List of Authors/Editors/Chairmen of Commissions referred to in the text/notes

1	2
Hailsham of St. Marylebone, Lord (Editor, *Halsbury's Laws of England*)	26 (91), 105 (13)
Hayton, David H.	92 (27)
Hidayatullah, M.	151 (79)
Ironside, D.J.	93 (38)
Jantscher, Gerald R.	92 (22), 93 (37)
Keeton, G.W.	18 (31), 92 (25), AN 4 (39)
Kitchen, Harry M.	92 (28), 195 (3)
Lambe, Hugh B.	AN 8 (15)
Latife, Daniel	195 (2)
Lovell	92 (25)
Mahmood, Tahir	24 (76), 25 (82)
Manderson, Herschel	93 (36)
McClean, A.J.	AN 3 (68)
Meade, J.E.	81, 90 (1), 169 (8) 170 (11)
Mellows, Anthony R.	92 (26)
Mukherjee, B.K.	27 (93)
Mulla, Sir Dinsha	14 (2), 25 (79), 151 (78), 151 (79)
Parker, David B.	92 (26)
Parker, Lee S.	AN 8 (15)
Pechman, Joseph A.	AN 10 (6)
Peffer, H.W.T.	33 (40)
Pettit, Philip H.	18 (31)
Rashid, S. Khalid	27 (78), 195 (2)
Rembar, Charles	AN 10 (6)
Riddall, J.G.	AN 10 (6)
Rudick, Harry	196 (5)
Sander, Frank E.A.	AN 10 (6)
Sandford, C.T.	93 (38)
Sheridan, L.A.	18 (31), 92 (25), AN 4 (39)

1	2
Shultz, Wilharn J.	92 (22)
Sommerfelt, Ray M.	93 (30)
Taylor, Eleanor K.	18 (36), 93 (34)
Thomas, G.W.	190 (2), 191 (8)
Thompson, Lawrence E.	191 (6)
Underhill, A.	92 (2)
Wanchoo, K.N.	145 (18)
Westfall, David	AN 10 (6)
Wheatcroft, G.S.A.	83, 190 (6)
Willie, J.R.M.	93 (38)

Additional Notes

Ch. (Note):

1(1) For the extent to which the trust concept existed before the Code of 1882, the Statement of Objects and Reasons accompanying the legislation may also be seen. The draftsman of the Indian Trusts Act was Whitley Stokes who was Law Member of the Governor-General's Council at that time.

There has been little amending legislation since the Act came into force. The Law Commission has made the following observation in its Seventeenth Report, which was limited to private trusts (1961) : "The Trusts Act has proved to be a very successful piece of legislation. It has stood the test of time. Its provisions are remarkable alike for lucidity and conciseness. There have been practically very few difficulties in the interpretation of the Act. This is as much due to the skilled draftsmanship of Whitley Stokes as to the fact that the rules of the English law of trusts were well-developed by the time of the drafting of the Act." However, the English law on trusts has itself been undergoing changes. Recent English legislation includes the Trustee Act (1925), Variation of Trusts Act (1958), Administration of Estates Act (1925) and the Settled Land Act (1925). The following are some of the statutes other than the Indian Trusts Act which affect the law of trusts in India—The Indian Trustee Act, XXVII of 1866; The Specific Relief Act, XLVII of 1963; The Limitation Act, XI of 1980; The Limitation Act, XXXVI of 1963; the Official Trustee Act, II of 1913; the Official Trustees (Amendment) Act, XLVIII of 1964; the

Transfer of Property Act, IV of 1882 (sections 10 and 18); the Indian Succession Act, XXXIX of 1925 (sections 112-118); the Penal Code (sections 405-9); Trustees' and Mortgagees' Powers Act, XXVIII of 1866; Specific Relief Act, I of 1877 (which contains a definition of a trust in section 3, with illustrations appended to it).

1(9) For a case of "dedication" of property to an irrevocable trust without its actual divestiture, see Peerchand Phoolchand v CIT, Special Leave Petition No. 8608 of 1980, dismissed by the SC on 4/4/83 (1983) 142 ITR 3 (Statutes).

