sought specific performance or damages in lieu. The property was worth £7,500 at the date fixed for completion and £11,500 at the date of the hearing. The Court refused to order specific performance on the grounds first that specific performance would involve the husband suing his wife to dispose of the charge created by her; second, that the remedy could not be granted subject to the wife's right of occupation as this would lead to the eviction of the husband and daughter with the result that the family, would be split.

5. Misdescription of Subject Matter

Where the property which has been agreed to be sold is incorrectly described in the con tract, this means that the vendor cannot fulfill his promise to transfer property which corresponds exactly with that which he contracted to convey. An example is inaccurate

62. See discussion of the maxim "delay defeats equity", *supra* Chap.2 and delay and acquiescence as a defence to grant of injunction, *supra* Chap.5. See also *Parkin v. Thorold* (1852) 16 Beav.59, 73; *Lindsay Petroleum Co v. Hurd* (1874) L.R.5P.C.221 (delay of 10 years before requesting for vesting of title. Delay without injustice to defendant does not bar the remedy: *Williams v. Greatrx* (1957) 1 WLR 31

63. *Thomas v. Dering* (1837) 1 Keen 729, 7478

64. [1974] Ch.30; Hayton & Marshall, *supra* n.26, pp.966969. See also *Patel v. Ali* [1984] Ch.283, 288

measurement in the plan. Since a misdescription, is a term of the contract, the vendor is regarded as being in breach of contract.

There are two types of misdescription: trivial and substantial. Trivial misdescription is a type which can be ignored or compensated for in damages when specific performance is ordered and where injustice is not occasioned by it. Substantial misdescription is so seri ous that if specific performance is ordered it would effectively force the purchaser to take something wholly different from what he intended. Justice is achieved by allowing the purchaser to rescind or refuse specific performance to the vendor. For instance, a contract is not fulfilled by contracting to sell the Muyenga Plot and then transferring the Ntinda plot.[65]

There are a number of factors which are considered in determining the nature of the misdescription. The major aspect of misdescription is where the subject matter of the contract is different in substance. A mere difference in the quality or quantity of the subject matter is not a sufficient defence to an application for specific performance, if these can be compensated for in damages. Thus in *Flight v. Booth*[66] Tindal C.J. stated that the misdescription is regarded as substantial if it affects,

> the subject matter of the contract that it may be reasonably supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all.

It may, however, be difficult to judge whether the misdescription is one of substance or quantity.

The second consideration is that the purchaser has a right to proceed with the completion of the contract despite the misdescription, but will then become entitled to abatement.[67] Third, the conditions affecting the contract such as restriction on the rescission of the contract and prohibition of claims for compensation

65. See also *Basma v. Weekes* (1950) 12 W.A.C.A.316 P.C.

66. (1834) 1 Bing N.C.370, 377

67. *Mortlock v. Buller* (1804) 10 Ves.Jr.292, 315; *Rutherford v. Acton Adams* [1915] A.C. 866, 870

in the event of misdescription should be examined. The Court will give effect to these provided that they are not inequitable or fraudulent.

Fourth, where the title of the subject matter is defective, specific performance will not be ordered; for instance where the vendor fails effectively to convey to the buyer property which the buyer intended to buy. This may arise literally from the vendor's land being burdened with restrictive covenants[68] or where the vendor has no title to the subject matter. In such cases, the purchaser is entitled to rescind the contract. Finally, misdescription could lead to the award of damages. However, in *Bain v. Fothergill*[69], it was explained that the purchaser is limited to the recovery of his deposit for the purchase of the land and interest thereon, as well as expenses incurred as a result of the transaction. An action for deceit is also possible where the vendor made a misrepresentation.[70]

6. Public Policy

Specific performance will not be ordered if the result would be contrary to public policy.[71] This includes illegal contracts where enforcement necessitates reliance on the illegality.[72]

D. Damages in Lieu or Additional to Specific Performance

1. Jurisdiction

Similar to an injunction[73] damages may be awarded in lieu or in addition to specific performance. It is significant that such damages

68. *Re Nisbett & Botts Contract* [1906] 1 Ch.386
69. (1824) L.R.7H.L.
70. See discussion on misrepresentation *infra* Chap.7
71. *Wroth v. Tyler* discussed *supra* n.65 and text thereof
72. *Tinsley v. Milligan* [1993] 3 All E.R.65. See also Bakibinga, *Law of Contract in Uganda* (Fountain, 2001) Chap.11
73. See detailed discussion *supra* Chap.5. See also Judicature Act, Cap.13, S.33, Magistrates' Courts Act, Cap.16, S.11(2)

are only awarded where the remedy which could have been granted is equitable.[74]

2. Measure of Damages

In contracts for the sale of land, the buyer is entitled only to expenses under the rule in *Bain v. Fothergill*[75], if the breach is caused by a defective title which the vendor cannot rectify. In other cases, the buyer is entitled to full damages for the loss of his bargain. In *Wroth v. Tyler*[76], £5,500 were awarded under Lord Cairn's Act instead of the common law damages of £1,500. If the property has depreciated at the date of the judgment, then less damages will be awarded under the principle in *Wroth v. Tyler (supra)*.

E. Specific Performance and Third Parties

Where the benefit of a contract is assigned to third party or assignee, she/he may apply for an order of specific performance.[77] Specific performance can also be decreed for the benefit of third parties.[78]

74. Lord Cairn's Act 1858 (UK) S.2
75. Discussed *supra* Chap.5
76. *Supra* n.65
77. *Manchester Brewery v. Coombs* [1907] 2 Ch.608
78. *Beswick v. Beswick, supra* n.26

Chapter 7

Other Equitable Remedies

This chapter examines four other major equitable remedies namely, rescission, rectification, delivery up and cancellation of documents and account. While we recognize the other equitable remedy of appointing a receiver or a manager, this is appropriately dealt with in works on partnership[1] and company law[2]

A. Rescission

1. Nature and Effect of Rescission

In a situation where the contract is voidable but not void, the contract remains valid but may be rescinded.[3]

Rescission arises where a party to the contract expresses by word of mouth in an unequivocal manner that he or she is no longer willing or that she/he refuses to be bound by the contract[4] This puts an end to the contract and restores the parties as between themselves to the position they were in before the contract was entered into.[5] However, it is important that for rescission to take effect, it must be possible to restore the parties to the position they were in before the conclusion of the contract. In other words *restituo in integrum* must be possible.

It is significant that rescission is not a judicial remedy but an act of the party entitled to rescind. Nevertheless, the court may intervene for instance to order an account to be taken of the property which might have passed between the parties. This is in order to ensure that

1. Bakibinga, *Partnership Law in Uganda* (Professional Books Publishers Rep.1997), Chap.5.
2. Bakibinga, *Company Law in Uganda* (Fountain Publishers, Kampala, 2001), chap.18
3. *Clough v. London & North Western Rly Co.* (1871) L.R.7 Exch.26
4. *Abraham Steamship Co. V. Westerville Shipping Co* [1923] A.C.773
5. *Erlanger v. New Sombrero Phosphate Co.* (1878) 3 App.Cas.1218, 1278

the parties are restored to the *status quo* before the contract. In this case, the court normally decides (i) whether the right to rescind was justified and (i) whether the rescission relied upon is effective.

2. Grounds for Rescission

There are four main grounds upon which the remedy of rescission may be based, namely mistake, misrepresentation constructive fraud and non disclosure. These grounds are more exhaustively discussed in works on the law of contract[6]. A brief review of them is, therefore, attempted here.

a) Mistake

i) Common or Mutual Mistake

Rescission may be granted where two parties to a contract are under a common or mutual mistake[7]. In *Sole v. Butcher*[8], it was held that a contract, is liable to be set aside if the parties were under a common misapprehension either as to the facts or their relative and respective rights, provided the misapprehension was fundamental and the party seeking to set it aside was not himself or herself at fault.

The recognised instances of mistake are[9] those where there is a mistake as to: the existence of the subject matter; the identity of the subject matter of the contract; the possibility of performing the contract; the quality of the thing contracted for and the quantity of the subject matter of the contract in terms of weight.[10]

ii) Unilateral Mistake

The remedy of rescission may also be granted where one party to the contract is mistaken as to the person she/he contracted

6. See e.g. Bakibinga, *Law of Contract in Uganda* (Fountain Publishers, Kampala, 2001) Chaps 7, 8 and 9
7. *Huddersfield Banking Co. V. Henry Lister & Son* [1895] 2Ch.273
8. [1950] 1K.B.671, C.A.(E)
9. Bakibinga *supra* n.6 (1996, 1998 Reprint) pp.100112
10. *Bell v. Lever Brothers* [1932] A.C.161

with.[11] Collateral mistake may also manifest itself where one party is mistaken as to the identity of the subject matter of the contract[12] or the terms of the contract.[13]

b) Misrepresentation

A contract which is induced by misrepresentation made either fraudulently or innocently, can be rescinded.

i) Innocent Misrepresentation

Misrepresentation is innocent if the defendant believes in the truth of his assertions even if he has no reasonable ground for his or her belief.[14] However, mere nondisclosure of material facts does not amount to misrepresentation unless the misstatement of facts is so active or partial or fragmentary as to be rendered false by that which is not disclosed.[15]

Equity affords a relief to an injured party even when the innocent misrepresentation is not expressly incorporated in the contract. However, a contract for the sale of goods cannot be rescinded on grounds of misrepresentation once the goods have been or are deemed to have been accepted.[16]

ii) Fraudulent Misrepresentation

Fraudulent misrepresentation occurs when a false representation is made knowingly and intentionally or without belief in its truth, or recklessly without caring whether it be true or false and with the intention that the other party should act on it and has been

11. *Cundy v. Lindsay* (1878) 3 App.Cas.459; *Phillips v. Brooks Ltd* [1919] 2K.B.243; *Lewis v. Averay* [1971] 3 All ER.243; *Ingram v. Little* [1960] 3 All E.R. See generally, Bakibinga, *supra* n.9, pp.106108 where those cases are discussed.
12. *Raffles v. Wichelhaus* (1864) 2H &C906; Bakibinga, *ibid* p.101
13. *Felthouse v. Bindley* (1862) 11 C.B.(NS)869; (1874) L.R.9 Q.B.446; Bakibinga, *ibid* pp 109110
14. *Derry v. Peek* (1889) 14 App.Cas.337; Bakibinga, *ibid* p.133
15. *University of Nigeria, Nsukka v. Turner &Ors* 1968(1) ALR Comm 90; Bakibinga, *ibid*, pp 151153
16. *Ajayi v. Eberu*, 1964 (1) A.L.R. Comm.155; Bakibinga, *ibid*, pp.151153

so acted upon by the other party.[17] Both at law and equity, such misrepresentation renders the contract induced by it voidable and can be rescinded. In *Sule v. Aromire*[18], the defendant advertised for sale by auction a piece of land and the advertisement mentioned that the defendant had obtained judgment of court for the land and gave a copy thereof to the plaintiff showing the plaintiff as the owner. However, the judgment did not in fact relate to the land. The plaintiff bought the land but was unable to obtain possession. He, therefore, sued the defendant for annulment of the conveyance and damages. The court agreed with the defence submission that where there has been a conveyance no rescission is possible unless there is fraud. However, the court rejected the submission that the defendant had hidden nothing and that the principle *caveat emptor* applied. It concluded that if the plaintiff had acted on the faith of a false representation made to him by the defendant, it is no defence for the latter that the plaintiff might have found out the truth if he had made an inquiry. Consequently, the defendant had made a false representation which was a material one and it was designed to, and did put the plaintiff off his guard. The fraudulent misrepresentation entitled the plaintiff to annul or cancel the sale and a refund of the purchase price.

c) Constructive Fraud

Constructive fraud consists of a variety of unconscientious conduct which, if made use of to induce a party to enter into a transaction, may be a ground for rescinding a transaction.

Undue influence is a common example of constructive fraud[19]. Undue influence exists if a party is influenced into a transaction which he does not desire to enter into. The onus of proof of undue influence lies on the party who alleges it.[20] Proof of the exercise of the power of undue influence must be produced and that this actually

17. *Derry v. Peek, supra* n.14; Bakibinga, *ibid* p.133; *Peek v. Gurney* (1873) L.R.6H.L.377; *Horsfall v. Thomas* (1862) 1 H&C.90

18. [1951] 20 N.L.R.20

19. Bakibinga, *supra n. 6 pp.173183*

20. *Johnson v. Maja* (1951) W.A.C.A.290

induced the contract.[21] However, there is a presumption of undue influence in the following relationships[22] which require no proof: parent and child, doctor and patient; solicitor and client, religious minis ter and disciple, teacher and student; trustee and beneficiary, among others. In these cases, the onus is on the defendant or a person in a superior position to rebut the presumption.[23]

A few decided cases illustrate the application of undue influence. In *Johnson v. Williams*[24], a deed of conveyance in which property was conveyed by a patient to her medical adviser, was set aside on the ground that it was obtained from her by undue influence arising from the fact, that the defendant was her medical advisor. In *Taylor v. Brew*[25], a trust deed by which property was conveyed to the settlor's father and solicitor was set aside on the ground that the deed was executed while the settlor was unduly influenced by her parent solicitor. This influenced the execution of the deed. In *William v. Franklin*[26], the respondent bought a piece of land subject to a mortgage from his client, R in 1938 after the latter had unsuccessfully tried to sell it by auction at the same price. The sale was witnessed by two of R's relatives. Later, the respondent entered into possession, improved the property and upon paying off the mortgage debt, the legal estate was transferred to him. The Lagos Executive Development Board decided to acquire the property. The appellant claimed the compensation money on two grounds. First, that there was never a sale to the respondent or alternatively that if there was a sale it should be set aside as it was in breach of the fiduciary duty which the respondent owed to R as his solicitor. The court refused to set aside the sale on the ground that independent legal advice was not in such circumstances an absolute prerequisite to such a transaction. The presence of two members of R's family was sufficient to fulfill

21. *Wingrove v. Wingrove* (1885) 11 P.O.81
22. Bakibinga, *supra* n.6 pp.174176
23. *Ibid* p.177
24. (1935) 2 W.A.C.A.248 (Nigeria)
25. (1942) 2 W.A.C.A.201
26. [1961] 1 All N.L.R.128

the requirement of independent advice. The case shows that it is not in all cases that a transaction would be set aside on the allegation that it was tainted by fraud, undue influence or duress.

d) Nondisclosure of Material Facts

The general rule is that a party to a contract is not under a duty to disclose information relating to a transaction.[27] However, exceptionally nondisclosure may amount to a misrepresentation of material facts inducing a person to enter into a contract.[28] There may also be circumstances of the particular situation which impose a duty to disclose. For instance, contracts *uberrimae fidei* or of utmost good faith such as those of insurance and those involving family arrangements relating to property require full disclosure of relevant facts by the parties thereof.[29]

A limited duty of disclosure also exists in relation to (i) contracts of suretyship or guarantee; (i) sale of land where disclosure of unusual defects of title is required; (ii) exemption clauses which should be drawn to the attention of the other party to the contract[30] compromises[31] situations where a fiduciary relationship exists[32]; statutory disclosure where information relating to promoters, directors and shareholding is required by the Companies Act.[33]

In *Century Insurance Co. Ltd, v Atumiya,*[34] the respondent was insured with the applicant company. When he was asked whether any policy of his had ever been cancelled, he answered negatively. However, he was unaware at the time he completed the proposal form that his previous policy had been cancelled. Later his car was involved in an accident and he claimed under the policy for loss and

27. Bakibinga, *supra* n.6, pp154155
28. *Ibid* pp.155166
29. *Ibid* pp 163166
30. *Ibid* p.84
31. See Bakibinga, *supra* n.2, Chap.17
32. Bakibinga, *supra* n.6 pp173177
33. Cap.110 (Laws of Uganda 2000 Edn) Third Schedule
34. 1966(2) ALR Comm.314

damage. The claim was rejected on the ground of nondisclosure of the cancellation of his previous policy, a fact which the insurance company considered material. The dispute was referred to arbitration, where it was decided that the applicant was liable to pay the respondent since the respondent had no knowledge of the cancellation at the material time. The applicant applied under the Arbitration Act to set aside the award on the ground that it was based on an incorrect proposition of the law. The court rejected the application on the ground that the insurance proposal asked for no more than what a proposer believed to be true could not be avoided on the ground of misrepresentation if the proposer honestly and reasonably believed the statement made to be true.

3. Loss of Right to Rescind

The right to rescind is lost if:[35] (i) the party seeking the rescission has affirmed the contract or acquiesced in it by his conduct[36]; (i) *restituo in integrum* is impossible i.e. where the parties cannot be restored to the position they were in before the conclusion of the contract;[37] (ii) the contract has been completed or executed;[38] a third party has in good faith and for value acquired rights under the contract. For instance where a contract to buy shares in a company is induced by fraud, the defrauded purchaser cannot rescind the contract after the commencement of the windingup of a company. This is because the creditors have acquired an interest in the company's shares[39].

B. Rectification

1. Rationale

There may be a difference or variance between the agreed intention of the parties to a transaction and the document or instrument

35. Bakibinga, *supra* n.6, pp 145153
36. *Taiwo v. Princewell* [1961] 1 All N.L.R.240
37. *Blackburn v.Smith* (1848) 2 Ex.783; *Erlanger* Case *Supra* n.5
38. *Bada v. The Premier Thrift Society* (1938) 14N.L.R.20; *Wilde v. Gibson* (1848) 1 H.L.C.605; 9E.R.897
39. *Oakes v.Turquand* (1867) L.R.2H.L.325

which is intended to express the agreed intention in writing. This justifies the equitable remedy of *rectification,* whose purpose in giving relief is to make the written instrument to conform with the agreed and true intention of the parties to the transaction. In *Lavell Christmas v. Wall*[40], CozenHardy, M.R. indicated that the essence of rectification is to bring the document which was expressed and intended to be in pursuance of a prior agreement into harmony with that prior agreement. The remedy presupposes an antecedent contract. Additionally, there must be proof that by common mistake of the parties the final executed instrument fails to give proper effect to the antecedent contract.

2. Scope and Nature of the Remedy

The rectification remedy may be used to rectify a number of documents including (a) conveyancing documents. Thus in *White v. White*[41], an executed conveyance purported to convey a moiety (portion) only of the real estate, when the agreed intention of the parties was to convey the whole estate. The court ordered rectification of the deed of conveyance to conform with the agreed intention of the parties. Other documents which may be rectified are: (a) leasehold agreements; [42] (b) building contracts,[43] (c) insurance policies;[44] (d) bills of exchange;[45] and marriage settlements. Thus in *Welman v. Welman*[46] Malins, V.C. said that where a marriage settlement or other contract is in improper form and contrary to the intention of the parties, the intention of the parties should be executed by putting the instrument in the form which will effect the intention.

40. (1911) 104 L.T.85
41. (1872) L.R.15 Eq.247
42. *Murray v. Parker* (1854) 19 Beav.305; *Oyadiran v. Baggett* (1962) L.L.R.96
43. *Roberts & Co.Ltd v. L.C.C.* [1961] Ch.555
44. *Motteu x v. London Assurance Co* (1739) 1 Atk.545
45. *Druiff v. Parker* (1868) L.R.S.Eq.131, 139
46. (1880) 15 Ch.D.570

There are, however, documents which cannot be rectified. A will cannot be rectified where there is fraud.[47] However, in Britain[48], a court can order the rectification of a will, if satisfied that it is so expressed that it fails to carry out the testator's intention as a result of either a clerical error[49] or a failure to understand his instructions. Memorandum and articles of association of a company though a contract cannot be rectified by the court.[50] The only remedy is to alter or amend the memorandum and articles in accordance with the Company's Act.[51]

Rectification is limited to the harmonisation of the written document with the intention of the parties. The court cannot alter the intentions or the parties or make a new contract for them. In *Mackenzie V.Coulson*[52]. James, V.C.stated that courts of equity do not rectify contracts. They rectify instruments purporting to have been made in pursuance of the terms of the contract. Therefore, it is necessary for a plaintiff asking for rectification to show that there is a concluded contract antecedent to the instrument sought to be rectified. In *Rose Ltd. V.W.Pim Ltd*[53], though there was mutual mistake as to the meaning of the words used in describing the subject matter of the contract, it was clear that the written contract expressed the oral contract antecedent to the written contract. The court refused to grant rectification as this would amount to the rectification of the intention of the parties. In this vein, where the contract correctly describes the subject matter of the contract but the parties are mistaken as to its value the court would not order rectification[54]. Similarly, misdescription of the subject matter is not a ground for rectification but is a ground for rescission.[55]

47. *Collins v. Elstone* (1893) P.1 at p.4
48. Administration of Justice Act, 1982, S.20
49. *Wordingham v. Royal Exchange Trust Co.Ltd* [1992] Ch.412; [1992] 3 All E.R.204
50. *Scott v. Scott* (1940) Ch.794, 801
51. *Evans v. Chapman* (1902) 86 LT381, 382; Companies Act Cap.110, Ss.7,12
52. (1869) L.R.8 Eq.368, 375
53. [1953] 2 All E.R.739. See also *Tucker v. Bennett* (1888) 38Ch.1, 16.
54. Jegede, *Principles of Equity* (Ethiopie Publishing Corpn, Benin, Nigeria, 1980) p.137
55. *Supra* Chap.6

3. Grounds for Rectification

a) Existence of a Finally Concluded Contract

The plaintiff must establish a finally concluded contract antecedent to the instrument sought to be rectified. In the absence of such contract, there can be no rectification. In *Mackenzie v. Coulson*[56], a claim for rectification based on a slip which was not part of the contract was rejected as the slip merely indicated the terms of the negotiation or mere talk between the parties. In *Rose v. Pim,* Denning L.J. stressed that[57], it is necessary to show that the parties were in complete agreement on the terms of the contract but by an error wrote them down wrongly.

The antecedent agreement need not be legally enforceable,[58] for instance when it is oral when it is required to be in writing.[59]

b) Common Mistake

The grant of rectification depends on proof common mistake of the parties in recording their antecedent agreement.[60]

c) Continuing Intention of the Parties

The concurrent intention of the parties must remain unaltered up to the time of the execution of the document intended to effect the antecedent agreement.[61] To ascertain this intention, the court examines the intention of the parties at the time when the instrument sought to be rectified was executed.[62] For this purpose, the court may look at the outward acts i.e. what the parties said or

56. *Supra* n.52
57. *Supra* n.53 at p.747
58. *Shipley U.D.C. V.Bradford Corporation* [1936] Ch.375, 395
59. *Cradock v.Hunt* [1923] Ch.136
60. *Murray v. Parker, supra* n.42; *Rose v. Pim*, *supra* n.53
61. *Gillespie v. Burch's* (1943) 169 L.T.91, 92
62. *Tucker v. Bennett, supra* n.53; *Murray v. Parker, supra* n.60

wrote to one another before reaching an agreement and compare it with the document they signed.[63]

d) Burden of Proof

The burden of proof lies on the party seeking rectification and a clear and high standard of proof is required[64]. This is because rectification may be solely based on parole evidence in exception to the statutory rule that oral evidence is not generally admissible to vary written instrument.[65]

e) Mistake of Law

Generally, it is only a mistake of fact rather than law which will sustain an action for rectification[66]. Consequently, where the mistake is as to the party's rights under the contract, there is no remedy both at law and equity. In *Napier v. Williams*[67], Warrington J. said that where a lease is drawn in accordance with the intention of the parties, its defect arising from a mistake as to its legal effect is not a ground for rectification. However, rectification may be ordered where the mistake arises from the legal effect of the words used, that is, where the parties intended the same legal effect but that they used words or language whose legal effect did not conform with their intent.[68]

f) Unilateral Mistake

The general rule is that rectification is not granted for unilateral mistake. There is unilateral mistake where the plaintiff is mistaken and the defendant is wholly and completely innocent. To this general rule are three main exceptions. First rectification will be ordered where one of the parties to the instrument sought to be

63. *Rose v. Pim, supra* n.53 at p.747, per Denning, L.J. See also *Oyadiran v. Bagett, supra* n.42; *Olubowale v. Manuki,* (1971) U.I.L.R.145 (Nigeria); *Whiteside v. Whiteside* [1950] Ch.65, 76

64. *Crane v. Hegeman Harris Co. Inc* [1939] 1 All E.R.662

65. Evidence Act Cap.6, S.92 (Uganda); *Murray v. Parker, supra* n.60 *Oyadiran v. Bagett, supra* n.42

66. *Midland G.W. Rly v. Johnson* (1858) 8 H.L.C.798; 10E.R.1059

67. [1911] 1Ch.361, 367

68. *Whiteside v. Whiteside, supra* n.63

rectified is mistaken and the other party is fraudulent.[69] Second, rectification may be granted to a party seeking it, if he can show beyond reasonable doubt that he believed a particular term to be in the contract and the other party concluded the contract with the variation or omission of that term in the knowledge that the other party believed it to be included. Thus in *Roberts & Co. V.L.C.C*[70], the defendant company agreed to erect a school for the defendant. The parties agreed that the building would be completed in 18 months. However, the contract, which was submitted to and executed by the plaintiff contained a completion period of 30 months which the officials of the defendant had substituted for the agreed period of 18 months. The substitution was not notified to the plaintiff before the execution of the contract. Later when the plaintiff learnt that the defendant was working on the basis of a 30 months period, they brought an action for the rectification, which was granted. It has been submitted that[71] the principle of this case is based on estoppel. The defendant was precluded from denying the mistake brought about by it.

Thirdly, in a case of unilateral mistake, the defendant who is resisting rectification may be put to his election either to submit to rectification or to have the agreement annulled. Thus in *Paget v. Marshall*[72], the plaintiff agreed to lease a portion of a block of 3 houses to the defendant at a rent of £500 per annum. The block was to consist of the first, second, third and fourth floors of the 3 houses. The defendant wrote accepting the offer and the lease was executed. The plaintiff alleged that the first floor of the houses had been included in the offer and the lease by mistake. The defendant denied that he accepted the offer and ex ecuted the lease under mistake. The evidence before the court was insufficient to establish a common mistake, upon which rectification could be based. However, it was clear that the plaintiff was mistaken. It was held that the contract was liable to be annulled but the defendant could

69. *Clarke v. Girdwood* (1877) 7Ch.D.9.C.A.

70. *Supra*, n.43

71. Snell, *Principles of Equity* (25th Ed) p.569

72. (1885) 28 Ch.D.255

choose to have the lease rectified or to abandon it altogether. The court's objective was to put the parties into the position they would have been in if the mistake had not happened.[73]

It is notable that although rescission was the appropriate remedy, the court was concerned with the justice of the case. Therefore, it decided to give the defendant an option of either rectification or rescission.[74] It has been observed[75] that the case is a deviation from both principle and logic. However, the decision was just and shows that where principle does not accord with justice, justice prevails.

4. Refusal of Remedy of Rectification

a) Contract Incapable of Performance

The remedy of rectification will be refused where the contract is no longer capable of performance.[76] This is based on the equitable principle that equity does not act in vain. The remedy will also be refused where a *bona fide* purchaser for value without notice of the contract has acquired interest in the subject matter of the contract[77]

b) Convenient Way of Reconciling Agreement With Written Instrument

Rectification will be refused if there is a more convenient way of ensuring that an agreement accords with the written instrument. For instance, where there is a collateral agreement whose enforcement would cure the same defects as those sought to be cured in the main contract.[78] In such a case, rectification carried out between the parties is also a bar to rectification.[79] Third, rectification will be refused if the mistake is so apparent and manifest on the face of the instrument that it can be rectified by the application of the usual

73. *Ibid* pp 266267 per Bacon V.C.
74. Jegede, *supra* n.54, pp 1412; *Bloomer v. Spittle* (1872) L.R.13 Eq.427
75. Jegede *ibid* pp1412
76. *Borrowman v. Russel* (1864) 16CBNS58
77. *Smith v. Jones* [1954] 2 All E.R.823
78. *Walker Property Investment Ltd v. Walker* (1947) 177L.T.204
79. *Whiteside v. Whiteside, supra* n.63

rules of construction by the Court.[80] For instance mistakes which may be corrected by the court are those of inadvertent or careless omission or insertion of something or the words in the instrument as a result of disarrangement.[81] In such a situation, the court may, in construing or interpreting the instrument add, substitute, delete or rearrange the words to give effect to the intention of the parties as gathered form the whole instrument as one.[82] It is notable that this represents the distinction between the common law power to correct a patent error on the face of the written instrument and the purely equitable relief of rectification which, as we have seen, requires extrinsic/external evidence to establish the concurrent intention of the parties at the time of the execution of the instrument.[83]

c) Contract Fully Performed

Where the contract has been fully executed, and nothing remains to be done under it, it will not be rectified. This is because there would be no contract to rectify. Thus in *Caird v. Moss*[84], the agreement sought to be rectified had been construed by the court and money had passed between the parties based on the judicial construction. The action for rectification was dismissed on the ground that an attempt to reform a spent agreement and recover money paid under it could not be allowed.[85]

d) Laches and Acquiescence

A claim for rectification may be barred by laches and acquiescence[86]. However, the notice of an error should be given to the plaintiff and time runs from the date of the notice.[87]

80. *Wilson v. Wilson* (1854) H.L.Cs.40
81. *Re Bacharach's W.T* [1959] cH.245
82. *Wilson v. Wilson, supra* n.80; *Re Alexander's Settlement* [1910] Ch.D.225, 229.
83. *Re Follett* [1955] 2 All E.R.22
84. (1886) 33 Ch.D.22
85. *Ibid* pp.3536 per Lindsey, L.J.
86. *Frednsen v. Rothschild* [1941] 1 All E.R..430 (30 years); *Burroughs v. Abbott* [1922] 1 Ch.86; [1921] All E.R.Rep.709 (12 years but rectification granted). *Beale v. Kyte* [1907] 1 Ch.564, 566
87. *Beale v. Kyte, ibid*

C. Delivery Up and Cancellation of Documents

1. Rationale

An order for delivery up and cancellation of documents is based on the equitable jurisdiction founded upon the administration of protective or preventive justice.[88] The basis of the remedy is that it is inequitable that the defendant should be allowed to remain in possession of an apparently valid document. In this regard, there is a risk to the plaintiff that an action may be brought against him based on the document many years later, when the evidence to support his defence may have become difficult or impossible to obtain. Consequently, where a document is voidable, and avoided for fraud, whether actual or constructible delivery up can be ordered.[89] It follows that the court may order delivery up if the document is *functus officio.* Nevertheless, if the document is void at law and the invalidity appears on the face of it and there is no risk of a successful action being based on it, delivery up will not be ordered.[90] However, where the invalidity is not apparent, the court would order delivery up.[91] In *Cooper v. Joel*[92], the defendants claimed benefits of a guarantee under an agreement found to have been obtained by substantial and material misrepresentation. It was held that the agreement was invalid but since the invalidity did not appear on the face of the document, it was ordered to be delivered up.

2. Documents to be Delivered Up

The documents which may be ordered to be delivered up include negotiable instruments,[93] forged documents,[94]policies of insurance,[95]

88. *Story on Equity* (3rd Ed) p.294
89. *Hoare v. Bremridge* (1872) 8 ch.App.22; *Brooking v. Maudslay, Son & Field*, (1888) 38 Ch.D.6363
90. *Gray v. Mathias* (1800) 5 Ves.286; *Simpson v. Lord Howden* (1837) 3 My & Cr.97
91. *Davis v. Duke of Marborough (1819)* 2Swan 108, 157; *Underhill v. Horwood* (1804) 10 Ves.209
92. (1859) 27 Beav 319; 1 De G.F. & J.240; Affd (1859) 1 De & G.F.& J.240
93. *Wynne v. Callander* (1826) 1 Russ 293
94. *Peake v. Highfield* (1826) 1 Russ.559
95. *Bromley v. Holland* (1802) 7 Ves.3; *Kemp v. Pryor* (1802) 7 Ves.237

documents which "form a cloud upon title to land[96] annuity deed,[97] and a forged bread wrapper likely to pass off the bread of the defendant as that of the plaintiffs.[98]

3. Requirements for Delivery Up

For a document to be ordered to be delivered up, it must be wholly void and not merely void and against creditors. In *Ideal Bedding Co.Ltd v. Holland*[99], it was stated that the relief is inappropriate in a case of a deed of settlement made to defraud creditors on the ground that the document is only void as against the creditors. Furthermore, a document will not be ordered to be delivered up where it is alleged that there is a good defence to an action at law, but the document is neither void or voidable.[100]

4. Discretionary Nature of Remedy

Since delivery up and cancellation of documents is an equitable remedy, it will only be granted on terms which would do justice to both parties. This illustrates the maxim that he who seeks equity must do equity.[101] Thus in *Lodge v. National Union Investment Co.Ltd*[102], a borrower gave certain securities to the lender under a money lending contract which was illegal and void under the Moneylenders Act, 1900. The court was only prepared to order delivery up of the securities on terms that the borrower should repay such money borrowed as was outstanding. However, terms cannot be imposed in respect of an unenforceable contract as to do so would be to enforce such contract.[103] Furthermore, in *Adagun v, Fagbola*[104], a member of

96. *Bromley v. Holland Ibid*
97. *Ibid*
98. *De Facto Works Ltd. V. Odumotun Trading Co.* [1959] L.L.R.53
99. [1907] 2Ch.157
100. *Brooking v. Maudslay, Sons Field, supra* n.89
101. Discussed *supra* Chap.2
102. [1907] 1 Ch.300; [19047] All E.R.Rep.333
103. *Kasunmu v. Balsa Egbe* [1959] A.C.539, 549; [1956] 3All E.R.266, 270 P.C. discussed *supra* chap.2
104. (1932) 11 N.L.R.110

the family purported to mortgage the property allotted to him. The mortgage was cancelled at the instance of the family on the ground that he had no alienable interest in the property.

D. Order for an Account

1. Background

At Common Law an action for account could be brought in certain designated cases: against a guardian in socage; a bailiff and receiver;[105] by statute[106]; by one joint tenant or tenant in common against another to compel him to account where he had received more than his or her fair share.[107] However, the common law action which could be an alternative to some other action such as an action in debt, assumpsit or for money had and received was described by Alderson B as.[108]

> so inconvenient that it has been long discontinued and parties have gone into a court of equity in preference.

This was due in part to the difficulty attending the process under the old writ of account, but mainly because of the advantage under courts of equity of compelling a party to account on oath.[109] Nevertheless, the Court of Chancery did not lay down rules as to when it would allow a bill for an account, and when it would leave the plaintiff to his action at law. However, the court acted on the principle that it would not exercise its jurisdiction where the matter could be as fully and conveniently dealt with by a Court of Common Law.[110]

105. *The Earl of Devonshire's Case* (1607) 11 Co Rep.89a

106. Administration of Justice Act 1705, S.27, repealed by Law of Property (Amendment) Act 1924, S.10 & Schedule IV, (UK).

107. *Sutton v. Richardson* (1844) 13M &W17; *Exp Bax* 1751, 2 Ves Sen,388

108. *Sutton v. Richardson, Ibid* p.20

109. *A.G.V. Dublin Corpn* (1827) 1 BLINS 312, 337 per Lord Redesdale

110. *Shepard v. Brown* (1862) 4 Giff 203; *Southampton Dock Co.v. Southampton Harbour & Pier Board* (1870) L.R.11Eq.254; Stoljar 80 LQR 203.

2. Scope

The order of account is normally exercised in the following instances. First, where there are mutual accounts except where they are extremely simple.[111] Second, where there was some confidential relationship between the parties, as between a principal and agent and between partners.[112] In this respect, a principal could maintain an action of account against the agent by reason of the confidence reposed and because the only way of determining the state of the account was by the equitable procedure of discovery.[113] However, the agent had no corresponding right for the facts were within his knowledge and he placed no special confidence in his principal[114]. Third, where the account was so complicated that a court of law would be incompetent to examine it.[115] Fourth where the plaintiff would have had a legal right to have the money ascertained and paid to him by the defendant if the defendant had not wrongfully prevented it from accruing.[116] Fifth in case of waste, an account would be ordered where an injunction was also sought and waste had already been committed, in order to prevent the need for the two actions[117] and in cases of waste not recognised at common law.[118] Sixth an account would be ordered as an incident to an injunction, but, not otherwise in cases of infringement of patent rights.[119]

The courts of Uganda have jurisdiction to order an account.[120]

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111. *Phillips v. Phillips* (1852) 9 Hare 471; *Fluker v. Taylor* (1855) 3 Drew 183
112. See Bakibinga, *Law of Contract in Uganda* (Fountain Publishers, 2001) Chap.12; Bakibinga, *Part nership Law in Uganda* (Professional Books Publishers, Rep.1997) Chap.4
113. *Beaumont v. Voultbee* (1802) 7 Ves.599; *Mackenzie v. Johnson* (1819) 4 Madd 373
114. *Padwick v. Stanley* (1852) 9 Hare 627
115. *Taff Vale Rly Co. V. Nixon* (1847) 1 HL Cas.111
116. *London, Chatham & Dover Rly Co. V. S.E.Rly Co* (1892) 1 Ch.120, 140 C.A Affd [1893] A.C.429 H.L.per Lindlsey L.J.
117. *Jesus College v. Bloom* (1745) 3 Atk.262; *Parrot. Palmer* (1834) 3 My & K632
118. *Duke of Leeds v. Earl of Amherst* (1846) 2 Ph.117
119. *Price's Patent Candle Co. V. Bauwen's Patent Candle,* Co.(1858) 4 K&J.727
120. Judicature Statute, Cap 13, S.33 Magistrates Courts Act, Cap 16, S.9(2).

3. Wilful Default

Apart from the ordinary order for an account, an order may be made for n account on the ground of willful default under which the accounting party is charged not simply with what he or she has received but also with what but for his/her willful default, he/she ought to have received.[121] For this purpose, willful default by a trustee would mean a passive breach of trust, omission of a trustee to do something which as prudent trustee he ought to have done as distinguished from an active breach of trust, that is doing something which the trustee ought not have done.[122]

In order to obtain an account based on willful default, the plaintiff must allege in his/her pleadings and prove, at least one act of willful default[123] although this is not necessary in the case of a mortgagee in possession where an account is ordered on this footing as a matter of course.[124] In granting an account for willful default, the court considers a frank admission by defaulting trustees of an act of willful default. The test, therefore, is whether the past conduct of the trustees is such as to give rise to a reasonable *prima facie* inference that other breaches of trust not yet known to the plaintiff or the court have occurred.[125]

4. Settled Accounts[126]

a) Nature

The plea of settled accounts, sometimes referred to as accounts stated, is a defence to an action of account. Essentially it is a plea that the account between the parties has been agreed for valuable consideration and should not be reexamined. It is available in cases

121. Pettit, *Equity and the Law of Trusts* (Butterworths 7th Ed.1993) pp.655 656
122. *Bartlett v. Barclays Bank Trust Co. Ltd* (No.2) [1980] Ch.515, [1980] 2 All E.R.92
123. *Sleight v. Lawson* (1857) 3 K&J 292.cf. *Re Wells* [1962] 2 All E.R.826
124. *Mayer v. Murray* (1878) 8Ch.D.424; *White v. City of London Brewery* 91889) 42Ch.D.237 C.A.
125 Pettit *supra* n.121; *Re Tebbs* [1976] 2 All E.R.858
126. *Ibid* pp.656658

of mutual debits and credits. As put by Romer J in *Anglo-American Asphalt Co. V. Crowley Russel & Co.*[127]

> Where A owes, or may owe, B money, and B owes , or may owe A money, and in their accounts they strike a balance and agree that balance, that truly represents the financial result of their transactions. There is mutuality in it, and whereas A may be giving up something, for the purpose of settling the matter between them, they expressly or by implication agree to a conventional position which is established by striking a balance, and that results in what is called a settled account. But that has no application to a case..... where the whole accounting is to be rendered by one party to another.

A settled account need not be signed by the parties nor is it required that vouchers should be delivered up.[128] Consequently settled accounts could be orally agreed and proved, though this may be difficult to establish in practice.[129]

Consequently, the normal effect of a plea of settled accounts is to prevent the accounts being reconsidered.[130]

b) Effect of Mistake or Fraud

Settled accounts may, in exceptional circumstances, be reopened on the ground of fraud or mistake[131] with the result that the whole accounts are reconsidered or new ones taken. Alternatively, the court grants the plaintiff the liberty to surcharge and falsify.[132] The court's decision is based on whether the claim is based on fraud or only mistake and whether there is any fiduciary relationship between the parties. The court also considers the number and amount of errors and the time which has elapsed since the accounts were settled.

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127. [1945] 2 All E.R.324, 331. For a contrary view see *Siqueiros v. Noronha* [1934] A.C.332 P.C.

128. *Willis v. Jernean* (1741) 2 Atk 252; *Yourell v. Hibernian Bank* [118] AC.372 H.L.

129. *Phillips Higgins v. Harper* [1954] 1 All E.R.116; affd [1954] 1 All E.R.411, [1954] 2 All E.R.51 C.A.

130. *Darthez v. Lee* (1835) 2Y&C Ex.5

131. *Davis v. Richards & Wallington Industries Ltd* [1991] 2 All E.R563

132. *Pit v. Cholmondeley* (1754) 2Ves, 565, 566 per Hardwick L.C. See also *Allfrey v. Allfrey* (1849) 1 Mac&G87; *Millar v. Craig* (1843) 6 Beav.433

In the absence of fraud, the relationship between the parties is of paramount importance. Although an account may be reopened for mistake alone[133], the *prima facie* remedy is an order to charge and falsify. However, where there is a fiduciary relationship between the parties the court will generally be prepared to reopen the accounts even for mistake.[134]

133. *Pritt v. Clay* (1843) 6 Beav.503

134. *Williamson v. Barbour* (1877) 9 Ch.D.529; *Getting v. Keighly* (1878) 9 Ch.d.547; *Re Webb* [1894] 1 Ch.73 C.A.

Chapter 8

Doctrines of Equity

A. Introduction

This chapter discusses three principal doctrines of equity, namely election, satisfaction and performance. The doctrine of conversion which is considered in some texts of equity originating in England is of little practical importance in Uganda and has in fact also declined in England through statutory restriction.[1] It may, theoretically, be significant in the context of section 26 of the Partnership Act[2] which provides that where land or any interest therein has become partnership property, in the absence of any contrary expression or a contrary intention it is to be treated as personality not only as between the partners (including the representatives of a deceased partner) but also as between the beneficiaries who are entitled in the real and personal estate of a deceased partner. The aim is obviously to achieve the various purposes of a partnership property among the partners. Furthermore, the doc trine of conversion may be significant where a person has died intestate and it is necessary to apportion his or her estate among his children, wives, dependants and customary heir.[3] Any real property held by the deceased may therefore be converted into personality for that purpose. Finally it is significant where the trust instrument specifically directs conversion as in the case of a trust for sale or under the rule in *Lord Dartmouth v. Howe*[4]. The duty to convert under that rule is conditioned upon [5](i) creation a trust by will (i) there being at least two beneficiaries; (ii)

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1. Administration of Estates Act 1925, Ss.33, 45, 46
2. Cap.114 Laws of Uganda 2000 Edn. See also *Attorney General v. Hubbuck* (1884) 13 Q.B.D.275. Discussed *supra* Chap.2 under the maxim "Equality is Equity".
3. Succession Act, Cap.162, S.27
4. (1802) 7 Ves.137; Sheridan (1952) 16 Conv.(N.S.) 349.
5. See Parker & Mellows, *The Modern Law of Trusts* (7th Ed., Sweet & Maxwell, 1998) pp.57678

the property consisting of residuary personality; (iv) the fact that the asset is wasting, reversionary or of an unauthorized character and (v) there being no contrary intention in the will.[6]

B. Election

1. Nature

The essence of the doctrine of election is that a person may not take a benefit and reject an associated burden or a person should not choose between parts of a single transaction. Alternatively, that a volunteer who takes a bequest under a will must give effect so far as is possible to everything contained in the will. The principle also applies to gifts under deeds. For instance if D gives property to B over which A has rights and as part of the same transaction gives other property to A, A cannot take the bequest to himself or herself without executing the bequest to B.

In *Re Edwards,*[7] Jenkins L.J. stated that[8] the essentials of election are that there should be (i) an intention on the part of the testator or testatrix to dispose of certain property; (i) that the property should not in fact be the testator's or testatrix's own property, (ii) that a benefit should be given by the will to the true owner of the property. For instance, if A is the owner of a plot at Muyenga in Kampala and T in his or her will devises that plot to B and then bequeaths shs 10 million to A, A is put to his or her election. He or she can choose to take with the will or against the will. If A takes *with* the will, he or she will release the Muyenga Plot to B and get his or her shs 10 million. If A takes against the will he or she will retain the Muyenga Plot but the shs 10 million will be subject to an equity in B to claim compensation out of it to the extent of the value of the Muyenga plot. If the plot is worth shs 12 million, B will take shs 10 million.

6. *ReSewell's Estate* (1870) L.R.1 Eq.80
7. [1958] Ch.168 C.A.
8. *Ibid* p.175

2. Requirements for Election

a) The Intention to Dispose of Property

Jenkins L.J. in the case of *Re Edwards*[9] talks of an intention to "dispose of certain property" but not "another's property". Consequently, the issue as to whether the testator realized or not that the property is his or hers to dispose of is irrelevant. The testator is presumed to know what his or her interest is in the property he or she is giving away. External evidence is not admissible to support or rebut an election. The equity of election arises because of the very coexistence of two particular gifts in the same instrument, not because of presumed intention.[10] Consequently, the first requirement of election is that it should appear from the will itself that the testator was purporting to dispose of property which was not in fact his or hers to dispose of[10a]. To this general proposition are two main exceptions. First, the disposition will not, as a matter of construction of the will, be construed as including another's property if it has a sensible effect when construed in some other way. For instance, a gift of residue does not normally raise an election as where for example, the bequest is to A for life, remainder in tail to B.[11] Furthermore, clear words of limitation are required to give rise to an election where a testator who had a limited interest in the property purports to dispose of a larger interest. It must therefore, be shown that the latter construction is reasonable. Second, although election operates on the facts existing at the time of the testator's death or at the time the deed is made, the court is entitled to reexamine the disposition to see whether the legacy has ceased to operate because of ademption or disappearance or disposal. For instance, if T devises the Muyenga Plot to B and other property to A and then sells the Muyenga Plot to A and dies without changing his or her will. The sale adeems or destroys the legacy which, therefore, becomes inoperative.

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9. *Ibid*
10. *Cooper v. Cooper* (1874) L.R.7H.L.53
10a. Pettit, *Equity & the Law of Trusts* (7th Ed Butterworths, 1993) pp72829
11. *Drummer v. Pitcher* (1833) 2 Myl & K262; *Re Harris* [1909] 2 Ch.206

b) Property of Another is Disposed Of

The testator must purport to dispose of an interest in the property belonging to another. In this respect four conditions must be satisfied namely, the property must be capable of being alienated, the disposition must not be void, the appointment must not be to an object with a *proviso* in favour of a nonobjective and finally A's title must be independent of the instrument raising the question of election. Each of these conditions is briefly considered below.

i) Property Must Be Capable of Alienation

The property which T purports to dispose of must be alienable by A. If it is not, A does not have to elect. This is because he or she has no choice in the matter which election presupposes. In such a situation, A will take the gift under the will without any obligation attaching to it. Thus in *ReLord Chesham*[12], Chattels were held upon trust to permit them to be enjoyed with settled land of which A was tenant for life. T bequeathed the chattels to B and his residuary estate to A. It was held that A was not put to his election because he had no power to alienate the chattels.

However, election will arise if A is not an absolute owner but has only a limited interest in the property which T has purported to dispose of absolutely. Thus in *Re Dicey*[13], T devised property to A and purported to dispose of the entire interest, in other property to B, which was in fact owned (on T's death) as to one halfshare byA and as to one quarter share each by B and C. It was held that A must elect and that in an election to take with the will, the equity of election is satisfied by his release of his property to B so far as he is able and a release of his halfshare to B thereby making B the owner of three fourths of the share.

12. (1886) 31 Ch.D.466. See also *Brown v. Gregson* [1920] A.C.860
13. [1957] Ch.145 C.A.(E)

ii) Void Disposition

The issue arises as to the effect of a void disposition owing to informality or the rule against perpetuities. One view is that A will be put to an election except where illegality is involved.[14] For this purpose the infringement of the rule against perpetuities is not an illegality. However, in *Re Oliver's Settlement*[15], it was held that infringement of the rule against perpetuities is illegal and would affect the disposition. Consequently, to allow election would be for equity to aid an illegality. However, the majority of academics argue that election should arise irrespective of the rule against perpetuities.[16]

iii) Appointment to Object With Proviso in Favour of Nonobjective

If the testatrix(T) makes a valid appointment in A's favour, but adds a *proviso* in favour of B (a nonobject), there is no election. The *proviso* is ignored and A takes the property appointed to him or her free from any obligation plus any property to which he or she is entitled in default of appointment.[17]

iv) The Title of the Person Put to Election Independent of Instrument Raising Issue of Election

A's interest in the property must be independent of the will which raises the question of putting A to his or her election. For instance if T's gift of his or her own property to B is void for informality or infringement of the rule against perpetuity, then B cannot take. In stead the property goes to A as a residuary beneficiary. In such a case A is not required to elect between the property which T failed to give to B and other property which he or she receives as part of the residue. Thus in *Wollaston v. King*[18], under a marriage settlement, T had a special power of appointment in favour of the children of her

14. *Tomkyns v. Blane* (1860) 28 Beav.422, 428
15. [1905] 1 Ch.191, 197. See also *Re Nash* [1910] 1 Ch.1
16. Gray, *Rule Against Perpetuities* (4th Ed.) Para. 556
17. *Re Nash, supra* n.15
18. (1869) L.R.Eq.165. See also *Re Macartney* [1918] 1Ch.300

marriage. The children were also the persons to take in default of appointment. By her will, T appointed part of the fund to her son, for life and the remainder to her daughters, A. The appointment included a general power of appointment given to the son. The appointments which were made by the son under that power were void for perpetuity. As a result, the property appointed by him was caught by the residuary appointment to the daughters, A. The daughters were also given other property by the testator's will. It was held that the daughters were not put to their election between this property and the windfall which arose from the son's default of appointment. The daughters took the property as a result of the appointment under the testator's will. Their rights arose wholly from the will.

c) Gift of Property to Person Electing

The third requirement for election is that the settlor should in the same instrument have given some property of his or her own to A. The property given to A should be given beneficially and in a form which makes it alienable. This is because the property has to be available to compensate B if A elects to take against the will.[19]

3. Effect of an Election

The property which is the subject of an election by A under Ts will is regarded as being subject to an equitable charge. Consequently, if A dies before electing, his assets devolve so that no one can elect in his or her place. The property given to A under T's will devolves subject to the charge. This means that the property can be claimed by the person entitled to it if B is compensated out of it.[20]

It should be stressed that the benefits which pass by virtue of an election are testamentary in character and what B receives is a testamentary gift. Consequently, if A elects to take with the will, A's prior property becomes part of the Testator's or Testatrix's assets and

19. *Re Vardon's Trusts* (1885) 31 Ch.D.275; *Haynes V. Foster* [1901] 1 Ch.361; *Re Wheatley* (1884) 27 Ch.D.606, 612

20. *Pickersgill v. Rodger* (1877) 5Ch.D.163 at 173 per Jessel M.R.

will be liable for the payment of his or her debts. In *Re Booth*[21], it was held that persons electing to take against the will were respectively bound to make compensation to other persons so electing, as well as to persons who took under the will only, for any disappointment caused by such election, the compensation being limited to the extent of the benefits received under the will by the several persons electing to take against it. Furthermore, that all the compensation so paid to any person electing to take against the will must be included in the benefits received by him or her under the will.

The election may be express or implied (for instance where there is receipt of rent). However, it must be made with the full appreciation of the issues involved[22]. When the election is made, it refers back to the date of the gift. Thus if A elects against the will, the amount of the compensation B receives depends on valuation at the date of T's death.[23]

C. Satisfaction and Performance

1. Definitions

Lord Romilly defined[24] satisfaction as "the donation of a thing with the intention that it is to be taken either wholly or in part in the extinguishment of some prior claim of the donee". Related to this is the meaning of ademption which may affect the effectiveness of satisfaction. Ademption is the disappearance of the subject matter of a specific legacy through its disposal or destruction before the testator's death. Performance is the act which a party has placed himself or herself to do is considered to actually have been done.[25] This is based on the maxim that "equity imputes on intent to fulfill an obligation".

21. [1906] 2 Ch.321
22. *Kidney v. Coussmaker* (1806) 12 Ves.136
23. *Re Hancock* [1905] 1 Ch.16
24. *Lord Chichester v. Coventry* (1867) L.R.2'H.L.71, 95
25. *Sowden v. Sowden* (1785) 1 Cox Eq.Cas.165, 166, per Kenyon, M.R.

Both doctrines of performance and satisfaction are based on intention. However courts tend to rely more on the presumptions as to the party's intentions.

2. Satisfaction of Debts by Legacies

The basic issue is that if a testator or testatrix(T) gives a legacy to a person to whom he or she owes money, can the legatee claim the legacy and the debt? The resolution of this issue in the eyes of equity is based on the intention of the testator or testatrix. This means that if the legacy is expressly said to be given in reduction of the debt, the legacy must be given that effect. Thus in *Hammond v. Smith*[26], the court relied on the intention of the testatrix who had made a proposal that the legacy should extinguish part of the debt owed to the creditor. The creditor did not object to this. However, generally, the issue is decided on the presumption of intention derived from the terms of the will itself. For instance, if a debtor, without mentioning the debt in his will gives a legacy to his creditor, the legacy destroys or swallows up the debt in the sense that the legatee has an option to choose. She/he can choose to get the legacy but if he does so she/he then admits that she/he cannot any longer enforce the debt.[27]

There are, however, exceptions to this presumption, which are briefly considered below. First, the presumption only exists where the debt existed before the making of the will.[28] In this context, the presumption does not apply to a running account such as a trade account.[29] Second the presumption will not apply if the will contains a direction to pay debts.[30] Third, the presumption will only apply if the legacy is in a sum as great or greater than the debt and is in every circumstance as beneficial as the debt. Consequently, there will be no presumption of satisfaction where : (i) the gift by will is of the whole or a share of residue; (i) it is a devise of land or a gift

26. (1864) 33 Beav.452 c.f. *Re Hall* [1918] 1 Ch.562
27. *Thynne V. Glengall* (1848) 2 H.L.C.131
28. *Horlock v. Wiggins* (1888) 39 Ch.D.142
29. *Rawlins v. Powel* (1718) IP. Wms 297
30. *Bradshaw v. Huish* (1889) 43 Ch.D.260

of chattels or unconditionality gift; (ii) it is an unsecured gift where the debt is in fact secured.[31]

In *Re Hawes*[32], there was covenant by the testator made upon the dissolution of marriage, to pay his wife £3 a week, charged upon specific assets. By his will, he gave her an annuity of £3 a week charged on the whole of his estate. It was held that the testamentary annuity was satisfaction of the covenant.

2. Satisfaction of Portion Debts by Legacies: Rule Against Double Portions

It is assumed that in the absence of special circumstances, most parents would wish to share our family capital in equal shares among their children. This, however, is not obligatory. However, equal division could occur unintentionally, where after a parent has made a will for equal division, he or she incurs an obligation to pay a portion or makes a distribution to some of the children during his or her lifetime. In such a case, the maxim "equity leans against double portions" applies and provides for the satisfaction of portion debts by the legacy. Where the distribution is *inter vivos*, it provides for ademption of the legacy by the portion.

Three main issues arise, namely, what is a portion; to whom does satisfaction apply and what is the strength of the presumption. These are considered briefly.

a) Nature of a Portion

For the rule against double portions to apply there must be both an unsatisfied portion debt and a testamentary provision by way of portion. It should be clarified here that ordinary debts between father or mother and child are governed by ordinary rules. What then converts a debt or gift into a portion? The gift must be one made or obligation undertaken by a parent or a child or by one in *loco parentis* to one in his charge with the intent of setting up the

31. *Barret v. Beckford* (1750) 1 Ves.Sen.519
32. [1951] 2 All E.R.928

child in life. Generally, a portion must be substantial although this depends on the wealth of the parent and the age of the child.[33] In this regard, separate sums are not added together to constitute a portion and casual gifts or gifts to discharge debts do not count as portions. There must be an intention to *establish* the child in life and not just to make a gift.[34] For this purpose, the payment of an admission fee to one of the Inns of Court in the case of a child intended for the Bar;[35] the price following a change of career,[36] of a commas soon and outfit of a child entering the army, and following yet another change of career; the price of plant and machinery and other payments for the purpose of starting a child in business have been held to be advancements to children by way of portion. A gift of stocks and shares or a business can also constitute a portion.[37]

b) To Whom Does Satisfaction Apply

The presumptions of satisfaction and ad emption are only applicable where both provisions in issue are made by a child's father or by some other person who stands in *loco parentis* to him or her.[38] In other cases, they only apply where a person acts systematically in relation to a child so as to show an intention of making full provision for the child, for instance the father or mother of an illegitimate child.[39] The presumptions may be difficult to establish in relation to a grandfather/mother[40], uncle[41] or other relative.[42] However in *Pym v. Lockyer*[43], it was held that a wealthy grandfather had placed

33. *Re Hayward* [1957] Ch.528, 540; [1957] 2 All E.R.474, 480 C.A.(E)
34. *Taylor v. Taylor* (1875) L.R.20 Eq.155, 157158 per Jessel M.R.
35. See also *Boyd v. Boyd* (1867) L.R.4 Eq.305 in relation to a premium to a solicitor
36. *Hoskins v. Hoskins* (1706) Prec Ch.263; *Andrew v. Andrew* (1874) 30 L.T.457
37. *Re Lacon* [1891] 2Ch.482
38. *Exp-Pye* (1811) 18 Ves.140; *Powys v. Mansfield* (1837) 3 My&Cr 359
39. *Re Lawes* (1881) 20 Ch.D.81 C.A.
40. *Re Dawson* [1919] Ch.102; [191819] All E.R. Rep.866; *Lyddon v. Ellison* (1854) 19 Beav.565
41. *Powys* Case *supra* n.38
42. *Shudal v. Jekyl*l (1743) 2 Alk 516
43. (1841) 5 Myl&Cr29

himself in *loco parentis* to his grandchildren though their father was still living. In contrast, in *Ojule v. Okoya*[44], the claim of satisfaction failed because the defendants failed to prove that the testator was in *loco parentis* to him in the sense of being bound to maintain him.

c) Strength of Presumption

The presumption in regard to portions is greater in comparison to debts. For instance, in regard to portion of debts a smaller legacy than the portion may constitute satisfaction;[45] while residuary gifts may also constitute satisfaction in relation to portion debts.

