

Title	Half-secret trusts in England and Ireland
Authors	Mee, John
Publication date	1992-05
Original Citation	Mee, J. (1992) 'Half-Secret Trusts in England and Ireland', The Conveyancer and Property Lawyer, May/June, pp. 202-206
Type of publication	Article (peer-reviewed)
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Download date	2026-08-21 07:57:12
Item downloaded from	https://hdl.handle.net/10468/15786

Half-Secret Trusts in England and Ireland

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If all you know about the Scottish Law of Contracts is that in Scotland any seriously meant promise is binding, then quite possibly all you know about the Irish Law of Trusts is that in Ireland the acceptance of a half-secret trust may validly take place after the execution of the will. This note confines itself to the second of those over-simplifications.¹

It is now more than forty years since Professor Sheridan first drew attention to the glorious footnote which the Irish legal system had carved out for itself in the secret trust chapters of the English textbooks.² In more recent years, some Irish commentators have placed this scintilla of international recognition in doubt, pointing out that the so-called rule was based on mere obiter dicta. It is even suggested in a leading Irish textbook that the Irish Courts should therefore take the opportunity to embrace the almost universally reviled distinction drawn by English law between fully secret trusts (where acceptance after the will is valid, if it occurs before the death of the testator) and half-secret trusts (where acceptance must take place before the will).³

¹ On the point of Scottish law, see e.g. Walker *The Law of Contracts and Related Obligations in Scotland*, (2nd ed., 1985) at p.17.

² “English and Irish Secret Trusts”, (1951) 67 L.Q.R. 314.

³ See Keane, *The Law of Equity and Trusts in the Republic of Ireland* (1988) at p.95, arguing that there are “powerful policy considerations for rejecting a totally logical approach in this area.”

Against this background, the recent unreported decision of the Irish High Court in *Re Prendiville deceased, Prendiville v. Prendiville*⁴ will be of interest to English lawyers for two reasons. First, it confirms, in a case where the point arose for decision, that Irish law rejects “the prior acceptance rule” favoured in the English cases. This should be of some comfort to those who advocate a change in the relevant English law. Second, the judgment of Barron J. contains a startlingly unorthodox analysis of the English case-law. Although, with all due respect, this analysis is seriously flawed, it does raise an interesting question in relation to the meaning of a dictum of Viscount Sumner in *Blackwell v. Blackwell*.⁵

The testator in *Re Prendiville*, Joseph Prendiville, left all his property to his wife, Mary “to be used by her according to my wishes, as she has been advised”. Before his death the testator had drawn up a second document containing a set of instructions which outlined the manner in which Mary was to deal with the property in her will.⁶ These instructions were accepted by Mary during the testator’s lifetime but it was unclear whether this had taken place before or after the execution of the will.⁷ Mary died intestate and a beneficiary under the terms of the testator’s instructions sought to enforce the half-secret trust.⁸ Counsel for the next-of-kin argued, on the basis of the English cases of *Re Keen*⁹ and *Re Bateman’s Will*

4 Transcript of the unreported judgment of Barron J., 5th December, 1990.

5 [1929] A.C. 318.

6 The fully secret trust in *Ottoway v. Norman* [1972] Ch. 698 took a similar form. Oakley (*Constructive Trusts* (2nd ed., 1987) at p.139) points out that, in the absence of a contract between the parties, the doctrine of mutual wills is not applicable to such cases.

7 The judgment of Barron J. is regrettably vague on this important point. On the view of the law taken by the learned judge, it was immaterial at what point during the testator’s lifetime the acceptance took place. His discussion of the law proceeds on the basis that acceptance *might* have taken place after the will.

8 It was accepted by both sides that, for the most part, the testator’s instructions were too obscure to be enforceable. However, there was an unambiguous provision requiring that the testator’s son, Billy, be given an option to purchase the family home. It was this provision which ultimately was enforced under the doctrine of half-secret trusts. It is arguable that it was not permissible to sever and enforce one isolated provision of the testator’s instructions. He clearly intended benefits for his other children and relations which would have balanced the one conferred on Billy. Given that the greater part of his overall scheme could not be carried out, perhaps it would have been more just to have allowed it to fail entirely.

9 [1937] Ch. 236.

Trusts,¹⁰ that an acceptance after the execution of the will was invalid and that therefore there was a resulting trust in their favour.