1(15) If the class of objects is conceptually uncertain, the trustee cannot exercise the power of selection. If the problem is evidential uncertainty, there may be difficulty in the exercise of the power but the power itself is not invalid. The difference between the two situations can be illustrated by contrasting "friends" with "first cousins". It may not be possible to find out all the friends of a settlor or testator but first cousins are ascertainable with less difficulty. See R.P. Austin, "Discretionary Trusts : Conceptual Uncertainty and Practical Sense", *The Sidney Law Review*, Vol. IX, no. 1, January 1980.

1(40) If a person has the discretion to operate an alleged trust as he likes he cannot be taken to be a trustee known to the law : Advocate General v Yusuf R.E. Ibrahim, AIR 1929 Bom 338; 84 IC 759.

1(45) Sec. 34 of the Indian Trusts Act resembles sec. 57 of the English Trustee Act, 1925. For the court's powers under section 34, see Official Trustee, West Bengal v Sachindra Nath Chatterjee AIR 1969 SC 823, which has followed the decision of the HL in Chapman v Chapman (1954) AC 429.

1(57) The fact that the trustee has claimed that the trust is a private trust will not disentitle the trustee

to the benefit of tax exemption if properties are clearly held under a trust for religious or charitable purposes : Velambal Ammal v Agl. ITO (1963) 47 ITR 558 (Mad).

1(58) A trust may ordinarily be taken to be private unless proved to be public. If somebody claims that his institution is private and the Charity Commissioner believes that it is public, it is for the latter to prove that it is public : Martand Pandharinath Harkari v Charity Commissioner 1963, Bom LR 274.

1(66), 1(70), 1(73) A society which is predominantly political in its objects will not be eligible for tax exemption in respect of any part of its income merely because some of its objects are charitable. For tax exemption, either all the objects of a society/trust should be charitable or an identifiable part of its income should be specifically applicable for charitable purposes : CIT v All India Hindu Mahasabha (1983) 140 ITR (Del).

1(69) In the UK, a trust for making spelling simpler cannot be classified as a trust which will be beneficial to the community : Trustees of Sir G. B. Hunter (1922) "C" Trust v IR (1929) 14 TC 427. A trust to enrol voluntary workers for carrying on essential public services in the event of strikes and public lock-outs exists for political action and not for charitable purposes : Trustees for the Roll of Voluntary Workers v IR (1941) 24 TC 320.

1(72) "Debuttar" is derived from the Sanskrit word "devatra". When the property dedicated to a deity is large, and the religious ceremonies to be performed are prescribed by the person who has made the endowment, the entire income from the property may not be exhausted. A portion of the beneficial interest cannot but vest in the heirs in such a case : Jadugopal v Pannalal AIT 1978 SC 1329.

1(89) Also Re. Ames' Settlement (1946) Ch. 217: (1946) 1 All ER 689. A marriage settlement confers

no right to the married couple, if the marriage is nullified.

1(91)) There is need in India for legislation similar to the UK Variation of Trusts Act, 1958, but see the penulitinate para of additional notes in 10(6) below.

1(92) When one of the two beneficiaries of a trust dies, the trust does not come to an end : Stott v Ratcliffe (1982) 126 SJ 310, summary in BTR c 49-50, 1982-83, no. 6.

3(1) For a discussion on the implications of a settlement as distinct from a trust, with reference to sec. 3 of the Stamp Act (2 of 1899), see the case of the Chief Controlling Revenue Authority, Board of Revenue, Madras v P.A. Muthukumar AIR 1979 Madras 5.

The difficulty experienced in the interpretation of uncertain words and phrases in taxation laws is demonstrated by IR v Plummer (1979) STC 793 (HL), mentioned at n. 63 (p. 57). The contention of the Revenue that the definition of a "settlement", which covered "any trust, covenant, agreement or arrangement", applied to all transactions that did not have a *bona fide* commercial reason, including transactions designed to avoid tax, was rejected by the HL in this case. An element of "bounty" has been held to be a necessary characteristic of a "settement". Also see, Bulmer v IR (1967) 44 TC; Copeman v Coleman (1939) 22 TC 594; Chamberlain v IR 25 TC 317.

3(7) If a trust deed provides for remuneration to the managing trustee, and the settlor himself becomes the managing trustee, that will not amount to a reservation of any interest and the trust property will not be deemed to pass on the settlor's death under sec. 12(1) of the Estate Duty Act, 1953 : CED, Vidarbha & Marathwada v Smt. Mangala (1983) 143 ITR 491 (Bom).