The presumption of the rule against double portions can be rebutted by extrinsic evidence or evidence of intention to be found in the will itself.[46] The rules as to the admission of extrinsic evidence are[47] first, the rules apply to both satisfaction and ad emption, second, if the second instrument contains an expression of intention as to whether there is or is not to be satisfaction, parole evidence will be admitted to contradict it;[48] third, if there is no such expression of intention, and no presumption of satisfaction or ad emption, extrinsic evidence will not be admitted to raise a plea of satisfaction or ad emption;[49] fourth, where in the circumstances equity raises a presumption of satisfaction or ad emption, parole evidence is admissible to rebut that presumption and also, in such case counterevidence is admissible to support it.[50]

In Britain, such rules are applicable subject to section 21 of the Administration of Justice Act, 1982 which allows extrinsic evidence including that in relation to the testator's intention, to be admitted to assist in the interpretation of the will where it is meaningless or ambiguous on its face or relative to surrounding circumstances. In

44. [1927 1 All N.L.R.(1) 385
45. *Warren v. Warren* (1783) 1 Broc.c
46. *Re Tussaud's Estate* (1878) 9 Ch.D.363 C.A.(E)
47. *Ibid*
48. *Kirk v. Eddowes* (1844) 3 Hare 509
49. *Re Shields* [1912] 1 Ch.591
50. *Powys v. Mansfield supra* n.38; *Kirk v. Eddowes supra* n.48

Re Blundell[51], it was suggested that the difference between provisions in a settlement and a will concerning people who are entitled to the remainder may be taken as rebutting the presumption of satisfaction that is, the presumption against double portions. In that case, by the marriage settlement of his daughter, a father covenanted to pay £5,500 to trustees to be settled on certain trusts for the wife, husband and children, the wife taking the first life interest. Subsequently, by his will, the father gave the wife a share of residue worth more than £5,500 for her separate use absolutely. It was held that there was satisfaction of the wife's life interest, but not of the interests of the other beneficiaries under the settlement.

3. Satisfaction of Portion Debts by Portions

The rules which apply to the satisfaction of portion debts by legacies equally apply to the satisfaction of portion debts by portions.[52]

4. Ademption of Legacies by Portions

The equitable presumption against double portions may adeem a legacy. Essentially, the rule is that a legacy by way of portion is adeemed or ceases to take effect, if after making the will, the legatee actually receives a portion or obtains an enforceable right to receive one for instance by means of a covenant or agreement.

Ademption only applies to portions between a parent and a child or someone in *loco parentis*. Extrinsic evidence may be admitted for this purpose.[53] The presumption in favour of ademption is stronger than the presumption in favour of satisfaction. As already seen[54], the presumption in favour of satisfaction of ordinary debts by legacies may be excluded by small differences between the two while differences must be substantial in order to exclude the presumption

51. [1906] 2 Ch.222

52. See *supra* notes 2632 and text thereof

53. See *supra* notes 4750 and text thereof

54. See supra notes 2651 and text thereof. See also *Lady Thynne v. Glengall, supra* n.27. *Re Tussauds, supra* n.46

of satisfaction of portion debts by legacies. However, with the presumption in favour of ademption, this can only be rebutted by considerable differences.[55]

5. Performance

Performance is closely linked to satisfaction[56], and in earlier cases what presently is referred to as performance was commonly described as satisfaction by implication. In Britain, the doctrine of performance has been curtailed by changes introduced by the law of intestate succession by the property legislation of 1925.[57]

Similar to the doctrine of satisfaction, performance is based on the maxim, "equity imputes an intention to fulfill an obligation". The essence of the doctrine of performance is that where X is bound in equity to do something for Y but leaves the thing undone, equity will in certain circumstances regard something else which X has done as performance of that obligation. Equity regards what has been done as having been done in the performance of an obligation.[58] However, there must be some positive acts on which equity bases its presumption.

Cases of performance fall into two categories. First, where there is a covenant to purchase and settle land and second, where there is a covenant to leave money. Each of these is considered below.

a) Covenant to Purchase and Settle Land

The doctrine of performance, which should be distinguished from the one of part perform ance is firstly connected with covenants in a marriage settlement to lay out money on the purchase of land to be held on the trusts of the settlement. This is illustrated by the leading case on the doctrine, *Lord Lechmere v. Lady Lechmere*[59]. In that

55. *Re Tussaud's Estate ibid; Thynne v. Glengall ibid; Re Varnon* [1906] 95 L.T.48

56. *Scrimes v. Nickle* [1982] 130 D.L.R. (3d)698

57. Pettit, *supra* n.10a

58. *Sowden v. Sowden* (1785) 1 Cox.Eq.165, 166 per Kenyon, M.R.

59. (1733) 3 PWMs 211; 25E.R.673' (1735) Cas Temp Talb 80. See also *Tubbs v. Broadwood* (1831) 2 Russ & M 487

case, upon the marriage of Lord and Lady Lechmere, articles were concluded whereby Lord Lechmere covenanted to lay out, within a year after his marriage and with the consent of the trustees, £30,000 in the purchase of freehold lands in fee simple in possession. The lands, when bought, were to be settled for his use for life, with the remainder, subject to the payment of a jointure to his widow, to his first and other sons in tail male, with the ultimate remainder to Lord Lechmere himself. Lord Lechmere died intestate without issue and without having complied with his covenants. Under the doctrine of conversion, the £30,000 was to be considered as realty and, therefore, devolving on Lord Lechmere's heiratlaw. However, a dispute arose as to whether from that sum there should be subtracted the value of other realty that devolved on the heiratlaw. At the time of the marriage, Lord Lechmere owned estates in fee simple. After the marriage, he bought and contracted to buy more, some in possession and some in reversion. However, he did not seek the trustees' consent for any of those purchases. It was held by Lord Talbot, L.C. that the purchases of and contracts to purchase the estates in *possession* should be regarded as intended as a partial performance of the covenant to lay out the £30,000, although they had not been entered into within a year of marriage nor had the trustees' consent been obtained, nor had the estates been settled. Lord Talbot stated that equity would, despite the difficulties identify the estates as purchased in the performance of the covenant so that their value could be deducted from the sum of money devolving on the heiratlaw. He could not have the estates and their value in addition. However, Lord Talbort declined to treat the purchases of estates in reversion as constituting performance of the covenant which expressly related to estates in possession alone. The estates already owned by Lord Lechmere at the time of the marriage did not also constitute performance of the covenant to purchase after the marriage.

The doctrine of performance also applies to a situation where a covenant is to pay money to trustees to be laid out by them for the purchase of land.[60] The covenantor will still be regarded as wholly

60. *Sowden v. Sowden, supra* n.58

or partially performing the covenant by buying himself or herself land. It also applies to a case where the covenant is to settle property of a certain value.[61] Consequently, purchases which are made after the covenant will be regarded as being in performance. Finally, in this context, the doctrine is restricted to a covenant which can be enforced by those entitled under the settlement to enforce it. It does not assist volunteers.

Equity may regard the property bought in performance as subject to the rights of the ben eficiaries from the time of the purchase. However, if in the meantime, she/he sells or mortgages the land, equity will say that she/he did not mean the purchase to be in the performance of his or her obligation.[62]

b) Covenant to Leave Money

The doctrine of performance is also associated with performance through intestacy. Thus if X covenants that he will leave, by his or her will part of his or her personal estate to Y or that his or her executors shall pay a sum of money to Y, and X dies intestate, under his or her intestacy, Y becomes entitled to a portion of X's personal estate. It should be stressed that Y cannot claim both the agreed sum and the intestate portion. The intestate portion is deemed to be performance or satisfaction of the covenant. This rests on presumed intention. Thus in *Blandy v. Widmore*[63], by marriage articles of A and B, it was agreed that A should leave B £620 by will if B survived him. A died intestate and B became entitled as a result to more than £620. It was held that she had no separate claim for the £620 as the covenant was deemed to have been performed. However, the position is different if the covenant was one which was to be performed during the covenantor's life and not later. Thus in *Oliver v. Brickland*[64], A covenanted that he would, within two years of marriage pay to B a sum of money. The sum taken by B on A's intestacy some years later

61. *Deacon v. Smith* (1746) 3Alk.323
62. *Ibid*
63. (1716) 1 Paws 324; 2 Vern.709; 24 E.R.408
64. (1732) 3 Atk.420; 1 Ves Sen 1; 27E.R.851

was held not to amount to the performance of A's obligation, which was judged to have been broken.

The rule will also apply where the covenantor makes a will in accordance with the covenant, but the legacies under the will fail to take effect, so that the property descends on intestacy and the covenantee becomes entitled to a share under the intestacy rules.[65]

65. *Goldsmid V. Goldsmid* (1818)1 Swans 211; *ReHall* [1918] 1 Ch.562

Chapter 9

Nature and Classification of the Trust

A. Concept of a Trust

A trust has been defined[1] as a relationship which is recognised by equity. It arises where property is vested in a person or persons known as trustees which those trustees are under a duty to hold for the benefit of other persons known as *cestuis que trust* or beneficiaries.

The interests of the beneficiaries are normally described in the instrument creating the trust. However, these may be implied or imposed by law. It is also notable that the ben eficiary's interest is proprietary in the sense that it can be bought or sold, given away or disposed of by will. It ceases to exist where the legal estate in the property passes to a *bona fide* purchaser for value of the legal estate without notice of the trust.[2]

It is significant that the subject matter of the trust must be some form of property. Normally this takes the form of legal ownership of land or of invested funds.[3] However, it may be any sort of property such as land, money, chattels, equitable interests and choses in action.

B. Trust Distinguished From Other Legal Relations

1. Agency

In some respects, the relationship between a principal and agent is similar to the one between a beneficiary and trustee. For instance, similar to trustees, agents must act personally in agency transactions. In additional, agents are accountable to their principals just as trustees are to the beneficiaries for any profits made out of the property

1. Keeton, *Law of Trusts* (10th Edn). P.5 for definitional problems see pp46
2. *Pillcher v. Rawlins* (1872) L.R.7 Ch.App.259
3. See further Trustees Act Cap.164, Ss. 311

or business entrusted to them. In both cases, the relationship is fiduciary. Nevertheless, there are differences between agency and the trust. First, a trust is proprietary. Where an agent owes money to a principal, it may be recovered from him personally. However, if the agent is insolvent the rules of insolvency[4] become applicable in that the principal's claim will be subject thereto. This means that if the agent has no assets whatsoever, the principal loses.[5] With a trust, the beneficiary's claim is proprietary in the sense that property held by the defendant trustee is not available to meet his debts. Conversely, if the trustee owes someone money, that money cannot be recovered from the trust property. It follows, however, that where the trustee disposes of trust property, the beneficiary can claim and recover it if it is identifiable through the remedy of tracing.[6] In this respect, it is notable that the property for which an agent is liable to account to his principal is only subject to a personal claim against the agent. Consequently, the remedy of tracing is not available to the principal.[7]

Second, usually there exists a contractual relationship between a principal and an agent. This need not be the case between a trustee and a beneficiary. Third, many rules relating to a principal and an agent are common law in character, while the trust relationship is solely equitable.

2. Bailment

Bailment is a relationship which is recognised by the common law. It arises where a chattel owned by X is with X's permission in the possession of Y.[8] The rights of parties to a bailment may or may not be governed by contract. Bailment entails certain standards of care

4. See Bankruptcy Act, 71. In case of companies see Companies Act, Cap.110, Parts V,VI and IX.

5. Bankruptcy Act, Cap.67, Ss.356, 63, Companies Act. Cap.110, S.315. See also, Ezejiofor, *et al Nigerian Business Law,* pp.475478

6. *Re Hallet's Estate* (1880) 13 Ch,D.696. See also *infra* Chap.18

7. *Lister v. Stubbs* [1890] 45 Ch.D.1 For detailed discussions. See *infra* Chap. 15

8. Keeton, *op.cit* pp.1213

by Y in his custody of X's chattel. Bailment differ from the trust in the following respects. First, there is no transfer of ownership from X to Y whereas there is such transfer of ownership from a settlor to a trustee. Second, Y's duties under a bailment depend on common law rules and not on equity. Third, bailor X could lose his legal ownership of the bailed article only through one of the ways in which legal owners lose rights e.g. estoppel, the operation of the Factors Act, 1899[9], and the Sale of Goods Act [10] and Laws[11] relating to sales by agent, under special powers of court, by pledgee, by carrier of perishable goods as agent of necessity; by an executor or administrator, in market overt; under voidable title; by seller and buyer, in possession. In contrast, if property is held by Y on trust for X, X's equitable title can only be defeated by the transfer of the legal title to a *bona fide* purchaser for value without notice of the trust[12]. Fourth, a trust may exist in respect of all kinds of property, but bailment is restricted to chattels.

3. Contract

A contract is a common law personal obligation which arises from agreement between the relevant parties, supported by consideration on the part of the promisee. On the other hand, a trust is an equitable proprietary relation which can arise independently of agreement or the provision of consideration.

The distinction between a trust and contract may be difficult to draw in the following circumstances. First, with regard to settlements and covenants to settle. Where the property is vested in trustees of a settlement, it is held upon the trusts of the settlement. Consequently, the beneficiaries are owners in equity of their interests under the settlement. However, if the property has not yet been transferred to the trustees and is simply subject to a covenant to settle, the

9. Keeton, *op.cit.* pp.1213

10. Cap.82, Ss.2327

11. See also Igweike, *Nigerian Commercial Law* (St.Hanbal, Lahore, 1980) pp.148166; Achike, *Commercial Law in Nigeria* (Fourth Dimension 1983) pp.199217

12. *Pilcher v. Rawlins, supra* n.2

beneficiaries will only be able to enforce the covenant if they have given consideration. This is based on the maxim that equity will not assist a volunteer. Second is the controversy[13] as to whether the problem or the inability by a third party to sue on a contract made for his benefit can be resolved by implying that one of the parties to the contract contracted as trustee for him. It has been suggested[14] that the issue here is not one of distinction between a trust and contract. Rather it is one of whether there is a trust of the promise, under the contract. This is resolved by looking at the rules relating to the creation of express trusts and determining whether there is an intention to create a trust of the promisee.[15]

Third is the case of unincorporated associations. An unincorporated association is not a legal entity. Where therefore, a gift is made to an Unincorporated Association, there is usually doubt as to whether the property is held by the donees on trust for the members of the association or for the purposes of the association, subject to members' contractual rights as evidenced by the constitution governing their relationship.

There are also statutory exceptions to the rule that only a party to the contract can sue upon it. For instance, Section 81 of the Property and Conveyancing Laws of Bendel, Ogun, Ondo and Oyo States[16] of Nigeria provides that "a person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument." Property has been defined to include things in action.[17]

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13. See Keeton, op.cit.pp.612. See now *Beswick v. Beswick* [1968] A.C.58. See also *Tweddle v. Atkinson* (1861) 30L. J.Q.B.265.

14. Keeton, *ibid* p.12

15. *Fletcher v. Fletcher* (1844) 4 Hare 87; 14 L.J.Ch.66

16. Reenacting Property & Conveyancing Law (W.R.N.1959, Cap.100) based on the English Law of Property Act, 1925.Based on the English Law of Property Act, 1925. There is no corresponding of provision in Uganda.

17. Income Tax Act, Cap.340, S.20

The effect of the section is "to allow a nonexecuting party to enforce the agreement[18]. Professor Marshall adds:[19]

> Majority opinion is that the section does not create third party rights: it merely enables rights created independently of it to be enforced. Before the Section can come to his aid the third party must show that the agreement was made with him and did not merely confer a benefit on him.

Under Section 11 of the Married Women's Property Act, 1882, policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband or of her children or of her husband and children or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured or be subject to his or her debts....."

4. Debt

A debt differs from a trust in the following respects. First, a debt may or may not be contractual and the duty of the debtor is to repay money to the creditor. In contrast a trust need not be contractual and the duty of a trustee is to hold trust property on trust for the beneficiary. Second, while the debtor's obligation like that of an agent[20] is personal, the trust is proprietary. Third, a trustee should, where possible, use trust funds in income bearing investments and account to the beneficiaries for the income. With a debtor such obligation is unnecessary except in so far as provided for in an

18. Nathan & Marshall, *A Case book on Trust* (5th Ed), p.13 commenting on Section 56 of the English Law of Property Act, 1925, which is in *pari materia* with Section 81. See also *Beswick v. Beswick,* supra n.13

19. Previously applicable in Uganda but now no longer applicable: Judicature Act, Cap.13, S.14(2)

20. See discussion on agency *supra*

agreement either expressly or impliedly.[21] Fourth, if the money which is borrowed is stolen from the borrower, he is still under an obligation to repay it. However, with a trust a trustee is not liable for loss which is not attributable to his negligence.[22] In addition, where a testator has attached obligations to a legacy, they must be fully carried out, if they are personal. However, if the obligations are subject to a trust or charge, they need only be carried out to the extent of the property available for their fulfillment.[23]

The words in an instrument may be employed in such a way as to create both personal and trust obligations. Consequently, it is possible for a debt and trust to coexist. In *Barclays Bank Ltd. V. Quistclose Investments Ltd*.[24], it was held that a loan to be held by the borrower on trust is repayable if the purpose for which the money was lent is carried out and may be held on trust for the lender if performance is impossible.

5. Conditions and Charges

Difficulties may arise in determining whether a gift of property is subject to a trust or whether it is conditional upon or charged with duty to make certain payments.[25] For instance a bequest to A "but to pay shs500 to B". This may give rise to a number of interpretations.[26] The first is that this amounts to a gift to A upon trust to pay B. This means that B is immediately entitled to the shs500, subject to the value of the property. The second approach is that the gift to A is conditional upon his performing an obligation. In such a case B obtains no interest in the shs500.[27] Consequently,

21. *Potters v. Loppert* [1973) Ch.399
22. *Morley v. Morley* (1678) 2Ch.Cas.2; 22E.R.817
23. *Rees v. Engleback* (1871) L.R.12 Eg.225; *Re Cowley* (1885) 65 L.T.494; *Re Lester* [1942] Ch.324
24. [1970] A.C.567. See also *infra* Chap.14 on resulting trusts.
25. For a good illustration see *Re Frame* [1939] 2 All E.R.865
26. Hanbury & Maudsley, *Modern Equity* (9th) p.89
27. See *AG v. The Cordwainer's Co.* (1863) 40E.R.208, Nathan & Marshall, *op.cit.* n.18, pp.4244

A has the choice of keeping the property and paying the shs 500 or declining both. Thirdly the bequest may be construed as imposing a charge on the property. In such a situation A will only be under a duty to B if he receives the property. His obligation will be limited to the value of the property. Thus in ***Re Cowley***[28] a testator gave all his interest in certain leasehold premises to his son, subject to payment of all his debts, funeral and testamentary expenses. The son accepted the bequest and it was held that he must be deemed to have accepted it but was not personally liable to pay the debts, funeral or testamentary expenses. A is, however, entitled to retain the surplus after meeting the payment to B. In *Re Oliver*[29], the testator gave his real estate at North and South Collingham and his residuary estate to this nephew. He later referred to the legacies as "charged on my Collingham Estate." It was held that the words, "he also paying there out the following legacies..." would by themselves have been apt to create a trust, but as the testator referred to the legacies as "charged" on the Collingham estate, a charge only and not a trust was created. The nephew was not, however, liable to account for the back rents and profits.

It is significant that B in the example above, similar to the position under a trust, acquires an equitable interest arising from the charge[30] which can only be displaced by a bonafide purchaser for value of the legal estate without notice. It is suggested,[31] though, that this interest is different from one of a beneficiary under the trust.

Finally, the bequest may be interpreted to impose a personal duty on A, if he accepts the gift. This means that A is in the position of a debtor.[32]

28. (1885) 53L.T.494
29. (1890) 62L.T.533
30. *Parker v. Judkin* [1931] 1ch.475
31. Hanbury & Maudsley, *op.cit* p.90
32. See discussion, *supra* relating to a debt and *Re Lester, supra* n.23

6. Office of Personal Representative

The relationship of the executor/administrator to beneficiaries is not necessarily the same as that of a trustee and *cestui que trust*[33]. The provisions of the Trustees Act[34] apply to both the personal representative [35] and trustee. Nevertheless, there are similarities between the two. Additionally, most of the powers of trustees can be exercised by personal representatives. By Section 1 of the Trustees Act [36]a trust is defined to include the duties incident to the office of personal representatives.

However, there are some differences between a trustee and personal representative. First, whereas the basic duty of a personal representative is to distribute the estate, that of a trustee is to hold trust property. Second, the authority of trustees is invariably joint. That of personal representatives is joint in respect of land, but joint and several in respect of pure personality. This means that one of several personal representatives may dispose of pure personality. This is not possible with a single trustee appointed with other trustees.[37]

Third, the provisions of the Trustees Act, relating to the appointment and retirement of trustees do not apply to personal representatives. Fourth, the period of limitation with regard to actions against trustees and personal representatives is generally the same (6 years). However, limitation in regard to personal representatives relating to actions for claims to the personal estate of a deceased person is twelve years.[38] Nevertheless, where a trustee or personal representative is fraudulent there is no limitation period. It is notable that a person may be appointed both a trustee and personal representative.

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33. *Adeniji v. Probate Registrar* 1968 NMLR 125.
34. Cap.164, S.1
35. See Trustees Act, Cap.164, Ss.1225
36. *Ibid*
37. See *Attenborough v. Salmon* [1913] A.C.76; *Harvell v. Foster* [1954] 2 Q.B.367; *Re Cockburn's Will & Trusts* {1957} Ch.438
38. See Limitation Act Cap.80, S.20

7. Power of Appointment

Power is defined[39] as "an authority to dispose of some interest in land, but confers no right to enjoyment of the land. A power is the right to dispose of an estate or interest in property rather than ownership of an estate or interest."

The following differences may be made between a power and a trust. First, while a power is discretionary, a trust is imperative. This means that if a person accepts to act as a trustee, he must do as the settlor directs. Second, under a power, the persons amongst whom the appointment is to be made have no right of action against the appointer in the absence of fraud if he does not appoint. However, if property is left on trust for division among certain people, the court would compel its division. Third, the objects of a power need not necessarily be capable of exact ascertainment. With a trust, the objects the trust must be certain. For instance, if property is held on trust for the members of a class, the trust is void for uncertainty except where the class has been described with sufficient precision to enable the trustees (with minimal trouble and expense) to compile a list of all its members throughout the duration of the trust. In contrast, a power would be valid even where no such list can be made. The only requirement of certainty is that a sufficient criterion of class membership should be provided to enable the court to say of any person whether he is an object of the power or not.[40]

There may be instances where powers exist in the nature of a trust. For instance where an instrument purports to give a power, when in fact a trust is really intended. Thus in *Burroughs v. Philcox*[41]. 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 dispose of the property by one of them or to as many of them as my surviving child shall think proper". The

39. Keeton, *op.cit* p.14 adopting the definition of Goodever & Potter in *Law of Real Property,* p.344

40. *Re Gestetner's Settlement* [1953] 1 All E.R.1150; [1953] Ch.672

41. (1840) 5 My &Cr.72. See also *Brown v. Higgs* (1799) 4 Ves 708; 31E.R.366, 700; 32E.R.473,R.290; (180013). All E.R.Rep.146. Nathan & Marshall, *op.cit* pp.3233.

testator's children 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 ben created, subject to a power of selection and distribution. It is significant that where there is a power with a gift over to other persons in default of appointment, this negatives the presumption that there is a trust in favour of persons who are objects of the power. In such a case, the test is whether the testator has shown an intention to benefit the class in any event. In *Re Weekes' Settlement*[42], a woman gave property by will to her husband for life, with power to dispose of it by will among their children. It was 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. Similarly, in *Re Perowne*[43], a testatrix gave her property to her husband for life, "knowing that he will make arrangements for the disposal of my estate, according to my wishes, for the benefit o my family". There was no gift over in default of appointment. The husband died without having validly exercised the power to appoint. It was held that there was no intention to create a trust from the power.

C. Classification of Trusts

Trusts may be classified into the following:

1. Express Trusts

An express trust is one which has been intentionally created by the settlor himself through manifestation of an intention to create one.[44]The most common methods of creation are by deed or will or by unsealed writing *inter vivos* or by word of mouth.

The express trusts may be subdivided into executory and executed trusts, on the one hand, and completely and incompletely constituted trusts, on the other. An executed trust is one in which

42. (1871) 1 Ch.289. See also *Re Coombe* [1925] Ch.210

43. [1951] Ch.785

44. *Soar v. Ashwell* [1893] 2Q.B.390; *Cooks v. Fountain* (1676) 3 Swan 585. See also Keeton, *op.cit* pp.34-36.

the settlor has indicated in appropriate technical terms what interests are to be taken by all the beneficiaries. An executory trust is one in which the settlor has indicated to his trustees a scheme of settlement but the details are to be gathered from his general expressions. The distinction is of practical significance in two respects.[45] Firstly, while the language of an executed trust is strictly construed, an executory trust is liberally construed. Secondly, where in an executed trust, the settlor makes use of technical expressions, the interpretation of which the law recognises certain rules, equity follows the law and gives effect to such interpretation.[46] However, with an executory trust, equity attributes less importance to the use or omission of technical words. Rather it seeks to discover the settlor's true intention. Once the intention is discovered, equity orders the preparation of a final deed which gives effect to the settlor's intention which is discoverable from the language **of the settlor's instrument.**[47]

The distinction between a completely and incompletely constituted trust is necessary in order to distinguish a trust from a void settlement. A trust can only be valid if the title to the property is in the trustee and if the trusts have been validly settled. For instance, a settlement that X holds on trust for Y will be ineffective if the property has not vested in X. The trust only becomes constituted and valid when the property is vested in X. The proper method of effecting a vesting will depend on the nature of the property to be vested. For instance in the case of a trust of land there must be written evidence of the declaration of trust.[48]

2. Implied Trusts

An implied trust is one which the court deduces from the conduct of the parties and circumstances of the transaction. For instance, where a person in return for valuable consideration agrees to settle property for the benefit of another, he immediately becomes a

45. Hanbury & Maudsley, *Modern Equity* (9th Ed.) Pp.9899
46. *Re Bostock's Settlement* [1921] 2 Ch.469
47. *Re Flavell's Will Trusts* [1969] 1 W.L.R.445
48. Registration of Titles Act, Cap.230, S.92

trustee of that property.[49] A trust may be implied even where the formalities for the creation of an express trust are missing. Thus, while a trust concerning land must be manifested and proved in writing,[50] this requirement does not apply to resulting, implied or constructive trusts.[51]

3. Resulting Trusts

These are trusts where property has been transferred to another person, but the beneficial interest returns or results to the transferor. An example is where property is transferred to trustees upon certain trusts, but those trusts do not exhaust the whole beneficial interest. The part which is not disposed of results to the settlor.[52] This may also happen where there is a gift on trust for X for life and then on trust for Y. If Y reaches the age of 18 but Y dies in X's lifetime, the property will result on X's death to the settlor. Similarly, if the property is given on trust to pay Shs.5,000.00 a year to X and on X's death to Y absolutely. If the income turns out to be Shs.10,000.00 a year during X's lifetime, there will be a resulting trust of the surplus Shs. 5,000.00.

A resulting trust arises by operation of law and is distinguishable from an implied trust which is said to be declared by implication in contrast to a resulting trust which arises from "the effect of a rule of equity".[53]

4. Constructive Trusts

These, in contrast to express trusts which arise from acts of the parties, arise by operation of law and thereby "results from the effect

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49. *Bamister v. Banister* [1948] 2All.L.R.133; Re *Llanover Settled Estates* [1926] Ch.826. No doubt an illustration of the maxim that equity regards as done that which ought to be done.

50. See note 48, supra

51. Property and Conveyancing Law, *supra* S.78(2); Statute of Frauds, S.8 *Akwei* (1943) 9 WACA 111.

52. *Re Lanover Settled Trusts, supr*a n.49. See further *infra* Chap.14

53. *Lewin on Trusts* 12th Edn.p.124. Referred to and approved in *Re Llanover Case,* ibid. See also Nathan & Marshall, *op.cit*. P.56

of a rule of equity[54] that in certain circumstances, the legal owner of property must hold it on trust for others.[55] A constructive trust may be resulting or no resulting.[56] Under the Trustees Act[57], the expressions "trust" and "trustee" extend to implied and constructive trusts and to cases where the trustee has a beneficial interest in the trust property....."

Similar to implied trusts,[58] formalities are not required for the creation of a constructive trust. Controversy however exists as to when a constructive trust arises and its nature.[59] Constructive trusts have been nevertheless held to cover (i) the duty of a trustee who has obtained benefits fraudulently; (i) the duty of a transferee from an express trustee. Such a person, except where he got the property from the trustee in good faith (i.e. a bona fide purchaser for value without notice of the trust) will be deemed in law to hold the transferred property on the trusts previously applying to it. In addition, the concept covers (ii) the duty of a trustee who has made a profit out of his office as trustee to hold the profit for the benefit of his beneficiaries,[60] and (iv) the position of a stranger to the trust who meddles with the trust property in such away that equity will regard him as a trustee.[61] The concept also includes (v) the relationship of vendor and purchaser between the signing of the contract and execution of conveyance and (vi) licensees and claimants to a matrimonial home.[62] In the United State of America, the doctrine of constructive trust has been used to prevent unjust enrichment.[63]

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54. *Ibid*. See also *Bannister v. Bannister, supra n.49*
55. *Soar v. Ashwell, supra* n.44; *Cooks v. Fountain, Supra,* n.44
56. *Underhill on Trusts* 8th Ed.p.9 Art.3
57. Section 1
58. See *supra* n.51
59. See e.g. Keeton & sheridan. *The Law of Trusts* (10th Ed.1974) pp.3537; *Re Llanover Settled Estates* spra n.49. See also *infra* Chap.15
60. *Keech v. Sandford* (1726) Sel Cast King 61; *Boardman v. Phipps* [1967] 2 A.C.46; *Industrial Development Consultants v. Cooley* [1972] 1 W.L.R.443.
61. *Selangor United Rubber Estates v. Craddock* [1968] 1 W.L.R.1555; *Re Barney* [1892]. 2 Ch.265; Nathan & Marshall, *op.cit* p.310
62. *Eves v. Eves* [1975] 1W.L.R.1338 (mistress); *Re Densham* [1975] 1W.L.R.1519 (wife); *Binions v. Evans* [1972] Ch.359
63. Hanbury & Maudsley, *Modern Equity* (9th ed.) P.102. See also *infra* Chapter fifteen.

5 Statutory Trusts

The division of trusts into express, and constructive trusts which first appeared in *Cook v. Fountain*[64] has been described[65]. Furthermore, under the Succession Act[66], where a person dies intestate the personal representatives hold the estate on statutory trusts for the issue and certain other classes of relatives of the deceased. In such a situation, by Sections 31 and 32 of the Trustees Act[67], the statutory powers of maintenance and advancement enumerated thereunder relating to the residuary estate of an intestate are also relevant.

6 Public and Private Trusts

Trusts can also be divided into public and private trusts. A public trust is said[68] to be "one which benefits the public at large or some considerable portion of it". An example is the charitable trust. However, due to the technical meaning which the courts have attributed to the term, "charitable", there is now an "important class of public no charitable trusts".

For instance a trust in favour of a political society would be regarded as a public noncharitable trust. A charitable trust "is normally permanent, or at least indefinite, in duration, and its beneficiaries may be a fluctuating and uncertain body."[69] A private trust on the other hand, is one which benefits specific individuals irrespective of whether they are immediately ascertainable and the interests therein defined will fail if they do not vest within the perpetuity period. Private trusts may be enforced by the beneficiaries, whereas a public trust is enforceable by any of the beneficiaries or the Attorney General where it is charitable.

64. (1976) 3 Swans 585, 591. See also Nathan & Marshall, *op.cit* n.18 p.5
65. Keeton & Sheridan, *op.cit* n.59, p.37. Their Emphasis.
66. Cap.162, S.27
67. Cap.164 (Laws of Uganda 2000 Edn)
68. Keeton & Sheridan, *supra* n.59, pp.3839
69. *Ibid*, p.39

Chapter 10

Creation of a Trust

A. Capacity to Create a Trust

The capacity to create a trust is similar to the ability to hold and dispose of a legal equitable interest in property. In this regard, a number of situations may be considered.

1. Minors

A settlement on trust by a minor is voidable in the sense that he can repudiate it during his minority or within a reasonable time of attaining his majority.[1] Such a settlement is, however, only possible in respect of an equitable interest. Since an infant cannot hold legal estate, a settlement of trust in respect of a legal estate is not possible by him [2]

2. Mental Abnormality

Generally, a person who is mentally abnormal cannot create a trust. Under the Trustees Act[3] "The court may direct a settlement to be made of the property of a lunatic or any part thereof or any interest therein, on such trusts and subject to such powers and provisions as the court may deem expedient". The direction may affect property, which has been acquired by the lunatic under a settlement, a will or an intestacy and with a view to protecting interested parties in the event of change in the law of intestacy or circumstances effecting an earlier disposition by the lunatic.

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1. *Edward v. Carter* [1893] A.C.360. The majority age appears to be the same as the contractual age which is 18. Contract Act (Cap.73) S.1(2)
2. Keeton & Sheridan, pp.4849
3. Cap.64, S.50(1) (b)(ii)

3. Married Women

A married woman may create trust of her property [4]. This is an obvious provision in the twentieth century, yet significant given the relatively inferior status attributed to women by African Customs [5]. Even in English Society this trend has historical connotation. In the words of Professors Keeton and Sheridan:[6]

> The progressive emancipation of the married woman from the restrictions impose by the common law upon her capacity to hold and to deal with real property was, until the second part of the nineteenth century, almost exclusively the result of equitable intervention. At common law a wife's chattels became the absolute property of the husband. He also possessed the power to reduce her choses in action into possession; whilst upon the birth of issue, he enjoyed the seizing for life of such present estates of inheritance as his wife might have possessed, as "tenant by courtesy". From the reign of Elizabeth I onwards, however, the Court of Chancery steadily evolved the doctrine of separate estate of the married woman, although it does not seem that this doctrine was applied to real property before the Restoration. In pursuance of this object, the Court of Chancery established that wherever property was given to trustees for the separate use of a married women, she could hold and dispose of it in equity free from her husband's interference, and such property was protected effectually against the husband's debts or other obligations.

4. Companies

Trading companies, which are incorporated under the Companies Act, have an implied power to borrow for the purposes of the company's business.[7]

Normally, this power is used to issue debentures and for the purpose of buttressing the issue the company has power to execute

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4. See Constitution of Uganda, 1995 Art.33 Land Act, Cap.227, S.3
5. D.Momodu, "The victimization of women", *The Guardian Newspaper,* May 12, p.11
6. *Supra* n.2, pp.4748. See also *Jackson v. Hobhouse* (1817) 2 Mer.483
7. See e.g. Schedule 1 Table A, Art.79 Companies Act, Cap.110 which gives directors such power. See also *General Auction Estate and Monetary Co. V. Smith* [1891] 3 Ch.432 Bakibinga, *Company Law in Uganda (2001).* Chap.10

a trust deed[8] by which "after covenanting to repay the loan with interest until payment, assigns to trustees real property or leaseholds belonging to the company, to constitute security for the repayment of the loan, and the trustees undertake to hold the property upon a certain trusts in favour of the debenture holders.[9]

B. Formalities for Creation of Trust

1. Registration of Titles Act

A settlor may create a trust by manifesting an intention to create it.[10] No formalities are required for creation of an *inter vivos* trust of personality. However, evidence in writing is required for the creation of a trust in land. Thus by Section 92 of the Registration of Titles Act[11] any declaration of trust respecting land must be evidenced by a memorandum in writing signed by the party creating the trust.

2. By Will: Secret Trusts

Under Section 50 of the Succession Act[12] all trusts created by testamentary disposition must be executed and attested in accordance with the formalities therein prescribed.[13] These are (i) that the will shall be in writing (i) that it shall be signed at the foot or end thereof by the testator, or some other person in his presence and by his direction, (ii) that the signature be acknowledge by at least two witnesses in writing in the presence of the testator.

The issue arises as to the effect of dispositions which do not comply with the formalities. Although the requirement of formality was intended to prevent fraud, what would happen if the intended trustee hides behind the provisions of the statutes? This could happen

8. Bakibinga, *ibid* p.174
9. Keeton & Sheridan *supra* n.2 p.47
10. *Jones v. Lock* (1865) L.R.I. Ch.App.25
11. Cap.230 Laws of Uganda, 2000 Edn
12. Cap.162 Laws of Uganda 2000 (Edn)
13. See also Keeton & Sheridan, *supra* n.2 p.64

in two instances. First, where the trustee induces the transfer of land to himself by means of an oral promise to hold on trust for the third party. Second, where the legatee or devisee induces the testator to make a disposition in his favour by will relying on an oral promise to hold the gift in trust for a third party. The general view is that equity will not permit a statute to be used as an instrument of fraud.[14] It is this doctrine which is said to be responsible for the growth of equitable principles relating to secret trusts. These principles are traceable from the second half of the seventeenth century in England and begun with the case of *Cook v. Brooking*[15] In that case, the testator bequeathed £1,500 to Simon and Joseph Snow to be disposed of by them on a secret trust which he communicated to Simon. After the testator's death, Simon revealed the secret trust to Joseph. The object of the trust was that if the testator's daughter died in the lifetime of her husband, the money should go to the children or another daughter as the first daughter should direct. The first daughter died in her husband's lifetime. The children of the other daughter claimed as beneficiaries under the verbal secret trust. It was held that since the testator had declared the terms of the trust to Simon in his lifetime, there was a good secret trust although the actual method of distribution among the beneficiaries was uncertain.

In permitting secret trusts it looks initially as if equity is interfering directly with statutory requirements. What then is the justification for such interference? It has been suggested[16] that equity cannot abrogate the requirements of a statute. It only ensures that the statute is not used in an inequitable way. It follows that if the trust is regarded as part of the will, equity will not validate it if it does not fulfill the statutory requirement for the creation of a will. Nonetheless, equity may regard the trust as falling outside testamentary dispositions.[17] Alternatively, the court may regard a

14. Keeton & Sheridan, *ibid*, Nathan & Marshall, *A Casebook on Trusts* (5th Ed.) P.286

15. 2 Vern 50 (1688). See also *Pring v. Pring* 2 Vern 99 (1689); *Padmore v. Gunning* (1836) 7 Sim 644

16 Keeton & Sheridan, *supra n.2 p.65*.

17. *Blackwell v. Blackwell* [1929] A.C.318, 334345 per Lord Sumner. *Jones v. Badley* (1868) L.R.3Ch. App.362, 364 per Lord Cairns

secret trust as unaffected by the Succession Act. It will then proceed to ascertain whether a trust has been created by the testator and accepted by the devisee in such a way as to raise the inference that a court of equity would enforce it as binding on the conscience of the devisee. A peculiar feature of a secret trustee is that he cannot himself be a beneficiary.[18]

Given the nature of a secret trust, the issue also arises as to how it can be classified. Is it express or constructive? It has been suggested[19] that if the secret trust is express, then in so far as it relates to land it must be evidenced in writing in order to comply with the Registration of Titles Act. If it is constructive, then the formal requirements are dispensed with even as regards land. Professor Marshall argues[20] that the fully secret trust is an example of a constructive trust. He adds:

> The court of equity finds the legatee or devisee in possession of the legal title to property and imposes upon him an equitable obligation to hold that legal title on trust for a third party as a result of what has taken place outside the will.

To the suggestion[21] that a half secret trust is express because the legatee is named as a trustee on the face of the will, Professor Marshall counters that the case of *Blackwell v. Blackwell*[22] "equates half secret trusts, within the limits of their validity, to those fully secret, and it is submitted that within those limits, the half secret trust is likewise constructive, so that formal requirements, even as regards land are dispensed with".

Connected with the issue of whether a secret trust is constructive or express is the basis for its enforceability, Professor Maudsley says[23] that this is so because it is enforceable on grounds of fraud.

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18. *Re Rees* [1950] Ch.304
19. Nathan & Marshall, *Supra* n.14, p.285 referring to Section 53 (1)(b) and (2) of the English Law of Property Act, 1925. See also *Re Bailiee* (1886) 2 TLR 660.
20. *Ibid*, p.286. Professor Marshall in fact treats secret trusts under the chapter on constructive trusts
21. Sheridan, "English and Irish Secret Trusts" (1951) 67L.Q.R.314
22. [1929] A.C.318. See also *Stickland v. Aldridge* (1804) 9 Ves Jr.516
23. Hanbury & Maudsely, *Modern Equity* (10th Ed.) P.215

Nonetheless, while a secret trust may arise from the fraud of the legatee, this need not always be the case especially where the testator does not intend to impose an obligation on the executor[24]. Before a secret trust can be declared on ground of the legatee's fraud, it is necessary to convince the court that there has been a fraudulent inducement held out on the part of the apparent beneficiary leading the testator to confide in him the duty to hold on trust.[25] Moreover, the emphasis on fraud may be justifiable in respect of fully secret trusts but perhaps not in cases of half secret trusts[26] (viz. Where the will gives property to a trustee without indicating the terms of the trust).

The normal practice, though, is to base a secret trust on the intention of the testator, which has been communicated and acquiesced in by the legatee.[27] Alternatively, a secret trust may be based upon a trust declared *inter vivos* which is constituted by a testamentary gift to the legatee trustee.[28]

Another relevant aspect is a situation where the settlor discloses to the legatee the existence of a trust but not its terms. In order to prevent fraud on the part of the legatee, he will be taken to hold on trust for the estate of the deceased. Thus in *Re Boyes*[29] a legacy was given to the testator's solicitor. The solicitor undertook to hold the property on direction which he would receive by letter. The letter was discovered after the testator's death. The solicitor accepted that he held as trustee and would carry out the trust. It was held that the trust was to hold in favour of the nextofkin of the testator.

The requirement of communication of the trust to the trustee is crucial to the existence of a secret trust. The trust should be communicated before the testator's death either orally or in

24. *McCormick v. Grogan* (1869) L.R.4H.L.82; Nathan & Marshall *op.cit*. P.286.

25. *Ibid* at p.97 per Lord Westbury

26. Hanbury & Maudsely, *supra* n.23

27. *Blackwell v. Blackwell*, *Supra* n.22. Discussed *infra*

28. *Re Young* [1951] Ch.344; *Banniser v. Banniser* [1948] 2 All E.R.133

29. 1884 26 Ch.D.531. See also *Re Hawkesly's Settlement* [1934]; Ch.384; *Johnson v. Ball* (1851) 5 De G &Sm 85; *Briggs v. Penny* (1851) 3 Mac & G.546; *Nuckleston v. Brown* (1801) 6 Ves.52

writing.[30] The testator may also in his lifetime hand to the legatee a sealed envelope to be opened upon the testator's death.[31] A testator is required to communicate the trust and its terms as well as the property which is the subject matter of the trust. Thus in *Re Colin Cooper*[32], a testator left £5,000 to legatees upon secret trusts, "already communicated to them." In a later codicil, the testator increased the sum to be used for the trust to £10,000 "they knowing my wishes regarding this sum". The testator did not inform the trustees of the new bequest. It was held that while the first installment of £5,000 could be devoted to the secret trust, the addition could not because it was not communicated to them.

A secret trust may create an obligation not only to hold for a beneficiary but also to make a will in his favour. In *Re Gardner* (No.1)[33], a wife left her estate to her husband for life. There was also an agreement that the property should be divided among certain beneficiaries on his death. The husband died intestate. It was held that the husband held the property after his life interest on trust for the beneficiaries. Similarly in *Ottaway v. Norman,*[34] the testator agreed with his house keeper that she should have a bungalow after his death.

She agreed to leave it to the testator's son by will. The testator left the bungalow to her absolutely. She made a will in favour of the testator's son but subsequently altered the will and then died. It was held that the son was entitled to the house upon the secret trust created by his father.

Half Secret Trusts

These arise where under a will property is given expressly on trust but without stating what the trusts are. It is suggested[35] that here,

30. The failure of communication before the testator's death in *Re Boyes, ibid*, was fatal to the intended beneficiary's claim under the trust.
31. *Moss v. Cooper* (1861) 1J.&H.352; *Re Keen* [1937] Ch.236 [1937] 1 All E.R.452.
32. [1939] Ch.586, 811
33. [1920] 2Ch.523. See also *Re Young supra n.28*
34. [1972] Ch.698
35. Hanbury & Maudsley, *op.cit* p.164

there would be no possibility of fraud by the legatee in view of the contents of the will and the express declaration of a trust. Such a declaration destroys the possibility of personal gain on the part of the legatee. In *Moss v. Cooper*[36], it was suggested that mention of the existence of a trust in a will prevented the operation of the doctrine of secret trust. Nevertheless, half secret trusts have been held to be valid since 1929. In *Blackwell v. Blackwell*[37], by a codicil, the testator gave a legacy of £12,000 to legatees upon trust to apply the income, "for the purposes indicated by me to them". The trust was accepted by the legatees before the execution of the codicil. It was held[38] that the trust was enforceable. It was further observed that the secret trust doctrine applied, (i) where there was a gift on trust, (i) where there was no question of fraud in the legatee. In the words of Lord Sumner,[39] a secret trust:

> ..... is a communication of the purpose to the legatee, coupled with acquiescence or promise on his part that removes the matter from the provisions of Wills Act and brings it within the law of trusts, as applied for instance to trustees, who happen also to be legatees....."

The question is whether this rule applies where the trusts are or may be declared in future. It is thought[40] that the rule is inapplicable especially regarding acquiescence where the communication has been made after the will. In this vein Lord Summer thus stated:[41]

> a testator cannot reserve to himself a power of making future unwitnessed dispositions by merely naming a trustee and leaving the purpose of the trust to be supplied afterwards.

Nonetheless, if the enforcement of secret trusts rests on the premise that they operate outside the statutes, then the rules relating to incorporation of terms by reference are irrelevant.[42] Consequently,

36. (1861) 1J&H 352, 367
37. [1929], A.C.318 at pp.339340
38. Following *Re Fleetwood* (1880) 15 Ch.D.694; *Re Huxtable [1902] 2Ch.793*
39. [1929], A.C.318 at pp.339340
40. Hanbury & Maudsley, *op.cit* p.165
41. *Supra n.53* p.339
42. Holdsworth, 1937 L.Q.R.501

what Lord Sumner objected to can be achieved by a fully secret trust.[43] Nevertheless, with half secret trusts, there is a distinction between declaring the trust before and after a will has been made. Thus in *Re Keen*[44], testator gave sum of money to trusts, "to be held upon trust and disposed of by them among such person, persons or charities as may be notified by me to them or either of them during my lifetime". If there was no such notification the money would fall into residue. Sometime before, one of the trustees had been given a sealed envelope containing the name of the beneficiary of the intended trust. The Court of Appeal decided in favour of the residuary legatees, because although the handing over of the sealed envelope was communication of the trust, since this was before the date of the will, it was inconsistent with the terms of the will which pro vided for " a future definition of the trust subsequent to the date of the will". The sealed letter notifying the trust was communicated before the date of the will. Lord Wright further stated in distinguishing *Blackwell v. Blackwell, Re Fleetwood and Re Huxtable* (supra).[45]

> ....[in those cases] the trusts had been specifically declared to some or all of the trustees at or before the execution of the will and the language of the will was consistent with that fact. There was in those cases no reservation of a future power to charge the trusts in whole or in part. Such a power would involve a power to charge a testamentary disposition by an unexecuted codicil and would violate Section 9 of the Wills Act... The trusts referred to but undefined in the will must be described in the will prior to or at least contemporaneously with its execution.....

The view in *Moss v. Cooper*[46] is that it is immaterial whether communication occurred before or after the making of the will.[47]

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43. Hanbury & Maudsley, *op.cit* p.165
44. [1937] Ch.236
45. *Ibid*, pp.246247. See also *Re Bateman's Will Trusts* [1970] 1 W.L.R.1436.c.f. *Moss v. Cooper, supra* n.36
46. *Ibid*
47. See also Keeton & Sheridan, *op.cit* pp.7778

C. Completely and Incompletely Trusts

A trust is said to be completely constituted when the trust property has been finally and completely vested in the trustees. Where this has not been done, the trust is said to be incompletely constituted. Consequently, a mere declaration of an intention to create a trust is insufficient to constitute the trust. Nevertheless all trusts arising under wills are completely constituted notwithstanding the fact that they may be either executed or executory.[48]

The distinction between completely and incompletely constituted trusts is significant with respect to the issue of consideration in the creation of the trust. Where valuable consideration has been given for the creation of the trust, the issue of whether the trust is completely or incompletely constituted is irrelevant since equity regards as done that which ought to be done.[49] Consequently, equity will perfect an imperfect conveyance. However, equity will not perfect an imperfect voluntary trust because equity does not assist a volunteer.[50]

The basic principle applicable in determining whether a trust has ben validly constituted is to be found in *Milroy v. Lord*[51] where Turner L.J. thus stated:[52]

> ... in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide and the provision will then be effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it on trust for those purposes..... but in order to render the settlement binding, one or other of these modes

48. *Ibid* p.82

49. See e.g. *Walsh v. Lonsdale* (1882) 21 Ch.D.9; *Savage v. Sarrough* [1937] 13 N.L.R.141; *Chidiak v. Coker* [1954] 14 W.A.C.A.505; *Ibeziako v. Chinekwe* (1972) 2E.C.S.L.R.71

50 *Ellison v. Ellison* (1802) 6 Ves.656, per Lord Eldon

51. (1862) 4 De G.F.&J.264

52. *Ibid*, p.274. See also *Thompson's Executors v. Yerbuu,* [1936] 1 K.B.645, 664 per Romer L.J.

must, as I understand the law of this court be resorted to for there is no equity in this court to perfect an imperfect gift.

The implication of this statement is that the transfer to trustees must follow the rules which apply to the property concerned. Thus trusts in respect of (i) legal estates in land must be transferred and evidenced in writing signed by the person creating the trust[53]; (i) shares should follow the format of transfer prescribed thereof[54]; (ii) equitable interests and copyrights must be in writing signed by the person disposing of the same[55]; (iv) chattels must be in the form of deed of gift or evidenced by an intention to give, coupled with delivery or possession;[56] (v) a bill of exchange, should be by endorsement thereof.[57] In *Milloy v. Lord*[58], a settlor executed a voluntary deed purporting to transfer shares in the bank of Louisiana to Lord, to be held on trust for the plaintiff. The shares, however, could only be transferred by registration of the name of the transferee in the books of the bank. Lord held a power of attorney on behalf of the settlor and it would have enabled him to take all necessary further steps to obtain registration. However, this was not done. It was held that there was no trust, altshough the intention was clearly to benefit the intended beneficiary. It has been said[59] that the principle embodied in Turner L.J.'s judgment in *Milroy v. Lord*[60] must be accepted with the qualifications introduced in *Re Rose*.[61] In this case by virtue of two transfers dated 30 March, 1943, the deceased, (i) transferred to his wife 10,000 shares in an unlimited company; (i) transferred another 10,000 shares in the same company to trustees to hold upon trusts of a voluntary settlement. The transfers were in the form required by the company's articles, but the articles also gave the directors power to decline to register any transfer. However, the

53. Registration of Titles Act (Cap.230) S.92
54. Companies Act, Cap.110, S.77; 1st Schedule, Table A, Arts 22, 23
55. Copyright Act, Cap.215
56. *Re Cole* (1964) Ch.175
57. Bills of Exchange Act, Cap.68 S.30(4)
58. *Supra* n.51
59. Keeton & Sheridan, *op.cit* p.83
60. *Supra* at n.51
61. [1952] Ch.499 C.A. Nathan & Marshall, *op.cit*. Pp.120125

transfers were stamped on 12 April, 1943 and registered in the books of the company on 30 June, 1943. The deceased died on 16 February, 1947 and it became necessary to determine for estate duty purposes, the effect of these transactions. It was held that since the deceased had done everything in his power by executing the transfer to transfer his legal and beneficial interest in the shares to the transferees, the transferees had become beneficial owners of the shares from 30 March 1943, when the transfers were executed until registration was complete. Consequently, during that time, the transferor was a trustee of the legal title for the transferees. The distinguishing feature between *Milroy v. Lord* and *Re Rose* was aptly stated by Evershed M.R. thus:[62]

> I agree that if a man purporting to transfer property *executes documents which are not apt to effect that purpose*, the court cannot then extract from those documents some quite different transaction and say that they were intended merely to operate as a declaration of trust which *ex facie* they were not; but if a document is apt and proper to transfer the property is, in truth the appropriate way in which the property must be transferred then it does not seem to me to follow from the statement of Turner, L.J. that, as a result, either during some limited period or otherwise, a trust may not arise, for the purpose of giving effect to the transfer.

The principle in *Re Rose*[63] also finds expression in the earlier case of *Re King*[64]. There a settlor wrote a letter to an intending trustee and purported to assign six policies of assurance upon trusts for his children. He sent to the trustee three policies which were then in his possession. He indicated that he intended to execute a trust deed and appoint another trustee. It was held that this was a valid assignment of the policies to the trustee because the settlor had done all in his power to create an effective settlement. Consequently, the settlement was completely constituted irrespective of the no execution of the intended deed. In contrast, *Jefferys v. Jefferys*[65] provides an instance in which there was no effective transfer of property which had

62. *Ibid* p.510. Emphasis supplied
63. *Supra n.61*
64. (1879) 14 Ch.D.179
65. (1841) Cr &Ph.138. See also Keeton & Sheridan, *op.cit* p.84

been voluntarily settled. In that case, a father voluntarily conveyed freeholds to trustees on trusts for the benefit of his daughters. He also covenanted to surrender copyholds to the trustees upon the same trusts. He died without surrendering the copyholds and by his will devised parts of both the freeholds and copyholds to his wife. His daughter applied for the enforcement of the trust. It was held (i) that as far as the freeholds were concerned, the trust was completely constituted and the daughter's title was complete; (i) as far as the copyholds were concerned, the court would not decree their surrender because the trust was incompletely constituted in that the settlor had not transferred them to the trustees nor had he declared himself a trustee of them. He had merely made a voluntary agreement to transfer them which was *nudum pactum* both at law and equity.

The above case shows that a trust is completely constituted in two instances: (i) where the property has been conveyed to trustees or (i) where the settlor declares himself trustee of the property.

1. Transfer of Property to Trustees on Trust

Most of the cases[66] considered above are examples of where a trust was constituted by conveying the property to trustees to be held on trust. It is evident therefrom that all steps must be taken to vest the property in the trustee and the appropriate methods of transfer must be employed[67]. If the intending donor or settlor himself only possesses an equitable interest in the property, it suffices if he transfers that. It is unnecessary that he causes a transfer of the legal estate.[68] Thus in *Kekewich v. Manning,*[69] a testator bequeathed residuary personally to his wife for life and remainder to his daughter absolutely. The daughter as signed the whole of her interest to trustees for the benefit of her nieces. It was held that the trust was valid since the daughter had done all in her power to divest herself of the interest which was

66. *Re Rose,* supra n.61; *Jefferys v. Jefferys* ibid, *Re King Supra* n.64
67. See further *Antrobus v. Smith* (1805) 12 Ves.39
68. *Gilbert v. Overton* (1864) 2 H&M 110, Keeton & Sheridan, *op.cit*.p.85
69. (1851) 1 De GM&G.176

equitable. Similarly, in *Re Bowden*[70], by a voluntary settlement made in 1868,a settlor settled any property to which she may be entitled upon her father's death. She gave the trustees full power to give receipts for the property in her name.

Her father died in 1869. Between 1871 and 1874 the executors of the father's will transferred the settlor's share to trustees of the voluntary settlement. In 1935, the settlor requested that the trustees should transfer the property to her. It was held that the trustees had received the settlor's share impressed with the trusts of the voluntary settlement and since the settlement was completely constituted, the settlor was bound by it and could not revoke it.