Barron J. began his discussion of the law with a review of the Irish authorities, *Re King's Estate*¹¹ and *Re Browne*.¹² Without discussing the issues of policy, he accepted a series of propositions, laid down in the former case and approved in latter, as representing Irish law on the matter. On this basis, he was satisfied that there was no difference in the rules applicable to fully and half-secret trusts. Had the learned judge let the matter rest there, pausing only to express his disagreement with the English cases, his judgment would have been entirely laudable.

Unfortunately, Barron J. embarked on an ill-advised attempt to demonstrate that, far from opposing his conclusion, the English cases in fact supported it. His analysis began on a relatively promising note, with an interesting interpretation of the following well-known dictum of Viscount Sumner in *Blackwell v. Blackwell*:¹³

A testator cannot reserve to himself a power of making future unwitnessed dispositions by merely naming a trustee and leaving the purposes of the trust to be supplied afterwards, nor can a legatee give testamentary validity to an unexecuted codicil by accepting an indefinite trust, never communicated to him in the testator's lifetime

This dictum, which echoes a similar passage in *Johnson v. Ball*¹⁴, is generally seen as one of the corner-stones of the prior acceptance rule.¹⁵ However Barron J. came to this passage after an examination of the Irish cases which, while rejecting the English requirement, nonetheless contain statements of principle couched in almost identical language to that employed in the two English cases.¹⁶ It appears that in the

10 [1970] 1 W.L.R. 1463.

11 (1881) 21 L.R. Ir. 273.

12 [1944] I.R. 90.

13 [1929] A.C. 318, 339.

14 (1851) De G. & S. 85, 91, per Parker V.C..

15 See e.g. Martin, *Hanbury and Maudsley: Modern Equity* (13th ed., 1989) at pp. 153-4 and Holdsworth, "Secret Trusts", [1937] 53 L.Q.R. 501, 504.

16 In *Re King's Estate* (1881) 21 L.R. Ir. 273, Monroe J.'s first proposition was that "A testator cannot reserve to himself the right of declaring trusts by an instrument informally executed subsequent to the execution of his will. This would be to repeal the statute of wills." (Ibid, 277). See also *Riordan v. Banon* (1876) Ir. 10 Eq. 469, 477 per Chatterton V.C..

Irish cases such dicta merely express the general principle that there must be acceptance by the secret or half-secret trustee and that such acceptance must take place within the lifetime of the testator. It is arguable that Viscount Sumner also intended to express only this general rule, without necessarily deriving from it the corollary of the prior acceptance rule.¹⁷ This argument is strengthened by the fact that two of the four cases cited by Viscount Sumner in support of the observations under discussion were *Johnson v. Ball*¹⁸ and the Irish case of *Riordan v. Banon*,¹⁹ which agree on the general principle but are in direct conflict as to whether that principle requires a distinction to be drawn between half- and fully secret trusts in relation to the time of acceptance. Finally, it is difficult to reconcile the conventional interpretation of Viscount Sumner's remarks with the general tenor of his judgment.²⁰ In view of these arguments, it was not unreasonable for Barron J. to interpret Viscount Sumner's dictum in the spirit of the Irish cases.

Unfortunately the learned Irish judge appears to have been fortified in his conclusion by a lack of awareness of any competing interpretation. His resulting failure to appreciate that the judgment in *Re Keen*²¹ is premised on a different understanding of the dictum in question led Barron J. to miss entirely one of Lord Wright M.R.'s two grounds for decision in that case. Barron J. asserted that there was "nothing" in the judgment in *Re Keen* to indicate that communication subsequent to the will was unacceptable and explained that case as turning entirely on the fact that the communication which took place was inconsistent with the express wording of the will.²²

17 This interpretation stresses that the testator cannot create a trust by "merely naming" a trustee. As Viscount Sumner noted almost immediately after the passage under discussion: "It is communication of the purpose to the legatee, *coupled with acquiescence or promise on his part*, that removes the matter from the provisions of the Wills Act and brings it within the law of trusts" (Ibid, 339. Emphasis added).

18 (1851) De. G. & S. 85.

19 (1876) Ir. 10 Eq. 469.

20 This was pointed out by Holdsworth half a century ago: "Secret Trusts", [1937] 53 L.Q.R. 501, 504.

21 [1937] Ch. 236.

22 At p. 10 of the unreported transcript. With all due respect, Barron J.'s reasoning on this point is almost as difficult to fathom as it is to accept. Martin (*Hanbury and Maudsley: Modern Equity* (13th

What is even more remarkable is that, having treated the inconsistency point as the sole basis for the decision in *Re Keen*,²³ the learned judge ignored that issue as it related to the facts before him. It will be recalled that the will in *Re Prendiville* required the wife to deal with the property “as she has been advised”, so that there would have been an inconsistency if communication had taken place after the execution of the will. Yet, without advertent to this question, Barron J. felt able to conclude that it was immaterial whether the communication and acceptance of the instructions had taken place before or after the execution of the will.