3(9,67) 6(5) The case of CIT v Nandiniben Narottamdas (1983) 140 ITR 16 (Guj) has been followed in

another case of a "donation" of share in a partnership to a trust and diversion of the income to the donor's daughters : Jyotsnaben Narottamdas v CIT (1983) 142 ITR 91.

3(26, 166, 167) Quantification of shares does not mean specification of shares in terms of rupees and paise. The provisions of sec. 164 will not be applicable if the aliquot shares of the beneficiaries are specified. The imposition of restrictions on the beneficiaries' withdrawal of amounts from the trust business or the vesting of the trustee with power to retain substantial cash will not justify a single assessement on the trustees under section 164 : CIT v K. Balakrishna Rao (1983) 143 ITR 651 (Mad).

3(36, 110) The Supreme Court dismissed SLP (Civil) number 9144 of 1982 filed in Gunvantal Jiwanlal Family Trust v CIT against the Gujarat High Court decision reported in (1982) 133 ITR 162 that the minor children having separate income cannot be held to be dependent upon the settlor of a trust for their maintenance and support within the meaning of clause (iii) of the proviso to section 164(1). The trustees would accordingly be liable to tax at the rate of 65 per cent in such circumstances : (1983) 140 ITR (Statutes) 5.

3(38) Once a trust is found to be for a public charitable or religious purpose, it will not be hit by the provisions regarding oral trusts in the Income-tax and Wealth-tax Acts, which are confined, in their scope, to private oral trusts. Where the origin of an endowment is obscure and no definite evidence is available to show whether it is for a public religious or charitable purpose, the court resolves the controversy about the character of that trust after taking into consideration the object and purposes for which the trust was created, the manner in which the property has been dealt with, contribution or participation of the public, etc. : P. K. Goswamy and Others v Mohd

Hanifa (deceased) by legal representatives, and others, AIR 1946 SC 1569.

3(57) A gift does not cease to be such if it is made through a trust. The trustee who has the legal ownership is not the real object of the bounty though it may be possible to regard him and the beneficiary together as donees : The Commissioner for Stamp Duties for New South Wales v Perpetual Trustee Co. (1948) 1 All ER 525, 530; Wheeler v Humphreys 1918 AC 506, 508, 509.

3(68) For an interesting discussion on once-for-all payment of capital to life beneficiary, see A.J. McClean, "Variation of Trusts in England and Canada", *Canadian Bar Review*, Vol. XLIII, No. 2, May 1969, pp. 181-261.

3(69) If a trust document is not stamped or is insufficiently stamped, the document may not be admissible in evidence till the requisite stamp duty is paid but the trust will not be invalidated : Poornachandra v Kalipada Roy, AIR 1942, Cal 386.

3(70) When an executor becomes a trustee is indicated in several other cases also : Estate of IAT Ward v CIT (1961) 43 ITR 219 (MP); Asit Kumar Ghose v Commr of Agl IT (1952) 22 ITR 177 (Cal); Jahangir Rustomji v Bai Kuku Bai (1903) ILR 27 Bom 281; Estate of V.R.R.M.S. Chockalingam Chettiar v CIT (1960) 40 ITR 429 (Mad); Suhasini Karuri and another v WTO (1962) 46 ITR 953 (Cal).

3(72) Initial donors are founders of a trust but subsequent donors do not automatically become donors or trustees even in regard to the property gifted by them : Gangaram v Dooboo Mania AIR 1936, Nagpur 223.

3(96) When the shares of the beneficiaries are indeterminate, the manager of a Court of Wards is liable to pay tax at the maximum rate notwithstanding pending litigation on government's claim of escheat : Manager, Court of Wards v CIT (1983) 140 ITR 78 (Pat).

3(135) In a gift, whether *hibba* or *sadaqaka*, the corpus of the property may itself be consumed, while in a *waqf* it is only the usufruct that is available for use : Nabi Hassan v Gajadhar Singh, AIR 1974 Patna 141.

3(140) The legal history of *waqf-alal-aulad* is given in the Supreme Court decision in Mohd. Ismail v Sabir Ali, AIR 1762 SC 1922. A Muslim is not precluded from creating a public religious or charitable trusts, which does not conform to the conventional form of *waqf* : Nawab Aziz Yar Jang v Director of Endowments, AIR 1963, SC 985.

Where no part of the income of a *waqf* can be distributed to any person other than the members of the family of the *waqif*, and poor Muslims come in only in the event of the entire line of the family becoming extinct, it will be a case of *waqf-alal-aulad* simpliciter : Tamil Nadu Waqf Board v M. Ibrahim Mutawalli and Others, AIR 1979 Madras 231.