2. Declaration of Trust by Settlor

The settlor may declare himself a trustee instead of transferring his property to trustees. In this case if the trust relates to land it must be evidenced in writing[71]. Otherwise the declaration may be oral or inferred from conduct.Any words which clearly express the intention to create the trust will be sufficient and the settler will thereafter be bound, provided the trust is unconditional.[72] Nevertheless, if the attempt to transfer property to another falls, this will not be regarded as a declaration of trust since equity will not construe a void gift as a declaration of trust.[73]

In *Jones v. Lock*,[74] a father was chided for failing to bring a present from Birmingham for his nine month old son. He then produced a £900 cheque payable to himself. He gave it to the child, who was about to tear it up. However, the father took it away and put it in an iron safe.The father died and the cheques was found among his effects. The issue arose as to whether the child was entitled to the cheque or it formed part of the father's estate. Put another way, was the father a trustee of the cheque for the child? It was held that (i) although

70. [1936] Ch.71
71. See *Supra* n.53 and text thereof.
72. Keeton & Sheridan, *op.cit* p.85; *Lady Naas v.Westminister Bank Ltd*. [1940] A.C.366
73. See *Supra* n.50 and text thereof; *Milroy v. Lord, supra* n.51
74. (1865) L.R.1Ch.App.25. See also *Francois v. Bank of West Africa ltd*. 3W.A.L.R.439

he intended to give the cheque to the child, there was no evidence that he intended to declare himself a trustee of it; (i)there was no effective gift and the child took nothing. Furthermore, in *Richards v. Delbridge*[75], a grandfather was entitled to leasehold premises on which he carried on business. He endorsed on the lease a memorandum in the following words: "this deed and all thereto belonging I give to R (a minor) from this time forth with all the stockintrade" He delivered the document to R's mother and then died. He, however, made no mention of this property in his will. It was held that no interest passed to R because at law, the endorsement was ineffective to assign a lease and in equity the words used were inappropriate for a declaration of a trust. In contrast, in *Middleton v. Pollock,*[76] a client placed in the hands of her solicitor a sum or money for investment. The solicitor did not invest the money and died insolvent. However, among his papers was written declaration of trust in the client's favour of certain leaseholds and other property. It was held that there was a valid declaration of trust in favour of the client.

3. Covenants to Settle

It would appear from the preceding discussion that if a settlor has neither conveyed property to trustees nor declared himself a trustee, no trust is created. However, if he has agreed or covenanted to settle his property, the issue arises as to whether or not the intended beneficiary can force or compel him to carry out the covenant and settle it. It appears that a beneficiary who has supplied consideration can compel the execution of the settlement. However, a beneficiary who has not furnished consideration, cannot enforce the covenant since equity will not assist a volunteer.

The issue then arises as to what constitutes consideration in this context. It has been suggested[77] that valuable consideration in the law of trusts, similar to the law of contract "is some valuable thing

75 (1874) L.R.18 Eq. See also *Milroy v. Lord, supra* n.51; *Re Rose, Supra* n.61 & Marshall, *op.cit*.pp.128130

76. (1876) 2 Ch.D.104

77. Keeton & Sheridan, *op.cit*.p.85

assessable in terms of money, with the proviso that marriage and also forbearance to sue are so considered.... "It follows that where a settlement is made before and in consideration of marriage, it is regarded as having been made for valuable consideration. What then is the scope of this type of consideration? It was held in *De Mestre v. West*[78] that only persons within the marriage consideration are the actual parties: the husband, the wife and the issue of that marriage. However, "exceptionally and perhaps doubtfully, children of a former marriage or a possible second marriage or even illegitimate children may come within a marriage consideration if their interests are inseparable from those of the issue of the marriage."[79] All other persons are regarded as volunteers and consequently cannot enforce the provisions of a settlement as against the settlor. Thus in *Re Plumptre's Marriage Settlement*[80], upon their marriage in 1878,a husband and wife covenanted with their trustees to settle the wife's after acquired property for the benefit of herself and her husband successively for life, then for the issue of the marriage and then for the wife's next of kin. In 1884, the husband bought certain stock in the wife's name and the wife died without issue leaving her husband as her administrator. It was held; that (i) since the nextofkin were volunteers, they could not enforce the wife's covenant to settle the stock against her husband as administrator; (i) the trustees could not sue for damages for breach of the covenant because the claim was statute barred. Nonetheless, if the beneficiary, though a volunteer is a party to the covenant he can sue not as a beneficiary in equity but as a covenantee at common law. Thus in *Canon v. Hartley*[81], a settlement upon separation to which the spouses and a daughter were parties provided that a sum of money should be paid by the father to the daughter. He failed to make the payment. It was held that since the daughter was a volunteer, she could not benefit as a result of the rule about marriage consideration, since the settlement

78. [1891] A.C.264

79. Nathan & Marshall, *op.cit* p.131 relying on *Newstead v. Scarles* (1737) 1 A tk.265; *Clark v.Wright* (1861) 6 H&N 849

80. [1901] 1 Ch.609. See also Keeton & Sheridan *op.cit* p.86

81. [1949] Ch.213

was not made in consideration of marriage. However, she could sue on her father's covenant under seal and recover damages for breach of covenant.

In *Pullan v. Koe*[82], however, in 1879 a wife was given a sum of money which was bound by a covenant executed by herself and her husband in their marriage settlement to settle her after acquired property. The money was paid into the husband's account, on which the wife had power to draw. Shortly afterwards, part of it was invested in bonds, which remained at the bank. The interest on them was credited to the account. In1909, the husband died and the bonds were taken over by his executors. There were several children of the marriage. It was held that since they were within the marriage consideration, they could enforce the transfer of the bonds to the trustees of the marriage settlement.

D. Exceptions to the Rule that Equity Will Not Assist a Volunteer

To the general principles, stated above, there appear to be four exceptions.

1. Donatio Mortis Causa

A donatio mortis causa is a gift made *inter vivos* which is conditional upon and which takes effect upon the death of the donor. This could be distinguished from (i) a normal *intervivos* gift under which title immediately passes to the transferee, (i) a testamentary gift which takes effect under provisions of a properly executed will.

The essentials of a valid *donatio mortis causa* were articulated by Lord Russel C.J. in *Cain v. Moon*[83] They are:

i) the gift must have been in contemplation though not necessarily in expectation of death;

82. [1913] 1 Ch.9 Keeton & Sheridan op.cit.pp.8687. For comparison se also *Colyear v. Mulgrave (1836)*, 2 Keen 81 *Fletcher v. Fletcher* (1844), 4 *Hare 67; Re Cook's Settlement Trusts* [1965] Ch.902

83. [1896] 20B.283. See also *Asante v. University of Ghana* (1972)2G.L.R.86

ii) the subject matter of the gift must have been delivered to the donee;

iii) the gift must have been made under such circumstances as to show that the property is to revert to the donor if he should recover.

The first condition was illustrated in the case of *Wilkes v. Allington*[84]. In that case, the donor was suffering from an incurable disease. He made a gift knowing that he did not have long to live. In actual fact, he had an even shorter time than he imagined. He died two months later of pneumonia. It was held that the gift was valid. The second condition may be illustrated from *Re Weston*[85], where it was held that where a dying man, could be shown to have handed over to his fiancee his Post Office Savings book, his action was sufficient to constitute an effective *donatio mortis causa* of the balance recorded in the book.

2. Non Application to Wills

The executor is under an obligation to carry out the provisions of a will in favour of beneficiaries who are volunteers. The property vests by the death of the testator in the executor on trust to execute the disposition of the will.[86]

3. The Rule in Strong v. Bird[87]

Where a person makes an imperfect gift to X and subsequently appoints X his executor, upon the death of the donor, the property vests fully in X. The equity of the beneficiary under the will is displaced by X's prior equity. Consequently, X may retain the property irrespective of the fact that until the donor's death X's title was imperfect. The rule has been extended to apply to a donee who

84. [1931] 2 Ch.104

85. [1902]1 Ch.680 Compare with *Birch v. Treasury Solicitor* [1951 Ch.298; *Delgoffe v. Fader* [1939] Ch.922

86. Keeton & Sheridan *op.cit* p.88

87. (1874) L.R.18 Eq.315. Keeton & Sheridan *ibid*.p.88

has taken out letters of administration to the estate of the donor[88], and the personal representatives of a person who had covenanted in favour of volunteers and had subsequently been appointed a trustee of the settlement in favour of the volunteers.[89] Furthermore, for the rule to apply the gift must have been perfect in every way except for the legal formalities required for the proper transfer of title. Thus in *Re Freeland*[90], a testatrix promised to give the plaintiff a motorcar in the future but did not do so. On the death of the testatrix, the plaintiff became her executrix and claimed that the imperfect gift had in consequence been thereby perfected. The court refused to apply the rule in *Strong v. Bird,* there having been no intention to make the plaintiff the owner of the car immediately.

Finally, anyone relying on the rule must show a continuing intention on the part of the donor up to the time of his death. Thus in *Re Wale*[91], investments of which the settlor was absolute owner were settled by her voluntarily in 1939 for the benefit of her daughter. The settlor did not take any steps to transfer these investments to trustees, who however, were appointed executors of the settlor's will. The will was subsequently altered from time to time and it eventually disposed of all her estate to other beneficiaries. It was held that although an incompletely constituted trust in favour of the daughter had been created by the settlement of 1939, the settlor had not shown any continuing intention to benefit the daughter.

4. Equitable Estoppel

There are situations where equity prevents "an owner of land who has made an imperfect gift of some estate or interest in it from asserting his title against the donee[92] The donee's equity is said[93]

88. *Re James* [1935] Ch.449
89. *Re Ralli's Will Truts* [1964] 2 Ch.288. See also *Re Innes [1910] 1 Ch.188, Re Greene [1949] Ch.333*
90. [1952] Ch.110
91. [1956] 1W.L.R. 1346. Keeton & Sheridan, *op.cit.* pp.8889
92. Nathan & MarshalL, *op.cit* pp.132133
93. *Ibid* p.133

to exist where he incurs expenditure in respect of the land in the mistaken belief that he has or will acquire an interest in it and the owner knowing of the mistake stood by and allowed the expenditure to be incurred. It is respectfully submitted that this may not be a true exception to the maxim that equity will not assist a volunteer since, the donee by incurring detriment could be said to have supplied consideration in the same way as a promisee under a contract is expected to do.[94]

E. Discretionary and Protective Trusts

1. Discretionary Trusts

A discretionary trust is one (i) where the trustees hold property on trust for a group of beneficiaries (i) and are required by the terms of the trust to pay or apply the income or capital in favour of such of the beneficiaries as the trustees shall in their discretion think fit, (ii) whatever each individual beneficiary is entitled to, depends on what the trustee deems fit to give him.

In *Abasi v. Kapon*[95], a testator appointed the defendants as executors of his will. He directed them to give and bequeath all his properties to his children who were loyal to him, excluding the plaintiff. It was held by the Divisional Court that the words constituted a general device and bequest of the testator's real and personal property to the executors in trust for the children of the deceased, excluding the plaintiff in such share as the executors think fit.

On appeal, it was argued for the plaintiff appellant that even if there was such a device to the executors on trust, the trust was void on ground of uncertainty both as to the individu als or class who were to be the beneficiaries of the trust. In rejecting this contention, the appellate court held that; (i) the intention of the testator was to devise all his estate to his executors for the benefit of his children

94. This approach may have some support from *Central London Trust Ltd. v. High Trees House* [1947]K. B.130. See also Kodilinye, *An Introduction to Equity in Nigeria* (1975) chap.15

95. (1921), 5 N.L.R.61

excluding the appellant; (i) the testator created a discretionary trust and the duty of the executor/trustees was to select the beneficiaries in accordance with the direction in the will.

Discretionary trusts have to be drafted in such a way that they do not fail for uncertainty.[96] They are in the nature of a special power of appointment. Consequently, the power of selection must be exercised within the perpetuity period.[97] Each exercise of the trustee's discretion is regarded as a separate gift.[98] Essentially,[99] the trustees must themselves exercise the discretion. Consequently, if they are unable to agree, they cannot abdicate the discretion to the court prospectively, although they may apply to it for directions in respect of income available for distribution. They are not allowed to retain the income for future distribution. Where they decide to pay but disagree on the remainder, the court treats the discretion as having ended.[100]

The discretionary trust resembles a power. However, it differs from a power in that under it the trustees are under a positive obligation to consider the exercise if their discretion, whereas the donees, of a power are under no such duty. With regard to trustees, the court will inquire into the reasons for refusal to exercise their discretion. This is not the case with donees of a power except where there is fraud.[101]

2. Protective Trusts

A protective trust arises where the settlor settles property on X for life until alienation or bankruptcy, and when that happens

96. See *infra* Chap.11 for the essentials of a trust.

97. See *infra* chap.12 on the rule against perpetuity and *I.R.C. v. Williams, [1969] 1W.L.R.1197*

98. *Re Coleman* [1936] Ch.528

99 See Keeton & Sheridan, *op.cit* pp.154155

100. *Re Allen Meyrick's Will Trusts* [1966] 1 W.L.R. 499; c.f. *Re Gulbenkian's Settlements* (No.2) [1970) Ch.408

101. *Re Gulbenkian's Settlements* [1970] A.C.508; *McPhail v. Doulton* [1971] A.C.424; *Houston v. Burns* (1918) A.C.337 Paul Mathews, "A Heresy and A half in Certainty of Objects" (1984) Conv.2231.

the interest is directed to pass to Y or the settlement is with a proviso that when a particular event happens the interest would shift to Y.[102]

The protected life interest will be extinguished; (i) where there is sequestration of the tenant for life's property, in which case a discretionary trusts arises[103] (i) where the principal beneficiary resides in enemy controlled territory,[104] although this may be avoided by a specially drawn protective trust[105] (ii) where an order of the court is made charging a husband's protected interest with payments to his wife.[106]

Where a settlement is made for the benefit of a person until his bankruptcy and it is desired that his interest should not pass to the trustee in bankruptcy, nothing should be paid to the beneficiary or applied for his benefit under the discretionary trust which arises after the life interest has been forfeited. He should only be paid what is necessary for his support.[107]. In *Godden v. Crowhurst,*[108] the trustees were directed to pay the proceeds of residuary personality to the testator's son for life, with a direction that if he did any act whereby the interest vested in him would be forfeited to others, the trustees were to apply the annual income; "for the children he might have... as the trustees should in their discretion think fit....." It was held that nothing was directed, to be paid. Rather, the proceeds were to be applied and therefore, the persons named could be maintained without their receiving anything at all. Consequently, upon the son's bankruptcy, nothing passed to the trustee in bankruptcy.

102. *Richford v. Hackman* (1852) 9 Hare 475; *Brandon v. Robinson* (1811) 18 Ves.429;S.33 Trustees Act
103. *Re Baring's Settlement Trusts* [1940] Ch.737
104 *Re Gourju's Will Trusts* [1943] Ch.24; *Re Wittke* [1944] Ch.166
105. *Re Parot's Settlement Trusts* [1952] Ch.427
106. *Re Richardson's Will Trusts* [1958] Ch.504
107. *Holmes v. Penney* (1856), K&J.90; *Re Ashby* [1892] 1QB.872
108. (1842), 10 Sim 642; Keeton & Sheridan, *op.cit* p.152

F. Trusts to Pay Creditors

Trusts to pay creditors usually raise issues of interpretation. The main question is whether the settlor is making his creditors beneficiaries of the trust deed or is merely "establishing a machinery for the payment of his debts at his convenience".[109] An attempt at tackling this issue by comparing an ordinary trust with one to pay creditors was provided by Turner, V.C. in *Smith v. Hurst*.[110] In his view, where a deed vests property in trustees upon trust for the benefit of particular persons, the deed cannot be revoked, altered or modified by its creators. However, with a deed purportedly executed for the benefit of creditors, the issue of whether it can be revoked, altered, or modified depends on the circumstances of each particular case. The distinction between the two situations may be difficult to draw the ground that in both instances, property is vested in trustees. Nonetheless, a distinction exists. With regard to trusts for the benefit of particular persons, the person creating the trust is said to have no other object than to benefit the persons in whose favour the trust is being created. If the trust is well created, the property in equity will belong to the beneficiaries in the same way as it would belong to them at law if the legal interest had been transferred to them. However, where the deed purports to be executed for the benefit of creditors, to which no creditor is a party, the intention of the party executing it may have been either to benefit his creditors or to promote his convenience. The court will then have to examine the circumstances in order to determine the true purpose of the deed. The investigation is not limited to the deed but may extend to what has happened after its creation or execution. This is so because the creator of the trust may, by his conduct or obligations which he has allowed his trustees to perform, have created an equity against himself.

A debtor's deed which is execute for his creditors' benefit, if so executed without the creditors' consent, may prejudice their right.

109. Keeton & Sheridan, *ibid*, p.105

110. (1852), 10 Hare 30,47

Consequently, it may be set aside by the court on application by the creditor who is thereby prejudiced. Where there is evidence that the trust has not been executed with the intention of benefitting individual creditors, they will be unable to sue upon it as beneficiaries. In a situation where it is shown that the effect of the deed is merely to constitute where it is shown that the effect of the deed is merely to constitute trustees agents for the payment of the settlor's debts, the settlor has power to revoke it at any time. In such a case the trustees will be trustees of the property conveyed not for the creditors but for the settlor[111] Where the debtor executes a deed in favour of creditors simply because he is travelling abroad, the trustees are regarded as mere mandatories t pay the settlor's debts. Consequently, the creators cannot sue on the deed.[112]

In such a case, the debtor may, at any time revoke, vary the trusts or call for a reconveyance of property. This will, however, depend on the fact that the execution of the trust has not been communicated, and the creditor refrains, as a result from proceeding against the debtor, basing himself on the deed, it then becomes irrevocable.[113]

Such deeds which created trusts for the payment of creditors were known as deeds of arrangement and were important before the passage of modern bankruptcy laws.[114] Their nature may be illustrated front the case of *Garrard v Lauderdale.*[115] By indenture between himself of the first part, trustees of the second part and the creditors of the third part, the Duke of York, transferred property to trustees for the creditors. When the deed was executed, a circular giving notice of it was sent to all the creditors. It was contended for the creditors that as a result of the circular they had refrained from suing the Duke. It was held that the receipt of the circular was not admitted. Even if it was received, the creditors had not refrained from suing since they had more claims in an administrative suit against

111. *Supra* n.109
112. *Cornthwaite v. Frith* (1851), 4 De G.&Sm.552
113. Keeton & Sheridan, *op.cit* p.106
114. See now Bankruptcy Act, Cap.67, S.17
115. (1830), 3 Sim 1; (1931) 2Russ & M.451; Keeton & Sheridan, *op.cit* p.106

the Duke's estate. Consequently, the creditors could not enforce the trust. Nonetheless, where property is assigned to a trustee and he communicates the trust to certain creditors, who express their approval of the arrangement, the trust may not be revoked because creditors are relying on the deed rather than upon their ordinary right of recourse against the debtor.[116]

There are specific instances of irrevocable trusts in favour of creditors.

These are[117]:–

i) where the settlor indicates that the provisions in favour of creditors would come into operation only after his death, the trust is irrevocable, the reason being that it is only the settlor who has the power of revocation. The beneficiaries under the will cannot exercise such power.[118]

ii) where the creditor is a party to the deed and executes it, the deed is irrevocable as concerns him.[119]

iii) where from the conduct of the settlor and the language of the instrument it is apparent that the settlor intended to create a trust, then it is irrevocable and enforceable by the creditors.[120]

The effect of certain provisions of the Bankruptcy Act should also be noted. Where the deed of arrangement involves the while (or substantial whole) of the debtor's property an it is for the benefit of creditors generally, it constitutes an act of bankruptcy and may be used to support a bankruptcy petition by person who has not assented or acquiesced in [121] The deed could also be used by an assenting creditor, if it has become void.[122] In addition, if the debtor is declared bankrupt following a petition presented within three

116. *Herland v. Binks* (1850) 15P.B.713; Bankruptcy Act, Cap.67, S.17(13)(14)
117. See Keeton & Sheridan, *op.cit.* p.107
118. *Synnot v. Simpson* (1845) SH.L.C.121; *Re; Fitzgerald's Settlement* (1887), 37 Ch.D.18
119. *Mackinnon v. Steward* (1850) 1Sim N.S.176
120. *Sharp v. Jackson* (1897) 2Q.B.[1892] A.C.419
121. *Bankruptcy Act, S.17(4)*
122. *Ibid* S.17(15),(16)

months of execution of the deed, the deed is void against the trustee in bankruptcy.[123] In effect, the trustee of the deed will not be able to act upon it before that time unless all the creditors have assented or are precluded from presenting a petition.[124]

Finally, may be asked what happens to the surplus under the trust following payment of all the debts and expenses. The surplus goes to the settlor or his personal representatives. In other words, there is a resulting trust. However, if the property was assigned absolutely to the trustees, the creditors will be entitled to the surplus[125] and this depends on the settlor's intention to be found in the instrument creating the deed.[126]

123. *Ibid*,s.45
124. Bankruptcy Act, *ibid* Ss.17(13),(14),(20),45.
125. *Smith* v. *Cooke* [1891] A.C.297
126. Keeton & Sheridan, *op.cit* p.108

Chapter 11

The Essentials of a Trust

In *Knight v. Knight*[1], it was stated that in order for a trust to be validly created, three conditions are necessary: (i) the words employed must be so used that taken as a whole, they ought to be construed as imperative, that is the words must be certain; (i) the subject mat ter of the trust must be certain; (ii) the objects or persons intended to be benefitted, must also be certain. The three requirements are usually described as the "three certainties" of a trust. It is suggested[2] that apart from these requirements, a trustee is also necessary for the execution of a trust. Each of the requirement will be considered in turn.

A. Certainty of Words

As equity looks at the intent rather than the form no special form of words is necessary in order to create a valid trust. Consequently, an intention to create a trust may clearly be gathered from the expressions which the settlor has used and the court gives effect to such intention. The issue, however, often arises as to whether precatory words (i.e words of recommendation or expression of belief), can give rise to a binding trust. Examples of such words are desire, wish and request, have full assurance and confident hope etcetera.

The courts have not been consistent in holding that such words do not create a binding trust. Thus in *Lambe v. Eames*[3], the testator gave his estate to his widow, "to be at her dis posal in any way she may think best for the benefit of herself and her family." By her will, she gave part of the estate outside the family. It was held that since

1. (1840) 3 Beav.148, 172173
2. Keeton & Sheridan, *op.cit* p.90
3. (1871) L.R.Ch.597. See also *Gyasi v. Quagrins* (1963) 2 GLR161

she was absolutely entitled the gift was valid. In *Re Hamlton*[4] Lopes, L.J. indicated that the court will not allow a precatory trust to be raised unless after considering all the words used it comes to the conclusion that it was the intention of the testator to create a trust. Following this trend, in *Re Adams & Kensington Vestry*[5], a testator gave his real and personal estate, "unto and to the absolute use of my dear wife Harriet..... in full confidence that she will do what is right as to the disposal thereof between my children either in her lifetime or by will after her decease." It was held that the wife took absolutely and there was no trust in favour of the children. Similarly, in *Mussorie Bank Ltd. v. Raynor*[6], the Privy Council held that where a testator left all his property to his widow, "feeling confident that she will act justly to our children in dividing the same when no longer required by her," there was no trust for the children.

However, a trust can be inferred from the use of precatory words if on a proper construction of the language of the will, this is the intention of the testator. This in *Comiskey v. Bowring Hanbury*[7], a testator gave to his wife, "the whole of my real and personal estate..... in full confidence that she will make such use of it as I should have made myself and that at her death she will devise it to such one of my nieces as she may think fit and in default of any disposition by her will.... I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces" It was held by a majority in the English House of Lords that there was an intention in the testator to make a gift over of the whole property at her death to such of her nieces as should survive her, shared according to the wife's will and otherwise, equally. However, Lord Lindley (dissenting) thought that the testator's intention was to give an absolute gift to the wife. In *Re Williams,*[8] a testatrix gave all her property to her husband absolutely,

4. [1895] 2 Ch.270
5. [1882] 7 App.Cas.321. See also *Re Williams* [1897] 2 Ch.12
6. (1884) 27 Ch.D.494
7. [1905] Ch.244
8. [1905] A.C.84

"knowing that he is fully aware of my intention that at his death all my possessions are to be sold and given to All Souls Church, Hastings..... I am aware of my husband's intention to bestow his possession at his death to the same All Souls Church..... I charge my husband to pay £20 free of legacy duty to my dear friend, Mrs Shoesmith.....". The testatrix died and her husband took the property. Thereafter, the husband died intestate. The Parochial Church Council claimed the testatrix's property, while the husband's next of kin said that he had taken the property absolutely, and free from any trust. It was held that as the husband knew of the contents of the testatrix's will, he had by his silence agreed to carry out her wishes. Consequently, an equitable obligation to execute the wife's wishes arose, which the court would enforce[9]. Although this is an example of a precatory trust it was also regarded as possessing some of the characteristics for a secret trust.[10]

It would appear that whether or not a court will infer a trust from the use of precatory words may depend on whether the subject matter and objects of the trust have been clearly indicated. In *Eade v. Eade*[11], Leach V.C. stated thus:

> A request or recommendation will raise a trust, if the objects and property are described with such certainty that the court can execute it.

From this, it is evident that the "three certainties" are interrelated. In *Re Steele's Will Trusts*[12], a testatrix left a diamond necklace to her son, "to go and beheld as an heirloom by him and by his eldest son on his decease and to go and descend to the eldest son of his descendants as far as the rules of law and equity will permit(and I request my said son to do all in his power by his will or otherwise to give effect to this my wish)". It was held that a precatory trust had been created. Its effect was that the eldest son, the grandson

9. Following *McCormick v. Grogan* (1869) L.R.4H.L.82; *Re Gardner [1920] 2 Ch.523,* considered *supra* chap.10
10. Keeton & sheridan, *op.cit*.p.100
11. (1820) 5 Madd,116, 121
12. [1948] Ch.603

and great grandson (all of whom were in existence at the testator's death) took the necklace successively for life. Furthermore, in *Re Burley*[13], it was indicated that if the gift or subject matter of the trust is contained in a will and the precatory words in a codicil, the inference in favour of a trust is much stronger than where the gift and precatory words are contained in the same instrument.

B. Certainty of Subject Matter

As was observed earlier,[14] the subject matter of a trust could take many forms. It could be interest in land in possession or reversion; chattels, money and choses in action. In *Re Diggles,*[15] it was indicated that uncertainty of subject matter will adversely affect the creation of a trust. Thus in *Curtis v. Rippon*[16], the testator appointed his wife, guardian of his children and then left his property to her, "trusting that she will in fear of God and in love to the children committed to her care, make such use of it as shall be for her own and their spiritual and temporal good, remembering always, according to the circumstances, the church of God, and the poor". It was held that the wife took the property absolutely since no specific part of it was apportioned to the children, the church or the poor. In *Bardswell v. Bardswell,*[17] there was a direction, "to remember certain persons". It was held that there was no valid trust. In *Knight v. Knight,*[18] there was direction, "to reward..... my old servants and tenants according to their deserts". It was held that the purported trust was invalid. In *Re Jones,*[19] a gift was given to a wife, absolutely, followed by a direction that, "as to such parts of my estate as she shall not have sold or disposed of, it should be held in trust for certain persons. It was held that the purported trust was invalid.

13. [1910] 1 Ch.215
14. See supra chap.9
15. (1888)39 Ch.D.253
16. (1820) 5 Madd.434
17. (1839) 9 Sim 319
18. (1840) 3 Beav.148
19. [1898] 1 Ch.438. See also *Springs v. Bernard* (1789) 2 Bro C.C.585

The above cases may be contrasted with situations where the subject matter of the gift is to be decided by the discretion of the trustee. Thus in *Re Golay's Will Truts*[20], there was a direction to the executors to allow a beneficiary to, "enjoy one of my flats during her lifetime and to receive a reasonable income from my other properties." It was held that there was a valid trust because; (i) the executors could select the flat; (i) the words "reasonable income" were not intended to allow the trustees to make a subjective decision. They provided a sufficient objective determinant to enable the court if necessary to quantify the amount.

It may also be contended that where the property is vested in trustees in trust for several beneficiaries, it is necessary also that the share which each beneficiary is to take should be determined. This could take (i) the form of a provision in the trust instrument; (i) the form of a power given to trustees to make a selection among a class of beneficiaries; (ii) the form of a discretion by the court based upon the maxim that equality is equity or making a determination based on what may be regarded as a proper division according to the circumstances.[21]

C. Certainty of Objects

This entails two aspects, (i) that the recipients or purposes of the gift should be identifiable with certainty and (i) that the interest they take should be discoverable.[22] In *Re Vandervell's Trusts*[23], it was indicated that in the case of future interests, the beneficiaries must be ascertainable within the period of perpetuity.

The test to be used in determining certainty of ascertainment depends on the nature of the trust. With a fixed trust, the trust is void unless it is possible to ascertain each and every beneficiary. Indeed

20. [1965] 1 W.L.R.969. See also *Abase v. Kapon* (1921) 5NLR58 discussed *supra*.chap.10
21. See *Burrough v. Philcox* 5Myl &Cr 72; *McPhail v. Doulton [1971] A.C.424; Re Wood* [1949] Ch.498, 501
22. *Re Endacott* [1960] Ch.232; [1959] 3All E.R.562
23. [1974] Ch.p.319. See also *Morice v. Bishop of Durham* (1804) 9 Ves.399; (1805) 10 Ves.522; *Re Astor's Settlement Trusts* [1952] 1 All E.R.1067

a fixed trust is understood to be one where the share or interest of the beneficiaries is specified in the instrument creating the trust. With regard to a discretionary trust, the test is, "can it be said with certainty that any individual is or is not a member of that class".[24], it was indicated that in the case of future interests, the beneficiaries must be ascertainable within the period of perpetuity.

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The test proffered by Lord Wilberforce[25] is the same as one established for certainty of the objects of a power in *Re Gulbenkians's Settlements*[28] Consequently, it has been suggested[29] that a combination of the tests for powers and discretionary trusts has destroyed what used to be the most important reasons for distinguishing between trusts and powers.

Other illustrations of the requirement of certainty of objects may be gathered from the following cases. In *Harland v. Trigg*[30] leasehold lands were given to X with the hope "that he will l continue them

24. [1969] 1 W.L.R.444
25. *McPhail v. Doulton [1971]* .A.C.424,454 456 per Lord Wilberforce. See also *Houston v. Burns* [1918] A.C.437
26. See supra Chap.10
27. Hanbury & Maudsley, *op.cit*. P.127
28. [1970] A.C.508. See also *Whishaw v. Stephens* [1970] A.C.508
29. *Supra* n.27, p.127
30. (1782) 1 Bro.C.C.142; Ketton & Sheridan, *op.cit* p.102

in the family". It was held that the objects of the bequest were too uncertain for the trust to be enforced. In *Meredith v. Heaneage*[31], real and personal estate were together given to X in full confidence that she would devise the whole of the estate to "such of my father's heirs as she may think best deserves her preference". It was held that the trust could not be enforced because the court could not determine whether heirs or next of kin, or both were intended. In *Sale v. Moore*[32], X was recommended to "consider my near relations". The court had difficult in determining how the relations were to be ascertained. Consequently, it held that there was no binding trust. Furthermore in *Re Wood*[33] there was provision of a sum of £2 per week for "The Week's Good Cause" of the BBC. It was held that the beneficiary in this instance was uncertain. Even if the directions were to be followed, the beneficiary could still not be ascertained because seven good causes were advocated one week in each month from different stations.

Related to the test of certainty of objects is what has been described as trusts of imperfect obligations.

As is evident from the requirement of certainty of objects, a trust, in order to be valid should have a beneficiary who can enforce it. Where there is no such beneficiary, except in cases of charitable trusts, the trust will be regarded as unenforceable and therefore bind. In *Re Astor's Settlement Trusts*[34], a trust was set up for the objects and purposes which included the improvement of good understanding between nations, the preservation of the independence and integrity of newspapers, the promotion of the freedom, independence and integrity of the press, the protection of newspapers from being absorbed by combines, the restoration and maintenance of the independence of the editors of and writers in

31. (1824) 1 Sim 542; Keeton & Sheridan, *op.cit* p.102

32. (1827) 1 Sim 534; Keeton & Sheridan, *ibid*

33. [1949] Ch.498

34. [1952] Ch.534; [1952] 1 All E.R.1067. See also *Re Endacott, supra* n.22; *Re Denley Trust Deed* [1969] 1 Ch.373; *Leahy v.AG for New South Wales [1959]* A.C.457 at p.478 per Viscount Simonds.

newspapers, the securing for the public of means of ascertaining by whom any newspaper is actually owned or controlled, and the establishment of any charitable public or benevolent schemes for (i) the improvement of newspapers or journalism or (i) the relief of persons or their families actually or formerly engaged in journalism or in the newspaper business or any branch thereof, or (ii) for any of the objects previously mentioned. It was held that the trust failed for lack of ascertainable beneficiary. Similarly, in *Re Shaw*[35] the trust was to apply income for an inquiry into how much time could be saved by the substitution of a proposed British alphabet, containing at least forty letters, for the present English alphabet, and towards the persuasion of the Government or to the public to adopt the proposed alphabet. It was held that the trust failed for lack of someone to enforce it.

Nevertheless, there are what are regarded as "exceptional" or "anomalous" cases [35a] where despite the trust being of imperfect obligation, it would be enforced by the court, if the trustees are disposed to execute it. Thus in *Pettingall v. Pettingall*[36], a testator bequeathed £50 per annum to be paid for the upkeep of his "favourite blackmare". It was held that (i) the bequest in favour of the animal was valid and (i) there were persons interested in the residue who, having regard to the court order made could enforce the terms of the trust. Similarly, in *Mitford v. Reynolds*[37], the trust was in respect of a sepulchral monument and horses. There was a remainder man on behalf of charity to ensure the enforcement of the directions. In *Re Dean*[38], an annual sum of £750 was given to trustees for the use of the plaintiff for life, with remainders over and horses, ponies and hounds were given to trustees to be maintained out of that sum. It was held that the trust was valid.

35. [1957] 1 All E.R.745

35a *Re Astor* [1952] Ch.534 at p.547 per Roxburgh J.

36. (1842) 11 L.J.Ch.176

37. (1848) 16 Sim.105

38. (1889) 41 Ch.D.552

In *Pirbright v. Salway,*[39], the testator, after expressing his wish to be buried in the enclosure in which his child lay in a certain churchyard, gave to the rector and churchwardens of the parish $800 consoles the interest and dividends to be derived therefrom to be applied in keeping up the enclosure an decorating the same flowers. It was held that (i) the gift was valid for at least a period of twenty-one years from the testator's death; (i) it was not charitable. Similarly in *Re Hooper*[40], the testator bequeathed to his executors and trustees money out of the income of which to provide for the care and upkeep of certain graves, a vault and certain monuments. It was held that the trust was valid since it could be enforced by a residuary legatee. Furthermore, in *Re Thompson,*[41], the testator bequeathed a legacy of £1,000 to a friend to be applied by him in such a manner as he should think fit towards the promotion and furtherance of foxhunting and devised and bequeathed his residuary estate to Trinity Hall, University of Cambridge. It was held that the gift was valid. The friend upon whom the money was given was ordered to undertake to apply the legacy for the advancement of foxhunting. If the legacy was not so applied, the residuary legatees were free to apply for it to be paid to them. Essentially, the decision turned on the fact that there was a beneficiary, Trinity Hall, which could enforce the trust.

Despite categorisation of the preceding cases as a anomalous[42] it is apparent that Nigerian Courts are inclined to follow them. Thus in *Adeseye v. Williams,*[43] a testator under his will directed his executors and trustees to let his property for fifteen years, and to use part of the rents and profits to erect a memorial stone over his grave. Thereafter they were to transfer the property to the plaintiffs, who were beneficiaries under the will. It was held that the trust was a valid private trust of imperfect obligation in so far as it did not

39. [1896] W.N.86
40. [1932] 1 Ch.38, following *Pirbright Case, ibid*
41. [1934] Ch.342, following *Pettingal v. Pettingall, supra n.36*
42. See *supra* n.35a
43. [1964] 2 All N.L.R.37

offend the rule against perpetuities and could be enforced by the plaintiff as residuary legatees.

D. Effect of Uncertainty

It has been suggested[44] that the effect of uncertainty relating to three certainties of a trust is not always the same. Thus when the words of a trust are not certain, then there is no intention to create a trust. Consequently, the donee of the gift takes beneficially. Likewise the donee will take beneficially where the trust fails for uncertainty of property,[45] the reason being that although an intention to create a trust may be evident, there is no property to which it can be attached. With regard to uncertainty of objects. Where the other requirements have been fulfilled, the donee of the gift would hold on trust for the settlor, residuary legatee or intestate successor[46] i.e. a resulting trust arises in favour of the testator's estate.

44. Keeton & Sheridan, *op.cit*.p.103
45. See *Re Jones, supra* n.19
46. See also *Re Denley's Trust Deed, supra* n.34; *Re Wood, supra* n.19

Chapter 12

Vitiated Trusts

A. Illegal Trusts

A trust which is contrary to the law, public policy or morality is invalid[1]

1. Trusts in Favour of Illegitimate Children

There are cases where settlements of property on illegitimate children to be born thereafter have been invalidated[2] Nonetheless, a trust in favour of illegitimate children who have been conceived but are not yet born is valid, the immorality being regarded as past.[3] It is doubtful, though, whether such distinctions have an relevance in the Ugandan or African context, where the concept of illegitimacy is either not stressed or is nonexistent.

2. Other Criteria for Determining Validity of Trusts

A trust which is aimed at separating a parent or child or of releasing father of his duties as a parent is void.[4] Similarly, trusts which subvert religion or morality are void.[5] So is a trust which is intended to be effective on the separation of husband and wife in the future.[6] However, a trust which is in contemplation of an immediate separation already decided upon as unavoidable is valid[7]. Nonetheless in such a situation, if the separation does not take place,

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1. Keeton & Sheridan, *op.cit* p.109
2. *Medworth v. Pope* (1859) 27 Beav.71
3. *Ebbern v. Fowler* [1909] 1 Ch.578; *Occleson v. Fullalove* (1874), L.R.9 Ch.App.147
4. *Re Sandbrook* [1912] 2Ch.471; *Re Piper* [1946] 2 All E.R.503
5. *Bowman v. Secular Society Ltd* [1971] A.C.406; *Thornton v. Howe* (1962), 31 Beav.14
6. *Re Moore (*1888) 39 Ch.D.116
7. *Wilson v. Wilson* (1848) 1 H.L.C.538

the trust becomes void for failure of consideration.[8] In addition, a separation deed which is intended to aid adultery is void.[9] However, if it includes agreements which are valid and others which are illegal these can be separated so that the court enforces those which are valid while ignoring those which are not.[10] It is finally significant that a trust for a wife on condition that it lasts for as long as she is deserted by her husband is valid.[11] Conversely in *Re Hope Johnstone,*[12] a trust was created in favour of a wife to last only so long as she lived with her husband. A gift over was given to the husband if she ceased to do so. It was held to be valid. In *Egerton v. Egerton,*[13] Denning L.J. summed up the position thus:

> ..... a settlement which contains provisions as to what should happen in the case of divorce is not contrary to public policy.

Nevertheless, such provisions will be void if their aim is to break up marriage.[14] A trust whose aim is to restrain marriage is void.[15] However, a trust which is intended to prohibit a marriage with a particular person or to prevent a second marriage is valid.[16] Similarly, a trust which is expressed to last until marriage is valid.[17] This is also true of a trust with a condition that the consent of a specified person to the marriage is obtained.[18]

Trusts which have in view or contemplation of immoral relations are void as being contrary to public policy.[19] However, a trust where

8. *Bindley v. Mulloney* (1869) L.R.7 Eq.343
9. *Evans v. Carrington* (1860) 2 De G.F.&J.481; *Fearon v. Earl of Ayelesford* (1884), 14 Q.B.D.792
10. *Merryweather v. Jones* (1864), 4 Giff, 509; *Hamilton v. Hector* (1871), L.R.6 Ch.App.701
11. *Re Charleton* [1911] W.N.54
12. [1904] 1 Ch.470
13. [1949] 2 All E.R.238, 242
14. *Re Johnston's Will Trusts* [1967] Ch.387
15. *Lloyd v. Lloyd* (1852) 2 Sim N.S255
16. *Allen v. Jackson* (1875), Ch.D.399
17. *Morley v. Rennoldon* (1843) 2 Hare 570
18 *Re Whiting's Settlement* [1905] 1 Ch.96
19. *Re Vallance* (1884) 26 Ch.D.353

the parties contemplate a future immoral connection, but this is not the consideration is valid.[20]

A trust whose aim is to procure a national honour is void.[21] Similarly, trusts whose object is to restrain a beneficiary from alienating his interest are void. However, if such restriction valid in the country where the trust was created, the court would enforce it.[22]

3. The Effect of Creation of Illegal or Void Trust

The basic rule is that the court does not help anyone who tries to obtain any benefit under the instrument creating the illegal trust. The court also declines to assist the settlor to get his property back where it has been transferred under such instrument.[23] Thus in *Re Great Berlin Steamboat Co.*[24], P advanced money to a company with the aim of giving the company illusory or fictitious credit. This was on the understanding that the company would hold the money on trust for him. Some of the money was withdrawn with P's consent and then the company was wound up. It was held that no assistance could be rendered by the court to recover the balance of the money since the money had been advanced for a fraudulent purpose which was never abandoned up to the winding up of the company.[25] The first implication of the case is that[26] when the illegal purpose has been fulfilled, the court does not assist the settlor to recover the money since the parties are in *pari delicto.* However, if the illegal purpose is still executory and the property has been transferred, the court would assist the settlor to recover it. This is provided that the illegal purpose has been abandoned. If the court does not assist him

20. *Re Wootoon Isaacson* [1904] 21T. L.R.89
21. *Earl of Kingson v. Lady Elizabeth Pierepont* (1681) 1 Verns
22. Re *Fitzgerald* [1904] 1Ch.573
23. Keaton & Sheridan, *op.cit* pp.114115
24. (1884), Ch.D.616
25. *Ibid*, pp.619620 per Cotton, L.J.
26. Keaton & Sheridan, *op.cit* p.115. See also *Sykes v. Beadon* (1879) 11 Ch.D.170

in this case, it means that the illegal purpose would be executed.[27] It is notable in this regard that where the parties are not in *pari delicto,* the court may assist the person who is not affected by the illegality.[28] The second implication which is based on the assumption that the parties are not in *pari delicto* is that if a person who is claiming relief is not the fraudulent party himself, but a person claiming through him, who is not a party to the fraud, he may be entitled to relief.[29] In the words of Lord Eldon in *Muckleston v. Brown*[30]

> There is a great difference between the case of an heir coming to be relieved against the act of his ancestor in fraud of the law and of a man coming upon his own act under such circumstances.

Notwithstanding the above propositions, a person who has got money as agent or trustee of another, cannot retain the money on the ground that it has arisen out of an illegal transaction.[31] The rule also applies to an executor whose testator obtained the money illegally. The executor cannot retain the money on the ground that it was got illegally.[32]

iv) Where There is Total Failure of Objects of Settlement

If there is a failure of the objects, the trust is cancelled. Thus in *Essey v. Cowlard*,[33] a settlement was made in consideration for an intended marriage between X and Y. It provided that stock which was to be transferred to the trustees by Y should be held by them on trust for the benefit of X and Y and for the issue of the marriage. Although that marriage was never celebrated, the parties cohabited and there were three children. In 1883, X and Y brought an action for the trust to be set aside and this was done.

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27. *Birch v. Blagrave* (1755) Amb.364; *Ayerst v. Jenkins* (1873), L.R.16 Eq.275, 283
28. *Reynell v. Spry* (1852) 1 De G.M.& G.660, per Bruce L.J.
29. Keaton & Sheridan, *op.cit* pp.115116
30. (1801), 6 Ves.52, 68
32. *Farmer v. Russell* (1798) 18 &P 296; *De Mattos v. Benjamin* (1894) 63 L.J.
33. *Joy v. Campbell* (1804), 1S.Ch &ef 328, 339

The issue arises as to what would happen when a marriage settlement is made and a marriage occurs but is later declared void. In *Re Wombwell's Settlement*[34], a father made a settlement upon trusts for himself until his son's intended marriage and then for the son. The son married with the result that he was entitled to enjoy the interest. Later, the marriage was declared void because of the son's impotence. It was held that the settlor's interest subsisted and continued up to the marriage. Similarly in *Re Eaves,*[35] a testator gave property by his will to his widow and afterwards to his son absolutely. He appointed his widow and son as executors and trustees. The widow remarried and the property was transferred to the son absolutely. After some years, the widow's second marriage was declared null and void on the ground that it had not been consummated. The wife then claimed from the son the income from the property. It was held (i) that the nullity order restored the widow's interest from the moment it ceased on her remarriage; (i) however, since she had accepted the position for a number of years, during which the marriage could have been avoided, it was too late to claim the property back from the son. Furthermore, in *Re Ames Settlement,*[36] a settlement was made in contemplation of marriage. The marriage was later declared null and void. It was held that the trusts failed and the property was held on resulting trust for the settlor's executors.

B. Voidable Trusts

A trust arising from mistake, fraud, undue influence, misrepresentation or duress may be set aside completely or rectified. This is conditional upon the settlor not having acquiesced after the vitiation of his consent has been removed. Settlements which are normally cancelled on this ground are voluntary rather than those where consideration is involved. A settlor who petitions for relief on any of the above grounds is under a duty to prove them except (i)

34. (1884) 2 Ch.D.191
35. [1922] 2 Ch.298
36. [1939] Ch.1000 affd.[1940] Ch.109

where the settlement is manifestly absurd; (i) where the beneficiary occupied a fiduciary position in relation to the settlor in which case there would be a presumption of undue influence.[37]

1. Duress

This is well illustrated in *Ayliffe v. Murray,*[38] where a deed was procured by two executors and trustees of a will following the issue of threats to the beneficiary under it. The court cancelled it.

2. Mistake

Mistake may be evidence of lack of consent, thereby making it inequitable to enforce a trust. In such a case, there is right to cause the relevant instrument to be wholly cancelled. Thus in *Forshaw v. Welsby*[39], a person who was at the point of death, executed a voluntary settlement. The settlement was not read to him, he did not understand it and the solicitor who prepared it deliberately omitted a power of revocation because he knew of the settlor's changeable nature. The court cancelled the settlement when the settlor recov ered. A deed may also be cancelled if it is signed without sufficient explanation and is misunderstood.[40] Thus in *Baker v. Monk*[41], an aged, infirm and ignorant woman executed a conveyance for valuable consideration without understanding its nature. It was set aside. Furthermore, in *Dutton v. Thompson,*[42] a testator bequeathed one twenty seventh share of his estate to P.P was a person of less than ordinary intelligence. The bequest gave power to the settlor's trustees to withhold the transfer of the same until P reached the age of 25, which he did in 1882. P's stepmother and his uncle, who was a co trustee, persuaded P to transfer his share to C and D on trust

37. [1946] Ch.217
38. Keaton & Sheridan, *op.cit* p.117. See also *Allcard v. Skinner* (1887), 36 Ch.D.
39. (1740) 2 Atk.58. See also *Barret v. Hartley* (1866) L.R.2Eq.789, 794795 per Sir J.Stuart, VC
40. (1860), 30 Beav.243
41. *Proctor v. Robinson* (1866), 35 Beav.329
42. (1864), 33 Beav.419, Keaton & Sheridan, *op.cit* p.118

for such person and generally in such manner as P should, with the consent of his trustees, C and D, by deed appoint. The grant of consent was to be at the absolute discretion of C and D, and subject to the power of appointment, in trust to pay the income to the plaintiff during his life and after his death to his children and other issue; with other trusts in default of issue. P had initially refused to carry out the transfer. After one year following the execution of the settlement, P applied for it to be set aside. It was held that it could be set aside because although the settlement was read over to P, it was evident that he did not understand its effect. Similarly in *Strauss v. Sutro*[43], the plaintiffs had just passed 21 years of age when they executed a settlement by which they tied up strictly the funds of a marriage settlement to which they were entitled. They did not read the settlement and the terms thereof were not explained to them. It was held that the settlements had to be set aside since the settlors did not know what they were doing.

In the cases so far considered the mistake affected the very nature of the transaction in question i.e. it was fundamental mistake. However, there are certain situations relating to voluntary settlements and those in contemplation of marriage where the court orders rectification of the trust instrument. Thus in *James v. Couchman*[44], a settlor assigned property to his trustees for himself for life, remainder to his wife remainder to his issue and in default of issue to his paternal next of kin. There was proof that the settlor's attention was not drawn to the last limitation and he did not understand the effect thereof. The court refused to cancel the whole settlement, but allowed it to be rectified by giving the settlor a power of appointment in default of issue. In *Fowler v. Fowler*[45] Lord Chelmsford LC suggested some conditions for rectification. He said that a person seeking rectification should show (i) that the intention for which rectification is sought continued in the minds of all parties to the deed up to the time of its execution,

43. (1883), 23 Ch.D.278
44. (1948) L.J.R.33
45. (1885) 29 Ch.D.212

(i) exactly and precisely the form to which the deed ought to be brought. In *Couchman;s Case*[46] this related to the residuary gift in default of issue.

The courts are more cautious in ordering rectification in cases of voluntary settlements than in respect of a normal contract. Thus in *Van der Linde v. Van der Linde*[47] a settlor entered into a deed of covenant with the aim of reducing the tax payable on his income. However, the deed failed to achieve that end. Upon an application for rectification, the court refused to order it.

3. Innocent Misrepresentation

This is best illustrated by the case of *Re Glubb*[48]. There, a charitable body innocently misstated that it could obtain a large legacy, if other people would subscribe other sums before a given date. In actual fact, the date on which the legacy could have been obtained had passed. It was held that the body's committee was under a duty to return the sums which were obtained in that manner.

4. Fraud

By "fraud" here is meant the type which is committed by the beneficiary upon the settlor. The type where a settlor makes a settlement for fraudulent purposes has been considered.[49]

The concept of fraud and undue influence in fact merge into each other. Some frauds may also induce mistake which would result into the cancellation of a trust instrument.[50] In other words the categories of fraud are never closed. In *Ajani v. Okusaga*[51], Fakayode J. Thus stated of the distinction between fraud at common law and at equity.

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46. (1859), 4 De G&J 250, 265
47. *Supra* n.45
48. [1947] Ch.306
49. [1900] 1 Ch.354
50. See *Supra* notes 2533 and text thereof
51. Keaton & Sheridan, *op.cit*. P.119

> Fraud or deceit at common law is "misrepresentation of fact, made either knowingly, or without belief in its truth, or reckless not caring whether it was true or false.[52] Fraud at common law is often referred to as *actual fraud* but fraud in equity is referred to as *constructive fraud*. Whilst actual fraud or common law fraud relates to *statements or misrepresentation* of fact constructive fraud or fraud in equity relates to conduct or transactions in respect of which the court is of opinion that it is *unconscientious of a person to avail himself of the legal advantage* he has obtained.

In *Norton v. Lord Ashburton*[53] Lord Haldane, LC indicated that[54] fraud does not require proof of intention to cheat. It may arise from a person's misconception of the extent of his obligation in given circumstances recognised by equity or it may be a technical fraud on a power. Hence the expression, "constructive fraud". He added:

> .....The trustees who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word fraudulent being applied to them. What it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a court that from the very beginning regarded itself as a court of conscience.

It is thus evident that rigid rules regulating the occasions when the court will set aside a settlement on the ground of fraud, cannot be formulated.[55] It is significant, though, that the court will only set aside settlements on ground of fraud if *restituo in intergrum* is possible. In *Johnston v. Johnston,*[56], a settlor married a woman who represented that she had divorced her first husband for adultery and cruelty. Actually he had divorced her for adultery. Upon discovering this the settlor applied to have the settlement cancelled. It was held that since the consideration for the settlement was marriage, which the settlor could not return, the settlement could not, therefore, be set aside.

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52. (1976) IFNR 188 HIS EMPHASIS
53. Relying on *Derry v. Peek* (1899) 14 App.Cas.337
54. [1914] A.C.932
55. *Ibid* p.954
56. Keaton & Sheridan, *op.cit* p.120

5. Undue Influence

Similar to fraud, the categories of undue influence are not closed[57a] Undue influence occurs where two people stand in a fiduciary relationship, with one capable of influencing another and by the abuse of confidence reposed in him by the weaker party obtains undue benefit or advantage. The person who abuses the confidence will not be allowed to retain the advantage arising from such abuse.[57] In *Ajani v. Okusaga*[58], Fakayode, J. Indicated that abuse of a fiduciary or confidential relationship is possible between (i) trustee and beneficiary (i) parent and child, (ii) Guardian and ward; (iv) Spiritual advisor and layman; (v) solicitor and client; (vi) Doctor and patient.

It has been suggested[59] that the application of the principle enunciated by Lord Chelmsford in *Tate v. Williamson*[60] to the relation of trustee and beneficiary explains the development of a class of constructive trusts[61]. Consequently, where a fiduciary relationship exists, equity places upon the beneficiary (the stronger of the two parties), the onus of showing, in order for the transaction to stand, (i) that no undue influence in fact existed. (i) that the settlor had the opportunity of taking independent advice; (ii) that he thoroughly understood the nature and extent of the disposition he was making.[62] In *Powell v. Powell*[63], a young woman was induced by her stepmother to execute a settlement by which she shared her property with the children of that stepmother. The woman had obtained advice from a solicitor who also acted for the other parties. The solicitor expressed

57. (1884), 52 L.T.

57a. *Ajani v. Abegbe infra* n.58

58 *Tate v. Williamson* (1866), L.R.2Ch.App.55,60 per Lord Chelmsford, L.C. See also *tulfon v. Sperni* [1952] 2 T.L.516, 521522 per Sir Raymond Evershed M.R.; *Ige v. Odukoya* (Unreported) Suit No.HIF/3/79 of 19 March 1980 *Ajani V.Abegbe* (Unreported) Suit No.1/37/75 of 11 Jan 1980 In Adigun, *Cases & Texts on Equity, Trusts & Administration of Estates* pp.239245.

59. *Supra* n.52, Adigun, *ibid*, pp.238239

60. Keaton & Sheridan, *op.cit*. P.121

61. *Supra* n.58

62. See *infra* Chap.15 for more detailed treatment

63. Supra n.60. See also *Allcard v. Skinner* (1887), 36 Ch.D.145, 190 per Bowen, L.J.

disapproval of the settlement but took no further steps. It was held that the settlement had to be set aside.

Where undue influence is presumed or established the settlement is voidable. Consequently, if a settlor having known the full circumstances of the transaction, and enjoying the opportunity of independent advice, does not elect to set it aside immediately, he may be taken to have acquiesced in it, should he try to set it aside at a later period. Thus in *Mitchell v. Humphrey,*[64] a patient gave a gift to a medical adviser and decided to stick by it even after the relationship had ended. It was held that her executors could not have the gift set aside. In *Allcard v. Skinner,*[65] the plaintiff sued to recover property which she had transferred to a sisterhood under the undue influence of the mother superior. She had left the sisterhood in 1879 but did not try to recover her property until 1885. It was held that it was too late for her to recover her property.

Finally may be noted that undue influence is not presumed between testator and legatee "whatever their relationship, although in any particular case it may be established as a fact."[66]

C. Void Trusts

1. Perpetuities

Historically, the policy of landowners in England was to try and tie up their land so as to make it pass on inalienably (without being disposed of) in the family as far as the rules of law allowed.[67] Nonetheless, the policy of law and of the courts had been to ensure the free disposition of land. To facilitate this, common law judges developed the rule against perpetuities which applies to Uganda by virtue of the Judicature Statute, 1996.[68]

64. [1900] 1 Ch.243
65. (1881), 8 Q.B.D.537. See also *Turner v. Collins* (1871) L.R.7Ch.App.329
66. *Supra* n.63
67. Keaton & Sheridan, *op.cit* p.124
68. *Ibid* pp245 pp.1245; Morris & Leach, *The Rule Against Perpetuities* (2nd Ed.) P.13

Equity applies both rules. Consequently, except where the interest is enjoyed under a trust for charitable purposes, it should not contravene the rules relating to perpetuities and accumulations.[69]

The essence of the rule against perpetuities is that the vesting of real or personal property must not be postponed for a period longer than a life or lives in being, or for twenty one years after the censer of such life, with the addition, in necessary cases of the period of gestation.[70] It is significant that the remoteness against which the rule operates relates to vesting of interest in property and not to their duration or determination, which may occur at any period of time, no matter how remote.[71] The court considers possible events and not those which occurred or were probable. In this context judicial notice would not be taken of the period at which a woman ceased to be child bearing.[72] Physical incapacity would also be disregarded[73] If the settlor does not mention a life or lives which could be used as a standard of measurement of the vesting period, he is restricted to a period of twenty one years.