It is understood that the decision in *Re Prendiville*²⁴ is under appeal to the Irish Supreme Court. It is hoped that the Supreme Court will uphold the High Court’s rejection of the prior acceptance rule but will accompany its decision with reasoning which will be of more persuasive value to an English court seeking to discard that unsatisfactory rule.²⁵

There also appears to be an opportunity for Irish law to expand into a neighbouring footnote. The absolute rule against inconsistency between the express requirements of the will and the actual time of communication has been criticised less than the prior acceptance rule, yet it appears to be founded on the same unsatisfactory reasoning. Since the doctrine of half-secret trusts operates *dehors* the will, in the

ed., 1989) at p.154) mentions the different argument that, despite Lord Wright M.R.’s views, the true ratio of *Re Keen*, supra, might be confined to the narrow inconsistency point.

23 Supra. *Re Keen* was followed in *Re Bateman’s Will Trusts* [1970] 1 W.L.R. 1463, where Pennycuik V.C. accepted without argument that a half-secret trust could not be upheld if future communication of the terms of the trust was contemplated in the will. This case was distinguished by Barron J. (at p.10 of the unreported transcript) as merely establishing “if it were necessary to do so, that where communication and acceptance of the testator’s wishes during his lifetime cannot be established, then such wishes can only be validly indicated by a testamentary writing admitted to Probate.” This explanation of the case is presumably based on the fact that the evidence in *Re Bateman’s Will Trusts* did not preclude the possibility that a sealed letter, which was relied upon to establish communication, might not have been received by the trustees until after the death of the testator.

24 Supra.

25 Space does not permit a detailed rehearsal of the arguments against the rule. It should be mentioned, however, that since the relevant legislation (s.9 of the Wills Act, 1837 as amended by s. 17 of the Administration of Justice Act, 1982 and, in Ireland, s.78 of the Succession Act, 1965) requires simply that wills be in writing and be properly signed and witnessed, “future” unwitnessed dispositions are no more objectionable than “prior” unwitnessed dispositions. The attempt to justify a distinction on the basis of the doctrine of incorporation by reference fails for two reasons. First, a document must be in writing to be incorporated into a will, but communication of the terms of a half-secret trust may be oral; and second, acceptance by the trustee is central to half-secret trusts but irrelevant to the doctrine of incorporation by reference.

realm of broad equitable principles, those broad principles should govern, on a case by case basis, the determination of the significance of any inconsistency. If the logic of the prior acceptance rule is rejected, inconsistency is relevant only if it indicates the possibility that the terms accepted do not actually represent the testator's intention at the time of death. In a case where a trustee has accepted certain terms but a subsequent will refers only to a future communication, the inference, in the absence of any other explanation, may be that the testator has changed his mind about those who are to benefit. In such circumstances, it might not be appropriate to enforce the trust as originally accepted. However, on facts such as those in *Re Keen*,²⁶ where the inconsistency appears to have been attributable to inadvertence,²⁷ it would seem unnecessary and unjust to strike down the trust.²⁸ It is hoped that the Supreme Court will provide a lead for the English courts and hold that an inconsistency with the terms of the will will not automatically defeat a half-secret trust.²⁹

[Note: Subsequent to the publication of this note, the Supreme Court appeal in *Re Prendiville* was abandoned.]

²⁶ Supra.

²⁷ The clause in question had been transposed from an earlier will without making the adjustments necessary for it to cover communication prior to the execution of the new will.

²⁸ Cases such as *Re Prendiville* itself, where the will envisages prior communication, seem to create less difficulty. Although a communication to the trustee after the will would not be consistent with the terms of the will, it would normally represent the most recent expression of the testator's intention.

²⁹ Bell, (*Modern Law of Personal Property in England and Ireland* (1989) at p.431), notes that the consistency problem "does not appear to have troubled the Irish Courts." He relies on *O'Brien v. Condon* [1905] 1 I.R. 51 as "evidence of the non-existence of the rule [against inconsistency] in Ireland." In that case, a fully secret trust was enforced notwithstanding the express terms of the will which allowed the trustee to deal with the property "as he thinks fit". This is arguably a somewhat different issue than the one which arises in relation to half-secret trusts, but the case seems to provide general support for the approach suggested in the text.