3(146) Once a *waqf* comes into existence a breach of trust cannot revoke it : Waji-ud-in Ashraf Shah v Murtaza Asharaf Shah, AIR 1930 Oudh 120 IC 828.

3(172, 173) Exemption from duty under section 33(1)(n) will not be available if the deceased has not retained the right to exclusive use of the house he occupies : Miss A.N. Khan v First Assistant Controller of Estate Duty (1983) 140 ITR 293.

3(177) The Madras High Court has held that there can be private *Mutts* : Sathappayar v Periaswamy (1890) AIR 14 Mad 1. There are also *Mutts* in which property is given to the head of a *Mutt* for his personal benefit : Madapam Madipudi Koti Veerayya v Board of Commissioners, AIR 1938 Mad 810; 179 IC 275.

3(178) Where a trust had been created for the maintenance and education of the settlor's children and powers were reserved to the trustee to execute supplementary

documents to strengthen the trust, supplementary deeds granting benefits to the settlor were beyond the powers of the settlor and the trustee. The original deed was operative and no part of the settled property could be taken to pass on the settlor's death : Manindranth Mukherjee v A C E D (1983) 140 ITR 476 (Cal).

4(19) The existence of a valid power of accumulation would prevent the beneficiary's having an interest in possession, since the trustees would take time to decide whether the income that had already arisen should be accumulated and the beneficiary's entitlement to the income would depend on the decision : Pearson v IR (1980) 2 WLR 872 (HL); (1980) 2 All ER 479.

4(39) The English law of trusts was introduced into Cyprus when it came under British administration in 1880. Nigeria, Ghana, Malaysia and Singapore have also followed the English law : G.W. Keaton and L.A. Sheridan, *The Comparative Law of Trusts in Commonwealth and Irish Republic*, 1976, Barry Rose.

5(11) The Asprey Committee has pointed out the need for a statutory provision to ensure that where an amount is received by a beneficiary at any time, it enters into the calculation of the personal entitlement of the beneficiary for purposes of allocating the net income of the trust to him (Taxation Review Committee, Australia, *Final Report*, 1975, para 15.5).

5(12) See sec. 677(a) of the US Code. If the grantor of a trust had been willing to maintain the periodical premium out of his own funds before he created the trust, the trust would simply be an irrevocable commitment of the income from the same ultimate source to the same purpose. If the trust income was used to meet the grantor's legal support obligations—the medical bills of the children of the grantor, for example—it could only be treated as his

income. It involved no substantial change in his economic position and was merely a reallocation of income within the family group : Burnet v Walls 281 US 376 (1930).

6(1) For a discussion on the use of a trust as an alternative to and not a duplication of a corporation, see Yves Caron, "The Trust in Quebec", *McGill Law Journal*, 1980, Vol. XXV, no. 4.

7(21) See also CIT v Wadilal Chunilal (1963) 47 ITR 305 (Bom).

7(22) Where a workshop was settled on trust for the benefit of Aurobindo Ashram of Pondicherry, which was exempt from tax as a charitable institution, it was held that the workshop was entitled to only the limited tax exemption available on actual donations to the Ashram under section 80G : it was not a branch of the Ashram but a different entity with different objects : CIT v Workshop Trust (1983) 142 ITR 26 (Mad).

7(79) In the UK, section 15 of the Family Law Reform Act, 1969 provides that in a disposition made on or after the 1st July, 1970 any reference to a child of any person shall be taken to include an illegitimate child: see P.M. Bromley, *Family Law*, 1977, Butterworth's, London, 5th ed., p. 577. Sec. 100 of the Indian Succession Act 1925 states that "in the absence of any intimation to the contrary in a will the word 'child', the word 'son', the word 'daughter' or any word which expresses relationship is to be understood as denoting only a legitimate relative, or, where there is no such legitimate relative a person who has acquired, at the date of the will, the reputation of being such relative".

8(15) The US Foreign Investment in Real Property Tax Act of 1980 subjects to US income tax a foreign person's entire income from dispositions of his interests, direct or indirect, in US real property. See Arthur A. Feder and Lee S. Parker, *United States*

Legislation—Taxing Gains of Foreign Persons for Dispositions of Direct and Indirect Interests in US Real Property, BTR 1981, pp. 83-103, and 176-90.