Difficulties may arise as to the application of the perpetuity rule to "class gifts" e.g. "To the children of X". In this situation, where the gift was to a class, all of it would fail if one member or the size of his share might not be ascertained within the perpetuity period. This would be so even where some members were found to fulfill the conditions within the perpetuity period.[74]

A trust for sale of a power or sale should be limited within the period of the perpetuity rule in order to be valid. However, where the trust is invalid, it would be regarded as an instrument "which has become inoperative"[75] Consequently, this does not affect the interests of the beneficiaries provided they vest within the permitted

69. S.16(2)
70. *Duke of Norfolk v. Howard* (1683), 1 Vern 163, 164 per Lord Guildford
71. *Cadel v. Palmer* (1833) 1C. &Fin 372; *Re Wilmer's Trusts* [1903] 2Ch.411.
72. *Wainwright v. Miller* (1897), 2 Ch.255; *Re Chardon* [1928] Ch.464
73. *Re Wood* [1894] 3 Ch.381; *Re Wilmer's Trusts* [1903] 2 Ch.464
74. *Re Gaite's will Trusts* [1949] 1 All E.R.459
75. Keaton & Sheridan, *op.cit*.p126

period. Thus in *Re Daveron*[76] there was a trust for sale of freeholds at the end of forty nine years, and a gift of the proceeds to a class ascertainable within the limits of the rule against perpetuities. It was held that the gift was good. However, since the trust for sale was void, the beneficiaries took the property as realty. Nevertheless, if any of the beneficiaries have died, the property passes to their personal representatives, since the trust power has failed.[77]

It has been suggested that the rule against perpetuities is inapplicable to charitable trusts.[78]

Nevertheless, this view is regarded as too wide.[79] This is because apart from that, in addition to the perpetuity rule is the principle that real property shall not be limited in a way which makes it inalienable. Consequently, the effect of bequeathing real property in fee simple to a charitable organisation which is able to hold it is that it becomes practically inalienable.[80] Irrespective of this, though, the law encourages such gifts and only discourages them if given to a private individual in identical circumstances. The law also allows bequests to one charitable body with a gift over upon the happening of a contingency to another charitable body. In this case the contingency may occur at any time however remote.[81] However, a gift for charitable purposes which is limited in execution, and which might not vest within the perpetuity period is void in the same way as any other executory limitation.[82]

2. Accumulations

It has been possible, even with the protection given by the perpetuity rule for accumulations of income to be created by a settlor with a view to denying their children the enjoyment of property in favour

76 *ibid* p.127

77. [1893] 3 Ch.421. See also *Goodier v Johnson* (1881), 18Ch.D.441

78 *Goodier v. Edmund* (No.2), [1893] 3 Ch.345

79. *Thomson v. Shakespear* (1860), 1 De G.F.&J.399, 407

80. Keaton & Sheridan, *op.cit.* P.128

81. *Re Dutton's Will Trusts* (1878) Ex.D.54

82. *Christ's Hospital v. Grainger* (1849), ImaC&G.460; *Re Tyler* [1891] 3 Ch.252

of a remoter issue. Thus in *Thelluson* v. *Woodford*[83] Thelluson directed that his property real and personal, should be accumulated during the lives of all his sons and grandsons born in his lifetime or living at his death for the benefit of those of his issue, who at the expiration of that period should be within the class of heirs male of his sons. This led to the postponement of the vesting of the property and its income for about seventy or eighty years. However, the disposition was within the perpetuity period. The will was held to be valid. Nonetheless in 1800 the Thelluson Act was passed with the object of preventing similar dispositions in future by restricting accumulations within a reasonable period.

83. *Chamberlayne v. Brockett*(1872) L.R.8Ch. App.206,211 *Re Mander* [1950] Ch.250; Keaton & Sheridan, *op.cit*.p.128

84. (1799) 4 Ves.227, Keaton &Sheridan, *ibid* pp 128129; Keaton &Sheridan, a *Casebook on Equity, and Trusts,* (2nd Ed.1974) pp.250252

Chapter 13

Charitable Trusts

Charitable trusts are not very common in the African context because of the system of extended family social welfare which is rooted in customary norms. In the words of Kodilinye.[1]

> ..... in Nigerian society the most pressing public need such as the relief of poverty and the advancement of education, are served not by a "welfare state" or by charities (as would be found in very advanced Western countries) but by the all embracing extended family system. Under this system, any individual who achieves more than average wealth is required to maintain and support as many of the less fortunate members of his extended family as possible. This he may do directly, e.g. by paying the school fees of his relatives or by erecting at his own expense a building to house them, or indirectly e.g. by making a cash donation to some local community project, such as the construction of a road or a maternity hospital which will be to the benefit of all the members of his family living in that community.

Kodilinye concludes that, as a result, there is little room left for charities not only because many of their functions are performed by the extended family system, but also because few individuals could afford to establish or contribute to charitable trusts after all the demands of their families have been met."

Nevertheless, given developments in Uganda over the past decade and a half, it is submitted that charities as understood in the English sense are likely to become more frequent. One of the causes of this trend has been the Strategic adjustment Programme of the Government.[2], by which reduced government expenditure has adversely affected the financing of public institutions. Consequently,

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1. Kodilinye *Introduction to Equity in Nigeria* (1975), p.97. See also *Fabunmi, Equity and Trusts in Nigeria* (1986) p.163

2. See Minister of Finance, *Budget Speeches* 19872000

a number of them, principally educational institutions, have had to rely on endowment funds contributed to by individuals and other corporate bodies. Another cause of the evolving trend towards English type charities is the proliferation of churches and religious groups, which invariably appeal for funds from the public[3] From these two developments, it is evident that the concept of charitable trust in relation to the advancement of education and religion as well as other purposes beneficial to the community as postulated by Lord Macnaghten in *Comm*issioners *of Income Tax v. Pemsel*[4] is becoming relevant in the Ugandan context.

A. Definition

Although the definition of what constitutes a charitable gift has been problematic since the Seventeenth century.[5] It has been suggested[6] that "the absence of any statutory attempt to define a charity is compensated by the classification of charities which is contained in certain observations of Lord Macnaghten in *Commissioner of Income Tax v. Pemsel*.[7] In that case Lord Macnaghten said that:

> Charity in its legal sense comprises four principal divisions:
>
> i) trusts for the relief of poverty;
>
> ii) trusts for the advancement of education;
>
> iii) trusts for the advancement of religion; and
>
> iv) trusts for other purposes beneficial to the community not falling under any of the proceeding
>
> The trusts last referred to are not less charitable in the eye of the law because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly.

3. See also Adigun, *Cases & Texts on Equity, Trusts and Administration of Estates* (1987), pp.252253
4. [1891] A.C.531, 583
5. Keeton & Sheridan, *op.cit* (10th Ed.1975), .159162
6. *Ibid* p.161
7. *Supra* n.4. See also the Sierra Leonean Case, *Re Brown(196869)* ALR S.L.158

Difficulty has arisen as to what the fourth classification which refers to "purposes beneficial to the community" means[8]. One view is that all charitable trusts (excepting trusts for poor relations and poor employees) must include an element of public benefit. The other opinion is that not all gifts for the public benefit are charitable. The implication is that the term public benefit is wider than "charity". Consequently, in order to determine whether a gift for the public benefit is also charitable, another test must be used. There is no difficulty if the gift is for the advancement of religion or education or for the relief of poverty. The problem arises though when the gift is said to fall within the fourth classification. Decisions on this point are both conflicting and unsatisfactory.[9]

Each of Lord Macnaghten's classifications will now be considered, in turn.

B. The Relief of Poverty

Bequests aimed at relieving poverty are regarded as charitable. As to what constitutes "poverty" there is no rigid definition. Thus in *Re Coulthurst*[10], it was indicated that poverty does not mean destitution. It may refer to persons who have "gone short". This means that it is possible to have a good charitable gift for the assistance of persons of limited means.[11] Furthermore, if there is a gift for those members of a class or profession who are in need the requirement of poverty is determined by reference to the general standard of the profession or class[12] and this therefore is a question of degree.

The cases which are mostly considered here are English cases which occurred before welfare payments were made available from public funds in Britain. Such cases may still be relevant for Uganda where welfare payments are not met by the government. In this context, the issue has arisen to the effect that if the relief of poverty is

8. Keeton & Sheridan, *op.cit* p.162
9. See *infra* for discussion on the fourth head
10. [1951] Ch.661, 665666
11. *Re Gardom* [1914] 1 Ch.662
12. Keeton & Sheridan, *op.cit* p.164

the duty of the state of what significance is a private charity?[13] It has been suggested[14] that the private charity fills gaps which the welfare state programme, if any, leaves uncovered. The only problem is that if a trust's purpose is not appealing enough to justify expenditure of public money should this justify the tax exemptions often given to a charity?

In *Re De Carteret*[15], trust was set up for the payment of annuities to women whose income was not less than £80 or more than £120. It was held that this was a valid charitable trust. However, if a gift covers people who are not in need, it will be invalidated. This would cover gifts to employees of a company except where the qualification of poverty is indicated.[16] Thus in *Re Sanders Will Trusts*[17] it was held that a gift for the provision for housing for the working classes was not charitable. Similarly, in *Re Gwyon*[18] a fund was set up to provide a gift of clothing to boys in Farnham and district. It was held that the gift was invalid because it failed to exclude affluent children but excluded black boys.

A trust for the relief of poverty does not have to be an endowment, i.e. immediate distribution is not required. Thus in *Re Scarisbrick*[19], a trust was set up, "for such relations of my son and daughters as in the opinion of the survivor of my..... son and daughters shall be in needy circumstances..... as the survivor..... shall by deed or will appoint". It was held that the trust was valid since it was meant for "poor relations" and did not have to benefit the public. This decision also shows that the persons to be benefitted may be selected at the discretion of these trustees; a sort of discretionary charitable trust is permissible.

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13. See in this regard Constitution of the Republic of Uganda, 1995, Objective XI
14. Hanbury & Maudsley, *Modern Equity* (9th Ed) p.264
15. [1933] Ch.103
16. *Re Drummond* [1914] 2 Ch.90 Compare with *Gibson v. South American Stores* [1950] Ch.177; *Oppenheim Case infra* n.21
17. [1954] Ch.265
18. [1930] 1Ch.255
19. [1951] Ch.622; See also *Re Cohen* [1973] 1 W.L.R.415, *Dingle v Turner* [1972] A.C.601

C. The Advancement of Education

This particular charity has been liberally interpreted. All that has been required to validate such trusts has been the existence of an element of advancement or furtherance of some educational purpose.[20] In *Re Obabunmi Pedro*[21], property was devised to trustees upon trust, "to collect the rents, therefrom and distribute such rents in equal share among my grandchildren and any other child for their training and education". There were no children living and only two surviving grandchildren both of whom were *sui juris* and no longer undergoing any formal training or education. The issues were whether (i) an absolute gift was intended (i) the devise was a valid charitable trust. It was held that an absolute gift was not intended and the gift was not charitable. Udo Udoma, J. thus stated:

> .....a devise.....on the ground that it makes provision for the education of the children or grandchildren of the testator is (not) a charitable gift. A gift for the education of descendants of named individuals must be regarded as a family trust and not one for the benefit of a section of the community.

The following trusts have been held to be charitable trusts for the education in business management and in the art of government;[22] production of a dictionary;[23] support the London Zoological Society[24]establishment and maintenance of museums[25]; support of learned, literary, scientific and cultural societies;[26] search for a Shakespeare Manuscript;[27] choral singing in London;[28] promotion of

20. *Whicker v. Hume* (1858) 7H.L.C.124, 155
21. (1961) LLR 127; See also *Adigun, op.cit. Supra* n.3 p.297. See also *Oppenheim v. Tobacco Securities Trust Ltd.* [1951] 1 All E.R.31
22. *Re Koettgen's W.T.* [1954] Ch.252
23. *Re Stanford* [1924] 1 Ch.73
24. *Re Lopes* [1931] 2 ch.130
25. *British Museum Trustees v. White* 1826
26. *Royal College of Surgeons v. National Provincial Bank* [1952] AC631
27. *Re Shakespeare Memorial Trust* [1923] 2 Ch.298
28. *Royal Choral Soc. V. IRC* [1943] 2 All E.R.101

the music of the composer Delius;[29] publication of Law Reports;[30] founding of lectureships and professorships[31] sort of finishing school for the Irish people where self control, oratory, deportment and art of personal conduct is taught.[32] In *Case of Christ's College Cambridge*[33], educational purposes were held to include matters ancillary to the main purposes; for instance the payment of teachers and administrative staff. It is thus significant that subject to the requirement of public benefit, the above examples provide a wide construction or meaning of the expression advancement of education.

Areas covered by Charitable Trusts For Advancement of Education

i) Research

The issue is whether a charitable trust can be set up to enhance research under the charitable head of advancement of education. It is thought that education as understood for charitable purposes should include more than simply accumulating knowledge. Thus *Re Hopkins*[34], Wilberforce J. thus stated:

> ..... the word education is used in a wide sense and extends beyond teaching.....The requirements is that in order to be charitable research must be of advanced value to the researcher or must be so directed as to lead to something which will pass into the store of educational material or so as to improve the sum of communicable knowledge in an area which education may cover education in this last context extending to the formation of literary taste and application.

Consequently, in that case, it was held that a testamentary disposition to the Francis Bacon Society to be used in finding the Bacon Shakespeare manuscripts was a valid charitable trust under both the advancement of education and the fourth head formulated by Lord

29. *Re Delius* [1957] Ch.299
30. *Inc. Council of Law Reporting v. AG* [1972] Ch.73
31. AG v. *Margaret & Regiu's Professors in Cambridge* (1682) 1 Vern 55
32. *Re: Shaw's W.T.* [1952] Ch.153
33. (1757) 1 WM.B.190
34. [1965] Ch.669, 680

Macnaghten.[35] The approach here may be contrasted with the result in *Re Shaw.*[36] By his will, George Bernard Shaw directed that his residuary estate should be devoted to researching the advantages to be gained by substituting the present twenty six letter alphabet by a new proposed British alphabet of forty letters, in which each letter would indicate a single sound, and to translate his play "Androcles and the Lion" into a new alphabet for comparison with the original. It was held that the gift was not charitable if the object was merely to increase knowledge and that in itself is not a charitable object unless it is combined with the original.

Professor Maudsley criticised[37] this approach as being too narrow a view of education. He pointed out that in order for a trust to be held charitable within Wilberforce J.'s test,[38] the research must be useful and this is a matter of individual judgement. It is significant though that not every type of knowledge whether researched or disseminated or taught is capable of being education. For instance schools for prostitutes or pickpockets or training of spiritualistic mediums would not qualify as charitable trusts for the advancement of education.

2. Artistic & Aesthetic Education

This could be the subject of a charitable trust. Thus in *Royal Choral Society v. Inland Revenue Commissioners*[39], it was held that a charitable trust to promote the practice and performance of choral works was valid. In the words of Lord Greene:[40]

> ..... a body of persons established for the purpose of raising the artistic state of the country... is established for [charitable] educational purposes.

35. *Supra* n.7 and text thereof
36. [1957] 1 WLR 729
37. Hanbury & Maudsley, *op.cit*. P.259
38. *Supra* n.36
39. [1943] 2 All E.R.101
40. *Ibid* p.104

Similarly, in *Re British School of Egyptian Archeology*[41] a trust was set up to excavate and discover Egyptian antiquities, and to hold exhibitions and to promote the training and assistance of students in the field of Egyptian history. It was held that it was educational. In *Re Delius*[42], a gift was given for the purpose of increasing the general appreciation of the musical work of the composer, Delius. It was held that the trust was for the advancement of education. Nonetheless, a trust which is expressed to be for "artistic" or "dramatic" purposes may be educational, a trust would not be regarded as charitable unless its purposes are exclusively charitable.[43]

3. Evaluation

It has been suggested that[44] whether a trust expressed to be for the advancement of education is held to be valid will depend on its valuation, which is subjective. Consequently, while one may rely on expert evidence to determine the validity of the trust, this by itself is not conclusive. The court itself has to be satisfied as to the merit for instance of the artistic work. Thus in *Re Pinion,*[45] a testator gave his studio and its contents to trustees to enable it to be used as a museum for the display of his collection of furniture, artistic objects and paintings. Some of these had been made by the testator himself. Expert opinion was tendered at the hearing and unanimously indicated that the collection had no artistic merit. It was held that the trust was void because " it would serve no useful purpose to impose on the public this mass of junk since it had neither public utility or educational value."[46]

41. [1954] 1 WLR 540
42. [1957] Ch.299
43. *Re Ogden* (1909) 25T.L.R. *Associated Artists v. IRC* [1956]
44. Hanbury & Maudsley, *op.cit* p.259
45. [1965] Ch.85
46. *Ibid* per Harman J.

4. Youth, Sports at School and University

Many bequests affecting the young have usually been held to be charitable. In *Re Mariette*[47], there was a gift to provide *inter alia* Eton (a public school) five Courts and Squash rackets at Aldernham school. It was held that this was valid because learning to play games at a boarding school was as important as learning from the books. However, in *Re Nottage*[48], a prize was created for a yacht race. It was held that it was not charitable because it was outside educational facilities and services.

5. Professional Bodies

Professional bodies whose object is to advance education many be regarded as charitable. Thus in *Royal College of Surgeons v. National Provincial Bank*[49], the object of the college was to promote and encourage the study and practice of the art and science of surgery. It was held that the College was a charity. It has also been held that a College of Nursing was entitled to a reduction of rating liability because the advance of nursing as a profession in *all* or any of its branches was a charitable purpose.[50] A construction industry training board has also been adjudged charitable.[51] Nevertheless, before a professional body can be held to be charitable, its objects must be exclusively charitable. Consequently, if the object or one of the objects of the society is to promote the status of the profession or the welfare of its members, it will not be charitable.[52]

47. [1915] 2 Ch.284

48. [1895] 2 Ch.649

49. [1952] A.C.631

50. *Royal College of Nursing v. St. Marylebone Borough Council* [1959] 1 WLR 1077

51. *Construction Industry Training Board v. AG* [1973] Ch.173; See also IRC v. *Yorkshire Agricultural Society* [1928] 1KB611; *Institute of Civil Engineers v. IRC* [1932] 1KB 149

52. *General Nursing Council for England & Wales v. St. Marylebone Borough council* [1959] A.C.540

6. Political Propaganda Disguised As Education

Political purposes are not charitable because although they may be of public benefit, they are partisan. In *Bowman v. Secular Society*[53], Lord Parker indicated that the court cannot determine whether any particular programme is for the public benefit. In *Bonar Law Memorial Trust v. IRC*[54], an attempt was made to propagate the views of the conservative party under the disguise of a trust for education providing for the advancement of education along the lines of the principles of the party. It was held that the trust was invalid. However, a similar trust could be upheld if it is presented in the form of education. Thus in *Re Snowcroft,*[55], the gift was of income to be applied "for the furtherance of conservative principles and religious and mental improvement", and was held to be valid.

7. Private and Independent Schools

An educational institution would not be regarded as charitable if it is operated for profit.[56] However, a private school would be regarded as charity if it does not operate for profit.

D. The Advancement of Religion

In *Bowman v. Secular Society*[57], Lord Parker advanced this definition of religion:

> Any form of monotheistic theism will be recognised as a religion. Religion requires spiritual belief, a faith, a recognition of some higher unseen power which is entitled to worship. It may include, but is greater than morality or a recommended way of life.

53. [1917] A.C.406.421 see too *National Anti Vivisection See.* IRC [1948] AC31
54. (1933) 49 TLR220
55. [1889]
56. *Re Girls Public Day School Trust* (1951) Ch.400
57. [1917] A.C.406

Under this head, in order for a gift to be valid as a charitable trust, it must be for the advancement of religion. In *Karen Kayemeth Le Jisroel v. IRC*[58], the expression "advancement of religion was explained to mean:

> The promotion of spiritual teaching in a wide sense and the maintenance of the doctrine on which this rests and the observances that serve to promote and manifest it not merely foundation or cause to which it can be related.

Consequently, in *Gilmour v. Coats*[59], a gift for closed order of nuns was held not to be charitable since the element of public benefit was lacking. Similarly, in *Fatumola v. Ogundimu*[60], a testatrix in her will directed that a usual yearly festival be performed in her dwelling house and yearly feastings given to the indigenous Faith of Africa both in her memory and as the women head of this religious sect. She also directed her trustees to reserve her dwelling house and verandah in perpetuity for the absolute use of the members of her religious sect for meetings and for any purpose. The issue arose as to whether the purported trusts were charitable. It was held that although the trusts created for the performance of yearly festival and feasting in the testatrix's memory and as women head of her indigenous Faith of Africa, relate to religion, in order to qualify as charitable it is an essential element that they should benefit the public at large and not a section of it, as in this case, members of a religious sect.

However, the court will usually not inquire into the value of the religion or even whether its followers are numerous. All that is required is that followers exist[61] Charitable gifts could also be established for all types of religion.

58. [1931] 2 K.B.465

59. [1949] AC 426; See also *Cocks v. Manners* (1871) L.R.12EQ.574

60. (1977) 12 CCHCJ2799. Adigun, *op.cit* p.298. See also the Sierra Leonean Case *Re: Brown* (196869) ALR S.L.158; Adigun *op.cit* .299

61. *Thornton v. Howe* (1862) 31 Beav. 14,19

Gifts for purposes connected with religion have been accepted as valid. These include gifts for the benefit of the clergy,[62] for the improvement and upkeep of the fabric of the church,[63] for the maintenance of a tomb in a church, this being part of the church fabric, although a trust for the erection and maintenance of a particular tomb in a church yard is not charitable.[64] In Nigeria trusts for the slaying of masses for the souls of the testator and his children.[65], and renting out or selling a house the proceeds thereof to be used on a scheme whereby the testator's name would be continually kept in remembrance perpetuated in connection with the work of Lagos Church Missions[66] were upheld as good charitable trusts for the advancement of religion. However, trusts for the maintenance of a private mosque[67] and to perform yearly festivals and feastings in the memory of the testatrix[68] have been rejected as lacking public benefit.

E. Other Purposes Beneficial to the Community

No general criterion appears to emerge from the cases as to what constitutes purposes beneficial to the community. The cases are arbitrary, conflicting and attempts to formulate principles by analogy have been futile.

The instances where charitable trusts under this head have been recognised include (i) provision for the relief of the aged, bereaved persons, persons under disability (e.g. the blind or maimed), other persons in need of care (e.g. orphans) through the provision of buildings, maintenance of homes, establishment of disaster funds etc.[69]; (i) matters associated with health, e.g. the provision of hospitals,

62. *Middleton v. Clitherow* (1798) 3 Ves.734
63. *Hoare v. Osborne* (1866) L.R.Eq.585
64. *Lloyd v.Lloyd* (1852) 2 Sim (N.S.) 225
65. *Re Obabunmi Pedro* [1961] LLR127, *Re Compton* [1945] Ch.123; *Re Caus* [1943] Ch.162
66. *Phillips v. Phillips* [1967] 1 All N.L.R.204
67. *Iyanda v.Ajike* (1948) 19NLR 11
68. *Fatumola v. Ogundimu supra* n.60
69. See Keeton & Sheridan, *the Modern Law of Charities*, 2nd. Ed.pp.107113

the training of nurses and some kind of propaganda e.g. in favour of temperance or against drugs and smoking[70], (ii) care and treatment of animals.[71]; (iv) recreational purposes[72]; (v) gifts for the general benefit of the country or of a locality such as a parish or town.[73]; (vi) local public works and amenities;[74] (vi) purposes connected with the armed forces[75]; (vii) the promotion of industry, commerce and agriculture.[76]

An example of lack of consistency by the courts under this head appears from the following cases. In *Re Moss*[77], a gift for the "welfare of cats and kittens" was held to be charitable. However, a gift made for the establishment of a centre for Welsh culture in London was held not to be charitable.[78] Similarly, in *IRC v. Baddeley*[79], trusts were created for the provision of faculties for the social and physical training and recreation in the boroughs (districts) of West Ham and Leyton of persons who belonged or were likely to belong to the Methodist church. It was held that those were not charitable trusts because the class to be benefitted was not a "public" class of the community. It is because of these inconsistent results that the Recreational Charities Act, 1958 was passed in Britain to try to achieve some consistency in the application of this head of charity.

In Nigeria three cases stand out as illustrations of the application of charity under this head. In *Iyanda v. Ajike*[80], the testator in a will directed that a certain house should not be sold but let and the rents accruing therefrom used for the upkeep of the deceased's mosque, which was a prayer room in the family house. The issue arose as to

70. *Ibid* pp.114118
71. *Ibid* pp.87 *A, Gv. Plowden* [1929] 1Ch.557
72. *Ibid*, pp.9198
73. *Ibid* pp.129131
74. *Ibid* pp.132133
75. [1949] 1 All E.R.495 c.f. *National Anti Vivisection Soc. V IRC* [1948] A.C.31
76. *Williams' Trustees v. IRC* [1947] A.C.447
77. [1949] 1 All E.R.495 c.f. *National Anti Vivi Section Soc.v.IRC [1948]A.C.31*
78. *Williams Trustees v. IRC* [1947] A.C.447
79. [1955] A.C.572
80. [1948] 19NLR 11, Adigun *op.cit*. p.298

whether this constituted a valid charitable trust for religious purposes and the advancement of religion. It was held that no charitable trust had been established. In the words of Baker S.P.J.[81]

> The room in this case is a private room used for prayer adjoining the deceased's dwelling house; it is known and bears the name of the deceased..... There is no suggestion that the public will be admitted to the room but that it was intended by the testator to be used as a private family mosque in a private house..... I cannot find in the devise any charitable purpose; for religious purposes are charitable only when (they) tend directly or indirectly towards the instruction or edification of the public.

The public benefit element was also found to be missing in *Fatunmola v. Ogundimu*.[82] Nevertheless, in *Phillips v. Phillips*[83], despite the fact that the trust was expressed to be aimed at perpetuating the name of the testator, which arguably could be said to lack a public beneficial element, what probably motivated the Supreme Court in holding that there was an overwhelming intention to create a charitable trust was the indication that the remembrance or perpetuation of the name was to be in connection with the work of the Anglican Lagos Church Missions. It is submitted that, that nexus created the public beneficial element required to validate the trust as charitable.

F. Special Features of Charitable Trusts

1. Purpose Trusts

The first aspect to note is that charitable trust are essentially purpose trusts. Consequently, there is no need for human beneficiaries to enforce them as with non-charitable purpose trusts.[84] Individuals who may benefit from charitable trusts have no *locus standi* to enforce them. They are regarded as public trusts enforceable by the

81. 19 NLR at p.12
82. *Supra* n.60
83. *Supra* n.68. See also *Re Bain* [1930] 1 ch.224
84. See *supra* Chap.11 under *Trusts of Imperfect obligation*

relevant Attorney General.[85] Nevertheless an obligation must have been imposed on the trustees since a mere power given to act for charitable purposes would not create a trust.

2. Objects Do No Have to be Certain

In contrast within other trusts, the objects of a charitable trust need not be certain. Consequently a trust established for "charitable purposes" will be valid. The court has power to define a scheme for the application of funds for specific charitable purposes. However, it is necessary that the objects of the trust should be exclusively charitable. Thus in *Moggerdige v. Thackwell*[86], a testratix gave her residuary personal property to X desiring him to dispose of it to such charities as he shall think fit. She recommended some clergymen who had large families and of good character as objects of the gift. It was held that the testatrix's intention was that property should be applied to charity. It was irrelevant that she had not indicated the particular charitable objects and that the trustee had died before the testatrix. Since the next of kin were excluded, the court formulated a scheme for the disposition of the estate.

3. Perpetual

It is possible for a charitable trust to be perpetual and in some cases be incapable of final achievement for instance trusts to increase the appreciation of the music of a composer[87] or to ensure the remembrance and perpetuation of the name of the testator.[88] Many charitable trusts may continue even after centuries of existence and many schools, churches and almhouses depend on them. It is finally significant in this regard that trustees of a charity normally require the leave of the court before they can deal with property which is part of the charitable gift.

85. *Re Belling* [1967] Ch.425

86. (1792) 1Ves J.464

87. *Re Delius, supra* n.29

88. *Phillips v. Phillips,* supra n.83. See also Chap.12 on the relationship between the perpetuity rule and charitable trusts, notes 8083 and text thereof

4. Tax Advantage

Charitable trusts may be exempted from income tax on rents, interests, dividends and annual payments provided that the income is applied for charitable purposes only.[89]

G. The Cypre's Doctrine

The law affecting charities "favours gifts for and saves gifts for charitable purposes which would otherwise fail"[90]. This may happen in three major instances.[91] (i) where the donor clearly indicated that he wished his property to go to charity but did not select a specific charity or left out some essential details for carrying out his charitable purpose, (i) where at the time the gift of charity was meant to be effected, it becomes impossible to carry out the precise charitable object indicated by the donor or to carry it out in some particular and yet it is clear that the donor had a general charitable intention; (ii) where after the property has become subject to a binding trust, it becomes wholly or partly impossible to continue to apply the property in the same way and there is no provision for a gift over in that event. Examples of this are changes in social conditions[92], the existence of surplus funds after the charitable purpose has been completed[93], the winding up of a charitable institution when its activities are taken over by another body.

The cypres application depends on the existence of a general charitable intent. Whether this intention exists, depends on the construction of the gift. Difficulties may arise where gifts are given to nonexistent institutions or ones which have existed but have ceased to exist before the death of the testator. Thus in *Re Slatter's*

89. Income Tax Act Cap340, Ss.2, 21, 34

90. Keeton & Sheridan, *Law of Trusts* (10th ed. 1974) p.168

91. *Ibid*, pp.168169. See also P.Luxton, "Cypres and the Ghost of Things that Might have been" [1983] *Conv.*107118

92. See *Re Colonial Bishoprics Fund* 1841, [1935] Ch.148; *Re Dominion Students' Hall Trust [1947] Ch.1833*

93. *Re Campden Charities* (1881), 18Ch/D.310; *Re: Raine* [1956] Ch.517.

Will Trusts[94], it was established that if an institution existed but ceased to do so before the testator's death, there is a strong presumption that the testator intended simply to benefit the particular institution. If this is the case then the gift lapses. However, if the institution named in the gift has never existed, the court will act on the assumption that the testator intended to benefit a purpose of the type named. In this case, the court will infer the existence of general charitable intention directing that the gift be applied *cypres.*[95],

Another possible issue is where the testator names a particular charity but no existing organisation can be identified with it. In *Re Satterthwaite's Will Trusts*[96], a testratix bequeathed money to named organisations for the care and cure of animals. One of these was a private business carried on by an unqualified veterinary surgeon which could not take as a charity. Another was referred to as "the London Animal Hospital". The Blue Cross Organisation claimed this bequest in respect of an animal hospital which it maintained. It was held that this could not be identified with the institution named in the will. However, the whole gift showed an intention to benefit the welfare of animals and therefore showed a general charitable intent. Consequently, the bequest could be applied *cypres.*

A further question is what constitutes the expression, "general charitable intent". In *Re Lysaght*[97] Buckley, J. suggested that expression may be regarded as being present where it is established that the donor had a paramount intention to effect a charitable purpose, which the court can find a method of putting into effect even though it is impracticable to give effect to a direction by the donor which is not an essential part of this paramount intention. In that case, the donor gave money for the establishment of medical studentships to be awarded by the Royal College of Surgeons, with the provision that the beneficiaries should be British born subjects,

94. [1964] Ch.512
95. *Re Harwood* [1936] Ch.286; *Re Tharp* [1942] 2 All E.R.358
96. [1966] 1 W.L.R.277. Keeton & Sheridan, *supra* n.90, p.169
97. [1966] Ch.191

"not of Jewish or Roman Catholic Faith". The college informed the trustees of the will that they would not accept the bequest with the condition attached. It also questioned the validity of the bequest. It was held that (i) the bequest was not void for uncertainty and did not conflict with public policy; (i) the administration of the trust by the Royal College of Surgeons was of the essence of the trust so that if the college refused the gift, it became impracticable to carry out the charitable purpose in the manner decided by the testatrix, (ii) the impracticability of the minor condition could not defeat the general paramount intention. Consequently, it was directed that the fund be applied deleting the discriminating clause.

It is also the view that where there is an absolute gift by will to a charity which comes to an end after the testator's death, the property may be applied *cypres.*[98]

98. *Re Slevin* [1891] 2Ch.636. See also *Re Whittaker* [1951] 2T.L.R.255

Chapter 14

Implied and Resulting Trusts

A. General

The purpose behind the recognition by equity of implied and resulting trusts is to execute the presumed intention of the testator. In contrast, constructive trusts are imposed on the parties by the court regardless of their intentions, whether actual or presumed "and sometimes even in opposition to those intentions".[1] The difference between implied and express trusts is one of degree and consequently unimportant. The main contrast arises between trusts arising by act of parties and those arising by operation of law. To draw a distinction between implied and resulting trust is also inappropriate since in both cases the court aims at giving effect to the presumed intention of the parties.

This chapter will examine about five principal situations in which implied or resulting trusts arise.

B. Purchase in the Name of Another

The first situation where an implied trust arises is where property is bought by X in the name of Y. In other words, X provides the purchase money and Y takes the conveyance in his name. Apart from other explanations, such as the intention to give the property to Y, equity presumes that X intends Y to hold the property on trust for him.[2] In *Coker v. Coker*[3], Lambo, J. quoted with approval the statement of principle by Eyre, L.C.B. in *Dyer v. Dyer*[4], relating to implied and resulting trusts, thus:

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1. Keeton & Sheridan, *op.cit* p.173. See also *Keech v. Sandford* (1726), Sel Cas.King 61. Discussed *infra* Chap.15
2. *Rochefocauld v. Bousted* [1897] 1Ch.196
3. [1964] L.L.R.188. See also Adigun, *Cases and Texts* on *Equity Trusts and Administration of Estates in Nigeria* (1987) p.303 see also *Ukatta v. Emembo* [1963] 7E.N.L.R.137
4. (1788) 2 Cox.92, 93, Adigun *ibid*, p.304

> The clear result of all the cases, without a single exception is that the trust of a legal estate whether freehold, copyhold, or leasehold, whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several whether jointly or *successive,* results to the man who advances the purchase money..... and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor.

It has been suggested[5] that this principle also applies to personality and where two or more persons advance purchase money jointly and the conveyance is taken by a third. In such a case, the third person holds in trust for the purchasers to an extent proportionate to the amount of the purchase money, which each has contributed. The principle is also applicable to a conveyance taken in the name of one of the purchasers only.[6]

1. Presumption of Implied/Resulting Trust

Frequent cases giving rise to implied trusts are where two persons (normally husband and wife), or more advance money for the purchase of a house and the conveyance is taken in the name of one of them.[7] In all these cases, there is an implied trust, in the absence of a contrary intention to benefit, for the contributories as equitable tenants in common in proportion of their respective contributions, with the legal owner holding on trust for sale.[8] Nonetheless, the mere sharing, of household expenses between husband and wife will not confer on the wife an interest arising from an implied or resulting trust of the house, if the cost of buying it and other family expenses could have been borne by the husband without the wife's contribution. Thus in *Gissing v. Gissing*[9], the wife paid a small sum for

5. Keeton & Sheridan, *supra* n.1 pp.173174

6. *Gravesend Corporation v. Kent County Council* (1935) 1KB 339

7. See *Bull v. Bull* [1955] 1 Q.B.234 (mother and son); *Cook v. Cook* [1962] p.235 husband and wife); *Cooke v. Head* [1972] 1W.L.R. 518 (man and mistress); *Ukatta v. Emembo, supra* n.3

8. See also Property and Conveyancing Law *(supra*) of Nigeria S.21

9. [1971] A.C.886 c.f. *Hussey v. Palmer* [1972] 1W.L.R.1286

some furniture and the laying of a lawn as well as for her own clothes and those of her son and other extras. It was held that the wife had no equitable interest in the house paid for by the husband, and of which he was the legal owner. Similarly, in *Pettitt v. Pettit*[10], following their marriage, the husband and wife lived in a house which was owned by the wife. The house was sold in 1960 for £4,241 and out of the proceeds a bungalow was bought in the wife's name for £3,813. The parties lived in the bungalow until 1965, when they were separated and later divorced. In proceedings, under Section 17 of the Married Women's Property act, 1882[11], the husband claimed a share of the proceeds of the sale of the bungalow, on the ground that while the parties were living in it, he had undertaken its redecoration and improvement to the extent of £1,000. It was held by the House of Lords that (i) the Married Women's Property Act 1882, S.17 was a procedural provision only, and did not enable the court to vary the existing rights of the parties and (i) from the facts of the case, it was not possible to infer a common intention of the parties that the husband by doing work, and by purchasing materials for the house should acquire any beneficial proprietary interest in it. Consequently, he was not entitled to any part of the purchase price. Lord Reid approved the statement by Lord Denning M.R. in *Button v. Button*[12], thus (with regard to the husband)[13], "he should not be entitled to a share in the house simply by doing the "do it yourself" jobs which husbands often do" and with regard to the wife:[14]

> The wife does not get a share in the house simply because she cleans the walls or works in the garden or helps her husband with the painting and decorating. Those are the sort of things which a wife does for the benefit of the family without altering the title to, or interests in, the property.

In *Osinowo v. Osinowo*[15], the plaintiff claimed joint ownership of the disputed property and an order that the property be declared

10. [1970] A.C.777
11. Statute which does not apply in Uganda
12. [1968] 1 W.L.R.457
13. *Ibid* p.461
14. *Ibid* p.462
15. Unreported Suit No.1/281/77; Adigun *supra* n.3, pp.304307

on trust for sale for the benefit of herself and the defendant, with the proceeds shared equally or as equitably as deemed fit between the two parties. The action was instituted following the dissolution of her marriage with the defendant. She argued that the disputed house was built with the direct joint financial contribution of herself and her husband and in effect a resulting trust in her favour had arisen. Evidence, however, showed that she did not make any direct financial contribution with the result that no joint ownership could be inferred. It was held[16] that the disputed property was not the joint property of the plaintiff and the defendant. Consequently, it could not be declared to be on trust for sale. Nonetheless, the judge awarded the plaintiff, £1,000 lump sum for her indirect contribution to the building.

In *Savage v. Dunningham*[17], the court refused to extend the doctrine of implied and resulting trusts to a lease, taken in the name of one out of three tenants all of who shared for a time in the rent and other expenses. This was because the rent paid was for the use of property and not for the acquisition of a capital asset. The result would have been different if all the tenants had shared in the premium for the acquisition of a lease.

2. Conditions for the Presumption

The Statute of Frauds, 1677[18] does not apply to the creation of or operation of resulting, constructive or implied trusts. Consequently, it is not necessary that there should be evidence in writing of the intention of the persons supplying the purchase money. This may be proved orally.[19] Nonetheless, the following conditions are relevant in determining the existence or otherwise of an implied trust.[20]

16. Applying *Gissing v. Gissing supra* n.9
17. [1973] 3 W.L.R.471
18. S.8 (UK)
19. *Bartlett, v. Pickersgill* (1760), 1 Egen 151
20. See generally Keeton & Sheridan, *op.cit* pp.175176

First, the oral evidence must clearly prove the fact of payment by the person for whom it is attempted to establish the trust. Circumstantial evidence, such as that the means of the nominal purchaser were so small that he would have been unable to supply the money himself, may be accepted as sufficient.[21] Second, the evidence must indicate that the purported beneficiary who claims as the real buyer, provided the money as *purchaser,* since if the money was aimed at being a loan to the person in whose name the conveyance was executed, there is no implied trust and the legal owner becomes merely the debtor of the other.[22] Third, where there is evidence that at the time of the transaction, it was the inten tion that the person who took the conveyance should have the beneficial interest the person who provided the purchase money cannot later change his mind and seek to establish, a trust.[23] Nevertheless, if the conveyance indicates an express trust, a resulting trust cannot be prayed in aid, in the absence of fraud or mistake, in order to prove equitable interests which are different from those of an express trust.[24]

In the situations considered, the true purchaser should endeavour to prove the trust with expedition, since the presumption is affected by lapse of time especially where the legal owner is in actual possession. In this respect, while it may be suggested that after the death of the legal owner, the presumption can never be established, this is not true because "the death of the nominal purchaser may detract from the weight of the parole evidence but does not affect its admissibility.[25] Fourthly, the presumption of a trust is inoperable where the result would be contrary to public policy, for instance by enabling a purchaser to defeat his creditor.[26] In such a situation, the legal owner takes beneficially.

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21. *Willis v.Willis* (1740) 2 Atk.71
22. *Bartlett v.Pickersgill, supra n.20*; *Hussey v. Palmer*, *supra* n.9
23. *Groves v. Groves* (1829), 3y&j.1C3, 172
24. *Re John's Assignment Trusts* [1970] 1 W.L.R.955
25. Keeton & Sheridan, *op.cit* p.176. See also *Lewin on Trusts* 16th Ed.p.132
26 *Gascoigne v. Gascoigne* '[1918] 1K.B.223

3. Presumption of Advancement

a) Purchase in Name of Child by Parent

The presumption of a trust is only possible "where there are no other circumstances to explain the transaction and remove the presumption".[27] Thus in *Young v. Sealey*[28]; a lady had a banking account and shares in the names of herself and her nephew, she having provided the money and the shares. Oral evidence and evidence of surrounding circumstances was admitted to rebut the presumption of a resulting trust of her estate. An example of such explanatory circumstances arises where the real and apparent purchasers are closely related. In this instance the equitable presumption of advancement is operable. A good example of the operation of this presumption to defeat the presumption of implied or resulting trust is where a father buys in the name of his child or children.[29] In *Grey v. Grey*[30], a fa ther advanced the money, and after the conveyance, received the profits for twenty years, made losses, took fines, enclosed part of a park on the estate, embarked upon building and entered into negotiations for the sale of the land. It was held that regardless of all these activities, the son held beneficially since ample provision had not been made for him previously. Similarly, where the father previously settled a reversionary estate upon the son this was not considered such a provision as would destroy the presumption of advancement since the son might starve before his reversionary estate fell into possession.[31] In *Stilemen v. Ashdown*[32], a conveyance was taken in the joint names of a son and father. It was held that this did not fulfill the purpose an advancement since if the son died

27. Keeton & Sheridan, *op.cit* p.176

28. [1949] Ch.278

29. *Dyer v.Dyer* (1788) 2 Cox 92, 9394 per Eyre L.C.B.; *Muniru Shekete v. FitJames* (Unreported) Suit No.FCA/L/83/81. See critique thereof in *Adigun, supra* n.3 pp.313322

30. (1677) 2 Swanst 594. See also *Shepard v. Cartwright* [1955] A.C.431

31. *Lampleigh v. Lumpleigh* (1709), 1P.Wms.111

32. (1742), Atk.477

his beneficial share would pass to his father by survivorship and if he was an infant, he would not be able to effect a severance. The result here may be contrasted, with the weight of authority to the contrary.[33] Thus in *Northern Canadian Trust Co. V. Smith,*[34] a father bought a house in the name of his son. The father and his family lived in the house rent free and both the father and mother spent money to improve it. It was held that these facts did not displace the presumption of advancement.

Similarly, in *Roberts v. Wilson*[35], the plaintiffs were the descendants of the five children of Wilson, who died intestate. The first defendant was the widow of the sixth child of Wilson. The disputed real property was purchased in the name of the sixth child and a conveyance was made out and obtained in his name. The first defendant claimed exclusive ownership of the property on the ground that the property belonged to her deceased husband. The plaintiffs argued that the property was the family property of Wilson. Consequently, all the descendants of Wilson including themselves were owners of the property and entitled to monetary compensation. It was held that unless the plaintiffs could sufficiently rebut the presumption of advancement which arose in favour of the sixth child by the registered conveyance covering the property, the property could not revert to their deceased ancestor, Wilson. The fact that the sixth child did not himself collect the rents from the property for several years and also that other members of the family had always lived on the property rent free did not destroy the continuance of the advancement. However, in *Warren v. Gurney*[36], a father bought a house in 1929 in the name of his daughter, Catherine, but retaining the title deeds. By a document written in 1943, he expressed a desire that the house should belong to his three daughters. Upon the father's death, Catherine claimed the house. It was held that the document written in 1943 was

33. *See Grey v. Grey, supra n.30* and cases cited therein
34. [1947] 3 D.L.R.135
35. [1962] L.L.R.39; Adigun, *supra* n.3, p.323
36. [1944] 2 All E.R.472

inadmissible, not being contemporaneous with the purchase of the house. Nonetheless, there was other contemporaneous evidence to rebut the presumption of advancement.

b) Purchase in Name of Wife by Husband

Where a husband buys a residential house in the name of a wife and pays installments of the purchase price, the presumption of advancement is applicable.[37] The presumption is stronger if the parties are about to marry.[38] Where the conveyance is in the names of the husband and his wife, the wife will be entitled to halfshare of the interest.[39]

One criticism of the presumption is that it does not apply to a purchase by a wife in the name of the husband.[40] In modern times though, the "presumption can be rebutted more easily..... in the light of greater frequency of contribution by both spouses to family income and outgoings".[41]

c) Restrictions on Application of Presumption

First, the presumption cannot be avoided on the ground that the purpose of the transaction was to enable the husband to avoid either Ugandan Law or the payment of income tax since equity will not assist a person who seeks to contravene revenue laws.[42] To establish such a position is evidence of fraud on the part of the husband.[43] Second, no presumption arises in favour of a reputed wife who has not been through a valid ceremony of marriage with the reputed husband. [44]Third, the presumption exists in respect of a marriage later declared to be null on ground of some disability provided

37. *Silver v. Silver* [1958] 1 W.L.R.259
38. *Moate v. Moate* [1948] 2 All E.R.486, 487 per Jenkins J.
39. *Kingdom v. Brides* (1688), 2 Vern 67, *Falconer v. Falconer* [1970] 1 W.L.R.1333
40. Keeton & Sheridan, *op.cit* p.179
41. *Ibid*, See also *Falconer, supra* n.39; *Gissing v. Gissing supra* n.9
42. Keeton & Sheridan, *ibid*
43. *Gascoigne v. Gascoigne, supra* n.26; *Re Emery's Investment Trust* [1959] Ch.410
44. *Soar v. Foster* (1858) 4K&J.152

it is void and not void *ab initio*[45] Fourth, no presumption arises where the parties cohabit without being married at all.[46] Fifth, the presumption does not apply where the wife buys property in the name of her husband.[47]

While at equity, when a mother bought property in the name of her child, there was no presumption of advancement since equity does not impose an obligation on a mother to provide for the child, by Section 21 of he Married Women's property Act, 1882, an obligation is imposed on a woman to maintain her children[48] with the result that if the issue of advancement by a mother arose, it would be decided positively. Unfortunately in the case of *Muniru Shekete v. FitzJames*[49], the implication of the provisions of the Married Women Property Act and Laws of Ogun, Ondo, Oyo and Bendel seem to have been lost on the Court of Appeal.[50] In that case, the testatrix, during her life time, possessed considerable real property which she had bought in the name of or conveyed to her two children, the second plaintiff and the defendant, either jointly or severally. Upon making her will, though, she transferred some of such property to third parties. There was evidence that throughout the testatrix's life time she collected rent from the property and continued to derive other benefits therefrom until her death. It was held that there could be no presumption of advancement in favour of the children because the textratrix, being a mother did not stand in *loco parentis* with her children and so a resulting trust arose. The court relied in this respect on the English case of *Bennet v. Bennet*[51] to the effect that there is no presumption of advancement "..... where a mother made a purchase in the name of her child, on the ground that whether the father was alive or not, she was under

45 *Dunbar v. Dunbar* [1907] 2 Ch.639

46. *Rider v. Kidder* (1805), 10 Ves.360

47. *Mercier v. Mercier* [1903] 2 Ch.98

48. See also Married women's Property Laws, of the United Kingdom

49. (Unreported) Suit No.FCA/L/83/81; Adigun, *supra* n.3 p.310313

50. See critique by Adigun, *ibid,* pp.313322, which also does not allude to the Married Women's Property Legislation applicable to Nigeria.

51. (1879) 10 Ch.D.474

no equitable obligation which would raise the presumption". It is submitted that given the fact that this case was decided before the Married Women's Property Act, 1882, more attention should have been given to Section 21 of that statute or its equivalent under the laws of Ogun, Ondo, Oyo and Bendel.[52] The other curious finding of the case is that[53], having held that a resulting trust arose in favour of the testatrix, it is incomprehensible why the court went on to decide that the testatrix could not devise the property in question by will. Section 3(1) of the Wills Law of Lagos Sate upon which the appellant relied in submitting that the devises were unlawful, provides thus:

> subject to any customary law relating thereto, it shall be lawful for every person to devise, bequeath or dispose of, by his will in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either in law or in *equity*, at the time of his death and which if not so devised, bequeathed and disposed of would devolve upon the heir at law of him, or if he became entitled by descent, of his ancestor or upon his executor or administrator.

It is respectfully submitted that in so far as a resulting trust in this context had the effect of creating real estate to which the testratix was entitled in equity at the time of her death she could dispose of it under Section 3(1) of the Wills Law of Lagos State. This is despite counsel for the respondents strange concession that the testatrix could not have devised the properties to other persons beside the children in spite of the resulting trust created.[54] In summary the finding by the court that the presumption of advancement did not arise in favour of the children is open to doubt in view of Section 21 of the Married Women's Property Act. Secondly, the decision that despite the resulting trust created the testatrix could not dispose of the property in dispute is also incomprehensible.

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52. It is not clear from Adigun's summary (*supra* n.49) where all the property in dispute was located. Nevertheless, irrespective of its location, it was subject to the Married Women's property legislation applicable in Nigeria. From the judgment, part of the Property was situated in Lagos State.

53. See also Adigun, *supra* n.49, pp.321322

54. Adigun, *ibid*, pp.311, 315

d) Presumption of Advancement Where True Purchaser Stands in Loco Parentis to Nominal Purchaser

The presumption of advancement will also arise where the person who provides the purchase money stands in *loco parentis* to the nominal purchaser or the person in whose name the conveyance is taken.[55] This will apply where a grandfather in *loco parentis* through the death of the father bought in the name of the grandson[56], where a nephew had been adopted as a son;[57] whether a stepson had been treated as a son[58]between father and illegitimate child.[59] However, the presumption will not apply in favour of an illegitimate son of a legitimate daughter to whom the grandfather had placed himself in *loco parentis*[60]. This, however, is subject to a rider in the Ugandan or African context. In the words of Adigun:[61]

> "..... in Nigeria, the concept of the extended family shows that children are natural beneficiaries of even their grandparents whether male or female. The grandparents have a moral obligation to support their grandchild as the society in turn places a moral duty on a grandchildren with means to provide not only for his parents but grandparents also. If the presumption of advancement (gift) arises from the moral obligation to give, the scope of such obligation is not limited to the natural parents of the child."

Indeed even in England *Tucker v. Burrow* has been said[62] to be not a true exception since a close examination of the facts shows only that the grandfather had taken care of the boy and sent him to school. This was not conclusive that he had placed himself in *loco parentis*. In the words of Wood V.C.[63],

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55. *Robbert v. Wilson, supra* n.35
56. *Ebrand v. Dancer* (1680), 2Ch.Cas.26
57. *Currant v. Jago* (1844), 1 Coll.261
58. *Re Paradise Motor Co.Ltd* [1968] 1W.L.R.1125
59. *Beckford v. Beckford (1774), Lofft.490*
60. *Tucker v. Burrow* (1865) 2 H&M.515; *Re Policy No.6402 of Scottish Equitable Assurance Society* [1902] 1 Ch.282
61. Adigun, *supra* n.3, p.322
62. Keeton & Sheridan, *op.cit* p.180
63. Supra n.60, p.527

> it would be extreme to hold the testator was under the obligation of making provision for an illegitimate child, with whom he was not under any liability, moral or legal, to support and whose father was alive merely on the ground that he had voluntarily brought up and educated him.

Wood,VC's remark implies that if the grandfather was under moral obligation to support the illegitimate children, he would stand in *loco parentis* to him. According to Adigun[64], this moral obligation arises from the concept and structure of the extended family in Nigeria.[65]

4. Rebutting the Presumptions

The operation of the presumptions hitherto considered is evidence of the real purchaser's intention[66]. The most critical factor here is the declaration by the person supplying the purchase money at the time of purchase. This means that subsequent declarations cannot rebut the intention to advance if it was really present at the time of purchase.[67] It is signifi cant in the case of the presumption of advancement, that even if the father later remains in control of the property even up to the son's coming of age, this will not rebut the presumption.[68] except where it can be shown from the remaining evidence of the father's real intention to provide for the son.[69]

Secondly, it may be noted that a declaration by a person supplying the purchase money at the time of the purchase is not a declaration of trust. It follows that, "the effect of the declaration is evidential. It furnishes material from which the court may conclude that the presumption was not intended to operate.[70]

Thirdly, while subsequent acts and/or statements of a purchaser may not be used by him to negative the presumption and prove

64. *Supra* n.61 and text thereof
65. *Grey v. Grey*, *supra* n.30
66. *Dyer v. Dyer, supra* n.4
67. *Shepard v. Cartwright* [1955] A.C.431
68. *Grey v. Grey, supra* n.30; Nathan & Marshall, *A Casebook on Trusts* (5th Ed)p.263
69. *Gorett v.Wilkinson* (1848), 2 De G &Sm 344
70. Keeton & Sheridan, *op.cit* p.180. See also *Williams v.Williams* (1863), 32 Beav.370

a trust, they may be used against him by the donee to support the presumption.[71] Nevertheless, if the donee was a party to the transaction, his subsequent acts and statements may be used against him by the purchaser to indicate by means of the donee's view of the transaction, what the buyer's intention at the time of the transaction really was. Thus in *Pole v. Pole*[72], a father, on his son's marriage, gave him a large advancement. There were several young children who were not provided for. Later he sold the property and received £500 of the purchase price. He took a mortgage for the remainder in the name of himself and his son. The interest, though, was invariably paid and the principal repaid to the father only, although the son joined in the receipts. It was held that the presumption of advancement was rebutted. The court used the son's subsequent acts (his acquiescence in the father's control and sole receipt of interest and principal) as evidence that the son knew that his father at the time of the transaction had not intended to confer any benefit on him.

C. Mutual Wills

An implied or resulting trust may arise where two persons (usually husband and wife) make an agreement for the disposal of their property and execute mutual wills pursuant to that agreement to govern the devolution of the property after their deaths. The result is that the survivor takes a life interest in the other's property, while a third party takes property of both testators on the death of the survivor. Consequently, where mutual wills are executed following an independent antecedent agreement, if the survivor takes the benefit given by the other will and then alters his own, his personal representative holds on trust for the person who would have taken under the mutual agreement.[73]

71. *Redington v. Redington* (1794), 3 Ridg P.C.106; *Roberts Wilson supra* n.35

72. (1748), 1 Ves.Sen.76. See also *Roberts v. Wilson, ibid*

73. Keeton & Sheridan, *op.cit* p.181. See too, Mitchell, "Some Aspects of Mutual Wills" (1951) 14 M.L.R.136; Burgess, "A Fresh Look at Mutual Wills" (1970) 34 *Conv.*230; O Donnell, "Contracts to make Joint and Mutual Wills (1972) 55 *Marguette law Rev. 103; Waters, The Constructive Trust,* pp.6265

In *Dufour v. Pereira*[74], a husband and wife who had power to bequeath some personal property secured to her separate use, made mutual wills. The residuary estate of each was pooled into one common fund and bequeathed to the survivor for life with limitations over. The wife survived. Having enjoyed the property for life, she died leaving a will, which disregarded the trusts of the mutual will. The beneficiaries under the mutual will sued. It was held that the surviving wife had bound herself to make good all the bequests in the mutual will.

Nevertheless, an implied or resulting trust can only be upheld in respect of mutual wills if the agreement on which they are based is certain.[75] In *Stone v. Hoskins*[76], there was prior arrangement. Mutual wills were made pursuant to that arrangement. It was held that the survivor could not object if the first to die departed from the arrangement in a subsequent will since the survivor was free to change his will. In *Re Oldham*[77], a husband and wife made mutual wills. However, there was no proof that these were made pursuant to a prior agreement. Each gave the other an absolute interest in the whole property if he or she survived, but if either of the parties did not survive the other, then the property of the survivor was to pass to third parties. The husband died first. The wife remarried, making fresh will which ignored the provisions of her mutual will. It was held that there was no implied trust preventing the wife from disposing of her property as she pleased. In *Gray v. Perpetual Trustee Co. Ltd*[78]. It was indicated that the fact that a husband and wife have simultaneously made mutual wills, giving each a life interest with similar provisions in remainder, is not itself evidence of an agreement not to revoke, and in the absence of a definite agreement to that effect, there is no implied trust preventing the wife from making a will, inconsistent with the earlier one, even though the husband has died and the wife has benefitted under the will. Consequently,

74. (1769), Dick, 419
75. *Lord Walpole v. Lord Orford* (1797) 3 Ves 402
76. [1905] p.194
77. [1925] Ch.75
78. [1928] A.C.391

a prior agreement is essential before a trust can be implied. A trust cannot be implied from the mere fact of mutual wills having been made. Thus in *Re Hagger*[79], husband and wife made a joint will by which they gave every thing they possessed at the death of the first dying to the survivor for life with remainders over. They also agreed that the will should not be altered or revoked except by mutual agreement. The wife died first and the husband received the income of the whole estate till his death. Three of the beneficiaries of the joint will survived the wife but predeceased the husband. It was held that from the death of the wife, the property of which the husband was then possessed was subject to a trust under which the beneficiaries took vested interests in remainder. Consequently, the death of the three beneficiaries before the husband's death did not cause a lapse of their shares.

D. Joint Purchase and Joint Mortgage

An implied trust would also arise where two or more persons advance the purchase price of the property or jointly lend money on mortgage and the conveyance is taken in all their names. Under the common law the right of survivorship or *jus accrescendi* applies in both cases, with the result that the survivor may claim the whole interest. However, equity leans against joint tenancies and may recognise different results, akin to a tenancyincommon, from those at common law.

A distinction exists with respect to joint purchases on the one hand and joint mortgages, on the other.

1. Joint Purchase

Where two purchasers provide purchase money in *unequal* shares and then take the conveyance jointly, although on the death of one, the survivor or survivors hold the entire legal estate, in equity, the survivor or survivors will be regarded as trustees for the personal

79. [1930] 2 Ch.190

representatives of the deceased purchaser, to the extent of his share of the purchase money.

However, if the purchase money was provided in *equal* shares, equity regards that there is no justification for the presumption of a resulting or implied trust in favour of the deceased personal representative. Consequently, the rule of survivorship applies.[80]

In *Omoregie v. Emovon*[81], the Oba of Benin granted the plaintiff's father the disputed land. The plaintiff's father asked for financial contribution from his half brother, the defendant, to erect a building on the land. The defendant was, thereafter rewarded with a gift of part of the building where he lived for almost 50 years before institution of this action. In this action, the plaintiff, who was the eldest son of the grantee sought a declaration that he was the sole owner of the disputed property and that the defendant had no interest therein. It was held (OmoEboh JCA, dissenting) that the defendant by his financial contribution, acquired an interest in the property which a court of equity would enforce. The plaintiff's claim was dismissed. Agbaje, JCA, thus stated:[82]

> ..... I am satisfied that the defendant by the contribution which he had made to the development of the land, the nature and extent of which I have just described, has acquired a beneficial interest in the property standing apparently in the name of the plaintiff as the legal owner. So the plaintiff in my judgement must hold the property in trust for himself and the defendant.

Joint Mortgage

Where the money is advanced jointly on a mortgage, it is irrelevant whether it is provided in equal or unequal shares. In both cases, the survivor holds as trustee for the deceased mortgagee's estate to the extent of the deceased's share of the loan. This is because

80. Keeton & Sheridan, op.cit, p.184. See also *Robinson v. Preston* (18580, 4 K&J.505) *Lake v. Gibson* (1729) 1 Eq.Cas.Abr.290.

81. (Unreported) Suit No.FCA/B/11/80 of Nov.20, 980; Adigun, *supra* n.3, pp.307310

82. *Adigun, ibid* pp.308309, following *Petitt v. Pettitt* [1969] 2All E.R.389, *Tulley v. Tulley* 109 Sol. J.956; *Falconer v. Falconer* [1970] 3 All E.R.449, 452, per Lord Denning, M.R.

equity imputes that in such a situation, it could not have been the intention of the lenders that there should be survivorship. Instead, each should receive back his own money, although for convenience, a joint security was taken.[83] Additionally, the insertion of a joint account clause is not conclusive evidence of an intention that the rule of survivorship should operate, since such a clause was usually inserted in a joint mortgage before Conveyancing Act, 1881, Section 61[84] which permitted the surviving mortgagee to give a mortgagor a receipt for the whole of the mortgage money. This is, however, a conveyancing device which does not preclude further investigation into the question whether the surviving mortgagee was intended to take the whole of the money beneficially or whether it was intended that he should hold a part of it for the personal representatives of the deceased joint mortgagee.[85]

E. Joint Accounts of Husband and Wife

The maxim, "equality is equity" is applicable to the determination of the rights of the parties on the breakup of a marriage. It is not applicable during the subsistence of the marriage.[86]

The best illustration of this principle is to be found in *Jones v Maynard*[87]. In that case, the husband was about to travel overseas. He authorised his wife to draw on his account, which was subsequently operated as a joint account on which both spouses drew and into which both paid their earnings. The husband, from time to time, withdrew money to pay for investments which were made in his name. No special agreement regulated the account and the spouses were divorced in 1948. The wife brought an action against the husband claiming the balance of the account and half the investments. The husband claimed that the balance and the investments should

83. *Morley v. Bird* (1798), 3 Ves.629, 631 per Arden, M.R.
84. of United Kingdom
85. *Re Jackson* (1887), 34 Ch.D.732
86. *Gage v. King* [1961] 1 Q.B.188
87. [1951]Ch.575c .f. *Pettitt v. Pettitt supra* n.10

be divided proportionately to payments in which they had been made by the parties. It was held that the wife was entitled to half the final balance and one half of the investments existing at the time when the account was closed. This was consistent with the original fundamental purpose of a joint purse or common pool. Similarly, in the Nigerian case, *Coker v. Coker*[88], the plaintiff and defendant were husband and wife. The marriage was later dissolved. The matrimonial home had been built jointly by them on a piece of land which was a gift to the plaintiff by her father. The plaintiff, packed out of the house, but the defendant remained resident there. In 1951, the defendant bought a booklet of a sweepstake and caused some of the tickets to be made out in his name and some in his wife's. When the results of the sweepstake were announced, one of the tickets bought by the defendant in the wife's name won a prize of £3,000 and a substantial portion thereof was applied towards the erection of the building. The building plan was in their joint names. It was held[89] that the property was jointly owned by the plaintiff and defendant.

F. Surplus Over Beneficial Interest

A resulting trust may also arise where the settlor transfers property to trustees upon given trusts which do not exhaust the whole beneficial interest or alternatively where the beneficial interests wholly or partly fail.[90] In that event there will be a resulting trust for the settlor. Where he is dead the resulting trust will be in favour of the residuary legatee, devisee or intestate successor. Thus in *Re Vandervell's Trusts* (no.2)[91] the settlor gave shares to the Royal College of Surgeons and also gave an option to a Vandervell family trust company to buy the shares from the College after the College had accumulated sufficient in dividends to set up a professional Chair

88. [1964] L.L.R.188, Adigun, *supra* n.3 p.303

89. Applying *Dyer v. Dyer*, *supra* n.29 and next thereof; *Rimmer v. Rimmer* [1952] 2All E.R.863, 869 per Lord Denning, M.R. *Hine v. Hine* [1962] 1 WLR 1124, 1129 per Donovan, L.J.

90. Keeton & Sheridan, *op.cit* p.186

91. [1973] 2 W.L.R.744

of Pharmacology. Subsequently the company exercised the option. However, at first instance, the court found that there was nothing in the terms of the grant of the option to indicate whether the company was to hold the shares on trust, and if on trust, for whom. Consequently, it was held that the company were not intended to take beneficially and since no trust has been declared, they therefore held on resulting trust. The Court of Appeal, in reversing the decision held that an express trust had been validly declared.

In the Nigerian case of *Re Obabunmi Pedro*[92], the testator in his will devised certain property to trustees upon trust, "to collect the rents therefrom and distribute such rents in equal shares among any grandchildren and any other children or children that may be born to me after the date of this my will for their training and education". The issue arose as to who was entitled to the trust property after the object of the trust had been accomplished and the trust property was not entitled to the trust property after the object of the trust had been accomplished and the trust property was not completely exhausted. It was held that since the gift was not an outright gift to the children but was for a specific purpose of education and since that purpose had been carried out there was a resulting trust to the testator's estate. Similarly, in *Re Gillingham Bus Disaster Fund*[93] in 1951, the Mayors of Gillingham, Rochester and Chatham, wrote a letter to the Press inviting subscriptions for a fund to be devoted "among other things to defraying the funeral expenses [of the boys killed in the disaster] caring for boys who may be disabled, and then to such worthy cause or causes in memory of the boys who lost their lives, as the Mayors may determine." Named and anonymous donors contributed to the fund, part of which could not be applied for the designated purposes. The trusts, not being charitable, the *Cypre's* doctrine was inapplicable. The issue, therefore, arose as to whether the remaining part of the fund was repayable to the donors or went to the Government as *bona vacantia*. It was held that a resulting trust of the fund which was undisposed of arose in favour

92. [1961] LLR 127; Adigun, *supra* n.3, p.304

93. [1958] Ch.300; [1958] 1 All E.R.37; Nathan & Marshall, *supra* n.68

of the donors. It was immaterial that some of them were anonymous or unascertainable since an inquiry with respect to them could be made and if not found the trustees would pay the money into court, "like any other trustee who cannot find his beneficiary".

That position may be contrasted with a situation where the property is held on trust absolutely for a person who is living when the trust instrument is executed and is operative but who subsequently dies intestate without any successors.[94] In this case it is certain that the settlor intended to part with his whole beneficial interest. Consequently, the trustee cannot take beneficially but will hold the equitable interest for the government as *bona vacantia*[95]. The same principle is applicable where the beneficiary was an incorporated company which has been dissolved without the equitable interest having been assigned.[96]

Another type of resulting trust may arise where trust of income are declared which in or dinary years are sufficient to exhaust the whole of the income, but in certain years there is a surplus which is unprovided for. A resulting trust of the surplus in favour of the settlor would arise.[97] A similar situation arose in *Re Abbott Fund, Smith v. Abbott*[98] Here, a sum of £248 which had been collected by the late Dr. Fawctt for the benefit of two members of the late Dr. Abbott's family was placed by Dr. Fawcett to the credit of two accounts heads, "The Abbott Fund" and "The Abbott Fund Treasurer, Dr. Rowland Morris Fawcett. "Dr Fawcett died shortly afterwards without having drawn on either of these accounts. However, the matter was taken up by the plaintiff, who issued a circular appealing for annual subscriptions for the benefit of the same two persons. The circular indicated that the fund which had been collected by Dr Fawfett was insufficient. Large sums were received in response

94. Keeton & Sheridan, *op.cit*.p.189

95. *Middleton v. Spicer* (1783), 1 Bro.C.C.201; *Re Bond* [1901] 1Ch.15

96. *Re Higginson & Dean* [1899] 1 Q.B.325

97. *Re Llanover Settled Estates* [1926] Ch.626

98. [1900] 2 Ch.326; Nathan & Marshall, *op.cit* pp.247248. Compare with *Re Andrew's Trust* [1905] 2 ch.48

to the circular. The executors of Dr Fawcett transferred the Abbott fund to the plaintiff and another as trustees and payments were made to the two beneficiaries. Both beneficiaries died in 1899, and there was then surplus in the hands of the trustees. An originating summons was taken out to determine who was entitled to the surplus, the defendants being the personal representative of the two deceased beneficiaries and one of the subscribers who was chosen to represent the subscribers as a class. It was contended for the defendant personal representative that the various subscriptions had been made as absolute gifts for the benefit of the two beneficiaries during their joint lives and then for the survivor. Consequently, the surplus now accrued to the estate of the survivor. It was held that there was a resulting trust of the moneys remaining unapplied for the benefit of the subscribers to the Abbott fund.

A resulting trust may also arise out of a commercial transaction for instance where money has been handed over for a purpose which cannot be executed. Thus in *Quistclose Investments Ltd v. Rolls Razor Ltd and Barclays Bank*[99], the plaintiffs lent over $200,000 to the defendant company, Rolls Razor Ltd to enable it to pay a dividend which it had already declared. The company paid the money into separate account with its bank, Barclays Bank Ltd., the second defendants. The terms of the loan did not require the company to do this. The company was at all material times indebted to the bank for substantially more than the amount of the loan. Before the dividend could be paid the company went into liquidation. The plaintiffs claimed that the bank held the money in the account on a resulting trust for the plaintiffs. This was upheld by the House of Lords with the result that the money in dispute was not available for other creditors in the liquidation.

99. [1967] 1 All E.R.864; [1970] A.C.567

Chapter 15

Constructive Trusts

The scope of the expression "constructive trust" is rather amorphous in so far as it encompasses a number of situations with very little common criteria. Consequently, the duties and rights of constructive trustees differ so widely that it is advisable to treat each relationship separately in order to identify its implications. Nevertheless, a constructive trust may be generally described as " a relationship created by equity in the interests of good conscience and without reference to any express or implied intention of the parties".[1] It follows that if a person in a fiduciary position uses it to gain some personal advantage, he becomes a constructive trustee for the person thereby deprived of the profit. It has also been suggested that "the constructive trusteeship is imposed by a Court of Equity as a per sonal remedy quite distinct from the proprietary institutional trust of specific property".[2]

A. Historical Conspectus and Problem of Definition

While the decision of *Keech v. Sandford*[3], is usually taken to be the originator of the development of the principles on constructive trusts, there are cases which predate it. Thus in *Holt v. Holt*[4] executors obtained the renewal of a lease, and claimed that the renewal did not accrue to the trust estate. It was, nevertheless, held "that in case of an Executorship in Trust, the Renewal of such a lease shall go to the benefit of the *Cestui que Trust*."

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1. Keeton & Sheridan, *Law of Trusts* (10th Ed.1974), p.191
2. Hayton & Marshall, *Cases and Commentary on the Law of Trusts* (8th Ed.1986) pp.443444; 473480; D.Hayton "The Hague Convention, on The Law Applicable to Trusts and On Their Recognition" Vol.36 *I.C.L.Q* (1987) P.264
3. (1726), Sel.Cas.f.King 61
4. (1670) 1 Ch.Cas.190

While some writers and judges have regarded the constructive trust doctrine as merely an elaboration of the rule in *Keech v. Sandford,* those who have taken a wider view still regard the rule in that case as significant. It has been pointed out [5] however, that equity was invariable called upon to assist a litigant by providing a better remedy against a party who had failed in his obligations, than the common law did. An example of this is where a binding contract for the sale of land existed and it was essential to protect the buyer's interest in the interval between contract and conveyance. Another example is where equity was prevailed upon to rectify an event where property had been obtained by fraud. In these instances and others where the Court of Chancery intervened the judges were in the habit of using the language of a trust to define the consequences of its intervention. These cases invariably had no tangible connection with each other and in some of them there was no fiduciary relationship. The use of the trust concept in these instances is, therefore, analogous in essence, to the common law concept of an express trust.[6] While this may be true as a "major hypothesis", the "initial supposition" may be questioned.[7] In this vein it was shown [8] that the constructive trust as a strategy to deal with "erring trustees was already firmly established in Lord Nottingham's day. This is the type of constructive trust referred 9 to in *Cook v. Fountain*[9], rather than one rooted in the common law" as Professor Waters would suggest. Nonetheless, Professor Waters is correct to appraise the significance of the rule in *Keech v. Sandford,* during the eighteenth and nineteenth centuries and the part it has played in connecting the constructive trust with a fiduciary relationship.

It has been posited that the rights and duties of a constructive trustee vary widely just as constructive trusts themselves do. Indeed in situations where a person acquires trust property from the trustee

5. Waters, *The Constructive Trust,* pp3335
6. *Ibid* p.39
7. Keeton & Sheridan, *op.cit.* p.193
8. Yale, *Lord Nottingham's Chancery Cases,* Vol.I, p.125
9. (1676), 3 Swans.585; See also Nathan & Marshall, *A Casebook on Trusts* (5th Ed.) P.55

with notice of the breach of trust or where a trustee makes a profit out of the trust, the constructive trustee is liable as if he were an express trustee. Nevertheless, it would be incorrect to regard such a trust as the exact equivalent of an express trust. If it were as Professor Waters indicated, the constructive trustee would be under an obligation to carry out the duties of management of the trust property and of the investment of trust funds. Consequently, sale with notice of the trust may simply result into another method of appointing trustees to an express trust.[10] There are of course cases where the constructive trust doctrine is more limited in its application, for instance with regard to the relationship of vendor and the mortgagee.[11]

It would thus, appear that English law conceives the constructive trust "as an institution and as one variety of trust, though of an anomalous kind, linking a number of situations not possessing any unifying thread, and some of them of doubtful utility to modern law. It has sought to remedy this defect in part by stressing the importance of the *Keech v. Sandford* cases, and by extending the principle which they embody to all situations where a fiduciary relationship exists and by making the principle of tracing applicable".[12] On the other hand, from the United States perspective, the constructive trust is a remedial process covering a wide number of cases of unjust enrichment, many of which do not depend on the existence of a fiduciary relationship. It is a remedy which is used wherever legal remedies are inadequate.[13]

The American approach is strange to English lawyers because of the long and historic separation of law and equity in England before the Judicature Acts. In the conception of English equity, a constructive trusts arises by operation of law, independently of the will of the parties. However, the courts have invariably failed in quite a number of constructive trust to identify what purpose they

10. *Supra* n.5 p.16
11. Discussed *infra*
12. Keeton & Sheridan, *supra* n.1 p.193
13. Maudsley, "Restitution in England" 19 *Vanderbilt Law Review*, 1123 (1966); Waters, *supra* n.5, p.10; Nathan & Marshall, *op.cit* p.267

are meant to serve. In contrast, by treating the doctrine as a remedy, American law has clearly indicated the uses to which it may be employed. In the words of Professor Waters:[14]

> It is a means whereby a person may recover or gain title to that which is unfairly withheld from him to the benefit of the withholder. Because of the unfair enrichment the deprived person is entitled to preference over the withholder's creditors and, if the withholder is insolvent, to follow against the third party to whom transfer has been made and whose transferor is insolvent.

B. Vendor as Constructive Trustee

In a situation where a binding contract for the sale of land exists, the view is held that the vendor is, until completion, a constructive trustee of the property of the purchaser. It has been argued [15] that this conception should be regarded cautiously and without qualification could lead to confusion. Consequently, while it is correct that from the date of the contract, the purchaser would take the benefits and bear the losses,[16] this does not automatically render the vendor a constructive trustee. In *Lysaght v. Edwards*,[17]it was indicated[18] that from the moment a valid contract is concluded, the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase, a charge or lien on the estate for the security of that purchase money, and the right to retain possession of the estate until the purchase money is pad. The position of the vendor is, therefore, something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not in equity (any more than a vendor), the owner of the estate. Should anything happen to the

14. *Ibid* p.12
15. *Supra* n.12 p.194.
16. *Paine v. Meller* (1801), 6 Ves.349
17. (1876) 2 Ch.D.499
18. *Ibid* pp.506508 per Jessel M.R. See also *Holroyd v. Marshall* (1862) 10 H.L.C. 191, 209,per Lord Westbury; *Re Wait* (1927) 1 Ch.606 per Atkin, L.J. *Shaw v. Forster* (1872) L.R.5 H.L.321

estate between the time of sale and the time of completion of the purchase, it is at the risk of the purchaser. Nevertheless, there is also a correlative liability on the part of the vendor in possession. He is not entitled to treat the estate as his own. If he willfully damages or injures it, he is liable if he does not take reasonable care of it. So far he is treated in all respects as a trustee, subject to his right to being paid the purchase money, and his right to enforce his security against the estate.

Where specific performance is available to enforce the contract of sale, this determines whether or not a constructive trust can be imposed on the vendor[19]. In such a case by virtue of his being a constructive trustee, the vendor is disabled from declaring an express trust of the property for anyone else.[20] Consequently, if he sells the property to someone else, he is constituted a trustee for the purchase money for the first purchaser [21].

By the beginning of the eighteenth century, it had become accepted that from the time the contract of sale was signed, there was conversion, as a result of which the purchaser acquired an equitable estate. However, this conception is problematic. [22] First, conversion depends on the availability of specific performance and will not be available until the vendor has proved good title.[23] Second, until the purchase money was paid, the vendor could retain possession and would not be under an obligation to convey the property. Consequently, the constructive trust would only materialise "when these uncertainties had been resolved and the duty to convey unqualifiedly existed".[24]Third, the vendor only became a trustee for the purchaser at the date agreed for completion.[25]

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19. *Central Trust & Safe Deposit Co. v. Swider* [1916] A.C.266, 271, 272 per Lord Parker
20. *McCarthy & Stone Ltd. V. Julian S. Hodge & Co. Ltd* [1971] 1 WLR 1547
21. *Lake v. Bayliss* [1974] 1 WLR 1073
22. Keeton & Sheridan, *op.cit* pp.195196
23. Waters, *supra* n.5 pp.7677
24. *Supra* n.22 relying on *Auckland v. Gosford* (1816) 2 Madd.28; *Wall v. Bright* (1820) 1 Jac.&W.494
25. *Dowson v. Solomon* (1859), 1 Dr.&Sm.I.

These uncertainties as to when conversion into an equitable interest for a purchaser would arise have been considered in a number of cases. In *Shaw v. Forster*,[26] the "traditional" view that a constructive trust arises when the contract of sale has been signed, subject to the vendor's right in protecting his interest for payment, was accepted. However, in *Lysaght v. Edwards*,[27] a different view was taken. In that case, after a contract, sale and acceptance of title by the purchaser, the vendor died, having left all his real property which he held as trustee to A subject to the trusts applicable thereto. The issue arose as to whether the land within the contract of sale passed to A or to the heiratlaw. It was held that the trust arose not at the time when the contract was made but when it was fully binding on both parties i.e. when the vendor had made out his title which the purchaser accepted. When this happened, the constructive trust related back to the time when the contract was entered into. This is the point at which conversion could be said to have arisen.

There is the related notion that a vendor as constructive trustee, must exercise reasonable care in respect of the relevant property. In *Phillips v. Silvester* [28] a vendor allowed property to waste away following the signing of the contract of sale. The purchase money was accordingly reduced by the court. Furthermore, in *Royal Bristol Permanent Building Society v. Bomash*[29] and *Earl of Egmount v. Smith*[30], it was held that if the vendors sell businesses as going concerns they must carry them on to prevent the destruction of the goodwill otherwise the purchaser would be entitled to repudiate the contract of sale. However, such business would be carried on at the purchaser's risk, provided that he is aware that it is being carried on.[31] This does

26. *Supra* n.18
27. *Supra* n.18, c.f. *Raynor v. Preston* (1881) Ch.D.1 1011 per Brett L.J.*infra* at n.38
28. (1872) L.R.8 Ch.App.173; See also *Clarke v. Ramuz* (1891) 2Q.B.456
29. (1887) 35 Ch.D.390
29. (1887) 35 Ch.D.390
30. (1877) 6Ch.D.475
31. *Dakin v. Cope* (1827), 2 Russ.170

not though, licence the purchaser to order the vendor to close down the business, since the vendor has to consider his own interest.[32]

There are, nevertheless, limits on the constructive trust doctrine in the vendor purchaser relationship. Thus in *Raynor v. Preston*[33], the vendor contracted to sell a house, which he had previously insured against fire. The contract did not mention the insurance. The house was damaged by fire, following the conclusion of the contract but before conveyance. The vendor obtained payment from the insurance company. After completion of the sale, the purchaser claimed the payment. It was held that the purchaser entitled to it. This result appears to have been altered by the property legislation. It is provided that where, a after a contract of sale money becomes payable under the policy of insurance maintained by the vendor in respect of the property, such money, on completion of the contract, is to be paid by the vendor to the purchaser. This is subject in some jurisdictions to any provision to the contrary in the contract, any requisite consents of the insurers and the payment by the purchaser of the proportionate part of the premium from the date of the contract.[34] In such a situation, it is obvious that payment could not be made to the vendor by the insurance company, the risk having been passed to the purchaser.

The limits may be categorised thus. First, that[35] an unpaid vendor is a trustee only in a qualified sense and becomes so chiefly because of the contract which a Court of Equity will order to be effected by conveyance to the purchaser. Even then, the vendor is a trustee only in respect of the property agreed to be sold and of this a policy does not form a part. In ad dition, a vendor is not a trustee for the purchaser of rents accruing before the time fixed for completion. On the facts of *Raynor v. Preston*, the fire had occurred and the right to recover money accrued before the day fixed for

32. *Golden Bread Co. Ltd. v. Hemmings* (1922) 1 Ch.162, 173174 per Sargant, J.
33. (1881) 18 Ch.D.I.
34. Property and Conveyancing Law Cap.100 (Laws of WRN) of Nigeria
35. *Supra* n.33, pp.67, per Cotton, LJ. *Sherwin v. Shakespear* (1854) 5 De G.M.&G.517, 531.

completion. Secondly, is the "middle view"[36]of the relationship to the effect that the relationship between the vendor and purchaser is not that of trustee and *cestui que trust* at all [37] The reason being that if this were so then whatever the vendor holds, under the contract would belong to the purchaser. This is not correct because the projected conveyance is conditional first on whether title to the property is proved, and, secondly, whether payment is ready. Unless these are satisfied the contract cannot be completed, on the property conveyed. In this vein Brett L.J. added:[38]

> ..... but suppose at the time when the contract should be completed, the title should be made out and the money is ready then the conveyance takes place. Now it has been suggested that when that takes place, or when a court of equity decrees specific performance of the contract, and the conveyance is made in pursuance of that decree, then by relation back the vendor has been trustee for the vendee from the time of the making of the contract. But..... it appears to me that if that were so then the vendor would in all cases be trustee for the vendee of all the rents which have accrued due and which have been received by the vendor between the time of the making of the contract and the time for completion; but it seems to me that is not the law..... doubt whether it is a true description of the relation between the parties to say that from the time of the making of the contract, or at any time, one is ever a trustee of the other.

Thirdly, is the view[39], that while there remain uncertainties as to completion of the contract it may be inaccurate to talk of a trustee and *cestui que trust* relationship, once the contract is performed by a actual conveyance or performed in everything but mere formal act of sealing the engrossed deeds, then the completion relates back

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36. Keeton & Sheridan, *op.cit* p.198

37. *Supra* n.33, pp.1011 per Brett, L.J.

38. *Ibid*

39. *Ibid* p.13 per James L.J. dissenting. See also *Shaw v. Forster, supra* n.18; *Ridout v. Fowler* [1904] 2 Ch.93 C.A. *Central Trust & Safe Deposit Co.v. Swidles, supra* n.19 *Re Lyne Stephens and Scott Miller's Contract* [1920] 1 Ch.472; *Re Hamilton Snowballs Conveyance* [1959] Ch.308: *Plews v. Samuel* [1904] 1 Ch.464, 468, per Kekewich; *J.Re Colling* [1886] 32 Ch.D.333; *Re Earl of Carnavon's Chesterfield Settled Estates* [1927] 1Ch.138

to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*.

Finally, may be considered the view[40], that the vendor is not a dormant trustee but one who has a personal and substantial interest of his own in the property to protect. This is the right to the purchase money, which is normally enforced by a lien arising immediately upon the execution of the contract of sale. It may be enforced before and after conveyance by the vendor.[41] In the latter case the relationship of the parties will be reversed, with the result that, following conveyance, the purchaser becomes a trustee for the vendor for the unpaid portion except where the vendor renounces the lien or relies upon some other security or on the personal credit of the purchaser.[42] The taking of collateral security does not amount to disclaiming the lien by the vendor.[43] The vendor's lien may be enforced through retention of the property until the money has been paid. The lien applies to both real and personal property[44], and is enforceable irrespective of the inclusion of a receipt in the deed of conveyance. In *Rice v. Rice*[45], an equitable mortgagee from the purchaser was held entitled to take the property free from the lien, because the original vendor had endorsed a receipt for the purchase money on the conveyance and had also delivered the title deeds to the first purchaser, who then deposited them with the mortgagee. Consequently both the vendor and equitable mortgagee had only equitable interests. Although the vendor's interest was first in time, it was postponed to that of the mortgagee, because the vendor had been negligent in endorsing the receipt on the conveyance when in actual fact the purchase money had not been paid. Thus, while the lien was not thereby destroyed, the receipt effectively amounted to an estoppel in favour of the mortgagee. In other jurisdictions,

40. *Shaw v. Forster, ibid* p.338 per Lord Cairns, *Lysaght v. Edwards* supra n.18, per Jessel M.R.
41. *Re Birmingham* [1959] Ch.523
42. *Mackreth v. Symmons* (1808), 15 Ves.329
43. *Collins v. Collins* (No.2) (1862) 31 Beav.346
44. *Davis v. Thomas* (1900) Ch.462, *Re Stucley* (1906) 2Ch.462
45. (1854) 2 Drew.73

it is provided that[46], " a receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof".

As a corollary to the vendor's rights in the property, is the notion that in the relationship of vendor and purchaser, either person is a constructive trustee for the one who has legal estate in the property, while at the same time owing duties to the other in respect of it. Consequently, if the purchaser pays the purchase money or part thereof before conveyance of the property to him, the vendor remains a constructive trustee for him entitling the purchaser to a lien on the property for the return of the purchase money. The lien has the same features as the vendor's and is enforceable against the same persons and under the same conditions governed by notice.[47]

It is also notable that a lessee possesses a lien for any money expended, where the lessor has agreed to grant him a lease, on the property, in the event of failure to grant him the lease.[48]

C. Mortgagee As Constructive Trustee

It has, for a long time, been asserted that a mortgagee in possession of mortgaged property is "in the nature of a trustee for the mortgagor.[49] This is rationalised on the premise that a mortgagee is liable to account for all rents and profits derived from the mortgaged property, while in possession. Furthermore, is the idea that the equity of redemption available to a mortgagor is an estate in land rather than a mere chose in action and constitutes a mortgagee a trustee in respect thereof for the mortgagor.[50] While this proposition received

46. Property & Conveyancing Law, of Nigeria *supra* n.34, S.93. See also the Nigerian Case of *Ayorinde v. Scott* CCCHCJ/2/92 which is to the same effect as *Rice v. Rice ibid*
47. *Rose v. Watson* (1864) 10H.L.C.672
48. *Middle v. Magnay* (1864) 2 H&M.233
49. *Amhurst v. Dawling* (1700) 2 Venn.401 per Wright L.K. Waters, *supra* n.5, pp.145146
50. *Casburn v. Scarfe* (1738) 2 Jac & W.194, 196, per Lord Hardwicke

subsequent support *in Quarrel v. Beckford*, it is not free from doubt. In *Quarrel v. Beckford*[51] a mortgagee went into possession under a decree of foreclosure which was not made ab solute. He paid off the loan and interest out of the profits. Subsequently, he retained the profits. Later, the assignees of the mortgagor sued for the subsequent profits with interest thereon based on the ground that a mortgagee who remains in possession after repayment of the debt is a trustee. It was held that the mortgagee was liable to account. In spite of doubts about this result[52] it has been contended[53] that the decision is correct on the premise that "when a mortgagee is in possession and receives rents, he is a trustee, at first with an interest to repay himself. Thereafter he is "converted into the situation of a bare naked trustee holding the legal estate and all profits from it for the mortgagor".

Nonetheless, there is contrary authority. In *Marquis Cholmondeley v. Lord Clinton*[54],it was pointed out that while on numerous occasions, the mortgageemortgagor relationship had been likened to others, it was *Sui generis* or distinct. Consequently, while a mortgagee ac quires a distinct and independent beneficial interest which equity will protect and enforce, the mortgagee's basic character is not fiduciary and he is unconcerned with those interested in the equity of redemption. This was a rejection of the principle that a mortgagee is special type of trustee. This approach has been adopted by Nigerian Courts. In *EkaEteh v. Nigeria Housing Development Society Ltd*[55], the mortgagor applied to have the sale of the mortgage property set aside alleging irregularity in the sale on the ground that it was made at a gross undervalue. There was no evidence of collusion or *mala fides* on the part of the mortgagee. The action was disallowed. Ibekwe Ag. J.S.C. thus stated:[56]

51. (1816) 1 Madd.269
52. Waters, *supra* n.5 p.154
53. Keeton & Sheridan, *op.cit* p.203
54. (1820), 2 Jac & W.I.C.A. per Sir Thomas Plumer, M.R.
55. (1973) 3 E.C.S.L.456; 3 S.C.183; Adigun *Cases and Texts on Equity, Trusts and Administration of Estates* (1987) pp.328329.
56. *Ibid* pp.464465 following *Warner v. Jacobs* (1882) 20 Ch.D.395,410

> We think it is now beyond controversy that undervalue alone is not enough to vitiate the exercise of a mortgage's power of sale. It must be shown that the sale was made at a fraudulent or gross undervalue.
>
> ..... it is settled law that a mortgagee is not a trustee of a power of sale for the mortgagor (except as to the balance of the purchase price money after a sale). It is a power given to him for his own benefit enabling him to protect the mortgage debt....."

The same approach is evident in *Omole v. Royal Exchange Assurance Ltd.*[57]and *Sabbach v. Bank of West Africa*[58]. In the later case, Crane Ag. J. distinguished *Viatonu v. Odutayo*[59] where the property which was worth £1500 was sold for £600 by private treaty. The mortgagee, the auctioneer and purchaser were members of the firm of auctioneers which sold the property. The court was of the view that the sale had been collusive and tainted with *mal fides* and therefore void against the mortgagor.

Difficulty may arise when the mortgage is executed in the form of a trust, enabling the mortgagee to acquire the powers of a trustee for sale when exercising his power of sale. It was suggested that this had the effect of constituting the mortgagee into an express trustee[60]. However, it was conclusively asserted that such a transaction remained a mortgage and not an express trust.[61]

A much more convincing proposition is that by virtue of going into possession, a mortgagee in possession becomes a constructive trustee.[62] Nevertheless, while a mortgagee in possession must account for rents and profits which he receives (or would, have received) while in possession, no other duties are imposed on him by going into possession and his position is consistent with that of a constructive trustee.[63]

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57. Unreported. See *The Guardian,* Nov.25, 1983; Adigun, *supra* n.55 and *Cuckmere Brick Co v. Mutual Finance* (1971) 2 All E.R.633, 646 per Cross, L.J.
58. (1962) L.L.R.174
59. (1950) 19 NLR 119.
60. Keeton & Sheridan, *op.cit* p.204
61. *Re Alison* (1879), 11 Ch.D.284
62. *Quarrel v. Beckford, supra* n.51; *Lewin on Trusts* 16th ed.p.149
63. Waters, *supra* n.5, pp.189197

Another aspect is the position of a trustee who sells mortgaged property and receives a price exceeding his mortgage debt. The mortgagee has been said to be a trustee of such surplus and must account to the mortgagor for it.[64] The Mortgage legislation now provides that[65] mortgagees are statutory trustees of any surplus for the mortgagor or other person entitled to the equity of redemption. This effectively takes care of the notion of constructive trust in respect of surplus arising out of sale under a mortgage.

The analogy between mortgagee and constructive trustee may be consequently said to be of little value. [66]

D. Acquisition of Property Through Fraud

If a person acquires property through fraud upon another, equity converts him into a constructive trustee for the benefit of the person affected by the fraud.[67] This need not be the person to whom the fraud was operated, as the cases on secret trusts show.[68] The fraud which is personal must be proved and for this purpose too, a statute cannot be used to perpetrate fraud.[69]

This principle has wide scope. Thus in *Bannister v. Bannister,*[70] the plaintiff bought the defendant's cottage for less than its value based on an agreement that the defendant could not rely on the absolute nature of the conveyance to defeat the plaintiff's beneficial interest. The fraud here amounted to using the absolute nature of the conveyance. Similarly, in *Binions v. Evans*[71] the owners of a cottage agreed to allow the defendant to live in it rent free for life. Subsequently, they sold the cottage to the plaintiffs, at a reduced price because the sale was expressed to be subject to the

64. *Banner v. Berridge* (1881) 18Ch.D.254; *Charles v. Jones* (1887) 35 Ch.D.544
65. Mortgage Act, Cap.229, S.11(1)(d)
66. Waters, *supra* n.5, p.216
67. *McCormick v. Grogan* (1869) L.R.4H.L.82
68. See *supra* chapter 10.
69. *Supra* n.67, p.97 per Lord Westbury. See also Chapter 10, *ibid*
70. (1948) 2 All E.R.133
71. (1972) Ch.359

defendant's rights. It was held that the plaintiffs could not evict the defendant's rights. It was held that the plaintiffs could not evict the defendant as they held the cottage on constructive trust for her for life. Lord Denning, M.R. explained that the defendant's right was a contractual licence protected in equity, rather than a life interest under a constructive trust. This precludes the idea in both this case and *Bannister v. Bannister*, that the plaintiffs were tenants for life of land with rights to have the legal estate vested in them and powers of sale. What the plaintiffs bought in *Binions v. Evans* was an equitable reversionary interest.

E. Express Trustee as a Constructive Trustee

A principal rule of equity is that a trustee should not make a profit from his position of trust and should not use that position to obtain a personal advantage adverse to the beneficiary. If he does so he is taken to hold the profit or advantage as a constructive trustee for the beneficiary. In *Keech v. Sandford* [72] a person in possession of a lease of the profits of a market devised his estate to a trustee in trust for his infant. Before the expiration of the term, the trustee applied to the lessor of a renewal, for the benefit of the infant, which he refused on the ground that since it was only the profits of the market, there could be no distress and the matter could only be agreed to, which the infant could not do. Consequently, the lessor indicated willingness to renew the lease in favour of the trustee in his personal capacity. The infant subsequently instituted this action to have the lease assigned to him, and for an account of the profits on the ground that whenever a lease is renewed by a trustee or executor it should be for the benefit of the *cestui que trust*. The court ordered the assignment of the lease to the infant and an account of the profits made by the trustee subsequent to the renewal. Lord King, L.C. stated thus:[73]

72. [1726] Sel.Cas.Ch.61; Nathan & Marshall, *A Casebook on Equity and Trusts* (5th Ed. 1967) pp.296297.

73. (1726) Sel.Cas.Ch.62

> I must consider this as a trust for the infant, for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que use.*

Similarly, in the Nigerian case of *Marques v. Edematies*[74], the lease of the plot was in the name of the plaintiff's father. Upon his death in 1913, the plaintiff was still a minor. The defendant, her uncle, used the plot and what her father had built on it for his personal ben efit. The lease expired in 1927, but the Commissioner of Lands continued to accept rents from the uncle in the name of the deceased. In 1944 he granted a new lease to the uncle despite the plaintiff's protests, and against usual practice. The court indicated that the uncle had concealed the fact that he had been holding the land as trustee for the plaintiff. Ademola J. held[75] that the defendant being a trustee of the property of the plaintiff's father was trustee of the lease given to him in 1944 for the benefit of the plaintiff, to whom he should assign the lease. Furthermore, in *Ukatta v. Emembo*[76], the defendant held a lease on resulting trust in favour of the plaintiff. When the term expired, he obtained a renewal in his name. It was held[77]that the defendant was a constructive trustee of the new lease for the plaintiff. He was accordingly ordered to assign the lease to the plaintiff.

While principally applying to trustees and fiduciaries, the rule in *Keech v. Sandford* has been extended to apply to persons not necessarily in a fiduciary position. It has consequently been applied to tenants for life[78], mortgagees,[79] joint tenants[80], tenants in common[81] and partners.[82] However, unlike trustees and tenants for life, the latter group of persons are "not irrebuttably precluded from

74. (1950) 19 NLR 75; Adigun, *supra* n.55, p.325
75. Following *Keech v. Sandford, supra* n.72 and *Bray v. Ford* (1896) A.C.44,51
76. (1963) 7 E.N.R.137, considered *supra*, Chap.14
77. Following *Marques v. Edematies, ibid and Keech v. Sandford, ibid*
78. *James v.Dean* (1808) 15 Ves.536
79. *Rushworth's Case* (1676) Freem Ch.13
80. *Palmer v.Young* (1684) 1 Vern.276
81. *Kennedy v. De Traford* [1897] A.C.180
82. *Featherstona Hugh v. Fenwick* (1810) 17 Ves.298

taking a renewal of a lease".[83] Thus in *Re Biss*[84], a shopkeeper who held under a yearly tenancy died intestate, leaving a widow and three children. The widow was appointed administratix. She continued to carry on business with the help of a son. Her application for the renewal of the lease was refused. However, the son applied and secured it. It was held that he could keep the leave for himself since he did not stand in a fiduciary position to the other persons entitled on intestacy and the position he occupied in the business was not abused.

The rule does not apply to the *bona fide* purchase by a person in a fiduciary position of the reversion on a lease, which is not renewable by custom or contract[85]. However, in *Protheroe v. Protheroe*[86], it was held that a husband, who was trustee of the lease of the matrimonial home for himself and his wife held the freehold on constructive trust when he bought it after separating from his wife. The husband was, though, entitled to be reimbursed the cost of buying the freehold out of the proceeds, when the house was sold. Similarly in *Thompson's Trustee in Bankruptcy v. Heaton*[87], following the dissolution of a partnership without the disposition of the lease, a company formed by one of the ex-partners acquired the freehold reversion of the leasehold property. It was held that a fiduciary relation arose from the duty of good faith which each partner owed to the other and that relationship continued after the dissolution of the partnership so long as its affairs remained unsettled. It is significant that the decision in *Bevan v. Webb* was not cited to the court either in the *Protheroe* case or *Thompson's Trustee v. Heaton*. Consequently, there is doubt as to whether a distinction can be drawn between a trustee obtaining the renewal of a lease as was the case in *Keech v. Sandford*[88]

83. *Nathan & Marshall, supra* n.72, p.298
84. (1903) 2 Ch.40
85. *Bevan v. Webb* (1905) 1Ch.620. See also *Brunner v. Rose* [1973] 1 WLR.443
86. [1968] 1 W.L.R.519
87. [1974] 1 W.L.R.605
88. *Supra* n.72

and *Marques v. Edematie*[89] whereby he is constituted a constructive trustee of the new lease and a trustee buying the landlord's freehold reversion.[90]

The categories of persons who occupy a fiduciary position to which the rule in *Keech v. Sandford* applies include executors and administrators[91], and executor *de son tort*[92] (one who interferes illegally with the deceased's estate), agents of these persons[93] and to t he husband or wife of a person in fiduciary position.[94]. Equally, the rule applies to a person who buys the right to renew from the trustee executor or tenant of life, the trust attaching to the purchase money rather than the renewed lease.[95] In *Pole v. Pole*[96] a tenant for life for valuable consideration permitted a statute sanctioning a railway affecting his property to pass without objection by him. It was held that the money received was subject to a trust. In *Aberdeen Town Council v. Aberdeen University*[97], the town council held certain lands near the sea in trust for the University and its professors. The council subsequently obtained a grant of Salmon fishing in the sea opposite the land which they held in trust. It was held that the grant should be held on trust for the University and its professors.

The situations in which a person cannot keep the benefit he has acquired by virtue of the rule in *Keech v. Sandford* were summarised by Romer, J.L. in *Res Biss*[98] as follows: (1) where the acquirer occupied a fiduciary position; (2) where a person not in a fiduciary position acquired property fraudulently representing that he was acting on behalf of others; (3) where a person occupied a special position and

89. *Supra* n.74
90. Keeton & Sheridan *op.cit*, 10th Ed.1974, p.207
91. *Walley v. Walley* (1687) 1 Vern,484; *Re Jarvis* (1958) 1W.L.R., 815
92. *Mulvany v. Dillon* (1810) 1 B&B 409
93. *Griffin v. Griffin* (1804) 1 Sch.& Lef 352; *Mulvany v. Dillon, ibid*
94. *Ex.parte Grace* (1799).IB&P.376; *Re Biss, supra* n.84
95. *Owen v. Williams* (1773), Amb; 734
96. (1865), 2 Dr.&Sm 420
97. (1877) 2 App.Cas.544. See also *Garth v. Cotton* (1753) 2 Atk.751; *Williams v. Duke of Bottom* (1784) 1 Cox 72.
98. *supra* n.84, pp.60/62.

by virtue of it owed a duty towards others interested in the benefit acquired. The persons in the third category correspond with those non fiduciary persons who are subject to a presumption of fact.[99]. The result in *Re Biss* contrasts strikingly with that in *Re Knowle's Will Trusts.*[100] Here the son was a residuary legatee and manager of the deceased's business. He was also a trustee of the will. He renewed the lease in his name. It was held that the renewal accrued for the benefit of all the beneficiaries under the trust.

F. Abuse of Fiduciary Position and Special Relationship

The foregoing treatment on an express trustee being constituted a constructive trustee in given situations is one of the illustrations of a much wider equitable principle. The principle was explained by Ademola, J.in *Marques v. Edematie* thus:[101]

> "A trustee or executor or other person standing in a fiduciary position, is not entitled to make a profit by the trust, either directly or indirectly; he is not allowed to put himself in a position where his duty and his interest conflict".

This principle is also applicable to an agent, director or "other person in an analogous fiduciary position" who is required to account for profits made by him by virtue of his fiduciary position. The duty to account does not depend on fraud or corruption.[102]

Related to this is the view that a constructive trust may be "an incident of miscellaneous relationships".[103] Consequently, a constructive trust may be constituted with respect to sums of money recovered under a promissory note. In *Hirachand Punamachand v. Temple*[104], a son was indebted to a moneylender for a sum of

99. Waters, *supra* n.5, pp.3133

100 (1948) 1 All E.R. 866

101. (1950) 19 NLR 75 at p.77 applying *Bray v. Ford* (1896) A.C.44, 51 per Lord Herschell

102 *Regal (Hastings) Ltd. V. Gulliver* (1942) 1 All E.R.378 per Lord Wright. See also *Boardman v. Phipps* (1967) 2A.C.45.

103 Keeton & Sheridan, *op.cit*. P.213

104 (1911) 2 K.B.330

money under a promissory note. His father communicated to the moneylender and offered an amount which was less than that owing under the promissory note. He also enclosed a draft for the smaller amount. The moneylender cashed the draft and then sued the son for the balance. It was held that he could not recover since he was disentitled from suing except as trustees for the father. Consequently, were they to sue on the promissory note and recovered money on it, it would be held on trust for the father. Similarly, an annuitant, who incurs business losses is deemed to be a trustee both of the sums he may recover in tax with respect to such losses and the right to make the necessary claim.[105]

Furthermore, a company director being a constructive trustee cannot enter into profitable contracts with the company[106],buy property and sell it to the company for a profit, receive commissions from persons buying from the company, or use information obtained as a director in order to secure for himself private remuneration.[107] Where a director diverts company funds and invests them in his own name, he is constituted a constructive trust tee of the investment for the company.[108] These transactions may be consented to by the company.[109] Nevertheless, directors are not trustees for the company's creditors[110] or individual shareholders[111]. They may therefore, buy shares from shareholders without revealing existing negotiations for the sale of the company's business. A company's promoters are also fiduciaries in relation to it. Consequently, they are liable to account to it for any secret commissions made by them in the course of sale of property to the company during its formation.[112] This also applies to a company secretary.[113]

105. *Re Kingcome* (1936) Ch.566; *Re Lyons* (1952) Ch.129
106. *Great Luxembourg Rlwy Co.v.Mangay* (No.2)(1858) 25 Beav.586
107. *Industrial Development Consultants Ltd. V. Cooley* (1972) 1WLR 443
108. *Rose v. Humbles* (1970) 1WLR 1061, 1072 per Buckley J.
109. Companies Act, Cap.110, Ss.1924: Table A, Art 83
110. *Re A.M. Wood's Ships Wodite Protection Co.Ltd* (1890) 62 L.T.760
111 *Perceival v. Wright* (1902) 2 Ch.421
112. *Gluckstein v. Barnes* (1900) A.C.240
113. *Mckay's Case* (1875) 2 Ch.D.1

Moreover, a solicitor who buys property from a client has to show both that he gave full value for it and the client benefitted from the sale.[114] Finally, a constructive trust may also be constituted out of contracts of insurance. This would be so where a person with a limited interest in property such as a carrier insures the property so as to cover both his own interest and that of other persons. The insured thereby becomes a trustee for the excess of the sum recovered over the amount of his own loss on behalf of the interested persons.[115]

G. Stranger to Trust as Constructive Trustee

If a stranger to the trust obtains trust property or fund from the trustee with knowledge that it forms part of the trust estate and that he is receiving it in breach of trust, he is ad judged a constructive trustee for the beneficiaries of the trust. Thus in *Udensi v. Mogbo*[116], the Mgbelekeke family of Onitsha acknowledged the father of the respondents as "kola tenant" in 1935 in consideration for £10 the father paid to the family. Subsequently, he was allowed to use the land, subject to the tenancy free from all incumbrances but subject to two conditions, (i) that there was to be no alienation of the land wholly or in part without the prior consent of the landlords and (i) that every "incoming tenant" must be liable to further payment of "kola" to the landlords. Upon taking possession of the land, John Undensi constructed a building on it in which himself, his family and the father of the appellant, Dominic Udensi lived from 1938 to 1940 when the appellant's father died. A couple of years before John Udensi's death, Dominic Udensi had gone to live in Aba. However, following John Udensi's death, Dominic Udensi, at the request of the respondents' mother, left Aba for Onitsha to live with respondents. On John Udensi's death, Dominic Udensi unsuccessfully claimed the disputed property. By a settlement of the dispute between Dominic Udensi, and the respondent's mother, the

114. *Spencer v. Topham* (1856), 22 Beav.573

115. Keeton & Sheridan, *op.cit* p.215 relying on *London and North Western Rlwy Co.v. Glyn* (1859), 1E&E. 652, 661 per *Wightman, J.*

116. (1976) 7S.C.1Adigun *supra* n.55, pp.325-326

plan of the disputed property and the Kola tenancy agreement were handed over to Dominic Udensi. Thereafter, D.Udensi collected the rents in respect of the property in dispute not occupied by the respondents and their mother, but by tenants. D. Udensi applied the proceeds of rent for the benefit and welfare of the respondents. In 1971 D. Udensi died and his son, the appellant started collecting the rent from the disputed property. Upon challenge from the respondents, he laid claim to the property. The Supreme Court held that the appellant held the rent and property as constructive trustee for the respondents. Idigbe, J.S.C. thus stated:[117]

> What is more; equity does impose a constructive trust where necessary to satisfy the demands of justice and conscience without reference to the intention of parties..... and where a person not expressly a trustee traffics with money belonging to another, the law raises a trust by implication and clothes that person with fiduciary character for the purpose of making him accountable.

The liability of a constructive trustee subsists even where he has given value, if he assists the trustee to commit a breach of trust knowingly, despite not having actually received the trust property. Similarly, a volunteer who receives trust property either with or without notice is constituted a constructive trustee of it.[118] Nevertheless, a stranger to the trust is not regarded as a constructive trustee merely by his acting as agent of the trustee's in transactions within the trustee's legal authority except where the agent receives and becomes chargeable with part of the trust property or knowingly participates in a fraudulent purpose of the trustee.[119] In *Selangor United Rubber Estates Ltd v. Cradock (No.3)*.[120] and *Karak Rubber Co. Ltd v. Burden* (No.2).[121], a bank was held liable as constructive trustee. The rationale for this was

117. Ibid 7S.C.pp.2223 applying *Soar v. Ashwell* [1893] 2Q.B.390; *Re Franklyn* (1930) 30 TLR 187

118. *Re Eyre Williams* [1923] 2 Ch.533

119. *Barnes v. Addy* (1874) L.R.9 Ch.App.244 per Lord Selborne; *Williams Ashman v. Price & Williams* [1942] Ch.219; *Belmont Finance Corpn v. William Furniture Ltd. [1980]* 1 All *E.R.392 C.A.*

120. [1968] 1W.L.R.1555

121. [1972] 1W.L.R.602

that a person is taken to "knowingly assist" in a fraudulent purpose if he has knowledge of circumstances which would show to an honest reasonable man that there was such a purpose or which would put one on inquiry as to whether there was a fraudulent purpose and he failed to make such inquiry.[122] However, a solicitor is not deemed a constructive trustee of money he received from his client simply because of his being aware that another party claims that the client is a trustee of the funds out of which the solicitor has been paid.[123] In addition, a partner of a trustee who has improperly employed trust property in the partnership business does not become a constructive trustee, unless he has notice of the breach of trust committed by the other, and the trust money may be recovered where it is still in the possession or control of the partnership firm.[124]

There are other illustrations of the notion that a person who acts as a trustee without requisite authority to do so is liable just like a trustee. In *Lysel v. Kenneth*[125], it was held that a person, who without authority collects rents property of which he is cognisant belong to others is a fiduciary in respect of the rents so collected. Similarly, in *Boardman v. Phipps*[126], it was held that a solicitor who had been active in promoting the interests of a company in which the trustee held shares as a result of which activity the value of the shares rose, must account to the trustees for the profit made out of a personal shareholding in the same company. By a majority, the British House of Lords[127] thought that by the way he acted (viz. As a proxy for the trustees, obtaining information about the affairs of the company), he had placed himself in a fiduciary position. However, since he acted with integrity and openly in the interests of the trust, thereby considerably benefitting the trust, he should be allowed payment on a liberal scale for his work and skill in producing the profits.

122. *Ibid*
123. *Carl Zeiss Stigtung v. Herbert Smith & Co.(No.2)[1969] 2Ch.276*
124. Partnership Act, Cap.114, S.16
125. (1889) 14 App.Cas.437 H.L. See aslo *Undensi v. Mogbo, supra* n.17
126. [1967] 2 A.C.46 H.L.
127. Per Lords Cohen, Hodson and Guest (Lords Dilhorne and Upjohn dissenting)

The decision has been criticised[128] on the ground that there was no way in which the estate could have exploited the opportunity itself and the profit was made honestly, and not in any sense at the estate's expense or risk.

In *Nasr.V.Berini Beirut Riyadh (Nig.) Bank Ltd.*[129], the plaintiff, who was a director of the defendant bank, secretly arranged for money to be paid into a fictitious account with which he built a house. In an action to recover the deed of lease which he had deposited as security for the loan, the bank successfully counterclaimed for the loan granted on the ground that the plaintiff had unjustly enriched himself in breach of his fiduciary duty as a director. Coker J.S.C. stated in this vein.[130]

> There is a broad principle of equity developed to ensure that trustees, agents of persons standing in such legal relationship shall not retain a profit made in the course of or by means of their office. The principle extends to all fiduciaries and is applied in a wide variety of circumstances.....

In *Cooke v. Head*[131], it was held that where a man sold a bungalow to which he had legal title, he and his mistress having contributed to its acquisition, the mistress was entitled to a share of the proceeds of sale, this being based on the imputation of a constructive or resulting trust. Similarly, in the Ghanian case of *Mensah v. Berkoe*[132], relatives of the respondent husband, who was a student in the United Kingdom in 1965 arranged a customary marriage between him, and the petitioner who was then staying in Ghana. The petitioner joined the respondent in the United Kingdom that same year and stayed

128. Gareth Jones (1968) 84 L.O.R.472. See also the Canadian case of *Peso Silver Mines Ltd v. Cropper* (1966) 58 DLR (2d) I and the Australian ace, *Queensland Mines Ltd, v. Hudson* (1978) 18 ALRI, (1978) 52 ALJR 399 (PC) which support this reasoning. The decision is evidently based on the approach in *Regal (Hastings) Ltd v Gulliver, supra* n.3. Another Canadian case to this effect is *Canadian Aero Services Ltd v. O'Malley* (1973) 40 DLR (3rd) 371. See also *IDC v. Cooley, supra* n.8

129. 1969(2) ALR Comm.32; Adigun, *supra* n.55, p.327

130. *Ibid* pp.3051 applying *Boardman v. Phipps, supra* n.27

131. [1972] 1W.L.R.518. C.A.

132. (1975) 2 G.L.R.347; Adigun, *supra* n.55, pp.327328

with him up to 1972, when they returned home. They had two children. The marriage, subsequently broke down and the petitioner was driven out of the home. The petitioner instituted this petition for the dissolution of their marriage, a claim for money had and received, being wages she earned during the period she worked in Britain and which were taken away from her by the respondent. The respondent was ordered to pay over the money since allowing him to retain it would amount to allowing him to unjustly enrich himself at the petitioner's expense.

H. Agent as Trustee

The issue of whether an agent is a trustee for the principal is controversial. It is evident that an agent cannot make a profit out of his position as agent and is accountable for that profit to the principal. Nevertheless, barring evidence of a fiduciary relationship, the position of an agent and principal in relation to profit unlawfully made is that of debt or and creditor and not that of trustee and beneficiary.[133] While it has been contended that an agent is a constructive trustee of the property of the principal left in his charge, the truth seems to be that this will be so only where there is some special confidential relationship as where the principal entrusts property with the agent for safe custody, sale or investment.[134] Where such a relationship is nonexistent, there can be no inference of a trustee beneficiary relationship. Consequently, the principal's remedy is at common law for money had and received.[135] It follows that a solicitor to whom money is given for general investment[136], a stockbroker[137] and a land agent are all constructive trustees of property left in their care. It has been suggested that the degree of discretion given to an agent would indicate whether he is also placed in a fiduciary position[138].

133. *Lister & Co.v. Stubbs* (1890), 45 Ch.D.1, 13
134. *North American Land Timber co.Ltd. V.Watkins* [1904] 2Ch.242
135. *Piddocke v. Butt* [1894] 1Ch.343
136. *Burdick v. Garrick* (1870) L.R.5Ch.App.233
137. *Re Strachan* (1876) 4 Ch.D.123
138. *Re Hindmarsh* (1860) 1 Dr &Sm.129

Additionally, where an agent is in a position of authority to which he has been appointed by the principal, and he obtains a personal profit, he is accountable for it to the principal[139]. He will also be accountable where he uses information or knowledge which he has been employed by the principal[140]. Accountability in this context does not affect profits obtained by an agent not on behalf or for the principle. Nevertheless, if the agent has used his principal's property or his position as agent to obtain profit, he will be accountable, even though his principal has suffered no damage thereby or lost profit[41]. This is because the profit is an unjust benefit which the agent is not allowed to keep.[141] In *Boardman v. Phipps,* Lord Upjohn indicated[142] that the accountability of an agent depended on the following circumstances:

i) The facts and circumstances must be examined to see whether the purported agent, or even confidential agent, is in a fiduciary relationship to his principal. This may not be so.[143]

ii) If a fiduciary relationship exists, it must be examined to see what duties are there by imposed upon the agent in order to discover the scope and ambit of the duties charged upon him.

iii) Once those duties are defined, it is essential to see whether the agent has breached any of them and by placing himself within the scope thereof in a position where his duty and his interest may possibly conflict. It is at this stage that the question of accountability arises.

iv) Once accountability is established, it will only affect profits made within the scope and ambit of the duty.

139. *Reading v. A.G.* (1951) A.C.507

140. *Boardman v. Phipps, supra* n.27; *Regal (Hastings) Ltd. v. Gulliver, supra* n.3; *Lamb v. Evans* (1893) 1 Ch.218

141. See also *Nasr v. Berini BeirutRiyadh (Nig.) Bank Ltd. Supra n.30*

142. *Supra* n.27, p.127

143. *Re Comber* (1911) 1 Ch.723. *Re Diehl K.G.'sApplication* (1970) 2W.L.R.944

Chapter 16

Appointment, Removal and Retirement of Trustees

A. Appointment

1. Capacity to Act as Trustee

Generally, a person, who is able to hold property can be a trustee. This means a person who is of full age and legal capacity.[1]

a) Infants

In Uganda there are no statutory provisions on holding of property by an infant. However, by way of comparison, in Nigeria. under the Property and Conveyancing Law,[2] the appointment of an infant to be a trustee in relation to any settlement or trust is void, but without prejudice to the power to appoint a new trustee to fill the vacancy. This provision apparently only relates to an express trust since an in fact can hold property other than legal estate inland upon resulting, implied or constructive trust.[3] Under Section 17 (3) of the same law, it is indicated that a conveyance of a legal estate to an infants, on any trusts operates as a declaration of trust but is not effectual to pass any estate. However, if the conveyance of the legal estate in land is to an infant, jointly with one or more other persons of full age on an trusts, this operates as if the in fact has not been named therein, but without prejudice to any beneficial interest in the land intended for the infant[4] Furthermore, under the Trustees Act[5], where a person

1. The age of majority in Uganda is 18 years. See Contract Act Cap.73 S.1(2); Constitution of Uganda, 1995, Article 59(1)
2. Cap.100 Laws of W.N.1959 applicable in Ogun, Ondo and Oyo States, Cap.129, Laws of Bendel States, S.18.
3. *Re Vinogradoff* (1935) W.N.68
4. Property and Conveyancing Law, *supra* S.17(4).
5. Cap.164 (Laws of Uganda 2000) S.35(1)

who is named as trustee is an infant, then subject to the restrictions on the number of trustees contained in the law, one or more other persons may be appointed a trustee or trustees in his place.

The general principle is that an infant lacks the capacity to exercise judgement and discretion[6]

b) Married Women

These can be trustees by virtue of the provisions of the Trustees Act[7].

c) Cestuie que Trust

A beneficiary can be appointed a trustee, although such appointments are generally undesirable since there may be a conflict between the beneficiary's interest and the trustee's duty.[8]

d) Corporations

A corporation may act as trustee, if so authorised by its charter, statutes of memorandum of association. In the case of a company incorporated under the Companies Act,[9] provision must be made in the memorandum of association. In the case of a public corporation, provision should appear in the law of statute creating it. In the case of a Public Trustee, who is a corporation sole under the Public Trustee legislation[10] relevant provisions are inserted therein.

e) The Public Trustee

A person who is beneficially interested under a trust may apply to court for the appointment of the Public Trustee in the place of existing executors, or administrators or of any guardians of infants or committee or receiver of a person incapable of managing his own

6. *Hearle v. Greenbank* (1749), 3 AtK.695 per Lord Hardwicke. See also Potter, "Dispositions of Land in Favour of An Infant" (1933) 19 *Conveyancer 1.*
7. *Supra* n.5. This is implicit from S.35(1)
8. *Forster v. Abraham* (1874), L.R.17 Eq.351; See also *Re Paine's Trusts* (1885), 28 Ch.D.725, Trustee Law *supra* n.5 S.35(1)
9. Cap.110 Laws of Uganda, 2000
10. See also *Bankers v. Salisbury Diocesan Council of Education* (1960) Ch.631

affairs if sufficient cause is shown.[11] Thus in *Re Williams, Deceased*[12], an application was made asking the court to appoint a Public Trustee to collect funds from a portion of the estate because the beneficiaries were unable to obtain their shares. Counsel for the sole surviving executor opposed the application, contending that no grounds were given to show that the executor had in anyway mal-administered his trust. It was held at first instance, that the issue here was one of undue delay rather than maladministration. Consequently, it was desirable to appoint the Public Trustee in place of the existing trustee under Section 14 of the Public Trustee Act. Upon appeal the court said (I) that the trial judge was wrong to make an order which applied to the whole estate, in the absence an application to that effect without sufficient cause being shown (i) that the omission to pay money due to the estate might not necessarily be due to default in the absence of any evidence to that effect having been adduced. The appeal was, consequently, allowed. It has been suggested[13] that the appellate decision was wrong in that under section 14 of the Public Trustee Act, before an application can be made under the Section default on the part of the trustee is not a prerequisite. All that is required is proof of sufficient cause and this depends on the circumstances of each case. In this case, the fact that the beneficiaries were unable to obtain their own shares of the trust property within a reasonable time was sufficient cause to justify the application of the section.

The Public Trustee may refuse to accept any trust involved[14]. In *Odekunle v. Williamson*[15], the applicants, who were trustees appointed by the deceased's Will, applied to the court under Section 13 of the Public Trustee Act for an order to appoint the Public Trustee as trustee of the estate of the deceased. The reason was that they could no longer continue with the administration of the trust because

11. Public Trustee Act, Cap.161, S.7
12. (1945) 11 W.A.C.A.53
13. Fabunmi, *Equity & Trusts in Nigeria* (1986), p.181
14. Public Trustee Act, S..4(3)
15. (1960) L.L.R.229, Adigun, *Cases and Texts on Equity, Trusts and Administration of Estates* (1987) p.332

they were so preoccupied with other matters and lived so far away from the trust property that it was impossible for them to devote as much time as necessary to the affairs of the trust. Counsel for the Public Trustee opposed the application and submitted that Section 13(1) of the Pubic Trustee Act should be read subject to Section 6(3) of the same Act. In rejecting the contention, the trial judge held that the powers given to the court under Section 13(1) could not be abrogated by the provisions of section 6(3), allowing the Public Trustee to decline absolutely or accept on certain con ditions any trust. Nevertheless, he accepted that the Public Trustee should be consulted before an order was made asking him to take over an estate. He, therefore, granted the trustees leave to retire and ordered the Public Trustee to be appointed in their place.

Any person who is aggrieved against any act, omission or decision of the Pubic Trustee may apply to court which will make an order as it thinks fit.[16]

f) Solicitors to the Trust

These may also be appointed trustees, although in principle (as distinguished from practice) the court does not make or sanction such an appointment.[17]

g) Bankrupts

A bankrupt may be appointed a trustee and where a trustee becomes bankrupt, the trust estate does not vest in his trustee in bankruptcy[18] Nevertheless, becoming a bankrupt may be a ground for removing him as trustee and appointing another in his place.[19]

It is also notable that the appointment of two trustees is necessary to protect the beneficiaries and it is normally required in the case of trusts relating to land, unless the trustee appointed is a

16. Public Trustee Act S.13
17. *Re Norris* (1884), 27 Ch.D.333; *Re Earl of Stafford* (1896) 1 Ch.288
18. Bankruptcy Act, Cap.67, *Taylor v. Plumer (1815)*, 3 M&S.562
19. Trustees Act, Cap.164, S.35(1)

trust corporation, since a sole trustee (not being a trust corporation) cannot give a valid receipt for the proceeds of sale or other capital money arising out of a trust for sale of land[20]. It is also significant that under the Trustees Act[21], the maximum number of trustees of a settlement of land (including a trust for sales shall be four, and if more than four are named, then the first four named who are able and willing to act shall be trustees. The Section only applies to dispositions of land and does not apply.[22]

a) In the case of land vested in trustees for charitable, ecclesiastical, or public pur poses, or

b) where the net proceeds of the sale of land are held for like purposes.

In addition, where personal representatives appoint trustees for the property of an infant, they must appoint either a trust corporation or not less than two and not more than four individual trustees.[23]

2. Appointment by Settlor or Testator

Original trustees are normally appointed under a deed of instrument by a settlor or under a will by a testator. Once they are appointed, the settlor has no power to appoint additional ones unless he has reserved a power in the will or settlement to do so.[24]

3. Appointment Under Trustees Act

Nevertheless, if the appointed trustees disclaim, the settlor holds the property as trustee. If they die the personal representatives of the last survivor hold as trustee.[25] The settlor or testator may appoint a Public Trustee as ordinary trustee or custodian[26]

20. Trustees Act, Cap.164, S.14(2)
21. Cap.164,S.34
22. *Ibid* S.34(3)
23. *Ibid* S.35(4)(6)
24. Fabunmi, supra n.13 p.181
25. Act *supra*, S.35(1)
26. Public Trustee Act, S.5

a) the person or persons nominated in the trust instrument; if any creating the trust;

b) the surviving or continuing trustees or trustee for the time being, or the personal

representatives of the last surviving or continuing trustee.

The appointment of new trustees may be made in the following circumstances:[27]

a) where a trustee is dead;

b) where a trustee remains outside Nigeria for an uninterrupted period of twelve months;

c) where the trustee refuses to act or desires to be discharged;

d) where the trustee is unfit to act such as a bankrupt trustee;

e) where the trustee is incapable of acting such as when he is an infant or suffers from mental disorder or is senile.

A trust corporation which has been dissolved is covered by this circumstance.[28]

New trustees may be appointed if none of the events under the Trustees Acts.35(1) have occurred provided (i) none of the existing trustees is a trust corporation, (i) the appointment would not bring the number of trustees to more than four[29]

A deed is required for the purpose of vesting property into the new trustees.[30]

While a person nominated to appoint trustees may not appoint himself as an *additional* trustee,[31] by Section 35(1) of the Trustees Act, he may appoint himself as a *replacement* trust tee to fill a vacancy if there are not more than two continuing trustees.[32]

27. Trustees Act, S.35(1). See also *Oluwu v. Renner* (1968) M.N.A.L.R.11

28. *Ibid* Trustees Act, S.35(3)

29. *Ibid*, S.35(6)

30. *Ibid* S.39

31. Re *Power's Settlement Trusts,* (1951) Ch.1074

32. See also Keeton & Sheridan, *op.cit* p.224 discussing Section 36(1) of Trustee Act, 1925 of England, in *pari materia* with S.35(1), Trustees Act, Cap.164

4. Appointment by the Court

The court is empowered to appoint new trustees, when it is expedient to appoint them and inexpedient, difficult or impracticable to do so without the assistance of the court"[33]. The appointment may be in substitution for or in addition to existing trustee or trustees. Although the court has discretion to consider and implement the wishes of the settlor and the beneficiaries, it may displace a trustee against his will especially where he has been convicted or is declared bankrupt and in the case of a corporation where it is in liquidation or has been dissolved. The appointment by the court of new trustees does not operate to discharge any former or continuing trustee from his obligations under the trust.[34]

It is apparent that the powers of appointment under the Trustees Act Section 35(1) must be exhausted before an application is made to court for the appointment of new trustees. Thus, in *Re Higginbottom,*[35], it was established that the court has no jurisdiction under the statutes to appoint a new trustee against the wishes of persons who have statutory power to appoint under the Sections. This is so even where the application to court has been made by a majority of beneficiaries. In *Re Tempest*[36], Turner L.J. laid down three guidelines on court appointment of trustees:

a) The court takes into account the wishes of the persons by whom the trust has ben created, if expressed in the trust instrument or can be clearly collected from it;

b) The court does not appoint a person to be a trustee with a view to the interest of some of the persons interested under the trust in opposition either to the wishes of the testator or interest of others or the *cestuie que trust*;

33. Trustees Act, *ibid* S.40

34. Trustees Act, *ibid* S.39

35. (1892) 3Ch.132

36. (1886) 1 ch.App.285, 487488. See also Keeton & Sheridan, *op.cit* p.231; *Renner v. Renner* (1961) 1 All N.L.R.233

c) In appointing a trustee, the court will consider the issue of whether his appoint ment will promote or impede the execution of the trust since the purpose of the appointment is that the trust may be better into execution.

5. Vesting of Property in Trustee

A trust is not constituted until property has vested in the trustee.[37] Consequently, the mere appointment of a trustee does not, of itself vest property in him. It is necessary for the appointment to also provide for the vesting of the trust property in the trustees.

With regard to the original trustees, the transfer of property must be affected using the appropriate methods of transfer. For instance, with land, there must be a deed of conveyance in writing, while with chattels there must be delivery thereof or a deed of gift. With respect to shares, there must be entry and registration in the company's register of shares, following a proper instrument of transfer. With respect to a testamentary trust, the will operates to vest the property in the trustee or trustees, named in the will.

As concerns new trustees, the vesting is effected in three principal ways. First, by a vesting declaration by the appointer contained in the deed of appointment.[38] By Section 39(2)(b) of the Trustees Act[39] it is provided that if the deed was made after the commencement of the law, even if it does not contain a vesting declaration, it operates as if it had contained such a declaration, subject to any express provision to the contrary, therein contained. By Section 39(4) of the Trustees Act, the provisions of Section 39 do not apply to any legal estate or interest in land conveyed, by or under the Registration of Titles Act or to any such share, stock or annuity or property as is only transferable in books kept by a company or other body, or in a manner directed by or under an Act of Parliament.

37. See *supra* Chap.10
38. Trustees Act, S.39(1)
39. Cap.164

Second, the vesting may be effected through a conveyance or transfer to new, by previous trustees in whom the property was previously vested.[40] Finally, vesting is possible through a vesting order issued by the court, in cases where it is impossible or impracticable to procure the transfer of the trust property to a new trustee.[41]

B. Termination of Trusteeship

1. Disclaimer

Since the duties of a trustee are onerous and usually gratuitous, except where provision has been made in the trust instrument for the payment of trustees, no person can be forced to accept the office of trustee.[42] Consequently, a person appointed a trustee may disclaim the office at any time before acceptance. This is usually done by means of a deed to that effect[43] However, once the appointed trustee has accepted the office, he cannot disclaim it. Instead he may retire from it. A disclaimer with respect to only part of the trust property will be ineffective relative to any part of the trust.[44] If the subject matter of the trust is personality only, then the disclaimer may be by means of an oral declaration.[45]

Normally, in a will a person is appointed both executor and trustee, of the will. If he renounces probate, this has the effect of relieving him from his executorship. Although this does not amount to a disclaimer of the trust, it is evidence from which coupled with the failure to act, the court will presume that the person has disclaimed.[46] In *Nylander v. Thomas*[47], the issue arose as to whether the respondent

40. *Ibid* s.39(2)(a)
41. *Ibid* s.40(2), 43
42. *Robinson v. Pitt* (1734), 3 PWMS 249, 251 per Lord Talbot
43. Keeton & Sheridan, op.cit. P.220; Fabunmi, *supra* n.13 p.185
44. *Re Lord and Fullerton's Contract* [1896] 1Ch.228
45. *Chigey v. Harris* (1847) 16 M&W.517
46. *Re Gordon* (1877) 6Ch.D.531
47. (1968) 1 All N.L.R.80; Adigun *supra* n.15, p.335 (Supreme Court of Nigeria)

was properly appointed a trustee of a will. One PJCT appointed three executors who were also to act as trustees, but only one of them took probate of the will and administered the trust for about ten years. The latter, in his will appointed the respondent a trustee of the will of PJCT. The issue was whether the two other executors/ trustees could still be regarded as trustees of the will. It was held that where a testator has appointed a person an executor and also a trustee, the fact of his renouncing probate and not acting as trustee is strong evidence that he has refused the trust, and is conclusive evidence of refusal if the duties of the executor are by the will inseparable from the duties of the trust. This was the case here, and although there was no formal renunciation of probate, the omission to act for ten years must be regarded as refusal to act as trustees.

Where the person disclaiming is the sole trustee, the legal title in the trust property reverts to the settlor. In other circumstances, it vests in the remaining trustees.[48]

Relative to the aspect of disclaimer is what constitutes acceptance of the office of trustee. Acceptance may be express, or implied and may be by words or conduct. In other words acceptance is a question of fact. Generally though, any interference by the appointee with the subject matter of the trust amounts to acceptance.[49], although it may be explainable on other grounds[50] In *Urch v. Walker*[51], leasehold property was left to trustees. The trustees assigned the lease to a beneficiary who was absolutely entitled under the trust. It was held that this was sufficient act of acceptance by him of the role of a trustee. On the other hand, in *Evas v. John*[52], the trustee held the trust deed for six months in safe custody. If a person who has been appointed both executor and trustee takes out probate of the will, he is deemed to have accepted the trusts as contained in the will.[53]

48. Fabunmi, *supra* n.13 p.185

49. *James v. Frearson* (1842), Y&C.C.C.370; *Cunningham v.Cunningham* (1750), 1 Ves. Sen.522, *Re Sharman's W.T.* [1942] Ch.311

50. *Stacey v. Elph* (1833), 1 My&K.195

51. (1838) 3 My&Cr.702

52. (1841) 4 Beav.35

53. *Mucklow v. Fuller* (1821) Jac.198

Nonetheless, if he renounces the probate; this is not regarded as a disclaimer, although it is strong evidence of it.[54]

2. Retirement

Upon accepting the office of trustee, a trustee can only vacate it through retirement or discharge by the court. This is possible through the following ways:

a) By the appointment of a new trustee in his place[55].

b) By the appointment of a new trustee in his place by the court.[56]

c) By the trustee retiring without any appointment in his place, provided that:

   i) at least two trustees or a trust corporation remain to perform the trust,

   ii) he executes a deed indicating that he wishes to retire and obtains the consent, by deed, or his co-trustees and of any person having power to appoint new trustees.[57]

d) By the trustee obtaining the consent of all the beneficiaries, if *sui juris*[58]

e) Under authority contained in the trust instrument, although this has lost impor tance in view of the very wide terms now conferred by statute;[59]

f) By the trustee retiring from the trust upon the appointment of a Public Trustee, irrespective of the fact that there are not more than two trustees.[60]

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54. *Re Gordon, supra* n.46. *Nylander v. Thomas, supra* n.47
55. Trustees Acts.36(1)
56. *Ibid* S.41
57. *Ibid* s.39
58. Keeton & Sheridan, *op.cit* pp.231232
59. Trustees Act, S.35(1)
60. Public Trustee Act, s.7

3. Removal

A trustee may be removed against his will if he remains outside Uganda, for more than twelve months, refuses or is unfit to act or is incapable of acting[61]. The court may also upon the appointment of a new trustee remove the existing trustee.[62] In addition, the court has an inherent power to remove a trustee with or without a new appointment in his place.

In *Adeseye v. Williams*,[63] it was indicated that a "trustee will be removed from office if the court is satisfied that his continuance in office would be prejudicial to the due performance of the trust and to the interest of the beneficiaries or if the trustee has disregarded his duties".[64] In exercising the jurisdiction to remove a trustee, the court is always guided by what is best for the beneficiaries. Consequently, if there is friction between the trustee and beneficiary, this is sufficient ground for the removal even if there has been no breach of trust by the trustee.[65]

In *Renner v. Renner*[66], the plaintiff, as co executor and co trustee of the will of MAR, sued his other executors and trustees for an account, the removal of one of them on the ground of incompetence due to ill health, and an injunction against the unhealthy executor and trustee to restrain him from further interfering with the estate of the said MAR. All the prayers were granted, the court holding that it had an inherent power to remove a trustee. Unsworth F.J. thus stated in this respect:[67]

> The jurisdiction of the court is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being

61. Trustees Act, S.35(1)

62. *Ibid* S.40

63. [1964] 2 All N.L.R.37, 39; Adigun, *supra* n.15, pp.336337

64. *Ibid*

65. *Lettersted v. Broers* (1884) 9 App.Cas.371; *Williams v. Bankole* LD/43/66 Unreported. But see Kodillnye, *An Introduction to Equity in Nigeria* (1975), pp1178

66. [1961] 1 All NLR 233; Adigun, *supra* n.15, pp.335336

67. *Ibid* p.235 applying *Letterstedt v. Broers, supra* n.66, p.386, per Lord Blackburn

> performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non contentious cases. And, therefore, though it should appear that the charges of misconduct were either not made out or greatly exaggerated, yet if satisfied that the continuance of the trustee would prevent the trust being properly executed, the trustee might be removed. It must always be borne in mind that the trustees exist for the benefit of those whom the creator of the trust has given the trust estate ..... In exercising so delicate a jurisdiction as that of removing trustees their lordships do not venture to lay down any general rule beyond the very broad principle enunciated, that their main guide must be the welfare of the beneficiaries.

In *L.E.D.B. v. Public Trustee*, [68] by consent judgment a trustee was removed from his position as trustee on the ground that he had committed a technical breach of trust in ratifying a scheme of partition differing from the terms of the will. However, *In the Estate of Williams*[69], at trial, the court granted the applicant's claim for the removal of the executor/trust tee of an estate of which he was beneficiary on the ground that there was undue delay in payments from the executor to the applicant. In reversing the decision, the West African Court of Appeal observed that,[70] "the omission to pay funds owing may or may not be due to default, but there is..... a complete absence of any evidence and the (applicant's) affidavit discloses no cause whatever to justify either the removal of the trustee..... or the appointment of the public trustee in his place."

It is also significant that under the Public Trustee Act, Section 8, the court may, remove a private trustee if it is satisfied that his continuance in office may be detrimental to the execution of the trust. This is irrespective of whether misconduct or maladministration has been proved against him.[71]

68. (1937) 3W.A.C.A.143 Adigun, *ibid* p.337
69. (1945) 11 W.A.C.A.53, Adigun, *ibid* p.338
70. *Ibid* P.54, per Baker Ag.C.J.
71. See also *Re Williams Deceased, supra* n.12 and text thereof

4. Death

The principle, *jus accrescendi* is applicable. Consequently, where there are two or more trustees, and one dies, both the office and the estate pass onto the survivor or survivors.[72] In addition, if the sole surviving trustee dies without having made any new appointment, his personal representatives may exercise or perform any power that could have been exercised by the sole surviving trustee, or either the trustees or trustee for the time being of the trust.[73]

5. Bankruptcy

As indicated earlier,[74] bankruptcy of the trustee does not automatically entail disqualification or removal from the office of trustee. However, in practice he should be removed. In the words of Jessel M.R. in *Re Barker's Trusts*[75]

> ..... it is the duty of the court to remove a bankrupt trustee who has trust money to receive or deal with, so that he can misappropriate it. There may be exceptions, under special circumstances, to that general rule; and it may also be that where a trustee has no money to receive he ought not to be removed merely because he has become bankrupt..... (However) a necessitous man is more likely to be tempted to misappropriate trust funds than one who is wealthy; and besides, a man who has not shown prudence in managing his own affairs is not likely to be successful in managing those of other people.

The exceptional situation when a bankrupt trustee will not be removed is where his insolvency has arisen solely from misfortune and he is himself entirely free from any moral stigma. He would then be permitted to retain his office of trustee[76]. In this context, it is significant that a trustee may be removed by the court where he is insolvent[77] or is unfit to act.[78]

72. Trustees Act, S.35(1)
73. *Ibid*
74. *Supra* notes 1819 and text thereof
75. (1875) 1 Ch.D.4344
76. As was the case in *Re Bridgman* (1860), 1 Drew &Sm.164
77. Trustees Act, S.40(1)
78. *Ibid* S.35(1)

6. Vesting Orders in Given Circumstances

Sections 4454 of the Trustees Act authorise the court to vest trust property on given occasions. Sections 44 and 51 are specially significant in their effect on the office of a trustee. By Section 44(b), if a trustee in whom land is vested, either solely or jointly with other persons:

a) is under disability; or

b) is out of the jurisdiction; or

c) cannot be found; or

d) being a corporation, has been dissolved, plus a number of other situations, the court may make an order vesting the land in any person in such manner as the court thinks fit.

By Section 51 provision is made for the transfer of stocks and shares and things in action in similar terms to those indicated in Section 44. These provisions have the effect of causing a trustee to vacate his office in the circumstances indicated.

A person under disability is usually a mental patient whose affairs have been placed in the hands of a third trustee or place under the control of the court[79]

79. *See e.g.* Public Trustee Act S.8; *Re Harrison's Settlement Trusts* [1965] 1 WLR 1492

Chapter 17

Duties and Powers of Trustees

A. Duties

1. Reduction of Property into Possession

The first duty of a trustee, following appointment, is to find out what the trust property is, the directions of the trust instrument in regard to it and whether the trust property has been properly and safely invested. He should also ensure the transfer to himself of any property which did not pass to him under the deed of appointment as well as the transfer of all the documents affecting the trust property, such as title deeds and share certificates.[1]

Where the trust fund includes an equitable interest the trustee's duty is to give notice as soon as possible to the person in whom the legal estate is vested. This is to enable him to obtain priority over any subsequent encumbrance.[2] In addition, where the trust estate includes a chose in action, the trustee should get it in at the earliest opportunity. If he fails to do so he would be held liable.[3]

Where the trust property includes chattels, the trustee should make out a proper inven tory. Furthermore, if a beneficiary under the will or trust is entitled to the chattels, for life, remainder to other third persons, he should sign the inventory, thus witnessing the nature and value of the property.[4] In this context, where there is a covenant in a marriage settlement by a wife to settle after acquired property, it is the duty of the trustees of the settlement, if they know or have reasonable ground to believe that the property has come to

1. *Hallows v. Lloyd* (1888) 39 Ch.D.689
2. *Jacob v. Lucas* (1839) 1 Beav.436
3. *Re Brogden* (1888) 38 Ch.D.546
4. *Temple v. Thring* (1887) 56 L.J.Ch.767

her which should be settled to ensure that it is settled according to the settlement.[5]

a) Time for Realisation

With respect to the time period within which to realise trust property, there is no absolute rule specifying a particular time. The trustee must use his discretion in the matter.[6] The test of the trustee's liability in this context is whether he has acted (i) prudently or honestly and (i) in the belief that he was acting in the best interests of all the beneficiaries.[7] Generally, though, unless the executor trustee has good reason to believe that the property will materially appreciate, he should realise it within one year of the testator's death. If he fails to do so the burden is on him to justify the delay.[8] This is subject to the exception that where the testator has given the executor an absolute discretion to postpone the sale and conversion of the estate, he is not under compulsion to convert within a year and in the absence of bad faith he is not responsible for loss resulting from failure to convert.[9]

Where the trust investment depreciates, thereby jeopardising the trust fund, the trustees should consider realising it. Thus in *Re Medland*[10], money was lent out on security of freehold mortgages, the property margin being allowed. However, the property later depre ciated so that the margin of safety was overstepped and the trustees failed to call in the mortgage. It was held that while there was no absolute duty on the trustee to call in the mortgage at once, there was a discretion which they must exercise with due regard to the circumstances, including the solvency of the mortgagor.

5. *Ex.p.Greaves* (1856), 8 De G.M.291
6. *Re Chapman* (1896) 2Ch.763, 782
7. Keeton & Sheridan, *op.cit*. p.243
8. *Grayburn v. Clarkson* (1868), L.R.3Ch.App.605, 606
9. *Re Norrington* (1879) 13 Ch.D.654
10. (1889) 41 Ch.D.476

b) Money

A trustee or executor should never allow money to remain outstanding simply on the personal security of a debtor, even though the money was lent by the testator personally. This is because the quality of the debtor may change from day to day. Consequently, if the trustee or executor fails to recover the debt within a reasonable time, he himself becomes the debtor's surety.[11]

Furthermore, trustees should not generally lend money on personal security even with a guarantor[12]. This is subject to the exception that if a trustee is expressly authorised to lend on personal security, he may do so.[13]

The provisions of the Trustees Act[14], Section 25 are also relevant in this context. It is therein provided:

> where an undivided share in the proceeds of sale of and directed to be sold, or in any other property, is subject to a trust, or forms part of the estate of a testator or intestate the trustees or personal representatives may (without prejudice to the trust for sale in reference thereto) execute or exercise any trust or power vested in them in relation to or having power in that behalf over the other share or shares, and notwithstanding that any one or more of the trustees or personal representatives may be entitled to or interested in any such other share, either in his or their own right or in a fiduciary capacity.

c) Operation as Suis Generis or by Agent

If there exists more than one trustees of property, it should be left in the control of all the trustees and not left in the control of one of them. In *Lewis v. Nobbs*[15], the trustees invested trust money in bearer bonds which one trustee allowed to remain in the custody

11. *Lowson v. Copeland* (1787) 2 Bro.C.C. 156; *Khoo Tek Keong Joo Tuan Neoh* (1934) A.C.529
12. *Holmes v. Dring* (1788), 2 Cox 1; *Styles v. Guy* (1849) 1 Mac& G.422
13. *Pickard v. Anderson* (1872), L.R.13 Eq.608
14. Cap.164 (Laws of Uganda 2000 Edn)
15. (1878) 8 Ch.D.591

of another, who misappropriated them. It was held that the trustee was liable for negligence in permitting the bonds to remain with the other leading to the misappropriation.

Under the statute[16], apart from the general powers of delegation, a trustee is authorised to employ a solicitor or legal practitioner as his agent to receive and give discharge for property under the trust, without being responsible for the defaults of such solicitor or legal practitioner, if such trustee acts in good faith. However, the trustee should then ensure that the money or other property does not remain under the control of the solicitor longer than necessary.[17]

The same rule is applicable where the trustee appoints a banker or a solicitor to be his agent to receive and give a discharge for any money payable to the trustee under a policy of insurance.[18]

Where any person owes money to the trust estate, the trustee's receipt for it or for any other personal property due to be transferred, shall be sufficient discharge of the debtor's obligation.[19]

The trustee legislation[20] also gives a personal representative or two or more trustees (or a trust corporation) power to accept property before the time when it is due to be transferred, power to give time for payment of a debt, power to enter into any composition with a debtor or to compound with him or enter into arbitration. It has been suggested[21] that "these powers are intended to make the trustee the judge of the appropriate steps to be taken, whenever, the debtor is in difficulties and cannot fulfill his obligation

16. Trustees Act, *Supra* S.23(1)

17. *Ibid* S.23(3)

18. *Ibid* S.23(2). The rule is to be gathered from the general provision of the Trustees Act, S.23(1), which refers to the transaction of "any business... or act done in the execution of the trust..... or the administration of the testator's or intestate estate.....

19. *Ibid* S.14

20. *Ibid* S.15

21. Keeton & Sheridan, *op.cit*.p.245. See also *Re Ezekiel's Settlement Trusts* [1942] Ch.230; *Re Ridsel* [1947] Ch.597

d) Legal Proceedings

For purposes of executing his duties and powers, a trustee may institute legal proceedings in respect of the trust property[22] For instance, where a debtor to the trust becomes bankrupt, it is the trustee's duty to prove in bankruptcy. He may do this without the consent of the beneficiaries, except where they are *sui juris* and absolutely entitled, in which event the court may require their consent.[23] The trustee is also entitled to the custody of relevant ti tledeeds, although the beneficiaries are entitled to inspect them at all reasonable times.[24]

e) Trustee's Liability

Should the trustee in the execution of the trust carry on business on behalf of the beneficiaries, he is personally liable to the creditors and may be made bankrupt in respect of the debts[25]. In addition, if trustees hold shares in a company, they are liable fully as beneficial owners and not to the extent of the trust estate.[26]

2. Duty to Invest

A trustee is under a duty to invest funds in his custody. Investment in this context refers to the employment of money in the purchase of anything from which interest or profit is expected.[27]

In investing, a trustee should consider the life tenant, that is a person entitled to the income and also the remainder man, i.e. the person who is entitled to the capital. Consequently, the investments must produce income and also maintain capital. In *Re Power*[27a] , the acquisition of a house for occupation by a beneficiary, which did not produce income was held not to be an investment.

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22. This being an incident of ownership: *Burges v. Wheater* (1759), 1 Eden 177, 251 per Lord Northington
23. *Ex.parte Green* (1832), 2 Deac.&Ch.113; *Ex parte Gray* (1835) 4 Deac &Ch.778.
24. *Whynne v. Humberston* (1858) 27 Beav.421
25. *Farhall v. Farhall* (1871) L.R.Ch.App.123
26. *Barclays Bank Ltd v. IRC* [1961] A.C.509; *Re Cheshire Banking Co* (1886), 32 Ch.D.301, 309, *Re Phoenix Life Assurance co.* (1862), 22 J&H.229
27. *Re Wragg* [1919] 2 Ch.64

27a [1947] Ch.572

a) Nature of Investment

Investment takes basically two forms (i) giving out money on loan at a rate of interest; (i) participation in profit making activities such as buying shares in a company with a going concern.

b) Statutory Investments

By the Trustees Act, Section 3 a trustee is authorised to invest in certain government securities, whether at the national or East African Regional level and securities created or issued by companies or corporations incorporated directly by an Act enacted by the legislatures of Uganda, Kenya or Tanzania.

The general duty of the trustee with respect to investments was considered by the British House of Lords in *Re Whiteley*.[28] It was therein indicated that while equity generally required from a trustee the same diligence as he showed in his own private affairs yet he is not allowed the same discretion in regard to investment he enjoys in his private affairs; for he may be prepared to take a hazard for his personal benefit to secure a greater immediate return. As a trustee, though, it is his duty to preserve the trust fund for the benefit of persons entitled in succession, and he must therefore avoid all hazardous enterprises even though included within the list of trustee investments. Lindsey L.J. thus concluded:[29]

> The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide.

3. Duty to Distribute

A trustee is under a duty to make out payments of income and capital as they become due and to do so to persons who are properly entitled. If he fails to do so this amounts to breach of the trust.[30]

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28. (1886), 33 Ch.D.347; Keeton & Sheridan, *op.cit* p.251
29. *Ibid* p.355
30. *Eaves v. Jackson* (1861) 30 Beav.136; *Hilliard v. Fulford* (1876) 4 Ch.D.389

a) Statutory Procedure

To facilitate the identification of persons entitled to trust property and fund the statute[31] lays out a procedure to be followed by trustees and personal representatives in ascertaining the existence and extent of the claims against the estate. They are required to advertise in the Uganda Gazette and also in a newspaper circulating in the area in which the land is situated; and such other like notices including notices outside the State as would have been directed by the court, requiring persons interested to send to the trustees within the time fixed by the trustees (which must not be less than two months from the last advertisement) giving particulars of the claims. Upon the expiration of this period, the trustees must pay claims of which they then have notice and distribute the estate and they are not liable in respect of claims of which they then had no notice. Nothing in this section, however,

a) Prejudices the right of any person to follow the property or any property repre senting the same, into the hands of any person, other than a purchaser, who may have received it; or

b) Frees the trustees or personal representatives from any obligation to make searches similar to those which an intending purchaser would be advised to make.

It is also provided[32] that a trustee or personal representative who is acting for more than one trust or estate shall not, in the absence of fraud, be affected by notice of any instrument, matter, fact or thing in relation to any particular trust or estate if he has obtained notice thereof merely by reason of his acting or having acted for the purposes of another trust or estate.

b) Trustee's Role and Beneficiary's Rights

The advertisement should be issued as soon as possible after the death[33] and a trustee or executor who has done what is required by the section enjoys the same protection as if he had administered

31. Trustees Act, *supra* S.27
32. *Ibid* S.28
33. *Re Kay,* [1897] 2 Ch.518

the estate under an order of court.[34] Nevertheless, where a trustee has notice of a claim by a creditor, this will not be barred because the creditor has neglected to claim promptly in response to the advertisement.[35] Furthermore, a mere response to the advertisement by a creditor does not save the claim from the operation of the Statutes of Limitation.[36]

Where the trustees distribute among the persons who are entitled to the property and subsequently, a debt of which they had no previous notice is claimed, they may call upon the beneficiaries to refund the property to the extent required to satisfy the debt. However, if the trustees had notice of the claim, but still proceeded to distribute, while they must pay the claim (except where statute barred), they cannot call upon the beneficiaries to refund except where the liability was a remote possibility, such as a call in respect of prosperous shares which was not foreseen at the time of distribution.[37]

It is significant that notwithstanding the advertisement requirement, the right of any person to follow the trust property or assets of the deceased into the hands of persons amongst whom the same may have been distributed other than a purchaser is preserved, irrespective of anything in the will or settlement to the contrary.[38]

It is also notable that Section 27 of the Trustees Act only protects the trustee with regard to the claims of which he has no notice. Definitely, he will have notice of all interests directly emanating from the will or other instrument. However, where a beneficiary assigns his interest in a trust fund, the rule in *Dearle v. Hall*[39] is applicable. It is there provided that the assignee of an equitable interest must give notice in writing to the trustees or estate owners, and the priorities of the encumbrances are determined according to the dates when

34. *Re Frewen* (1889) 60 L.T.953; *Hunter v.Young* (1879), 4 Ex.D.256
35. *Scottish Equitable Life Assurance Soc. V. Beatty* (1889), 29 L.R.lr.290
36. *Re Stephens* (1889) 43 Ch.D.39
37. Keeton & Sheridan, *op.cit* p.284. See also *Jervis v. Wolferstan* (1874), L.R.18 Eq.18; *Whittaker v. Kershaw* (1890), 45 Ch.D.320325
38. See also Trustees Act. S.26(2); *Re Diplock* [1947] Ch.716
39. (1823) 3 Russ 1. Discussed *supra* chap.2

they gave notice. However, "there may still be occasions when a trustee is affected with constructive notice of an assignment, and in such a case he would not be protected if he paid to the assignor"[40]. An example is that of an equitable assignment of a legal chose in action.

c) Benjamin Order

Where a beneficiary has left Uganda, and has not been heard of for seven years, there is a presumption that he is dead[41] Consequently, the court, upon application by the executor/trustee may authorise the distribution of the whole of the assets of the estate, although not all the beneficiaries or creditors have revealed themselves so as to receive their share. This is known as a *Benjamin Order* and its purpose is to protect those who distribute the assets. Nevertheless, if those who are entitled, receive nothing under the distribution so ordered, they may later come forward and establish their claim.[42] They can also sue within the limitation period persons who have been wrongfully paid[43] In the circumstances, "the usual practice of the court in paying out is to require security, in case repayment should become necessary. Accordingly, the proper course for the trustee to adopt is to obtain a proper indemnity or to accumulate the fund, or to seek the direction of the court"[44].....

d) Doubtful Claims

By the Trustees Act Section 60, it is provided that where the trustees are in doubt, whether to pay a beneficiary in full or whether the claimant is really entitled, they may pay the money or property into court and the certificate of the officer of the court will discharge them from liability.[45]

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40. Keeton & Sheridan, *op.cit*.p.284. See also Marshall, *Assignment of Choses in Action, pp.105106*
41. *Re Benjamin* (1902) 1Ch.723; *Re Aldersey,* (1905) 2Ch.564
42. *Lord Woodhouselee v. Dalrymple* (1861) 9 W.R.475, 564
43. *Ministry of Health v. Simpson* (1951), A.C.251 47.
44. Keeton & Sheridan, *op.cit* p.285
45. See also *Re Jones* (1857), 3 Drew 679; *Re Headlington's Trust* (1857), 27 L.J.Ch.175; *Re Schnapper* [1928] Ch.420

The trustees are also protected from liability if they obey the court's directions [46].

e) Payment into Court

If the beneficiaries cannot be determined or for some special reason the trustees cannot obtain good discharge from the trust, there is a residual power in the trustee to pay the trust moneys into court.[47] A trustee should not, however, pay money into court without reasonable cause. Otherwise, he may be made liable for costs.[48]

f) Overpayment and Underpayment by Trustee

This has occasioned some controversy in the cases. Where a trustee overpays some beneficiaries and underpays others, the general position is that in the absence of fraud or other fault he may have the mistake rectified with the aid of the court. To this general rule is an exception in the case of *Re Horne*[49]. Here the trustee was himself one of the beneficiaries. He inadvertently overpaid the other beneficiaries and underpaid himself. Before the requisite rectification could be made, the trustee beneficiary died. It was held that his executors could neither recover the overpayments from the beneficiaries nor have them deducted from future income to be paid to the other beneficiaries. The reason advanced by the court was that to alter the position "would be very inconvenient and a great hardship on the other legatees." It has been suggested[50] that while "this may be true..... it is scarcely a conclusive reason for refusing to ensure that a trust is carried out according to the intention of the settlor." Indeed Warrington J. did admit that:[51]

> If Richard Horne had not himself been a trustee, but only one of the beneficiaries, the case would be plainly covered by authority, and it

46. *Re Londonderry's Settlement* [1965] Ch.918
47. Trustees Act, Cap.164, S.60. See also *Re Gillingham Bus Disaster Fund* (1959) Ch.62, considered *supra* Chap.14
48. *Re Giles* (1886), 55 L.J.Ch.695
49. [1905] 1Ch.76
50. Keeton & Sheridan, *op.cit* p.286
51. *Supra* n.49, p.79

> would now have been the duty of the plaintiff, as the surviving trustee of this will, in administering the trusts of it for the future, to equalize the payments which have been made out of income.

This, it has been submitted[52] is the general rule and *Re Horne*[53] should be regarded as an exception to it. The trustee beneficiary's position was "altered for the worse" because[54]

> Any equity that he might have had in his character of beneficiary is displaced by the fact that he is himself responsible for the mistake which has been made.

In contrast to *Re Horne*[55] in *Re Ainsworth*[56],the executors of a will wrongly and mistakenly paid the legacy duty on a life interest in a settled legacy out of the capital of the legacy rather than out of the income during the first, four years of the life tenancy as provided by the Legacy Duty Act, 1796. The legacy had been bequeathed (upon termination of the life interest) to two special trustees one of whom was one of the executors authorising the wrong payment. It was held that the executor trustee was entitled after seven years to have the mistake rectified. This was done by reducing the payments of future income to the tenant for life in order to make up the capital of the settled legacy which had been reduced by the payment of legacy duty. *Re Horne* was expressly distinguished as being severe and not being the general rule, it was submitted, to be applying to this case. Another rationalization of the distinction is that *Re Horne* "dealt with a trustee beneficiary, who impoverished others by his own mistake, *Re Ainsworth*[57] dealt with a trustee who was not a beneficiary, (but) who had impoverished others by his own mistake, and those persons naturally had a right to have the mistake rectified in their favour".[58]

52. Keeton & Sheridan, *supra* n.50
53. *Supra* n.49
54. *Supra* n.49 p.81
55. *Supra* n.49
56. [1915] 2Ch.96. See also *Re Musgrave* [1916] 2Ch.417, which bore similar facts and was similarly distinguished from *Re Horne, supra* n.49
57. *Ibid*
58. Keeton & Sheridan, *supra* n.50

In *Re Reading*[59], Mrs S. Executrix of the last surviving executor of the testator, secured sole control of the distribution of the income arising out of the trusts of the will, purporting to appoint herself as trustee. The appointment was irregular, but she nonetheless, became a constructive trustee and made distributions of income whereby she overpaid both herself and another. Admittedly, this was the converse case to *Re Horne*[60]. Consequently, the attempt to apply to case failed leading to an order of redistribution. *Re Horne* could not be applied because (i) the beneficiary who lost by the transaction was in no way responsible for the error; and (i) the duties which a trustee must observe towards his beneficiary have no counterpart in the relation of the beneficiary to trustee; (ii) Mrs S's overpayment of herself was a violation of the elementary rule that a trustee must not profit from his trust.

Professors Keeton and Sheridan have thus summarised the rule to be gleaned from the decisions considered above, thus:[61]

> Where a trustee is also a beneficiary, he is still bound by his mistake, where it results in an underpayment to himself. Where the trustee is not a beneficiary or where the trustee beneficiary overpays himself, the mistake will be rectified.

g) Other Matters

Where the trustees hold property on behalf of a beneficiary who is of full age and absolutely entitled, they must, at his request, transfer to him the entire trust fund.[62] Under the Trustee legislation[63], trustees and personal representatives who transfer real property are protected with regard to rents, covenants and other obligations which may exist in respect of the property if they have satisfied all liabilities and covenants up to the date when they transfer the property. For this purpose the expression "lease" includes both an underlease and an

59. (1916) W.N.262; Keeton & Sheridan, *ibid* p.287
60. *Supra* n.49
61. *Supra* n.59
62. *Re Selot's Trust* [1902] 1 Ch.488
63. Trustees Act, S.26

agreement for a lease or underlease, while "lessee" include persons claiming under him.

If there is a dispute between two people respecting a right to the trust fund, the trustee is entitled to keep the fund until the issue has been resolved[64]. Furthermore, a person who makes an improper claim to the fund may be held liable for costs.[65]

h) Discharge

Upon the termination of the trust, the trustees should present their final accounts and obtain a discharge from the beneficiaries. This is usually done under seal i.e. by deed in order to forestall beneficiaries complaints against fraud, concealment, mistake or undue influence. If the beneficiaries refuse to give release under seal, the trustees may apply to court for accounts to be taken and approved.

A trustee who makes erroneous distribution may be relieved by the court from liability if he acted honestly and reasonably and ought to be fairly excused.[66]

4. Duty to Maintain Equality between the Beneficiaries

A trustee should not favour one beneficiary at the expense of another. Consequently, he should act impartially between all the beneficiaries. An obvious example of this is that the trustee should act impartially between life a tenant beneficiary, who is entitled to the income out of the trust property and the remainder man, who is entitled to the capital under the trust.

a) Conversion of Property and Scope of Application of the Rule

A pertinent aspect of the above duty is the obligation place on the trustee to convert all hazardous or wasting property into property of a secure or non wasting character[67] Examples of property of a

64. *Hockey v. Western* [1898] 1 Ch.350
65. *Re Primrose* (1857), 23 Bev.590
66. Trustees, Act, S.58
67. *Howe v. Lord Dartmouth* (1802) Ves.137

wasting nature are leases which terminate after a period of time, mines, ships which will eventually be worthless, patents or copyrights which expire and future or reversionary property being that which will only fall in after the death of the life tenant. Conversion of such property is essential in order to maintain the interest of the remainder man. Furthermore, future property such as the remainder or reversionary interests and other property which for the moment does not produce income is not of immediate benefit to the tenant for life. Consequently, it is in his interest for it to be converted into income bearing properties.

The rule in *Howe v. Dartmouth*[67a] does not apply to cases of intestacy since intestacy legislation imposes a statutory trust of sale. [68] The rule also incorporates the principle of equity that "Equality is Equity". [69]

The rule also does not apply to property which has been settled *inter vivos*[70] or to specific as contrasted with residuary bequests.[71] With regard to specific bequests, the court's view is that the intention of the testator was that successive beneficiaries should enjoy the actual income of the property. Consequently, it would not direct conversion or apportionment regardless of the result being that the remainder man ends up with nothing due to the termination of the wasting security[72]. With respect to settlements *inter* vivos, the view is that such instruments must be strictly adhered to with the result that the property should be enjoyed as settled. Even in settlements by will, the rule directing conversion will not apply where the testator indicates that conversion should occur at some future date.

In addition, if the intention is manifested from the will that the property should be enjoyed *in species* even though not strictly given

67a. *Ibid*

68. Succession Act, Cap.162, S.27

69. *Supra* n.67, p.148 per Lord Eldon. See also Sheridan, "Howe v. Lord Dartmouth Reexamined" (1952) 16 *Conv*.349

70. Re *Van Straubenzee* (1901) 2 Ch.779

71. *Re Brooker* (1926) W.N.93

72. *Re Pitcairn* [1896] 2 Ch.199

specifically, it should not be converted.[73] Similarly, where various types of property are bequeathed which include specific ones, this will raise the inference that the other property was also intended to be enjoyed *in specie*[74].

Consequently, the terms of the will must be considered carefully to discover what the true intention was.[75]

The effect of excluding the rule in *Howe v. Dartmouth* has been aptly summarised by Keeton and Sheridan thus:[76]

> The question of excluding the rule in *Howe v. Dartmouth* is one of considerable importance, since the effect of failing to exclude the rule is that all unauthorised securities, whether wasting or hazardous, must be sold, and the proceeds reinvested in authorised securities. This may affect the income of the tenant for life substantially and, in view of the fall in value of trustee stocks, it may adversely affect the remainder man. Accordingly the draftsman of a will should secure specific instructions on this point; and it may be added that the common form of the bequest of residue excludes the rule.

b) Apportionment

The duty to convert also gives rise, in the absence of an intention that the life tenant shall enjoy the income, until sale, to a duty to apportion fairly between the life tenant and remainder man, the original property pending conversion.

The assumption is that wasting, hazardous or unauthorised investment usually produce income which exceeds what the tenant would reasonably receive. This is at the expense of the security of capital due to the remainder man. Consequently, the purpose of the apportionment rule is to provide that the life tenant receives an income which represents the current yield on authorised investments.

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73. *Bothamley v. Sherson* (1875) L.R.20 Eq.304; *Robertson v. Broadbent* (1883), 8 App. Cas.812; *Re Gough* [1957] Ch.323

74. *Bethune v. Kennedy* (1835), 1 My & Cr.114

75. *Re Gough, supra* n.73; See also *Re Game* [1897] 1 Ch.881; *Macdonald v. Irvine* (1878), 8 Ch.D.101

76. *Op.cit* pp.2656

In *Re Baker*[77] and *Re Berry*[78], this was calculated at 4 percent interest on the value of unauthorised, wasting and reversionary property. However, if the interest received by the life tenant is less than 4 percent, the balance has to be made up out of subsequent income or from the proceeds of the unauthorised investments when sold.[79]

The issue then arises as to when capital should be valued for purposes of calculating the 4 percent income. Two situations should be distinguished in this respect (i) where there is a power to postpone conversion and (i) where there is no such power.

i) Where there is No Power to Postpone

Conversion in this instance should be effected within "the executor's year" i.e. the period during which the administration of the deceased's estate is expected to be completed. It follows then that if the investments are sold within the year, the net proceeds of the sale will be regarded as their value.[80] If this is not the case, the investments are valued together at the end of one year from the testator's death.[81] In each case the life tenant will be entitled as from the date of death of the testator to 4 percent on that sum.

ii) Where There is Power to Postpone Conversion

In this instance, "the executor's year" is irrelevant. The duty to convert exits but there is no time limit within which it has to be executed. Therefore the date of valuation is the date of the testator's death. In *Brown v. Gellartly*[82], the testator settled the residue of his estate and part of it comprised ships in respect of which he provided that until sale, the executors should have power to operate them for profit. Lord *Cairns* thought that this showed that the testator

77. [1924] 2Ch.271

78. [1962] Ch.97, 113

79. *Re Fawcett* [1940] Ch.402

80. *Ibid*

81. *Dimes v, Scott* (1828), 4 Puss, 195

82. (1867) L.R.2 Ch.App.751. See also *Gibson v. Bott* (1802) 7 Ves.89, *Re Parry* (1947) ch.23

contemplated that sale of them would be postponed for an indefinite period. Consequently, valuation would be from the date of the testator's death.

With regard to future, reversionary or other non income producing property, it is also necessary in the life tenant's interest to provide for apportionment. If not, the life tenant would obtain no benefit from the property until it falls into possession. Normally, the reversion should be sold and the proceeds reinvested.[83] If this is not done, it will be impossible to produce income for the life tenant. Even where the reversion has been sold, it is necessary to determine how much of the proceeds should be apportioned to capital and how much to the life tenant. This is done by placing a value on the reversion as it falls in or is sold. This sum is part principal and part interest. The principal is the sum which, if invested at 4 percent at the date of the testator's death would have produced the sum now received. The balance goes to the tenant for life.

iii) Contrary Intention

All the rules, hitherto considered, are subject to a contract intention by the testator or settlor[84]. Nevertheless, where there is such intention, the burden of proof is on the person alleging that the equitable rules have been excluded.[85]

An express trust to convert usually carries with it the duty to apportion the income, pending conversion[86] in this regard, there is no question of a contrary intention with regard to the apportionment. For instance, where there is an indication that although the property should be converted, the life that should enjoy the whole income produced pending conversion.

Where there is no express trust to convert, this may be manifested in the will preventing conversion. Alternatively, the will may permit the life tenant to retain the whole income. This, is regarded as

83. Presumably in accordance with the Succession Act, *supra* n.68
84. *Hinves v. Hinves* (1844) 3 Hare, 609; *Re Pitcairn,* [1896] 2Ch.199
85. *Macdonald v. Irvine* (1878) 8 Ch.D.101, 124
86. *Gibson v. Bott, supra* n.82

excluding apportionment. In *Gray v. Siggers*[87]. The trustees were given power to retain any portion of the testator's property in the same state in which it should be at his death or to sell and convert the same as they should, in their absolute discretion, think fit. It was held that such power excluded the duty to convert.

5. Duty Provide Accounts and Information

a) Accounts

A trustee should keep accounts and be ready to produce them to the beneficiaries at any time.[88] The beneficiary's right in this regard is merely to see and inspect the accounts. If he requires a copy thereof, he has to pay for it.[89] A beneficiary remainder man is entitled only to such information as relate to capital transactions. Accounts should be prepared in a simple form understandable to the beneficiaries.

The audit of the accounts is not normally necessary except in large and complicated trust or where the beneficiaries may cause trouble. However, the trustees may use their discretion to have the trust accounts audited or at the request of a beneficiary, and by virtue of the Trustee legislation[90] who is receiving income is entitled to full accounts, while the remainder man is entitled only to such information a relates to capital transactions. Accounts should be prepared in a simple form understandable to the beneficiaries.

b) Information

Beneficiaries are entitled to be informed about matters affecting the trust. To facilitate the supply of up-to-date information, the trustees should keep a trust diary or Minute Book recording decisions and events affecting the trust.[91] A large trust can also keep other documents such as the minutes of the trustee's meetings. Documents

87. (1880) 15 Ch.D.74
88. *Pearse v. Green* (1819) 1 Jac & W.135, 140
89. *Ottey v. Gilby* (1845) 8 Bev.602
90. Trustees Act, S.22(4); Public Trustee Act, Cap.161, S.12
91. *Tiger v.Barclays Bank Ltd.* [1952] 1 All E.R.85

affecting the trust are trust documents and therefore, the property of the beneficiaries, who may inspect them.[92] Nevertheless, the trustees' power and discretions cannot be challenged if they have been exercised *bona fide*.[93]

The issue arises though as to whether the beneficiaries are entitled to see trust documents relating to the exercise of confidential discretions. In *Re Londonderry's Settlement*[94], the donees of a power under a discretionary trust decided to distribute the capital. One member of the discretionary class was not happy with the sum intended to be given to her. She, therefore, asked for copies of the minutes of the trustees' documents prepared for the meetings and the trustees. The trustees were willing to show her only the documents giving the intended distributions and the annual trust accounts. They refused, in the interest of the family to disclose additional documents. They then brought summons in court for the purpose of determining the nature and extent of their duties. The court addressed itself firstly to what constituted trust documents. It said that while there was no comprehensive definition of them, they had three main characteristics.

i) They are documents in the possession of trustees, as trustees;

ii) They contain information about the trust which the beneficiaries are entitled to know;

iii) The beneficiaries have a proprietary interest in the documents and are accordingly entitled to see them.

Secondly, the trust documents may contain confidential information, disclosure of which may cause trouble in the family out of proportion to the benefit to be derived from the inspection of the same. Consequently, where the trustees are dealing with discretionary trusts, their role is confidential and would be defeated if it was investigated by the beneficiaries. However, if *mala fides* or

92. *O'Rourke v. Darbishire* [1920] A.C.581

93. *Re Beloved Wilke's Charity* [1851] 3 Mac & G.440; *Klug v. Klug* [1918] 2 Ch.67

94. [1965] Ch.918

bad faith is proved in the exercise of the discretion, then the court may intervene and order discovery.

It is also significant that a trustee's duty is not restricted to merely answering questions, but also to providing the beneficiaries with information relating to their interests under the trust. In the case of an infant beneficiary, he should be informed of his entitlement on attaining majority age.[95]

Furthermore, any person who has an interest in the trust property may demand information, whether his interest is vested or contingent. Nevertheless, it was suggested[96] that "it is not part of the trustee's duty to inform an intending assignee of a beneficiary's interest of the manner in which the beneficiary has dealt with his interest in order to facilitate the squandering of the beneficiary's interest.[97]

Where the beneficiary is about to assign his interest, it had been suggested that the intending assignee is not a person interested in the trust property.[98] Nevertheless, it is plausible "that a trustee who makes an honest misrepresentation negligently may be liable to the person to whom it is addressed".[99]

6. Fiduciary Duties

a) Remuneration and Reimbursement

The general rule is that a trustee, in administering the trust acts gratuitously or voluntarily and is therefore not paid for his services[100] This is irrespective of whether his services are of a personal or professional nature. Consequently, a trustee will only be able to claim remuneration if he can show that he is specifically entitled to it. To

95. *Hawksley v. May* [1956] I.O.B.304; See also *Ryder v. Bickerton* (1743) 3 Swanst.80n; *Walter v. Symonds* (1818) 3 Swanst.I.

96. *Low & Bourverie* [1891] 3 Ch.82

97. Keeton & Sheridan, *op.cit*.p.326

98. Gower, "The present position of the Rule in *Dearle v. Hall* (1935) 20 Conv.137

99. Keeton & Sheridan, *op.cit* p.327 relying on *Hedley Byrne & Co.V.Heller* [1964] AC.465

100 *Robinson v. Pett* (1734) 3P.Wns 249; *Re Barber* (1886) 34Ch.D.77

the general rule is the exception that a trustee can recover for his proper out of pocket expenses, including (i) payment of agent's fees, where their employment is justified; (i) calls on shares; (ii) proper costs of litigation.[101]

Types of Remuneration

i) Authority by Trust Instrument

The trust instrument may authorise remuneration for a trustee. This is common because of the onerous duties placed upon trustees. If that was not the case many professional people (usually solicitors, bankers, insurance companies and the Public Trustee) would decline to assume the function.

Remuneration could take the form of income from the estate[102] and payment thereout is regarded as a legacy to the trustee.[103]

Charging clauses are interpreted strictly, with the result that if a solicitor or other agent is entitled to charge for "professional services", only those services which fall within the expression may be charged for[104]. Thus in *Re Chalinder and Herrington*, the authorising clause indicated that the solicitor should be allowed, "all professional and other charges for his time and trouble notwithstanding his being such executor and trustee". It was held that this did not entitle the solicitor to charge for work not professional, which could have been done personally by a trustee who was not a solicitor.

Normally charging clauses are inserted for the benefit of trustees, who are also solicitors. However, they may also apply to many other professionals or businessmen. In *Re Wertheimer*[105] a trustee who was a keeper of antiquities at the British Museum was held to be entitled under a charging clause to charge a commission on the sale of the testator's works of art.

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101 Trustees Act, Cap.164, S.23

102 *Public Trustees v. I.R.C.* [1960] A.C.398

103 *Re Pooley* (1888) 40 Ch.D.I

104 *Clarkson v. Robinson* [1900] 2 Ch.722; *Re Chalinder and Herrington* [1907] 1 Ch.58

105. [1912] 106, L.T.590

Where a beneficiary institutes an action against a professional trustee for excessive charges under a charging clause, this is taken to be an action for an account and not for breach of trust. In such a case the beneficiary is entitled to an account as of right without indicating particulars of the amount which it is claimed is excessive.[106]

ii) Authority by Statute

Statutory provisions may allow trustees to charge fees as fixed by the government. For instance, the Public Trustee and judicial trustees are entitled to charge for their services regardless of any such power or otherwise in the trust instrument to charge. With the Public Trustee the payment is governed by statute[107].

Where the court appoints a trust corporation "other than the Public Trustee to be a trustee, either solely or jointly with another person, the court may authorise the corporation to charge such remuneration for its services as a trustee as the court may think fit."[108]

iii) Authority by the Court

The court has both inherent and statutory power to authorise remuneration or increase the rate of authorised remuneration for a trustee[109]. However, the inherent power is exercised only in exceptional circumstances such as where the execution of the trust is very difficult.[110]

iv) Authority Through Contract with Beneficiaries

Trustees may agree with beneficiaries all of whom are *sui juris* and absolutely entitled to all the trust estate for remuneration. However, such an agreement may be impeached on ground of undue influence.

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106. *Re Wells* [1962] 1 W.L.R.874
107. Public Trustee Act S.11
108. *Re Masters* (1953) 1 W.L.R.81; R.e *Barbour's Settlement* [1974] 1 All E.R.1188; Trustees Act, S.41
109. *Re Worthington* (1954) 1 W.L.R. 526; *Re Freeman's Settlement Trusts* (1887) 37 Ch.D.148; Trustees Act, *ibid*
110 *Ayliffe v. Murray* (1740) W.Atk.58

The agreement should be reached before the trustees have entered into the administration of the trust [111].

v) Authority through the Rule in Cradock v. Piper [112]

A solicitor who is also a trustee may charge for costs if he has acted for a co trustee as well as himself in respect of business done in an action or matter in court. This is provided that his action does not increase the expenses which would have been incurred if he or his firm had appeared only for this co trustee. [113]

The action must be of litigious nature. Consequently, a solicitor trustee can also employ his partner in cases where it is proper to employ an outside solicitor, provided that he himself does not obtain benefit, direct or indirect from such employment. [114] Nevertheless, a solicitor, cannot employ his firm for this purpose.[115]

The rule is an exception to the general rule that a trustee acts gratuitously with respect to the administration of a trust. It does not apply to a liquidator who is a solicitor, and who conducts legal proceedings on behalf of himself and his co liquidator [116].

b) Trustee not to Purchase Trust Property

i) Purchase of Trust Property

The general rule is that trustees should not acquire either absolutely or by way of lease, trust property. This is irrespective of the consideration given by the trustee for the property or the lease. Thus in *E&M Khoury v. Jojo*,[117] the defendant trustee bought a house

111. (1850) 1 Mac & G.644
112. *Re Corsellis* (1887) 34 Ch.D.675, 681 per Cotton L.J.
113. *Clack v. Carlon* (1861) 30L.J.Ch.639
114. *Re Gates* [1983] Ch.913
115. *Re R.Certzenstein Ltd* (1937) Ch.115
116. (1956) W.A.R.L.102. See also Adigun, *op.cit* pp.342343
117 Applying *Coles v.Trecothick* 9 Ves.243, 240 *and Ex.p.Lacey* 31.E.R.1228

which was part of the trust estate at a public auction. It was held[118], *inter alia* that he was liable to reconvey the house to the estate. Korsah J.A. thus stated:[119]

> The *cestui que trust* is not bound to prove, nor is the court bound to decide that the trustee made a bargain advantageous to himself. The fact may be so and yet the party not have it in this power distinctly and clearly to show it. It is to guard against such uncertainty and hazard of abuse and to remove the trustee from temptation that the rule does and will permit the *cestui que trust* to come at his option, and without showing essential injury, to insist on another sale or to compel the trustee to reconvey the property to the estate on repayment of the purchase money... In my view the whole transaction is tainted with fraud such as would make the defendant not only to reconvey the property to the estate..... but also to account for the rents and other profits since the purported purchase.

Similarly, in *Okesuji v. Lawal* [120], under a will, the first, second and third defendants were appointed the executors and executrix of the will. Under a deed of a conveyance the said persons purported to transfer part of the estate to the second defendant in fee simple, when the will clearly showed that he had only a life interest. The second defendant subsequently mortgaged the property for a loan for a period and later sold the property do a third party who later sold it to the appellant. In an action by the respondent a grandchild of the testatrix in a representative capacity for and on behalf of the other grandchildren, for the return of the property, the trial judge found for the respondent and made the declarations sought. On appeal it was argued that the trial judge was wrong and the tenant for life has power to dispose of settled property. It was held by the Court of Appeal that a tenant for life is in a fiduciary position as regards the remainder men and thus, he must take care to ensure that when selling the settled property he must not put himself in such

118. *Supra* n.18, pp.105107. See also *Lister v. Lister* (1802) 6 Ves.631

119. [1986] 2NWLR 417 (Court of Appeal); Adigun *op.cit* pp.339341

120. *Ibid* p.433. Emphasis supplied. Applying *Aberdeen Rail Co.v. Blaikie Brothers* (1843.60) All E.R.249

a position whereby his interest conflicts with that of the remainder men. Kolawole JCA further stated: [121]

> It is a settled rule of equity that no one having duties of fiduciary nature to discharge shall be allowed to enter into engagements in which he has or can have personal interest conflicting, or which may possibly conflict with the interest of those whom he is bound to protect. *One consequence of the rule is that a trustee for sale may not purchase the trust property for himself.*

To the general rule is the exception that the court has discretion to allow a sale to a trustee in a proper case. Thus in *Holder v. Holder*[122], Danckwerts, L.J. observed that the true rule is not that a trustee may not purchase trust property, but that the sale may be set aside within a reasonable time at the instance of any beneficiary. Consequently, it was held that the rule did not apply to an executor who only acted in that capacity in a purely formal manner. The executor made no secret of his wish to buy. He also disclaimed his executorship in order to enable him to make the purchase. Although he failed to do so, the Court of Appeal was satisfied that he had done virtually nothing in the administration of the estate and had acquired no special knowledge of the farm in his capacity as executor.

The rule cannot be avoided by sales by a trustee to nominees who then resale to him. The right to avoid the sale is effective against a purchaser who is aware of the arrangement.[123]

iii) Purchase of Beneficial Interest in Property

Equity is less strict when it comes to buying by a trustee of the beneficial interest of a beneficiary. The purchase will be allowed if the trustee has given full value and all the relevant information has been given to the beneficiary at the time of the sale.[124] The

121. *Ibid* p.433. Emphasis supplied. Applying *Aberdeen Rail Co.v. Blaikie Brothers* (1843.60) All E.R.249

122. [1968] Ch.353

123. *Khoury v. Jojo supra* n.19; *Okesuji v. Lawal, supra* n.21 *Silkstone & Haigh Moor Coal Co.v. Edey* (1900) 1 Ch.167. See also *Bishi v. Ipaye* Lagos High Court Suit No. L.D.221/69 Unreported but see Ko dilinye, *An Introduction to Equity in Nigeria* (1975) pp.127128; *Williams v. Scott* [1900] A.C.499

124. *Coles v. Trecothick* (1804) 9 ves.234; *Williams v. Scott, ibid*. *Thompson v. Eastwood* (1877) 2 App.Gas 215, 236 per Lord Cairns. *Ex Parte Lacey supra* n.19

notion of undue influence may apply, but the trustee may rebut the presumption by showing that the whole transaction was conducted at arm's length. Thus, in *Coles v. Trecothick*[125], the beneficiary took complete control of the sale (which was by auction), approving the auctioneer, the plan of sale and the price. The sale was held to be regular. In contrast in *Dougan v. Macpherson*[126], two brothers, X and Y, were beneficiaries under a trust. X was also a trustee, but Y was not. X purchased Y's interest without showing him valuation of the trust estate made for the purpose of obtaining a loan on X's share. If the valuation was correct, Y's share was worth considerably more than X paid for it. When Y later became bankrupt, Y's trustee in bankruptcy successfully set the sale aside.

c) Incidental Profits

If profits come to a trustee in his capacity as such, he must hand them over to the beneficiaries[127]. It has sometimes erroneously been suggested that a fiduciary who is required to account for a profit becomes a constructive trustee. This view is wrong since the duty to account is a personal liability while a constructive trust is a proprietary remedy.[128]

i) The Rule in Keech v. Sandford[129]

This rule prevents a trustee from keeping for his own benefit a renewal of a lease which he was able to obtain for himself as a result of his being a trustee of the original lease.

ii) Trustees as company Directors

The question arises as to whether trustees who become directors by virtue of their trusteeship are entitled to keep the directorship

125. *Ibid*
126. [1902] A.C.197
127. *Aberdeen Town Council v. Aberdeen University* (1877) 2 App.Cas.544, 549, per Lord Cairns.
128. Hanbury & Maudsley, *Modern Equity* (9th Ed.) p.370
129. (1726) Sel.Cas.t. King 61 Discussed *supra chap*.15

remuneration. In *Re Macadam*[130], the trustees had power under the articles by virtue of their office to appoint two directors of a company. They appointed themselves. It was held that they were liable to account for the remuneration they received because they acquired it by their use of their powers as trustees. To this general rule are the following exceptions. First, the remuneration could be retained if the trustees were directors before they became trustees.[131] Second, where the trustees were appointed independently of the votes of the shares of the trust.[132] Third, where the trustee did not obtain the remuneration by the use of his position as trustee but by an independent bargain with the firm employing him.[133]

iii) Other Incidental Profits

Any incidental profits made by the trustee in his capacity as such must be disgorged to the beneficiary. In *Williams v. Barton,*[134], a trustee who introduced a firm of which he was a member to do business with the trust was compelled to account for the profit. In *Sugden v. Crossland*[135], a trustee who received a sum of £75 to induce him to retire, was held accountable for the sum to the estate and consequently the beneficiaries. In *Brown v. I.R.C.*[136], a trustee who sued trust funds in his own business was required to account for the profits there from.

iv) Trustee not to compete with Trust

A trustee should not place himself in a position where his duty and his interest conflict[137]. An example of an area of possible conflict is where the trustee operates a business in competition with the

130. [1946] Ch.73; See also *Williams v. Barton* [1927] 2 Ch.9
131. *Re Dover Coalfield Extension Ltd.* [1908] 1 Ch.65
132. *Re Gee* [1948] Ch.284; *Re Llewelin* [1949] Ch.225
133. *Re Lewis* (1910) 103 L.T.195
134. *Supra* n.31
135. (1856) 3 SM& Giff.192
136. [1965] A.C.24
137. *Boardman v. Phipps* [1967] 2 A.C.46, 123

trust. Thus in *Re Thompson*[138], the executors of a will were directed to carry on the business of a testator who had been a yacht broker. One of the executors intended to set up on his own account as a yacht broker in competition. It was held that he could not set up in a competing business. This case may be compared with the Irish case, *Moore v. M'Glynn,*[139], where the court refused to restrain a trustee from setting up a competing business, but considered that it would be a good ground for removing him from his trusteeship.

Chatterton VC thus observed:[140]

> I have not been referred to, nor am I aware of, any case deciding that an executor or trustee of a will carrying on the business of his testator is disabled from setting up a similar business in the same locality on his account..... I am not prepared to hold that a trustee is guilty of a breach of trust in setting up for himself in a similar line of business in the neighbour hood, provided that he does not resort to deception of solicitation of custom from persons dealing at the old shop.

Professor Marshall suggested[141] that "perhaps the distinction between this case and *Re Thompson* is that in the latter the business was highly specialised and the locality was very small so that competition was inevitable whether or not there was a solicitation of custom."

B. Powers

A trustee's powers are normally contained in the relevant trust instrument. In addition, certain discretionary powers are conferred on him by statute[142] which is applicable in given circumstances and in the absence of contrary provision in the trust instrument. Many of these powers are closely linked to the duties which we have considered. We have already treated the powers of delegation, issue of receipts and compounding liabilities in the context of the duty to

138 [1930] 1 Ch.203

139 [1894] 1 lr.R.74. See also Nathan & Marshall, *A Casebook on Trusts* (5th Ed.1967) pp.373374

140. *Ibid* p.89

141. *Supra* n.40, p.374

142. Predominantly, Trustees Act. Cap.164 Ss.1132

reduce property of the trust into possession, powers of advertisement for claimants, payment into court in the context of the duty to distribute and powers of investment in the context of the duty to invest. It remains to consider three types of powers which have not been treated.

Before this is done, the distinction between a power and a duty should be borne in mind. The principal distinction is similar to that between a trust and a power.[143] A duty is imperative, whereas a power is discretionary. Additionally, while most of the duties of trustees derive form case law, the powers are largely statutory. The court will not normally interfere in the exercise of a power, which is discretionary. All it does is to ensure that the power is exercised in good faith and fairness irrespective of the outcome.[144]

1. Power of Sale

The power of sale is usually given either expressly or impliedly by the trust instrument or statute. With regard to trust property comprising land held on trust for sale[145], the trustees have a duty to sell not simply a mere power, although in most cases they are empowered to postpone sale.[146]

The trustees are under an obligation "to obtain the best price they can for the beneficiaries and must act prudently"[147]. However, the beneficiaries can only sue the trustee where the price paid is inadequate and following the execution of the conveyance can impeach it against the purchaser only where there was some collusion between the purchaser and the trustee.[148] The trustees may also sell by auction in concurrence with other persons.[149]

143. See Chapter 9 supra
144. *Re Witke's Charity* (1851) 3 Mac & G.440 per Lord Truro
145. Trustees Act, S.12
146. Kodilinye, *supra* n.25, p.130. See also *ibid*
147. Kodilinye *ibid*
148. Trustees Act, S.22(2)
149. Trustees Act, s.12

2. Power to Insure

A trustee is empowered to insure against loss or damage by fire, "any building or other insurable property" up to three quarters of the value of the property insured. The premiums thereof may be paid out of the income of such insured property or the income of any other property subject to the same trust.[150] Any money received by the trustees under the policy of insurance shall be capital money for the purposes of the trust and may be used for rebuilding or any other authorised purpose of the trust.[151]

3. Power of Maintenance and Advancement

a) Maintenance

Section 31(1) gives the trustees wide powers to apply income for the maintenance of a beneficiary during his minority. The power is exercisable by the trustee in respect of any interest whether vested or contingent subject to any prior interests or charges affecting the trust property. It also applies to intestacies[152] and is additional to any power conferred by the trust instrument, but only so far as no contrary intention is expressed.[153]

The whole of section 31 "may be varied by the settlor even though some parts of it may appear to be couched in imperative language[154] for instance section 31(1)(a), after provision for maintenance out of income during infancy, directs Thus in *re Turner's Will Trusts,*[155] the settlor postponed the vesting of the beneficiary's interest until he attained the age of twenty-eight and further directed that sums not needed during this period should accrue to capital. It was held that this provision superseded the direction in section 31(1)

150. *Ibid*, S.19
151. *Ibid* S.20
152. Succession Act, Cap.162, S.27
153. Trustees Act, S.2(3)
154. Keeton & Sheridan (10th Ed, 1974), p.90 referring to S.31 of the British Trustee Act, in *parl materia* with S.31, Trustees Act
155. [1937] Ch.15; Keeton & Sheridan, *ibid*

(i) of the British Trustee Act, 1925[156], with the result that when the beneficiary died before attaining the age of 28, his executors had no claim upon the annual balances of income between the time when the beneficiary attained the age of majority and his death.

The payments under section 31 may be made to the parent or guardian of the infant for his "maintenance, education or benefit" up to the whole of the income, and they may be made even though there are other funds applicable for that purpose (such as under other trusts), and even though there is some person bound by law to maintain the infant (such as the father). However, in effecting the payments, the court would, consider the general requirements of the infant, and other funds applicable to the infant's maintenance regarding the proportion to be borne by each fund.

Section 31(2) provides that during the infancy of the beneficiary, if his interest so long continues, the trustees should accumulate all the residue of that income in the form of compound interest by investing the same and the resulting income thereof from time to time in authorised investments and shall hold those accumulations as follows:

i) If any such person:

   a) attains the age of 21 years or marries under that age, and his interest in such income during his infancy or until his infancy or until his marriage is a vested interest, or

   b) on attaining the age of 21 years or on marriage under the age becomes entitled to the property from which such income arose, the trustee shall hold the accumulations in trust for such person absolutely.....

ii) In any other case the trustees shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as one fund with such capital for all purposes.....

156. Identical to s.31(1)(b) of the Trustees Act.

However, the trustees may at any time during the infancy of the beneficiary, if his interest so long continues, apply those accumulations, or any part thereof as if they were income arising in the then current year.

As already indicated, the trustee's power to grant income for maintenance is "subject to any prior interests or charges". The effect of this is that "A remainder man cannot be maintained out of the income of the tenant for life, without the latter's consent"[157]. Furthermore, if the trust instrument contains an express power for the accumulation of the income of the beneficiary's share, this has the effect of excluding the statutory power of maintenance.[158]

The receipt of the parents or guardian is a sufficient discharge under section 31 of the Trustees Act.

A complex issue of maintenance arises where property is settled upon a class of such children as shall attain the age of majority, in equal shares, so that each child shall receive a proportionate share of the income on attaining full age, as if the class were then close. Such was the case in *Re King* [159]. It was held that an apportionment of income for such members of the class as had attained twenty one should be made on the basis of the number of children then existing. The effect was that if the class subsequently increased, the income payable to those members of the class who had not reached 21, there would be a provisional division of the income, with the possibility that the proportion would diminish as from the birth of another member of the class, but the effect of such provisional assignment of income to infant beneficiaries is to permit maintenance under Section 32 of the Trustees Act.[160]

157. Keeton & Sheridan, *op.cit* p.294

158. *Re Alford* (1886), 32 Ch.D.383; *Re ReadeRevell,* [1930] 1Ch.52 *Re Stapleton* [1946] 1 All E.R.323

159. [1928] Ch.330

160. See also Keeton & Sheridan, *supra* n.58, pp.294295 referring to Section 31 of the British Trustee act, 1925, in *pari materia* with Section 31 of the Trustees Act

In *Re Joel's Will Trusts*[161], there were five young grandchildren at the time when exercise of a power of appointment constituted them beneficiaries with contingent interests, and three other grandchildren were later added to the class. It was held that the shares of the infants (and therefore the amount of income available for maintenance) was initially established when the appointment was made, and were subject to modification whenever the class was extended. Consequently, where a grandchild died before obtaining a vested interest, the accumulations of income attributable to that grandchild's contingent share in the capital of the fund had to be dealt with in accordance with Section 31(2)(i) of the Trustee Act, 1925 (Section 31(2)(b) of the Ugandan Trustees Act) with the result that the investments representing the accumulation of income being added to the general capital of the fund irrespective of the grandchild being born later would obtain an interest in capital due to interest which arose before he was born. It was not, as was suggested in *Re King*, capital. Section 31(2) permits maintenance out of the income of a contingent interest, and accumulation of the balance of unapplied income. If the contingent interest fails. Section 31(2)(b) will nevertheless govern the destination of the allocated income.

Where the infant beneficiary's interest is likely to be modified through a future appointment to another beneficiary or by his failure to satisfy a given condition, his interest is not said to be enjoyed by him absolutely within Section 31(2)(a)(i). Thus in *Re Sharp's Settlement Trusts*[162], a power of appointment was given to trustees to be exercised among a class of beneficiaries, and in default of appointment the fund was to be held in trust for such of the settlor's children as reached 21 in equal shares. All the contingent interests carried the intermediate income. There was one exercise of the power of appointment and the settlor had three children, X, Y and Z and was not likely to have more. The income of the fund was allocated to the three children in equal shares. X was 21 and the income was paid directly to her. Y reached the age of 21 in 1967, but

161. [1967] Ch.14. See also Keeton & Sheridan, *ibid*, p.295
162. [1973] Ch.331

before that date, his income been accumulated. Z was still under 21 and her share (subject to maintenance) was also being accumulated. It was held[163] that the accumulations did not form an accretion to the general body of the fund, but were held for Y and Z subject to any future exercise of the power of appointment and in Z's case, subject to her reaching 21 of age as provided in section 31(2)(i)(b) of the British Trustee Act 1925 (S.31(2)(a)(i) of the Uganda Trustees Act).

b) Advancement

Under Section 32 of the Trustee Act, the trustees may pay up to one half of the beneficiary's share by way of advancement, whether the share is vested or contingent, and whether or not the interest is liable to be defeated by the exercise of a power of appointment or revocation. All the sums advanced must be brought into account as part of the share, and no advancement may be made to prejudice any person entitled to a prior interest, unless he is in existence and is of full age and consents in writing to the advancement.

Section 32(2)(b) refers to "advancement or benefit". In *Re Moxon's Will Trusts*[164] it was indicated that the expression "benefit" has the widest possible connotation, and includes payments made directly to the beneficiary. However, that expression does not prevent the trustees from deciding whether the payment as contemplated was for the benefit of the person advanced. Consequently, if the trustees know that an advancement to a beneficiary is to be used, for other purposes, they would be held liable to repay the sum advanced.[165]

With respect to the term, "advancement", in *Pilkington I.R.C.*[166], it was indicated that it meant, "the establishment in life of the beneficiary who was the object of the power or at any rate some step that would contribute to the furtherance of his establishment". In addition, in the nineteenth century conveyancing practice it had

163. Following *Re King Supra* n.60 and *Re Joel's Will Trusts Supra* n.161
164. [1958] 1W.L.R.165per Danckwerts, J.
165. *Re Pauling's Settlement Trusts* (1964) Ch.303
166. [1964] A.C.612, 633 per Lord Radcliffe

been frequently used in conjunction with other words of wide meaning such as preferment or benefit. The court also described advancement as "any use of the money which will improve the material situation of the beneficiary". In the case of a wealthy person, this could cover a gift to charity by the trustees on his behalf, where the beneficiary accepted a moral obligation to contribute.[167] It is also suggested[168] that the "power is commonly and validly exercised to diminish the incidence of estate duty, by taking half the remainder man's share of the capital out of the trust at least seven years before the death of the tenant for life."

The statutory power under Section 32 is only applicable in the absence of a contrary intention expressed in the trust instrument and takes effect subject to any conditions expressed therein[169]. It is also significant that by Section 32(2), the power is made applicable only to trust property consisting of money or securities or of property held upon trust for sale.[170]

What amounts to advancement will depend on the circumstances of the transaction. Thus in *Taylor v. Taylor*[171], it was indicated that an advancement by way of portion was something given by a parent to establish the child in life as distinguished from a casual payment. Consequently, "sums given on marriage, or on entry into a profession, or to purchase a business, or to supply further capital for a business have at various times been considered to be advancements.[172] Nonetheless, small sums or temporary assistance do not fall within the scope of this provision. Thus in *Taylor v. Taylor*[173], it was held that a father's discharge of his son's debts did not amount to advancement, although in *Re Brockley*[174], the view was that a sum

167. *See Re Clore's Settlement Trusts* [1966] 1W.L.R.955
168. Keeton & Sheridan, *op.cit* p.297, relying on *Re HastingBass* [1974] 2 W.L.R.904 C.A.
169. Trustees Act, S.2(2)
170. See also *Re Stimpson's Trusts* [1931] 2Ch.77
171. (1875) L.R.20Eq.155
172. Keeton & Sheridan, *supra* n.160, p.298
173. *Supra* n.171
174. (1885) 29 Ch.D.250

given by a father to his son to pay debts could be considered to be an advancement. Professors Keeton and Sheridan have submitted[175] that there is no real conflict between the two cases since "the circumstances of one transaction might easily preclude it from being so considered, although in the other case, the nature of the debts and their amount might point to the fact that a discharge of them amounted to an advancement of the son."

175. *Supra* n.172

Chapter 18

Breach of Trust

A. Nature of Breach of Trust

A breach of trust consists of an improper act, neglect, default or omission of a trustee with regard to trust property or of a beneficiary's interest in it. Consequently it may include

(i) direct intermeddling with trust property for improper purposes

(i) failure to exercise proper care in discharging a duty;

(ii) *mala fide* exercise of a discretion.[1]

In all these instances, the trustee must replace any consequential loss from the trust fund, as a result of his/her actions. The purpose of the rule is not to punish the trustee but to compensate the beneficiaries.

B. Liability of a Trustee

i) Personal Liability

The general rule is that the trustee is liable only for his/her own breaches and not those of his/her co trustees.[2] Nevertheless, a trustee will be held liable if he left the matter in the hands of a co trustee without inquiry or if he/she stood by while a breach of trust was being committed.[3]

ii) Extent of Liability

A trustee is not liable for breaches of trust committed before his/her appointment.[4] However, if upon examining the books and documents relating to the rust, he/she discovers that a breach of

1. Keeton & Sheridan, *op.cit* (10th Ed.1974), p.373
2. *Townley v. Sherborne* (1634) J.Bridg.35; Trustees Act, S.23
3. *Bahin v. Hughes* (1886) 31 Ch.D.390
4. *Re Strahan* (1856) 8 De GM&G.291

trust was committed prior to his/her appointment, he/she should institute an action against the former trustee except if he/she is able to show that such proceedings are fruitless.[5]

A trustee is only liable for breaches committed during his/her term of office and his/her estate is liable in respect thereof after his/her death, although he/she may be released by all the beneficiaries who are absolutely entitled provided they are *sui juris*. He is not liable for breaches committed after his retirement, although he may be liable if he retired in order to facilitate a breach of trust.[6] If the trustee in breach is also a beneficiary, his beneficial interest bears the loss against the other beneficiaries and trustees.[7] In this regard an impounding order may be issued by the court following consent by a beneficiary that he is in breach of trust.[8]

iii) Measure of Liability

The measure of liability of a trustee is the loss caused to the trust estate directly or indirectly[9]. For instance, if a trustee makes an unauthorised investment, he will be liable for the loss incurred on the sale. The beneficiaries may adopt the sale and claim the difference between the value of the investment and the purchase price.[10] Secondly, if the trustee is required to invest in a specific investment within a reasonable time and afterwards he fails to make the investment rises, he is liable to buy as much of the investment, as would have been bought at the right time.[11] Thirdly, if the trustee uses trust funds in his trade or busi ness, he is liable as a constructive trustee for profits he makes or for sums involved with interest, whichever is greater.[12] Fourthly, where the trustee misapplies trust funds with interest

5. *Re Forest of Dean Coal Co.* (1878) 10 Ch.D.450, 452
6. *Head v. Gould* [1898] 2 Ch.250,272; *Re Whitehead's W.T.* [1971] 1 W.L.R.833
7. *Re Dacre* [1915] 2 Ch.480; *Chilingworth v. Chambers* [1896] 1 Ch.685
8. Trustee Act, S.59
9. *Knott v. Cottee* (1852) 16 Beav.77
10. *Re Pattern* (1883) 52 L.J.Ch.787; *Re Lake* [1903] 1 K.B.439
11. *Byrchall* v. Bradford *(1822)* 6 Madd.235
12. *Re Davis* [1902] 2Ch.314

(usually put at 4 percent[13]) from the date of the misapplication.[14] In *Wallersteriner v. Moir*, the court charged interest at the current minimum bank lending rate (9 percent) plus one percent.

In a situation where there is a profit in one transaction and loss in another, the gains made out for the trust property belong to the beneficiaries while the loss incurred as a result of a breach of trust should be made good by the trustee. A trustee is consequently, not allowed to set off a gain in one transaction against a loss made in another transaction.[15] This rule does not apply where the court finds that the gain and loss were part of the same transaction.[16]

iv) Trustee's Liability for Acts of CoTrustee

Where there exists more than one trustee their liability for breach of trust is joint and several.[17] Consequently, a beneficiary may claim the whole loss by suing all or some of or anyone of those who are liable and can levy execution for the whole sum against anyone of them. Nevertheless, a trustee who has paid more than his share of liability for breaches of trust is entitled to contribution from the other trustees who are also liable[18] or from their estate after death.[19] Each trustee who is liable should contribute equally regardless of the degree of fault.[20]

Indemnity

There are situations where a trustee is not liable to contribute. These are where he is entitled to indemnity from his co trustee against his own liability. Examples of these are firstly, where on trustee has

13. *Re Beech* [1920] 1Ch.30; *Re Baker* (1924) 2Ch.271
14. *Burdick v. Garrick* (1870) 5Ch.App.233; *Wallersteriner v. Moir* (No.2) [1975] O.B.573
15. *Dimes v.Scott* (1828) 4 Buss.195
16. *Fletcher v. Green* (1864) 33 Beav.426
17. Keeton & Sheridan, *op.cit*.pp.378, 380; Income Tax Act, Cap 340, S.71(7)
18. *Lungard v. Bromley* (1812) 1 Ves & B114; Trustee legislation *supra* n.2
19. *Jackson v. Dickinson* [1903] 1 Ch.947
20. *Bahin v. Hughes*, *Supra* n.3

acted fraudulently on his own and he alone is liable.[21] Secondly, where one trustee is a solicitor and has exercised such controlling influence that the other trustee is unable to exercise independent judgment.[22] Thirdly where a beneficiary has par ticipated in a breach of trust with a view to obtaining a personal benefit, he is required to indemnify the trustee[23] However, if he is also a trustee he can expect a contribution from his co trustee. In *Chillingworth v. Chambers*[24], two trustees invested on insufficient security. They became jointly and severally liable to the beneficiaries for the loss. One trustee made up the loss and then tried to recover contribution from his co trustee. This was refused because he had become entitled to a share in the trust estate as his wife's successor. This was in line with the principle that a trustee who has assented to and profited by a breach of trust must bear the loss to the extent of his share. Nevertheless, after his interest has been exhausted, the right to contribution will arise again.

C. Limitations on the Liability of a Trustee

1. Where Beneficiary Participates in or Consents to Breach of Trust

If a beneficiary has participated in or consented to a breach of trust, he may not sue the trustees[25]. Before a beneficiary can be adjudged to have consented for or participated in a breach of trust, he must be *sui juris* in circumstances in which he had a free choice. Sec ondly, the court should consider all the circumstances in which the beneficiary concurred in order to ascertain whether they were fair and equitable so as to prevent him from turning round and suing the trustees. Thirdly, it is not necessary that he should know that he is concurring in a breach of trust. It is sufficient if he understands

21. *ReSmith,* (1896) 1 Ch.171
22. *Re Partington* (1887) 57 L.T.654; *Head v. Gould, supra* n.6
23. See also Trustees Act S.59
24. Supra n.7
25. *Re Pauling's Settlement Trusts* [1964] Ch.303; (No.2) [1963] Ch.576; [1962] 1 W.L.R. 86, 107108 per Wilberforce J.

what he is concurring in. Neither is it necessary that he had profited from the breach of trust.[26] The decision to participate must have been freely taken. Consequently, even with a beneficiary who is *Sui Juris*, it may be possible to show that the consent was a result of undue influence.

Where a beneficiary has acquiesced in a breach of trust another may sue the trustee in respect of it and the court may in such a case order that the trustee be indemnified out of the interest of the concurring beneficiary except where the latter is under a disability.[27] Additionally, by the trustee legislation[28] it is provided that where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the court may, if it thinks fit, make such order as to the court seems just for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or persons claiming though him. In *Griffith v. Hughes*[29], it was indicated that neither the instigation nor the request need be in writing, but only the consent, to be within the sec tion. Furthermore, the court does not impound the beneficiary's interest except where the beneficiary clearly realised that the action contemplated amounts to a breach of trust.[30] The order, when made will take priority over the interest of a mortgagee whose charge was created after the breach of trust.[31] The object of the provision is to widen the power of the court as to the indemnification of trustees.[32]

It is further significant that "it is not necessary that a beneficiary should reap benefit from the breach of trust which he instigates, or to which he consents[33] Consequently, where a remainder man

26. *Re Pauling's Settlement Trusts, ibid,* per Wilberforce J. *Holder v. Holder* (1968) Ch.353, 394; *Fletcher v. Collis* (1905) 2Ch.24
27. *Raby v. Ridehalgh* (1855), 7 De G.M.&G.104; *Sawyer v. Sawyer* (1885) 28 Ch.D.595
28. Trustees Act S.59
29. [1892] 3 Ch.105, applying S.6 of the Trustees Act, 1888, in *pari materia* with the relevant Ugandan Trustee legislation provisions, *ibid*
30. *Re Somerset* [1894] 1 Ch.231
31. *Bolton v. Curre* [1895] 1 Ch.544; *Burrows v. Walls* (1855) 5 DeFM&G.233
32. *Ibid* p.549
33. Keeton & sheridan, *op.cit* p.405

induces the trustee to commit a breach of trust for the benefit of the tenant of life, the remainder man's interest may be impounded.[34]

Finally, if a trustee is exercising his right to impound a beneficiary's interest to make up for a breach of trust which he has instigated, he is not entitled to insist on remaining a trustee in order to exercise the right. A former trustee, who has been removed, may exercise it.[35]

2. Release and Acquiescence

These relate to conduct of the beneficiary after the breach has taken place. The release may be but need not be formal and may be inferred from conduct. Thus in *Egg v. Devey*[36], a beneficiary accepted benefits under his mother's will which prevented him from claiming in respect of the administration of his father's estate. The length of time taken by a ben eficiary in making the claim may be evidence to the trustee of an intention to release by a beneficiary. However, in such a case the court should inquire into all the circumstances which induced the concurrence or acquiescence.[37]

3. Statutory Relief

Where a trustee may be personally liable for a breach of trust but he has acted honestly and reasonably and ought to be fairly excused for the breach of trust for omitting to obtain the directions of the court in the matter in which such breach was committed, the court may relieve the trustee either wholly or partly from personal liability.[38] Whether the court grants or refuses relief under the section depends on the circumstances of each case,[39] and the burden of proof that a trustee has acted reasonably and honestly is on him.[40]

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34. *Chilingworth v. Chambers, supra* n.24, p.700 per Lindley L.J. See also *Head v. Gould* [1898] 2 Ch.250 per Kekewich, J.
35. *Re Pauling's Settlement Trusts* (No.2)[1963] Ch.576, 583585 per Wilberforce J.
36. (1847) 10 Beav.444
37. *Stackhouse v. Baruston (*1805) 10 Ves. Jr.453; *Walker v. Symonds* (1818) 3 Swams 1, 64
38. Trustees Act, S.59
39. *Re Turner* [1897] 1 Ch.536, 542
40. *Re Stuart* [1897] 2Ch.583

In *Re Kay*[41], a testator left an estate of £22,000 with apparent liabilities amounting to £100. The executor paid at once to the testator's widow a legacy of £300 and allowed her to receive a portion of the income of the estate in accordance with the terms of the will. This was done prior to the executor's advertisement for claims. It appeared that the testator was liable in respect of a claim for fraudulent misappropriation, which when satisfied would render the estate insolvent. It was held that the appropriation of the legacy and the payment of the income until service of the writ were reasonable and excusable, but that payment after that date was not.

The trustee must act both reasonably and honestly[42]. It follows that "in dealings with the trust property reference will be made to the conduct of a prudent man of business. Consequently, where a debt is owing to the estate which was small, and debtor was of good standing the trustee could be excused for not promptly suing him.[43] This would also apply to a trustee who fails to sue because of his belief that the proceedings would be unsuccessful.[44] However, trustee who invests without obtaining certain necessary consents is not regarded as having acted reasonably[45], nor does he where he permits a co trustee, who is also a solicitor to persuade him to make an unauthorised investment (although he is entitled to indemnity).[46]

In *Perrius v. Bellamy*[47]; by mistake of law, trustees believed they had a power of sale and in pursuance thereof sold settled leaseholds, with the result that the income of the tenant for life was reduced. It was held that (having been advised by a solicitor that they had power to sell and by a surveyor that it was undesirable to retain the properties), they were entitled to relief. Similarly, in *Re Allsop,*[48] a trustee, acting upon a mistaken construction of the will, but on

41. [1897] 2 Ch.518
42. Keeton &Sherdan, *op.cit* p.402
43. *Re Grindley* [1898] 2 Ch.593
44. *Re Roberts* [1897] 76 L.T.479
45. *Chapman v. Browne* [1902] 1Ch785
46. *Re Turner, supra* n.39
47. [1899] 1 Ch.797
48. [1914] 1Ch.1

legal advice distributed to the wrong persons, but was relieved. In contrast, in *National Trustees co of Australasia Ltd. V. General Finance Co. Of Australasia Ltd.*[49], trustees who were paid as such were wrongly advised by their solicitors to make a distribution, which, in fact they had no power to make. It was indicated by the court that a trustee does not automatically, become entitled to relief on showing that he has acted reasonably and honestly. Each case is dependent on its own facts and the relief is discretionary upon the court. It would appear that a higher standard of diligence and knowledge of affairs is placed upon a paid trustee than an unpaid one.[50]

The case of *Khoo Tek Keong v. Ch'ng Joo Tuan Neoh*[51] provides an excellent illustration of what constitutes "reasonably and honestly". Under a will a trust was created by which the trustees were authorised to invest trust moneys in such investments as they in their absolute discretion should think fit. The sole surviving trustee lent money at interest on the security of deposited jewellery without independent valuation thereof and also made other loans without security. It was held that the loans on the security of the jewellery weren't breaches of trust in the absence of proof that the security was insufficient when the loans were made. However, the unsecured loans were made in breach of trust. Additionally, it was held that the trustee was not entitled to relief since though he acted honestly, he did not act reasonably. This was because he had not considered whether the unsecured loans were dispositions which it was prudent for him to make as a trustee, but had simply relied on the knowledge that the testator himself made such loans in his life time.

4. Statutes of Limitation and Laches

The Limitation Statute[52] provides that an action to recover money or other property or in respect of any breach of trust may not be

49. [1905] A.C.373. See also *Re Diplock* (1948) 1 Ch.465; discussed infra.

50. *National Trustees Co. Of Australia Ltd, Case, ibid, Re Waterman's Will Trusts* [1952] 2 All E.R.1054; *Re Pauling's Settlement, supra* n.25

51. [1934] A.C.529 P.C.

52. Limitation Act, Cap.80, S.20

brought against a trustee or any person claiming through him after the expiration of six years from the date on which the right of action accrued. To the general rule are some exceptions. First, the limitation period is inapplicable where the claim is based on fraud or fraudulent breach of trust to which the trustee is a party or privy. Second, the period will not apply where the claim is to recover from the trustee property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use[53]. Third, the right of action shall not be deemed to have accrued to a beneficiary who is entitled to a future interest in the trust property, until the interest fell into possession. Fourth under Section 21(1) the Limitation Act if on the date on which the right of action accrued, the person to whom it accrued is under a disability (such as infancy or mental derangement), the action may be brought at any time before the expiration of six years from the date when the person ceased to be under a disability or died, whichever event occurs first.

Furthermore under section 19(3) of the Limitation Act, a beneficiary who is barred by lapse of time under the Act or Law cannot benefit from proceedings brought by one who is not barred. An instance of this is where a trustee commits an innocent breach of trust such as choosing a wrong investment. After the tenant for life's right of action has become barred, the court could, at the suit of the remainder man compel the trustee to replace the money lost. In such a case, the tenant for life will not be able to claim the interest on the money (to which he would normally have been entitled in his lifetime). The interest will belong to the trustee.[54] It is notable in this example that the remainder man is not entitled to his interest and therefore right of action until the determination of the life interest of the tenant for life.

53. For an illustration of this see *Re Howlett* [1949] Ch.767

54. *Re Somerset* [1894] 1Ch.231; *Re Fountains* (1909) 2Ch.382

D. Remedies Available to a Beneficiary for Breach of Trust

1. Compelling Performance of the Trust

If a trustee neglects the administration of the trust or defaults in protecting the trust estate a beneficiary may take steps to ensure that he takes the necessary actions in the interest of the trust estate.[55] Example of this are where a trustee fails to renew leaseholds or a certificate of occupancy;[56] where trustees are about to sell at an undervalue [57],where the character of the trustee is such as would endanger the trust fund [58],where the number of trustees has been reduced by the death or retirement of trustees and there has been a failure to appoint new ones a beneficiary may require the appointment of new trustees.[59]

Apart from that general right there are certain equitable remedies to which a beneficiary may resort. First, he may apply for an order of injunction to be granted by the court where a breach of trust is contemplated. [60] In this respect by the Law of Property Legislation in some jurisdictions [61] trustees for sale shall, so far as practicable give effect to the wishes of the beneficiaries of full age. Consequently, the failure to consult them or some of them amounts to a breach of trust which can be restrained by injunction. This will be so even where the husband is a sole trustee and his wife is the other beneficiary.[62] An injunction may also be obtained against a bankrupt trustee who wants to obtain possession of trust property.[63] Second, the court may

55. *Forey v. Burnell (1783)* 1 Bo.C.C.274
56. *Bennet v. Colley* (1832) 5 Sim 181, 192
57. *Anon* (1821), 6 Madd.10; *Milligan v. Mitchell* (1833) 1 My & K446
58. *Everett v. Prythergch* (1841) 12 Sim 363; *Keeling v. Child* (1678) *Rep.t.Finch 360 Re Sir Lindsay Parkinson & Co. Ltd, Settlement Trusts* (1965) 1 W.L.R. 372
59. *Hibbard v. Lamb* (1756) Amb.309; *Buchanan v. Hamilton* (1801) 5 *Ves.*722; *Finlay v. Howard* (1842) 2 Dr.& War.490
60. *Millgan v. Mitchell, supra* n.57
61. Property & Conveyancing law Cap.100 (Laws of W.R.N.) S.24(3) of Nigeria
62. *Waller v. Waller* [1967] 1 W.L.R.451
63. *Bowen v. Phillips* [1897] 1 Ch.174

appoint a receiver upon the request, by application of a beneficiary.[64] The appointment of a receiver is normally premised on the possibility of actual or prospective violation of the duties of the trustee likely to endanger the trust property.[65] Examples of this are failure of the trustees to agree so that the trust cannot be properly administered; [66] loss of part of the trust estate through failure to realise it [67], refusal of the trustee to act [68] ; and denial of the trust [69]. In the Nigerian case of *Odulate v. Odulate* [70], the applicants applied for an order of the court for a transfer of the administration of the estate in dispute to an administrator or a receiver operating under the supervision of the court pending the determination of the substantive proceedings. It appeared from the pleadings that there was a total deadlock in the administration of the estate and it was no longer possible for the defendants to act or meet to perform their duties and functions as administrators, and trustees of the estate; that the trust funds which should have been paid into the estate account with the bank were under the control of factions to which the trustees, had split and that the estate was wasting away. Adio, J.granted [71] the application and appointed the Administrator General and Public Trustee of Oyo State as receiver under the supervision of the court..

Thirdly, where the trust property is endangered as when it is invested in unauthorised and hazardous securities, the court may, on the admission of the trustee that the fund is in his co trustee's hands, order the amount to be paid into court by the trustee who is not holding the fund, if that trustee admits that the fund has not been properly applied. [72] In the Nigerian Case of *Fregene v. Aweshika,* [73] the

64. See also Trustees Act, Cap.164, S.56
65. *Middleton v. Dodswell* (1806) *13 Ves.*266; *Barkley v. Lord Reay((*1842) 2 Hare 306, 308.
66. *Bagot v. Bagot* (1841) 10 L.J.Ch.16; *Swale v. Swale* (1856) 22 Veav.584
67. *Richards v. Perkins* (1838) 3 Y&C.Ex.299
68. *Tait v. Jenkins* (1842), 1 Y&C.C.C.492
69. *Sheppard v. Oxenford* (1855) 1 K&J.491
70. Unreported Suit No.1/169/76 in Adigun, *Cases & Texts on Equity, Trusts & Administration of Estates* (1987) pp.344345
71. Applying *Hart v. Denham* (1852) 16 Beav.269
72. *Wigglesworth v. Wigglesworth* (1852) 16 Beav.269
73. (1957) WRNLR 156; Adigun, *supra* n.70, pp.343344

plaintiffs applied to court to remove the defendants from the office of trustees, an account and an injunction restraining the defendants from carrying on the duties of trustees, on ground of alleged misconduct. It was proved that the defendants relieved the principal trustee of his post and replaced him with another person, who, with them signed cheques for withdrawing money from the trust fund bank account; made cash gifts to strangers, borrowed money on account of the trust fund at 10% percent interest and lent money to the fund at the same rate of interest. It was held that the defend ants were guilty of misconduct and mismanagement, should be removed from office and render account of the trust fund. It has also been observed [74] that where a trustee commits a breach of trust, fraudulent or otherwise, any beneficiary can bring an action to question the validity of the acts of the trustee and need not sue in a representative capacity.

2. Proprietary Remedies

a) Advantage over Personal Remedies

There exists a number of advantages in respect of a beneficiary's proprietary remedies over the personal remedies just considered .[75] First, with regard to a proprietary remedy, satisfaction of the plaintiff's demand does not depend on the solvency of the defendant trustee. If the property to be traced belongs to the plaintiff in equity, it will escape the defendant's bankruptcy[76]. Second, in some cases, the plaintiff will be able to take advantage of increases in the value of the property. This is especially so where specific property is treated as the plaintiff's in equity and was recently established where a mixed fund is in question. [77] Third, there are cases in which the proprietary remedy is available although no personal action is possible.[78] Fourth, judgement in a proprietary action carries interest from the date on

74. *Smith v. Walker* (19641966) ALRS.L.326
75. See generally Hanbury & Maudsley, *Modern Equity* (9th Ed.) pp.414415
76. Bankruptcy Act Cap.67 S.41(2)(a)
77. *Re Tilley's W.T.* [1967] Ch.1179
78. *Sinclair v. Brougham* [1914] A.C.398, considered *infra*

which the property came to the defendant's hands, while claims in *personam* carry interest only from the date of judgement.[79]

b) Doctrine of Unjust Enrichment

It has been suggested[80] that proprietary remedies cannot be fully understood without some appreciation of the doctrine of unjust enrichment. This doctrine appears in virtually every legal system. Basically, it is to the effect that where the defendant is unjustly enriched at the expense of the plaintiff, the defendant must make restitution to the plaintiff.[81] The principle operates mainly under *quasi* contract but is also relevant in contract, torts and other areas of equity.

c) Tracing at Common Law

A proprietary remedy is one which entitles a claimant to treat specific property or a portion thereof as his own. The common law did not develop a real action in respect of chattels which entitled a plaintiff to specific recovery thereof. The court at common law recognised the plaintiff as the owner of the chattel, but there was no action at common law of paying damages on returning the chattel. A discretion to award specific recovery was given to the court. [82] The plaintiff's ownership was relevant in that his entitlement was to the chattel or its value. The issue then arose as to whether the right of the plaintiff was limited to the case of a specific chattel. Put another way, should his right end if the defendant had changed one chattel for another or the chattel for a sum of money or had spent the money on another chattel? The answer seems to be that the chattel can be followed so long as its nature could be ascertained as such. The right only ceases when the means of ascertainment fail, for instance where the chattel is turned into money and mixed and confounded in a general mass of the same description. [83] However,

79. *Re Diplock* [1948] Ch.465
80. Professor Maudsley, *supra* n.75, p.415
81. See also generally Goff and Jones, *Law of Restitution* (2nd Ed.1978)
82. Common Law Procedure Act, 1854, S.78
83. *Taylor v. Plummer* (1815) 3 M&S.562 per Lord Ellenborough

this is contested and the approach proffered [84] is that there is nothing at common law which corresponds with the equitable tracing order. To trace at common law means no more than identifying property in a changed form and in new hands in order to found a personal action in support of a proprietary right.

The conclusion is that the right to trace at law is only lost if the money becomes part of a mixed account because it is no longer identifiable. For this purpose, mere payment into a bank account does not prevent identification.[85] Nevertheless, if the bankrupt's money is mixed with the plaintiff's it is no longer possible to identify anything that the plaintiff owns at law. The means of ascertainment fail.

Equity has tried to overcome this problem. In practical terms, the common law remedy becomes irrelevant because in practice, tracing is limited to cases where the plaintiff is seeking money in a mixed account. Consequently, the tracing remedy is limited to cases where there is breach of a fiduciary relation which makes the equitable remedy available.

d) Tracing in Equity

Equity has developed more sophisticated methods of tracing.

i) Straight Case

This is one in which there has been no mixing of trust funds with the trustee's own money. Consequently, if the trustee has sold trust property, the beneficiary may take the proceeds if he can identify them. In a situation where the proceeds of sale have been used to buy other property the beneficiary may follow them and may choose whether to take the property bought or to hold it as security for the amount of money used in the purchase.[86] This is subject to the condition that claims in equity are invalid against a *bonafide* purchaser for value without notice of the trust.

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84. Professor Maudsley, *supra* n.75, p.418; see also Scott, (1966) 7 W.A.L.R.463
85. *Banque Belge v. Hambrouck* [1921] 1K.B.721
86. *Re Hallett's Estate* (1880) Ch.D.690 per Lord Jessel, .M.R.at pp.708709

ii) Mixed Funds

In the hands of Trustee

The situation becomes complicated where the trustee has mixed trust funds with his own or, if after mixing, there are additional dealings with the fund. The problem then becomes one of identifying the trust funds in a mixed account or in other property into which it has been converted. In this regard, the burden of proof is on the trustee to prove initially that part of the mixed fund is his own. In *Re Tilley's W.T.* Ungoed Thomas J. Stated thus:.[87]

> If a trustee amalgamated trust property with his own, his beneficiary will be entitled to every portion of the blended property which the trustee cannot prove to be his own.

Consequently, if the composition of the mixed fund is established at the time of the original mixing, the problem of identification is one of determining how to account for the reductions in the fund by payments out and for increases in the fund by payments in. Thus in *Re Hallett's Estate.* Hallett who was a solicitor, died after having mixed with his own money certain funds from two trusts. One was his own marriage settlement of which he was trustee. The other trust had his client Mrs *Cotterill* as beneficiary. At his death, the funds were insufficient to pay his personal debts and to meet the trust claims. Three issues arose. First whether Mrs Cotterill not being a beneficiary of a trust of which Hallett was a trustee was entitled to the tracing remedy on the ground of her fiduciary relationship. Second, assuming that she was, how to allocate the payments from the fund as between Hallett and the claimants. Third, how to allocate the payments as between the claimants themselves. It was held that Mrs Cotteril was entitled to trace and that the payments out must be treated as payments for Hallett's own money. This was enough to satisfy both Mrs Cotterill and the beneficiaries. Consequently, the third issue did not arise. The main reason advanced by Jessel, M.R[88] was that whenever an act can be done rightfully, a man is

87. [1967] Ch.1179, 1182, following *Lewin On Trusts* (16th Ed.) P.223

88. *Supra* n.86

not allowed to say against the person entitled to the property or the right that he has done it wrongfully. Jessel, M.R.further stated in this regard.[88]

> The modern doctrine of equity as regards property disposed of by per sons in a fiduciary position is a very clear and well-established doctrine. You can, if the sale was rightful, take the proceeds of the sale if you can identify them. If the sale was wrongful, you can still take the proceeds of the sale, in a sense adopting the sale for the purpose of taking the proceeds if you can identify them. There is no distinction therefore between a rightful and wrongful disposition of the property, so far as regards the beneficial owner to follow the proceeds. But it very often happens that you cannot identify the proceeds. The proceeds may have been invested together with money belonging to the person in a fiduciary position in a purchase... Now what is the position of the beneficial owner as regards such purchase? I will, first call for shortness the trust money, although it is not confined, as I will show presently, to express trusts. In that case according to the now well established doctrine of equity, the beneficial owner has a right to elect either to take the property purchased, or to hold to elect either to take the amount of the trust money laid out in the purchase; or as we generally express it, he is entitled at his election either to take the property, or to have a charge on the property for the amount of the trust money. But in the second case, where a trustee has mixed the money with his own, there is this distinction, that the cestuie *que trust,* or beneficial owner, can no longer elect to take the property, because it is no longer bought with the trust money simply and purely but with a mixed fund. He is, however, still entitled to a charge on the property purchased, for the amount of the trust money laid out in the purchase, and that charge is quite independent of the fact of the amount laid out by the trustee.

Professor Maudsley has criticised[89] the application of the tracing rule in *Re Hallett's Estate* as having been too precise in the sense that it could lead to a wrong result if the earlier payment out was in favour of an unauthorised investment which prospered and the remainder disappeared. He suggests[90] that the correct rule should be that a beneficiary may claim a charge upon any part of the trust

89. Hanbury & Maudsley, *supra* n.75 p.420

90. *Ibid* p.420 relying on the American case of *City of Lincoln v. Morrison* 64 Neb.822 90 NW 905 (1920)

fund which he can identify as having been part of the mixed fund. Secondly he questions whether it is fair to apply the tracing remedy when the defendant is insolvent and argues that this is a situation where it is necessary to ascertain whether the beneficiary who is tracing should have priority over other creditors. Consequently, the beneficiary will have to compete with the other creditors of the trustee. In this vein Professor Maudsley thinks that the tracing remedy as applied in *Re Hallett's Estate* is unfair to the creditors in the sense that they suffer when the trustee pays money out of the mixed fund (which amounts to payment of the trustee's own money). Second, part of the fund consisting of the trust money is money which the trustee should never have had on his own account. Third, the extreme position is that since it is the trustee's duty to perform the trust, the whole of his property should be available for that purpose. Consequently, the money he earns or receives after the mixing should be used to remedy the breach[91]. Professor Maudsley concludes that the attitude in *Re Hallett's Estate*, is too harsh on the creditors because a creditor lends money or gives credit to the defendant on the basis of his estimate of the defendant's financial stability. It is therefore unfair to apply the trustee's money in priority to the satisfaction of the beneficiaries' claims. The criticisms, notwithstanding, the rule appears to be that the tracing remedy is only applied against a mixed fund to the extent that the trust funds can still be shown to be there. If the account is shown to be below that sum that part of the trust money must have been spent.

In *Roscoe (Bolton) Ltd v. Winder,*[92] it was held that later payments into the mixed fund cannot be treated as repayments of the trust money unless the trustee shows an intention to do so. It is, therefore, necessary to ascertin from the accounts the lowest intermediate balance in the fund. The tracing remedy is then available to that extent.

91. Following *Hungerford v. Curtis* 43 R.T.124; 110, 650 (1920)
92. (1915) 1Ch.62, 69

Concerning the relevance of the rule in *Clayton's Case*[93]. That rule is to the effect that in the case of an active continuing bank account the first payment is appropriated to the earliest debt which is not statute barred. In other words first in, first out. The issue arises as to whether payments in and out of a mixed fund may be allocated according to that rule. The view[94] is that this rule should strictly not apply to accounts between a trustee and a beneficiary, although it was applied in *Re Hallett's Estate*[95], with different results. Generally though, it is used only in cases of continuing or current account with different results. Generally, though, it is used only in cases of continuing or current account.

In the Hands of Fiduciaries/Beneficiary

Re *Hallett's Estate* shows that the tracing remedy is also available as between fiduciaries or beneficiary. In *Sinclair v. Brougham*,[96] the Birkbeck Building Society operated a banking business which was held to be *ultra Vires*. In the winding up of the society, competition arose between the claims of the shareholders and bank customers or depositors. The main issue was whether the depositors had the right to trace into the general assets of the so ciety. It was held that there was a fiduciary relationship between the depositors and the directors. The directors had mixed the funds and the depositors had a right to trace them into the hands of the society.

In *Re Diplock*[97], a testator left his residuary estate "such charitable institution or institutions or other charitable or benevolent object or objects in England" as the executors should select. It was held by then House of Lords that the words included non-charitable as well as charitable objects. Consequently, the gift failed for uncertainty. However, before the decision was given, the executors had

93. (1817) 1 Mer.572
94. Hanbury & Maudsley, *op.cit* n.75, p.421
95. *Supra* n.86, p.729 per Jessel M.R.; p.738 per Baggalay, L.J.
96 *Sinclair v. Brougham, Supra* n.78; *Re Diplock, Supra* n.79
97 *Supra* n. 79.

distributed most of the residuary estate to a number of charitable organisations. The next of kin of the testator claimed the property from the executors, and following compromise of the claims with the court's approval, sought to recover the balance of the residue from the charities who had wrongly received it. The charitable organisations had treated the sums received from the *Diplock Estate* in a variety of ways. In most cases, they had been paid into the general account of the charities. Some of these were in credit, while others were overdrawn (either secured or unsecured). In some cases, payment had been made into a special account. In one or two cases payment was earmarked for a particular purpose. The next of kin presented two types of claim. First, he claimed *in rem* by way of tracing the fund based on the *Re Hallett's Estate* case principle. It was held that the remedy of tracing could be used to recover property wrongfully (even if innocently) transferred by the trustee to volunteers irrespective of whether the volunteer himself had changed the form of the property or has mixed beneficiaries or (as in this case) persons or institutions who have received the property on the mistaken assumption that they are beneficiaries, when in law they are not. The remedy may be used by both beneficiaries under the trust and legatees under wills. The effect, therefore, is that if a volunteer keeps the property in an unmixed form, it is still subject to the trust and must be returned when the beneficiary claims it. However, where the volunteer has mixed the property of the trust with his own, the beneficiary has a charge upon the mixed fund for the value of the trust property. The principle to be applied in such situations differs though from that applicable to trustees against whom a beneficiary traces. This is because a volunteer who has taken innocently can also set up a claim in respect of his own property and if he does he and the beneficiary will share the proceeds equally.

The second claim by the next of kin was in *personam* against the charitable organisation as an underpaid beneficiary under the will. It was held that (i) where claims coexist as in this case against the executor or trustee and the overpaid beneficiary, the injured beneficiary's primary claim is against the trustee and it is only when

the remedy against the trustee has been exhausted that the remedy against an innocent but wrongly paid, beneficiary, arises; (i) the erroneous payment by the executor was strictly a mistake of law, and not of fact, but relief was still available in equity; (ii) the claim of the next of kin could not be defeated simply because the recipients had no title and were strangers to the estate. Consequently, their consciences were as much tainted as if they had been beneficiaries under the will.

In the hands of third parties

The right to trace property into the hands of a third party to whom it has been passed by the trustee will depend on the nature of the equitable interest in the property. Consequently, where a trustee has transferred trust property in breach of trust the transferee will be bound by the he trust except in the following instances. First, when he establishes that he has legal title to the property.[98] Second, that he is a *bona fide* purchaser for valuable consideration without notice that the transaction was breach of trust. In *Pilicher v. Rawlins*, James L.J. stated that "..... a notice is an absolute, unqualified, unanswerable defence, and unanswerable plea to the jurisdiction of this court....."

Where the recipient is a volunteer and has no notice of the breach of trust, the right of the beneficiary to trace against him will be equal to that of the recipient's own creditors.[99] For this purpose, if an innocent volunteer has mixed trust money with his own in the bank account, the rule in *Clayton's Case* applies rather than that in *Re Hallett's Estate*

e) Critique of Right to Trace

Professor Maudsley has indicated[100] that the right to trace should not be restricted to a proprietary interest which is equitable, but should also be available to a beneficial legal owner. This is in spite

98 Cave v. Cave (18800 15 Ch.D.639.

99 *Re Diplock, Supra* n.96

100 See *supra* n.86

of the suggestion in *Re Diplock*[101] and *Re Hallett's Estate*[102] that the equitable remedy of tracing is only available where a fiduciary relationship can be established. Secondly, the right to trace should not be limited to situations where a proprietary interest exists. The breach of a fiduciary duty should be sufficient to make available the tracing remedy.

101 *Supra* n.75

102 Supra n.96.

Chapter 19

Taxation of Trust Income

A. Nature of Trust

Trust income refers to income from trusts. This in turn poses the question, "What is a trust? A trust has been described[1] as strictly referring to "the duty or the aggregate accumulation of obligations that rest upon a person described as a trustee. The responsibilities are in relation to property held by him, or under his control. That property, he will be compelled by 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"

Alternatively, a trust is described[2] as a relationship which is recognized by equity. It arises where property is vested in a person or persons known as trustees which those trustees are under a duty to hold for the benefit of other persons known as *cestuis que trust* or beneficiaries.

The interest of the beneficiaries are normally described in the trust instrument creating the trust. However, these may be implied or imposed by law. The beneficiary's interest is proprietary in the sense that it can be bought or sold, given away or disposed of by will. It ceases to exist where the legal estate in the property passes to a *bona fide* purchaser for value of the legal estate without notice of the trust.[3]

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1. *Stroud's Judicial Dictionary* (5th Edn Sweet & Maxwell, London 1986) p. 2696 quoting *Re: Scott* (1943) S.A.S.R. 193 Mayo J. see also ITA, s.2.

2 Keeton, *Law of Trusts* (10th Edn.) p.5, For definitional problems see pp.46 thereof. See also Bak ibinga, *Company Law in Uganda (1993)* pp. 181182 in relation to the fiduciary powers of directors when compared to trustees.

3 *Pilcher v Rawlins* (1872) L.R., 7 Ch. App.259. See also generally Bakibinga, *Law of Trusts in Nigeria lorin, Nigeria (1989)* chapter 2.

The subject matter of the trust must be some form of property. This normally takes the form of legal ownership of land or invested funds. Nevertheless, it may be any sort of property such as land, money, chattels, equitable interests and choses in action.[4]

B. Trust Income

Trust income is what the beneficiary receives. The income is distinguishable from estate income since an estate in the course of administration differs from a trust.

In the case of income from a trust, a beneficiary who is entitled to the income of the trust of a particular year of assessment, or to a share of such income other than by way of annuity or annual payment, is liable to tax on such income, or his share of it, whether he receives it in that year or not, subject to deduction for expenses properly incurred and paid by the trustees out of the trust income.[5] However, for this principle to apply, the beneficiary must be entitled to the income as, and when, it arises; if such income is retained by the trustee and the title of the beneficiary to it is liable to be divested on some later event, then it is not the income of the beneficiary, but only of the trustee.[6] This would normally occur in connection with the income of an infant which is accumulated by trustees during his minority.

If the infant has an absolute right to the income and it is not paid to him only because he cannot give a good receipt, then the income is treated as his. If, however, the infant's right to the income depends upon a contingency (e.g. attaining his majority) and if that contingency does not occur the income passes to others, then it is not his income.[7] Although this situation normally arises mainly in connection with infants, it is of general application and in deciding whether a beneficiary is, or is not, entitled to the income when it

4 Bakibinga, *ibid*.p.18.

5 *Baker v ArcherShee* (1927) A.C. 844; ITD, S.11 (2).

6 *Stanley v. IRC* (1944) 26 T.C. 12 [1944] K.B. 255

7 *Whiteman & Wheatcroft on Income Tax* (2nd Ed) p.176, para 1704.

arises, a useful test to apply is whether his personal representatives would be entitled to it if he died immediately after the income arose. Income which is not accumulated but is extended under a discretionary power for the maintenance of an infant, is treated as the income of the infant,[8] unless it is deemed to be the income of the settler.

In *B.H. v Commissioner of Income Tax*,[9] the appellant was entitled to a life interest in her deceased husband's estate. After her death, his estate was to be divided among their children. In 1954 and 1956, the appellant, in accordance with the wish and intentions of the deceased, divided the income among herself and her children equally. In 1959, a deed for family arrangement was executed to give effect to this trust and the estate investments were then transferred to trustees for this purpose. The appellant claimed that the deed was of a retrospective effect and that the assessments for the years 1955 to 1957 should be amended accordingly. It was held that as the accounts for the years 1954 to 1957 did not demonstrate a trust in favour of the children by virtue of which they received any income of their own in those years, and as the deed of arrangement did not recite any parole declaration of trust in 1954, the appellant had not discharged the onus upon herself of satisfying the Court that she had divested herself of part of the income in favour of the children in those years.

For a beneficiary to be taxable, he must be a beneficiary entitled to income under the general law, subject to any special terms of the trust. If for instance, a trust makes a profit of a particular nature which, by the terms of the trust, is added to capital, that profit will not be attributed to it, any income tax charged on it, in the absence of any special provision in the trust, will be charged to capital. Consequently, two tests must be applied. First has such income, as defined by the Income Tax Act, been received by the trust? Second, what part, if any, of that income is attributed to a beneficiary as

8 *Drummond v. Collins* [1915] A.C 1011 H.L. (E)

9 3 E.A.T.C. (Pt I & I) 192 (Uganda)

income under the terms of the trust, otherwise than as an annual payment out of the trust income?[10]

In contrast with an estate in the course of administration, a residuary benefit is not regarded as taxable income of an estate in the course of administration. A share of residue does not belong to the beneficiary until it is ascertained either in whole or part by transfer or assent to him or by appropriation. It is, therefore, important to ascertain when an estate ceases to be administered and residue is ascertained.

With specific legacies, an assent by personal representatives, although two years after death, has been held to relate back to the date of death, so that income of shares specifically bequeathed become income of the beneficiary from the date of death.[11]

A pecuniary legacy belongs to the legatee for taxation purposes from the time of payment, but any interest due and paid to him for a period since the death will be chargeable to tax in the normal way.

Additionally, an annuitant is in a special position: tax is chargeable by deduction from his/ her annuity and, accordingly as it is paid out of taxed income or not, the year of assessment in which it is treated as having the income will be determined. If, however, owing to insuf ficiency of assets he becomes entitled to a part of the estate, in lieu of annuity, he is treated as a residuary beneficiary and payments made to him before insufficiency was ascertained are treated as having been paid on his account of his residuary share.[12]

1. Statutory Position

The current statutory position as to what constitutes trust income is contained in the Income Tax Act. Cap 340 which provides[13] that chargeable trust income relative to a year of income means

10 *Whiteman & Wheatcroft on Income Tax, supra* n.7 para 1704. See also the *Trustees of the A.D Charitable Business Trust v. Commissioner of Income Tax* 2 E.A.T.C (Pt. I & I)89.

11 *ibid*. para 1705.

12 *ibid* p.176.

13 ITA. S.70.

the gross income of the trust (other than amounts attributable to beneficiaries of legatees) for that year calculated as if the trust is a resident taxpayer, less the total amount of deductions allowed under the ITA for expenditures or losses incurred by the trust in deriving that income.

C. Taxation of Trust Income

1. Preliminary

Trust income may be received either by the trustees/personal representatives or the ben eficiary. Consequently, any of them may be adjudged liable income tax in respect of the income of the trust property depending on certain contracts which deem either of them liable.

2. Assessment to Income tax of Trustees/Personal Representative

a) Charge

Generally, all income received by the trustees (or by the personal representatives, in the case of the deceased's estate) is assessed in their hands. This arose from the principle that legally income of the trust or from trust property is deemed to be income of the trustee. This concept has been slightly modified by the ITA which stipulates[14] that save in relation to a settler trust or qualified beneficiary trust, the income of a trust is taxed either to the trustee or to the beneficiaries of the trust. In addition, a trustee of an incapacitated person's trust is liable for tax on the chargeable trust income of the trust.[15]

For a trustee/personal representative to be liable to tax, he must have received such income in his capacity as a trustee/personal representative. Thus in *Williams v. Singer*,[16] trustees resident in the

14 *ibid*. S.71(1).

15 *ibid*. S. 71(6)

16 [1921] A.C.65.

United Kingdom held shares in a foreign company on behalf of a beneficiary resident and domiciled abroad. The dividends were paid to the beneficiary and were never received in that country. Viscount Cave thus observed:[17]

> …the fact is that if the Income Tax Acts are examined, it will be found that the person charged with tax is neither the trustee nor the beneficiary as such, but *the person in actual receipt and control of the income which it is sought to reach*. The object of the Acts is to secure for the state a proportion of the profits chargeable and this end is attained (speaking generally) by simply an effective expedient of taxing the profits where they are found. If the beneficiary receives and controls them, he is liable to be assessed upon them If the trustee received and controls them, he is primarily so liable.

It was, therefore, held that the trustees could not be assessed upon income which had not come into their hands. Section 4 (1) of the ITA imposes income tax on the personal income of a taxpayer. The effect of this is that a person cannot be liable to tax by proxy or on behalf of another person. Income tax is borne personally. However, Section 71 (1) of the ITA is an exception to that rule in that a trustee who receives income from trust property is liable to income tax upon such income on behalf of others and he is so assessed in that capacity.[18]

b) Rate and Computation of Tax

(i) Rate

Income assessed in the hands of a trustee bears the corporation tax rate[19] which is 30%.[20] Where such tax has already been deducted at source, the trustees cannot be assessed upon it because this would amount to double taxation. Exceptionally a trustee would not be assessed to income tax in two instances. First, where the trust

17 EMPHASIS SUPPLIED.

18 *Williams v. Singer, supra* n. 16; *E.C. Boucher v CIT* [1965] EA 576 C.A. (Kenya).

19 ITA, S.8, Part II, Third Schedule.

20 *ibid*.

income is paid directly to the beneficiary without passing through his hands.[21] Second, a trustee, may have a good answer to a particular assessment as regards some share or part of the income assessed, on the ground that such a share or part of it arises or accrues beneficially to a *cestui que trust* or in whose hands it is not liable to income tax.[22]

In *E.C. Boucher v Income Tax Commissioner*,[23] in 1953 and 1955, the appellant settled shares in a Kenya Company on discretionary trusts in favour of his infant children by deeds ex ecuted in the United Kingdom. The settler, the trustees and the beneficiaries were at all relevant times resident in the U.K. The dividends accruing to the trust from these shares from 1957 to 1960 were deemed by the respondent to be the income of the appellant as a settler under Section 24 of the E.A. Income Tax (Management) Acts, 1952 and 1958[24] and he was assessed accordingly. On appeal, the Supreme Court Kenya upheld the assessments. On further appeal, the appellant contended firstly that Sections 11, 24 and 75 of the 1958 Act were irreconcilable and nullified any charge to tax. Second, that the trustees of the settlement were "individuals" within para 6 (2) of the Double Taxation Relief (Kenya – UK) Arrangements Notice 1952, so that the income the appellant was deemed to have received under Section 24 qualified for double taxation relief. Third, that the income caught by Section 24 was income of the beneficiaries under the U.K. settlement and not the income of the trustees from the Kenya shares, with the result that it was not chargeable to tax not having accrued in the [East African] territories. The Court of Appeal held that the interaction between Sections, 11, 24 and 75 produces no uncertainty as to who should be taxed and at what rate. Section 11 amplifies Section 3 and provides that generally in the case of trusts the income thereof is first deemed to be the income of the trustee which is liable to tax at the standard rate.[25] When

21 *Williams v Singer*, supra n.16.

22 *Reid's Trustees v IRC* (1929) 14 TC 512 at p.525 per Lord Clyde.

23 Supra n.18.

24 Equivalent to ITA, S.71 (5).

25 Under ITA, 8(1).

part of the trust income so chargeable is paid to or for the benefit of a beneficiary, then as a result of Section 11 (2), such income, grossed up in the way specified, is assessed on the beneficiary at his individual rate.[26] Section 75 merely provides the machinery for an infant beneficiary to be assessed at the individual rate in the name of the trustee. Furthermore, that there is no conflict between Section 11 (1) which deals with the assessment of a trustee for income received in trust and Section 24 which deals with the assessability of a settler for income paid to or for the benefit of a beneficiary. Additionally, the court held that "individual" in its normal sense and as used in the E.A. Income Tax (Management) Act and the Double Taxation Relief (Kenya – UK) Arrangements Notice does not include the holder of an office such as a trustee.

It should be noted that the ITA charges trust income in respect of a trustee at a uniform rate of 30% except where the trust relates to an estate of a deceased resident individual or an incapacitated person where the individual rate is chargeable.[27] Income from a retirement fund is also chargeable at the trust rate.[28]

Where a trust has two or more trustees, they are jointly and severally liable.[29]

ii) Computation

A trustee cannot claim any deduction, against income so taxed, for expenses incurred by him in relation to the trust. Thus in *Aikin v Macdonould's Trustees* C.E. (Scotland),[30] the trustees in Scotland received remittances of income from trust properties abroad and distributed the net income, after deducting the expenses of management, among the beneficiaries. It was held that the trustees

26 Under the ITA, the trustee is assessed at the corporate rate of 30% and beneficiary is assessed at the individual rates under ITA Schedule II Part 1.

27 *ibid*.

28 *ibid* S.8(4).

29 ITA, S.71(7).

30 (1894) 3.T.C. 306.

were assessable upon the full amount of income received by them, without deduction of expenses. The Lord President Robertson thus observed:

> …it seems to me that all the authorized deductions and charges occur at an earlier state than that at which these expenses have been incurred. When the net sum was placed in the hands of the trustees, it has passed through all the vicissitudes which entitled anyone to make deductions. It had come home, and was in their hands for them to apply to their uses.

3. Assessment to Income Tax of a Beneficiary

Income of the beneficiary liable to tax is the amount received as income in any year of income by a person beneficially entitled thereto from any trustee in his capacity as such, or paid out of income by the trustee on behalf of such person.[31] However, amounts received from a trustee in the form of an annuity or which have borne tax are excluded from taxation.[32] The assumption that the amount received by a beneficiary has already borne tax is based on the general rule that income received by the trustees is assessed or charged in their hands.[33]

For a beneficiary to be liable to income tax, he must have received income or in the case of an estate during the course of administration entitled to receive.[34] Thus in *Drummond v. Collins*,[35] income received by a person resident in the United Kingdom, who was an object of a foreign discretionary trust, formed part of his total income for income tax and surtax purposes. It was argued that these allowances which were sent to America were not "income" of the children, because they were voluntary payments by the trustees. Earl Loreburn thus stated:

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31 ITA, Ss.72(1), (2), 73(1).

32 *ibid* S.71 (8).

33 *Williams v. Singer*, supra n.16; *Reid's Trustees v IRC supra* n.22.

34 Easson, *Cases and Materials on Revenue Law* (2nd Edition. 1990), p.392. see also ITA, S. 72(2) which indicate that the discretion by a trustee to vest trust income in the beneficiary should be exercised within the second month after the relevant year of income.

35 [1915] A.C. 101.

> …I do no assent to the proposition that a voluntary payment can never be charged, but it is enough to say that these were not voluntary pay ments in any relevant sense. They were payments made in fulfillment of a testamentary disposition for the benefit of the children in the exercise of a discretion conferred by the will. They were the children's income in fact.

Where trustees apply trust income for the benefit of a beneficiary rather than paying him in cash, the beneficiary is assessable on the value of the benefit received.[36] Where the income is retained by the trustee and the interest of the beneficiary to it is liable to be divested on some later event, then it is not income of the beneficiary, but only the trustee. Consequently the beneficiary is not liable to tax thereon. Thus in *Stanley v IRC*,[37] the appellant was a life tenant of a trust fund, the income of which, apart from certain payments for the maintenance of the appellant, was accumulated during his minority. The Revenue claimed to assess the appellant to surtax on the accumulated income. It was held that by virtue of Section 31 (2) of the Trustee Act 1925,[38] the income could not be said to be the income of the appellant during the year in question. Lord Greene, MR thus observed:

> …The infant does not during infancy enjoy the surplus income. It is not his in any real sense. The title to it is held in suspense to wait the event, and if he dies under twenty one,[39] his interest in it (whether or not it be only described as a vested interest) is destroyed. He is, in fact for all practical purposes in precisely the same position as if his interest in surplus income was contingent. If he attains 21, he takes the accumulations; if he dies under 21, he does not.

Furthermore, where property is settled upon discretionary trusts for the benefit of a number of possible objects, but during the relevant period there is in fact only one person within the discretion, such a

36 *Lord Tollemach v. IRC* (1926) 11 TC 277; *IRC v Miller* (1930) AC 222.

37 [1944] K.B. 255; [1944] 1 All E.R. 230.

38 Equivalent to Trustees Act Cap 164, S.3 1(2) (Uganda).

39 The majority Age in Uganda is 18: Contract Act, Cap 73, S.2 (2).

beneficiary cannot be said to be entitled to income from such fund. In this vein in *Cornwell v. Barry*[40] Harman J. stated:[41]

> …The question at issue can be stated tersely: Was the income of this fund in the years in question the infants income? If it was, he is entitled, nd through his Trustee, to the usual personal relief against the tax suffered. If, however, it could not be said to be his income, he is not a person who can get that relief! Consequently, though it may well be and I think is the fact that Michael being in existence had got a vested interest in this money, it was an interest which was liable to be divested if another object of the trust came into existence during the eight years. It is not until the end of this time that you could say: The class is closed: the object is achieved: and the money, if there be any unapplied vests absolutely in any of the persons who were objects of the trust and whether then dead or then living matters not.

Where a beneficiary is absolutely entitled, accumulated income forms part of his total income and is assessable to tax.[42] However, if the income is accumulated during the minority of the infant it is not his income. Where the accumulations are later paid to him, they come as capital and not assessable to tax.[43]

Income in the hands of the trustees may be received as capital by the beneficiary. Equally payments from the capital fund may be received as income, and assessed as such, in the hands of the beneficiary. Thus in *Brodie's Trustees v IRC*,[44] the trustees of the will held property on trust to pay income to the testator's widow for life with a provision that if, in any year the income did not amount to 4,000 Pounds, the trustees were to raise and pay to her out of capital. The income was in fact below 4,000 Pounds in certain years and the trustee duly raised sums out of capital in augmentation of the

40 (1955) 36T.C.268Ch.D.(E).

41 EMPHASIS SUPPLIED.

42 *IRC v. HamiltonRussel's Executors* [1943] 1 All E.R. 474.

43 *IRC v. Blackwell* [1924] 2 K.B. 351 [1926] 1 K.B. 389 c.f. *Gascoigne v. IRC* [1927] 1 K.B. 594.

44 (1933) 17 T.C. 432. See also *Cunard's Trustees v. IRC* [1946] 1 All E.R 159 and *Stevenson v. Winshart* [1987] 2 All E.R. 428.

income. It was held that the sum so raised out of capital was taxable as income in the hands of the widow.

D. Income of the Settlor – the anti Avoidance Provisions

1. Methods of Avoidance

The manner of taxing the income of trusts and of beneficiaries suggests two methods of reducing the impact of taxation:[45]

> by transferring income of the trust from a higher rate taxpayer to one who pays at a basic rate, e.g. a wealthy grandfather transferring income bearing as sets to trustees for the benefit of his grandchildren.[46] In this way the trust is used to reduce tax in a way that instead of the grandfather paying income tax at the individual rates or at the source of his assets, he puts such assets on trust rate of 25% in the United Kingdom and at the trust rate of tax of 30% in Uganda.[47]

In this way avoidance is made possible by splitting income among the members of the settlor's own family, whom he already might be responsible, in particular, the children of the settler, thereby reducing tax liability while retaining the same disposable wealth within the family unit.

> By ensuring that the income of the trust belongs to no individual (i.e. the settler has completely divested himself of any interest in the trust but no beneficiary is entitled absolutely to all or any part of the income e.g. as in a discretionary trust).[48] The trustees will then be taxed on the trust income at the basic rate/corporation rate (for both Uganda and U.K.) and at the additional rate (for U.K.)

The trustees might accumulate the posttax income and later extract it in the form of capital distributions to the beneficiaries, or they

45 In the British Context.

46 Easson, *Cases & Materials on Revenue Law* (2nd Edn 1990) pp 400401.

47 ITA, S.8(1). In Uganda the reduction can be achieved by transferring the trust income to an incapacitated person or to the estate of a deceased person (ITA, S.8(2), (3)).

48 Eassson, *supra* n. 46, pp 400401.

may distribute the income to those beneficiaries, who pay income tax at the basic/individual rate,[49] in which case no further tax will be due for the beneficiary.

Avoidance is attractive in this case, by disposing of income in other directions such that a lower rate is paid, or providing for its accumulation, while still retaining power to enjoy the income by parting with the income for a limited period only, by means of a power to revoke the settlement, by reserving a beneficiary interest or by continuing to derive a benefit in some other manner.[50] In this, case, the settler uses the trusts to reduce tax and the rate paid is far much reduced where a settler is a beneficiary.[51]

2. Anti-Avoidance Provisions

However, the taxing Acts including the ITA contain provisions aimed at preventing this type of avoidance, whereby for income tax purposes the income under certain types of set tlement is deemed to be the income of the settler. Thus a settler or a qualified beneficiary trust is not treated as an entity separate from the settler or qualified beneficiary and the income of such trust is taxed on the settler or qualified beneficiary. Furthermore, the property owned by the trust is deemed to be owned by the settler or qualified beneficiary.[52]

A "settler trust" is defined[53] as a trust in relation to a whole or part of which the settler has the power to revoke or alter the trust so as to acquire a beneficial entitlement in the *corpus* (body) or income of the trust, or a reversionary interest in the corpus or income of the trust.

A "qualified beneficiary trust" means:[54] a trust in relation to which a person, other than the settler has a power solely exercisable

49 ITA, Schedule II, Part I

50 Easson, *supra* n.48.

51 See *supra* n.49.

52 ITA, S.71(5).

53 *ibid* s.70.

54 *ibid*.

by that person to vest the corpus or income of the trust in that person; or a trust whose sole beneficiary is an individual or an individual's estate or appointees but does not include a trust whose beneficiary is an incapacitated person.

The effect of these provisions is to prevent the arrangements which have been outlined above whose effect is to use the trust device to avoid tax.

The following discussion reviews cases which have tried to deal with the problem. In *E.C. Boucher v. Income Tax Commissioner*,[55] it was held that there was no conflict between Section 11(1) which deals with the assessability of a trustee for income received in trust and Section 24 which deals with the assessability of a settler for income paid to or for the benefit of a beneficiary. Furthermore, that Section 11(2) is a general provision that yields to the special provision of Section 24; this is an expedient to prevent tax avoidance and is an exception to the general rule that the income of a person should be assessed on that person. Finally, it was held that the dividends on the Kenya shares accrued as income of the settlement on which the trustees could be assessed at the standard rate; to the extent that it was thereafter paid to or for the benefit of the children and was deemed under Section 24 to be income of the settler, such income was not chargeable to tax under Section 2 because it was derived from the settlement whose *locus* was outside the territories (East Africa.)[56]

In *W.B. v. Commissioner of Income Tax*,[57] the appellant, who was a director of certain companies, had three children, each of whom in 1951 was a minor. At different times between 1945 and 1951 each of the children had acquired from the appellant or his wife shares in companies of which the appellant was a director. It was alleged that the purchase price for the shares was obtained by money lent to the children by the parents under an arrangement whereby the

55 [1965] E.A. 576, for facts see *supra*.

56 *ibid*. 580 applying *Archer Shee v. Baker* 11 T.C. 749 and *Commissioner of Income Tax v. P. co. Ltd* 1 E.A.T.C. 131 C.A. (Tanganyika). See also *F v. Commissioner of Income Tax* 1 E.A.T.C 36 (Uganda).

57 2 E.A.T. 32 (Uganda). See also F *v. Commissioner of Income Tax ibid*.

dividends on the shares were received by the parents in repayment of the loans. The shares were acquired at their nominal value and bonus shares were issued to the children as a result of their shareholdings. The children in 1951 obtained dividend income from the shares originally acquired and the bonus shares. The commissioner of Income Tax treated the dividend income of the children as the income of the appellant. The appellant appealed to the High Court on the ground that the purchase of the shares by the appellant's three children were not settlements within Section 24 of the E.A. Income Tax (Management) Act, 1956.[58] It was held firstly that the dividends on the shares were income originating from the appellant as the appellant directly or indirectly provided the funds for the purchase of the shares.[59] Second, that whenever a father provides funds, whether by way of gift or of loan, so as to enable his infant children to acquire shares, then there is *prima facie* evidence that the transaction is a settlement within the meaning of the Section [70 of ITA]. Third, that the appellant had failed to discharge the onus on him of proving that the shares were transferred for adequate consideration. Finally, that the transfers of the shares to the appellant's children were not genuine commercial transactions and that the transactions were settlements within the meaning of the Section [70 of ITA].

In *Kanjee Naranjee v Income Tax Commissioner*,[60] the appellant made a settlement to make provision for his existing and future grandsons. The appellant and his wife were trustees of the settlement and the property settled by the settlement consisted of shares in two companies. The operative clauses of the settlement provided that in no circumstances was the settler to retain or become entitled to any beneficial interest under the settlement and that the settlement "shall be absolutely irrevocable in all circumstances". Additionally, clause 10 thereof provided *inter alia* that the trustees might invest the trust monies with any firm or company regardless of the trustee(s) having any interest in such firm or company.

58 Equivalent to ITA, S.71(5).

59 See *ibid* S.70 (definition of settler) read together with S.71(5).

60 4 E.A.T.C. (Pt 1) 19; [1964] E.A 257 P.C. (Tanganyika).

In respect of the "year of income 1958" the appellant was personally assessed on the whole of the dividends received by the appellant and his wife as trustees of the settlement on the ground that such income had arisen "under a revocable settlement" within the meaning of Section 25 (2) of the Income Tax (Management) Act, 1958.[61]

The appellant appealed against the assessment and the judge in dismissing the appeal held that the settlement was a revocable settlement by virtue of the terms of Section 25 (4) (b)[62] of the Act, because according to the meaning and effect of Clause 10 of the settlement, the appellant was "able to have access by borrowing or otherwise" to the income or assets of the settlement. The judge construed the words, "is able to have access by borrowing or otherwise" to mean that there was no lawful bar to be found in or under the settlement to the passing of any of the settlement income to the appellant and concluded that the appellant was able to have access by borrowing or otherwise to the income or assets of the settlement because the trustees could have lent the trust monies to the appellant as a member of a firm had he in fact been such a member. The decision of the judge was affirmed by the Court of Appeal for East Africa. The appellant appealed to the Privy Council.

The Privy Council held, firstly, that during the year of income 1958, the appellant was a trustee of the settlement and, therefore, it was incompetent for trustees of the settlement to lend him personally any of the trust monies or income or to allow him to have access thereto or otherwise than in his capacity as trustee. Secondly, there was no evidence that the appellant was a partner in a firm which was within the category of those who could be said to have "the ability to have access" to the trust property, and even if the appellant had been a partner in such a firm, still it would in such circumstances have been to the firm as such that the possible lending would have been made and the access given. Third, the words "is able to have access by

61 Equivalent to ITA, S.70 (Definition of settler trust).

62 See *ibid*.

borrowing or otherwise" in Section 25 (4) (b)[63] of the E.A. Income Tax (Management) Act, 1958, in relation to a settler in a settlement, presuppose that the settler, if he falls into the contemplated category, as an individual some existing characteristic, some positive ability, and it is not enough to say that there must be in the settlement some bar or disqualification to his having access to any of the trust property. Fourth, the "access" which a settler must be able to have in order that a settlement is treated as revocable within the meaning of Section 25 must clearly be "access" otherwise than in his capacity as a trustee. Finally, that in respect of the tax year 1958, the appellant was not a person who could properly be described as under the terms of the settlement "…able to have access…" to any part of the trust property or its income.

3. Ineffective Disposition Under a Trust

In the case of an ineffective disposition, there is a resulting trust in favour of the settler with the result that the income under the disposition will be his in any event.

Thus in *Vandervell v. IRC*[64] Mr. Vandervell having formed a wish to give 150,000 Pounds to fund a chair at the royal college of Surgeons and having consulted his experts, decided by September, 1958 to make over to the college the 100,000 "A" shares in his manufacturing company, Vandervell Products Ltd. In November, 1958, he proposed to the college (and it accepted) the proposal that the College should grant an option to resell the shares to the Company, Vandervell Trustees Ltd for 5,000 Pounds.

It was explained in a letter of November 19, 1958, that Mr. Vandervell had decided to make 150,000 Pounds available to the College and that 145,000 Pounds (gross) would be paid by way of dividend on the shares in Vandervell Products Ltd; the balance of 5,000 Pounds to be paid when the option should be exercised. The

63 *ibid*.

64 [1967] 2 A.C 291. See also Bakibinga, *Law of Trusts in Nigeria (1989)* pp 36, 124, 232 and generally Chapter 7 on resulting trusts.

transaction was completed by transfer of the shares and the grant of the option on or about November 25, 1958.

The issue arose as to whether the grant of the option prevented Mr. Vandervell from having divested himself absolutely of the shares. Lord Wilberforce thus observed:

> …The conclusion, on the facts found, is simply that the option was vested in the trustee company as a trustee on trusts, not defined at the time, possibly to be defined later. But the equitable, or beneficial interest, cannot remain in the air: the consequence in law must be that it remains in the settler.

Chapter 20

Retirement and Pension Trusts

A. Introduction

Retirement and Pension arrangements have lately gained prominence after years of neglect since Uganda's political independence in 1962. A number of reasons have contributed to this tendency. First, after years when retirement and pension schemes were adversely af fected by inflation, devaluation of the Uganda Shilling (currency) and exemption of many large employers particularly from the National Social Security Fund (NSSF) Scheme, the macroeconomic policies of Government,[1] which have brought a measure of economic sta bility to the country, have resuscitated the viability, significance and utility of retirement and pension schemes for employees. Second, the major reforms introduced by Government since 1994[2] in relation to the value of a pension have revived interest by current and retired public employees in the pension as a retirement benefit. Third, the NSSF's initiative in investing workers' funds in real property[3] and stock[4] has also attracted interest.

In spite of the above reasons which are a positive indicator of public awareness about retirement schemes, such schemes are not clearly understood by most people including legal professionals and their intended beneficiaries.

The aim of this exposition is to explain the nature of retirement schemes in the context of Uganda, their link to the trust concept, the tax implications of such schemes and their practical operations.

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1 Bakibinga, D.J. *Commercial Law in a Liberalised Economy: The Case of Uganda*. (Makerere University Professorial Inaugural Lecture Delivered on 12 June 2002 at Faculty of Law, Makerere Univer sity).

2 See Pensions (Amendment) Statute No.4 of 1994.

3 For instance the

4 NSSF is a major shareholder in Uganda Clays Ltd and British American Tobacco Co.

B. Nature and Categories of Retirement Schemes

1. Definition

A retirement scheme is defined[5] as "a pension or provident fund established as a permanent fund maintained solely for either or both of the following purposes:

- The provision of benefits for members of the fund in the event of retirement; or
- The provision of benefits for dependants of members in the event of the death of the member.

There are basically three types of pension or retirement schemes namely:

- *State Pension;*
- *Personal Pension*, where an investment is normally made by an individual with an insurance company;
- *Occupational Pension Scheme*, normally organized by an employer to provide pensions and other benefits for the employees and their dependants upon leaving employment or death.[6]

2. Occupational Pension Scheme

At this stage it may be observed that occupational pension schemes take various forms. However, essentially the assets of such schemes are segregated or separated from those of the Employer/Company's normal operations and invested to provide pension benefits. It is in this respect that the trust device plays a significant part. It has, indeed, been observed[7] that one of the most important purposes for which trusts are employed is to provide pensions for retired persons and their dependants.

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5 Income Tax Act Cap 340, Ss.2.13.

6 See e.g. *Brooks v. Brooks* [1996] 1 A.C.375.

7 Parker & Mellows, *The Modern, Law of Trusts* (Sweet & Maxwell, London, 1998).p.441.

By way of clarification, a trust is defined[8] as a relationship which is recognized by equity and arises where property is vested in a person or persons known as trustees which those trustees are under a duty to hold for the benefit of other persons known as *cestuis que* trust or beneficiaries.

In relation to the occupational pension scheme, payments are made by an employer or company to trustees to be invested and in due course used for the provision of benefits for the employees.[9] As we shall shortly see such schemes may be either contributory in which case both employer and employee pay into the fund, or noncontributory, in which case the whole of the necessary funding is provided by the employer.[10]

3. State Pension

Many public sector schemes such as those for teachers and civil servants are established by legislation and are unfunded because there is no trust fund set aside to provide benefits.[11] The employee's security is based on the statute rather than the segregation or separation of assets. Each financial year, government budgets for pension payments.

The state pension is an example of *earnings related or benefits scheme*. The benefit is calculated by reference to the member's pensionable earnings for the period of pensionable service ending at or before the normal pensionable date or leaving service. Normally, there is a restriction on the number of years (eg.35) which qualify as pensionable service and not all earnings (e.g. bonus or allowance) are pensionable. The benefits are usually based on a fraction of the final salary for each year of pensionable service.

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8 Bakibinga, D.J. *Law of Trusts in Nigeria* (University of Illorin, Nigeria, 1989) p.18. See also Keeton, *Law of Trusts* (10th Ed) p.15, Hayton, D.J. *The Law of Trusts* (Sweet & Maxwell, London, 1998) p.3.

9 Parker & Mellows, *supra* n.6 op.442.

10 *ibid*.

11 See Pension Act Cap 286.

With particular reference to Uganda, persons employed by the Public, district and Education Service commissions are entitled to pension if they have serve an aggregate period of 10 years.[12] The pension is payable for a maximum of 15 years after retirement or decease of the entitled person.[13]

The retiring age is 60.[14] The amount of pension payable is 87% of the highest pensionable emolument drawn in the course of service under government.[15] Pensionable emolument includes salary, overseas addition, inducement pay and personal allowance but excludes duty allowance, house allowance, entertainment allowances or other emolument. "Pensionable office" is restricted to service in the District, Public and Education Service commissions and Urban authority. It does not include service in Government parastatals or corporations, which presumably should have their own schemes or are expected to utilize the NSSF.

4. Personal Pension/Use of Insurance

As observed, a personal pension can be created by an individual investing by way of payment of periodical sums known as premium to an insurance company. Under an occupational scheme, the trustees of the pension fund may also take out an insurance contract (policy) for each member which guarantees benefits corresponding to those promised under the scheme rules. It is notable that this is an investment through the medium of an insurance company with the trustees using the contributions to pay premiums. In this respect, the Insurance is the only significant asset of the scheme.

Where the sums payable by the insurer are sufficient at all times to cover all benefit, the scheme is said to be fully insured. In modern times, most schemes are run through insurers.[16]

12 *ibid*, S.1.

13 *ibid*, S.18(3).

14 Pension Act, Cap 286, S.12(1).

15 *ibid*, S.13(1).

16 An example is the Makerere University Deposit Administration Plan (DAP) which is run by the National Insurance Corporation.

5. The National Social Security fund (NSSF) Scheme

(a) Nature

The NSSF Scheme is an example of a *money purchase or contributory scheme.*

A contributory or money purchase scheme is one where the contributions are paid into the scheme by or on behalf of the member usually increased by an amount based on the investment return on those contributions. The contributions are fixed (normally as a percentage of a wage or salary) by the scheme and the benefits vary according to investment performance. The fund is either used to purchase an annuity with an Insurance Company or to provide a pension or a pension may be paid from the fund according to the member's account in the fund.

The NSSF Scheme is a Provident Fund created by the National Social Security Fund Act.[17] It replaced the Social Security Fund previously established in 1967.[18]

(b) Eligibility

A person eligible for the membership of the fund is one who is between 16 and 55 years of age.[19] This excludes an employee employed in excepted employment. This includes:[20]

- Persons excepted under an International Convention to which Uganda is a member;
- Employment by a University or College by virtue of which the employee is entitled to receive benefits under a superannuation Scheme appointed by the Minister;
- Employees of the Uganda police, Prisons Service. Army and Air Force;

17 Cap 222 Laws of Uganda (2000 Edn).

18 See Act No.21 of 1967.

19 NSSF Act, Cap 222, S.6.

20 *ibid*. First Schedule.

– Employees by virtue of which employees are eligible for pension benefits under the Pensions Act;
– Students on vocation employment;
– Employees under the age of 18 who is an apprentice or is undergoing full time education at a University, School or College;
– Recipient of less than 75% of the legal monthly minimum wage for full time employees;
– No-resident employee;
– Employee not employed in Uganda.

(c) Contributions

Fifteen Percent (15%) of the total wages of the employee should be paid to the NSSF.[21] Five percent (5%) of this is contributed from the wages,[22] while ten percent (10%) is contributed by the employer.[23]

As at 30 June, 2001, the active paying employers were 1920 while active members contributing to the fund were 103,861. The vigorous enforcement of compliance to increase coverage has contributed to the increased volume of contributions. Thus, the more contributions collected the more investments made by the NSSF and the larger the income received for meeting management costs and maintaining the value of member's accounts.[24]

d) Benefits

There are five categories of benefits available under the NSSF Scheme, namely:[25]

– Age benefit;
– Withdrawal benefit;

21 *ibid*; S.11(1) See also Internet Web NSSFContributory Scheme.
22 *ibid*; S.12(1).
23 *ibid*. S.13(1).
24 *Internet Web: NSSFSocial Security in Uganda.ht.26/09/02*.
25 NSSF Act, Cap 222, S.19(1).

– Invalidity benefit;
– Emigration benefit;
– Survivors benefit.

(i) Age Benefit

A member of the NSSF is entitled to the age benefit if they attain 50 years and has retired from regular employment or attains 55 years.[26]

(ii) Withdrawal Benefit

A withdrawal benefit may be paid if a person reaches 50 years and has not been employed under a contract of service for a period of one year immediately preceding the claim.[27]

(iii) Invalidity Benefit

A member of the NSSF is entitled to invalidity benefit if he is subject to physical or mental disability rendering him permanently incapacitated or is subject to permanent or mental incapacity rendering him permanently incapacitated and therefore unable to earn reasonable livelihood. Permanent total incapacity means that which renders a person unable to undertake employment which he was capable of before an accident or illness.[28]

(iv) Emigration Grant

A person who emigrates permanently from Uganda may be paid the balance of their account with NSSF.[29]

(v) Survivors Benefit

The survivors benefit is paid to dependent relatives of members of the fund. These include in order of priority:[30]

26 *ibid*, S.20(1).
27 *ibid*. S.21.
28 *ibid*. S.22(1).
29 *ibid*, S.23.
30 ibid.S.24.

– The wife, husband, son or daughter under the age of 18 or son and daughter who is above 18 and is wholly and substantially dependent upon the deceased. These take preference over the other categories of relatives.
– If the above are nonexistence, payment is made to the parent, brother or sister either to one or all of them
– If the above do not exist payment may be made to the grand parent, grand child or any other relatives prescribed by the Minister as belonging to a class of deceased's relatives, either to one or all of them.

Following the above payment, the NSSF account for the deceased member is closed.

(e) Proposed Reform of NSSF Scheme

(i) Transformation to Pension Scheme

Since the NSSF is a provident Fund, the benefits payable to members comprise a refund of accumulated savings over time plus interest. It is felt that this arrangement has proved to be inadequate in providing meaningful social security to its members.[31] Consequently, transformation to a social insurance pension scheme of the NSSF is being considered. Government approved the new proposed scheme in 1995 and the transformation plans are at an advanced stage with the principles for a bill to establish the new scheme in place and a cabinet memorandum has been drafted[32]

(ii) Liberalisation of social Security and Pension Sector

Related to the above general transformation are calls[33] for the liberalization of the provision of social security and pensions in line with the general government policy of economic liberalization.[34]

31 *Internet Web: NSSF Social Security in Uganda*, p.2 (26/09/02).

32 *Internet Web: NSSF Contributory Scheme.*

33 Consult Ssemanda, A.R. "Social Security & Pensions Sector Reform: The Position of the Federation of Uganda Employers" (January 2002).

34 See Bakibinga, *Inaugural Lecture, Supra* n.1, pp5977.

The calls for the liberalization of the social Security Sector are premised on the following factors:[35]

- NSSF is one of the largest player in the social security and pension sector;
- NSSF has a wide spectrum of stakeholders including its contributors (Employers and Workers); government as the custodian of social responsibility for citizens and a major employer; insurance sector which manage the funds of contributors, investors who depend on mobilized savings, beneficiaries (potential and actual) who include workers and their dependents and indirect beneficiaries including the public who depend on direct beneficiaries and others who obtain benefits arising from the accumulated savings, resultant investments and national economic growth:
- Given the limitations of NSSF where contribution is restricted to employers of five or more employees many reputable employers operate parallel schemes usually with insurance companies on the side where they pay an additional 10% contribution;
- The NSSF is only a Provident Fund offering limited benefits leading employers to incur other social costs including provision for workers' compensation schemes (120%); redundancy pay, maternity gratuities bereavement and medical costs (510% of wages) leading to a total social cost bill to employers of between 25% and 35% of the wage bill.

It has therefore, been proposed that:[36]

- the social security (and Pensions) sector be opened up to as many players as possible to enable employers and employees to choose where to invest to meet their social security needs, thereby reducing the cost of providing social security cover and widening the scope of benefits offered to the beneficiaries.

35 Ssemanda, *supra* n.33, pp23.

36 *ibid* pp34. See also Ojulu, E. "Uganda Insurers want Stake in Pension Scheme" *The East African* Newspaper, February 14, 2000.

- a mandatory employee's' contribution not exceeding 10% of the employee's wage remains a legal requirement
- employees could consider whether to increase their mandatory savings from 5% to 10%.
- NSSF urgently consider widening the scope of its social security cover to include workers' compensation, maternity, redundancy and sickness benefits and offer more acceptable level of returns to the beneficiaries, including benefits that are prompt and safeguarded against loss of value of the contributors' fund.
- A strong regulatory framework be put in place to ensure fair play and compliance.

Specifically on the role of the NSSF in a liberalized economy while recognizing certain weaknesses shown by NSSF and the probable effects on it arising from a "free for all" social security sector as well as the commercial nature of emerging operators following the opening up of the sector, it was proposed that:[37]

- NSSF should not be left to die and should be allowed transitory protection to enable it become more competitive;
- NSSF should be permitted to continue to receive a mandatory social security contribution but at a reduced rate of only 5% to 7.5%, with the balance of the mandatory contribution being invested with another operator of choice, including NSSF;
- NSSF should not be privatized since it is not a public institution;
- Government should decrease its involvement in NSSF which is perceived to be stifling its operation and rather increase the participation of workers and employers, to give the NSSF more entrepreneurial and private sector initiative through decreasing Government Board appointees and increasing those elected by employers and workers and restricting the role of the Minister to appointing the Board leaving the management and appointment of officers to the Board.

37 *ibid*.pp45.

(iii) Structural Reform

There have been suggestions to split the roles of social security and pension operators into: collection, Investment and Enforcement. Given that it is envisaged that there will be several operators following the opening up of the sector, this is logical.[38] However, the separation of funds collection from funds management is unacceptable on three grounds.[39] First, it results in many role duplication leading to overall operating costs and reduced returns to beneficiaries. Second, the split would detach ownership of liability to contributors from those managing their funds. Third, the separation may reduce the motivation of each unit to maximize collection or to pursue defaulters. It is, therefore recommended that:[40]

– the regulator should have the power to enforce the legal provisions of social security;
– since NSSF would retain a mandatory contribution, it should retain an enforcement role in addition to the regulator;
– the role of funds collection and investment should be left as core functions to the social security operators.

(iv) Regulation

It is suggested that in order to protect the operator and the contributors, a competent, independent operator should regulate the free market. This role should not be assigned to the Capital Market Authority, as some have suggested, since it may lead to a conflict of interest in a situation where the social security and pensions sector becomes a major player in the 'capital markets'.[41] Two alternative regulators are suggested. The Insurance commission or Bank of Uganda or better still a social Security and Pensions own Regulatory Authority given the envisaged expansion of the sector through the incorporation of civil servants and those in informal employment.

38 *ibid*. p.5.
39 *ibid*.
40 *ibid*.
41 *ibid* p.6.

C. Retirement and Pension Schemes Compared with Ordinary Trusts

As already observed,[42] the trust has been the major device used recently to provide pensions for retired persons. However, it is important to examine the retirement or pension trust to determine whether it is truly a specie of the conventional trust. Four aspects will be considered in this respect, namely voluntariness in a trust, relationship between a trust and the employment contract, special treatment of retirement trust beneficiaries and the general picture.

1. The Concept of Voluntariness

In the traditional or family trust, the constitution of a trust is not based on contract or consent involving the beneficiary and the settler. Rather, it is a voluntary arrangement whereby the settler (owner of assets or property) transfers his property to a trustee with instructions to utilize if for the benefit of named beneficiaries.

In contrast, pension trust beneficiaries are not volunteers because pension benefits are a form of deferred or postponed remuneration for their services and from their contributions (if any) to the fund. Thus in *Brooks v Brooks*,[43] it was held that the husband, who was the employee rather than the employer was regarded as the settler of the marriage settlement constituted by the pension scheme. Similarly in *Mettoy Pension Trustee Ltd. v. Evans*,[44] the scheme contained a power of appointment in favour of the members. Any surplus not so appointed was to go to the employer, which was in liquidation. The fact that the members were not volunteers was critical in classifying the power as *fiduciary* rather than personal. By way of clarity a *fiduciary* power is one which must be exercised for the benefit of the beneficiaries. The court concluded that had it been only a *personal*, that is, a bare power, the unfortunate conclusion

42 *Supra*, n.t6 and text thereof.

43 [1996] 1 A.C. 375.

44 [1990] 1. W.L.R. 1587. See also *Thrells Ltd. v Lomas* [1993] 1 W.L.R.456; In *Re: Markin (William) & Sons Ltd.* [1993] B.C. 453; *British Coal Superannuation Scheme Trustee Ltd.* [1995] 1 All E.R. 912, 925.

would have been that the entire surplus would have gone to the creditors. If this happened, the power would have been of illusory or fictitious benefit to the members in that the surplus would go to meet the company's creditors, claims. The classification of a power as fiduciary meant that it would not be released.

In another case, *Re Courage Group's Pension Schemes*,[45] fiduciary powers were vested in a committee set up to manage a pension scheme. It was held that even if the existing members of the Committee could release, fetter or agree to exercise their powers (which aspect was not decided), they could not deprive their successors of the right to exercise their powers. Furthermore, in *Davis v. Richards and Wallington Industries Ltd,*[46] there were doubts whether the definitive or final deed had been validly executed. This deed provided that any surplus should belong to the employers after increasing the personal benefits to the statutory maximum. If the deed was invalid, the trust would be incompletely constituted. However, since the beneficiaries were not volunteers, they could compel the execution of a valid deed and their rights (by applying the equitable maxim that equity regards as done that which ought to be done) were as if such deed had already been executed. In actual fact the deed was held valid.

2. Trust and Employment Contract

In a pension trust, the trustee/beneficiary relationship exists in parallel with the contractual employer/employee relationship. Thus in *Imperial Group Pension Trust Ltd.v Imperial Tobacco company Ltd*,[47] the company had power under the Scheme to consent to an increase in benefits. The issue arose as to whether the Company was under a duty to consider the interests of members when granting or withholding consent. It was held firstly, that there existed the implied contractual obligation of good faith between the employer and employee. This was that the employer would not act in a

45 [1987] 1 W.L.R. 495; Summary from Hanbury & Martin, *Modern Equity* (15th Ed 1997).p.

46 [1990] 1 W.L.R. 1511 *ibid*, p.

47 [1991] 1. W.L.R. 589.

manner calculated or likely to destroy or damage the relationship of confidence and trust between the employer and employee. Second, this obligation applied to the exercise of the employer's rights under the pension scheme just as it, applied to its other rights and powers. Third, the power to give or withhold consent was, therefore, subject to a restriction that it could not be validly exercised in breach of the obligation of good faith. It has indeed been said[48] that the pension trust lies at the interface between trust and employment law.

3. Special Treatment of Pension Trust Beneficiaries

Since pension trust beneficiaries, are not volunteers, the law may allow them to be more favourably treated than other beneficiaries in the matter of legal costs. In *McDonald v. Horn,*[49] it was held that, contrary to the usual rule, pension beneficiaries may obtain a "preemptive costs order" where there are serious allegations of impropriety and breach of trust against employers and trustees. Furthermore, the fact that the beneficiaries had given consideration made the action analogous or similar to an action by a Minority shareholder on behalf of a company, where such an order could be made.[50]

4. General Position

The general view, despite the above special features of the pension trust, is that ordinary principles of trust apply to pension trusts as to other trusts. Thus in *Wilson v. Law Debenture Trust corp. PLC*,[51] it was held that the principles of *Re Londondery's Settlement*,[52] whereby trustees are not obliged to give reasons for the exercise of their discretion to the beneficiaries, applied equally to pension trusts.[53] It

48 Vinelott, J.Vol. 18 *Trust Law International* 35 (1994).

49 [1995] 1 A11E.R. 961.

50 See also *Wallesteiner v Moir* (No.2) [1975] Q.B. 373.

51 [1995] 2 A11E.R. 337.

52 [1965]Ch. 198.

53 For contrary view see Lord BrowneWilkinson (1992) Vol.6 *Trust Law International* 119, 125, Schaffer, (1994) Vol.8 *Trust Law International* 27 and 118.

follows that although the court must have regard to the fact that the beneficiaries are not volunteers, when constructing the trust deed, effect must be given to settled principles of trust law in determining the effect of the deed on its true construction.

D. Tax Considerations

This section considers three types of social security schemes in relation to taxation. These are public pensions, the NSSF and Insurance.

1. Pensions

Pensions are exempted from taxation.[54] However, the person paying the pension (normally the employer) is not allowed to deduct the payment for tax purposes.[55] This means that the pension is taxed indirectly in the hands of the person making the payment and is an exception to the general rule that expenditures and losses incurred by a person or business in the course of business are allowable deductions for tax purposes.[56]

2. Contribution to Resident Retirement Fund (e.g. NSSF)

A lump sum payment made by a resident retirement fund to a member of the fund or a dependant of a member of the fund[57] is exempted from income tax.[58] However, the person paying the contribution to a retirement fund either for the benefit of the person paying or for the benefit of any other person (i.e. worker or employer) is not allowed to deduct the payment for tax purposes.[59] Similar to the pensions' position, this is an exception to the general

54 Constitution of Uganda, 1995, Article 254 (2); Income Tax Act, Cap 340, S.21(1)(n).

55 Income Tax Act Cap 340, S.22 (2)(K).

56 *ibid*. S.22(1).

57 See NSSF Act, Cap 222, S.19 discussed at text notes 2530 *Supra*.

58 Income Tax Act, Cap 340, S.21(1)(o) For definition of a resident retirement fund, See ITA, S. 13.

59 *ibid*. S.22 (2)(1).

rule that losses and expenditures incurred in the production of income are allowable deductions for taxation purposes.[60] Effectively, the contributions are indirectly taxed in the hands of the contributor. In practical terms, the contributions to NSSF by the worker (5% of wages) and employer (10% of wages) cannot be deducted from the worker's pay or employer's gross income before taxation.

3. Insurance proceeds Under a Life Policy

The proceeds of a life insurance policy (contract) paid by a person carrying on life insurance businesses are exempted from income tax.[61] However, the premium or similar payment to a person carrying on life insurance business on the life of the person making the premium or on the life of some other person is not deductible for tax purposes.[62] Similar to pensions and retirement funds, the premiums are indirectly taxed in the hands of the person paying them.

4. Proposals on Taxation of Social Security & Pension Sector

It has been proposed[63] that with the liberalization of the social security sector, encouragement should be extended to the growth of the sector which includes tax incentives. It is argued that "the benefits of a rapid growth of the sector will rapidly recoup any taxation benefits foregone by providing liberal taxation policy". It is, therefore, recommended that

- Social security contributions be exempted from taxation;
- Social security benefits be exempted from taxation;
- Social security operators' incomes be subjected to normal taxation.

60 *ibid*. S.22 (1).

61 *ibid*, S.21(1)(P).

62 i*bid*. S.22 (2)(j).

63 Ssemanda, *Supra* n.33,p.6.

It is significant that the disallowance of contributions to pension, retirement funds and insurance was motivated by an International Monetary Fund Report,[64] which was concerned about double taxation reliefs under the previous law. The proposal by the Employers[65] obviously is premised on investment incentives. The second and third proposal by the employers are already recognized under the law.[66]

E. Practical Operation of NSSF

1. Requirement on Contributions

As already discussed,[67] the employer is obliged to deduct 5% from the eligible employee's gross wage/salary and add 10% of the employees gross salary to make a standard contribution of 15%. This is done monthly. The employer is required to remit to the nearest NSSF office all the deducted contributions by the 15th day of the following months. Late payments attract a penalty of 10% of the total expected contributions.

2. Targets

Each financial year, the NSSF compliance Department sets itself targets of contributions to be collected in that particular year. During the Financial Year, 2001/2002, the NSSF had a target of collecting shs.52. billion in contributions.

3. Remittance of Contributions

Payments of contributions must be made by crossed cheques and bank drafts written in the full names of "National Social Security Fund". Payment by cash is discouraged. All the cheques/bank drafts

64 IMF, *Uganda: A Programme for the Reform of Income Tax and Taxation of Minerals* (1996).

65 *Supra* n.63.

66 See discussion at notes 54 to 62 *supra.*

67 See text at *Supra* notes 2123. See also *Internet Web: NSSF-Contributory Scheme.*

must be accompanied by SF58 schedules which should indicate the full names of the members, the members' social security numbers, the gross salary paid to the member and the 15% standard contribution of the member. The information is important in facilitating the updating of members' accounts and issuing of statements of account.

4. Accountability

The NSSF is accountable to the members and the accountability is effected by issuing employers/members' statements of account. Employers' statements are issued twice a year while those of members are issued once a year.

F. Conclusion

This chapter has sought to analyse the nature of retirement and pension schemes in Uganda, their link to the trust concept, the tax implications of such schemes and the practical aspects of the NSSF.

It has been found that there are three types of retirement schemes namely: The occupational pension scheme, the state pension and the personal scheme normally operated through the insurance arrangement. The occupational pension scheme is normally operated by an employer through the separation of the assets of the scheme from those required by the employer's normal operations. Such a scheme can be contributory as illustrated by the NSSF or non-contributory in the sense that all necessary funding is met by the employer. The state pension scheme is unfunded in the sense that there is no regular fund set aside for its operation. Rather the state budgets for pensions to be paid to eligible employees annually. The state pension is *earnings related or benefits scheme* based on a member's pensionable earnings. The NSSF is a *money purchase or contributory scheme* which provides five types of benefits.

There are proposals to reform the NSSF scheme by transforming it into a pension scheme, opening it up to other operators through liberalization, restructuring its operations and regulation as well as

changing its tax aspects in order to create incentives for investors in the sector by permitting contributions to the scheme to be tax deductible.

The chapter has also explained the linkage between retirement schemes and the trust concept relative to voluntariness, the employment contract and the unique treatment of pension trust beneficiaries relative to ordinary trust beneficiaries

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