The Tax Reform Act of 1976 also sought to curb the use of foreign trusts as a tax-planning device in the USA. Earlier, it had been possible to have income accumulated in a foreign trust and enjoy the advantage of a tax deferral. When the income was actually distributed, the income tax had to be worked out as the sum of the taxes that would have been hypothetically payable if the income had been received during the different years during which it had been earned by the trust. Code section 668 charged a special tax at 6 per cent of the income tax leviable on the income distributed, multiplied by the number of years during which the income had been accumulated, subject to the total demand not exceeding the amount of income distributable to the concerned beneficiary.

Code section 679 requires the US settlor to pay tax on the income from property transferred to a foreign trust that has a US beneficiary under the grantor trust rules (secs. 671-679). These rules ignore the existence of the trust and tax the grantor if he has a reversionary interest taking effect within ten years, or if the trust is revocable or if he has reserved certain powers.

But even these provisions are not invulnerable: see Egerton W. Duncan, "Use of Foreign Trusts by Non-resident Aliens", p. 113-19, *The International Tax Journal*, Vol. 9, No. 2, December 1982. For an indication of the optimum tax position that can be secured under both the US and the Canadian death tax regimes and the importance of drafting multiple trusts for wills of US citizens resident in Canada, see Hugh B. Lambe, "Will Planning for U.S. Citizens resident in Canada", *Canadian Tax Journal*, Vol. 30, No. 3, May-June 1982, pp. 335-359.

For the Canadian tax consequences of administering a trust resident in Canada that has resident and non-resident beneficiaries, see Gordon Cooper, "Canadian Resident inter vivos Trusts with Non-resident Beneficiaries", *Canadian Tax Journal*, Vol. 30, No. 3, May-June 1982, pp. 422-438.

For a case of apportionment of accumulated gains in a descretionary trust with non-resident trustees, see Leedale v Lewis, Simon's Intelligence, Oct. 22, 1982, reported in BTR, C 71-72, 82-83.

For the complexities of the residence of trusts, see Richard A. Green, "The Residence of Trusts for Tax Purposes" *Canadian Tax Journal*, May-June 1983, pp. 217-35.

8(22) In the UK, trusts were dealt with in over 700 separate local offices. The work was concentrated in 55 selected Tax Districts in 1982-83. The Chief Inspector's office in the UK has two branches, one dealing exclusively with charities and the other advising on trusts and deeds.

The *inter vivos* trust has been effectively used for tax reduction in Canada. For some of the questions of law that have come up in this connection, see Marshall A. Cohen, *Income Taxation of Inter Vivos Trusts*, 1964, Canadian Tax Foundation.

10(6) As for the US experience, David Westfall sums up the position as follows : "In few other areas is a lawyer's work as tax-dominated as it is in the creation if irrevocable *inter vivos* trusts . . . The conclusion is inescapable that irrevocable *inter vivos* trusts usually are created primarily to save taxes and in forms dictated by tax considerations. They are part of a nation wide adventure in tax avoidance." (Westfall, "Trust Grantors and Section 674: Adventure in Income-tax Avoidance", *Columbia Law Review*, 326 (1960), reproduced at page 471, *Readings in Federal Taxation*, edited by Frank E.A.

Sander and David Westfall, Foundation Press, New York).

In his message on the Revision of the Tax Laws, in 1950, President Truman attributed the low yield of federal estate and gift taxes in the USA to "excessive exemptions, unduly low effective rates of most estates and the fact that the law as written favours large estates for small ones and leaves substantial amounts of wealth completely beyond the reach of the tax laws." (HR Doc. No. 451, 81st Congress, 2nd Sess, 6-7, 1950, quoted at page 591 of *Readings in Federal Taxation*). The contribution of trusts to development of this situation was, perhaps, not negligible.

Pechman points out that the trust device had been frequently used by the wealthy to transfer property to the later generation. In the 1940s and 1950s more than three of every five millionaires transferred at least some of their property in trust. Transfers on trust accounted for at least one-third of non-charitable transfers by millionaires in this period. While those with smaller estates gave much more of their property outright, trusts were used primarily by the rich. (Joseph A. Pechman, 1977, *Federal Tax Policy*, 3rd ed., Studies of Government Finance, Brookings Institution). According to Rembar, the main contemporary motive of trusts is "the ancient one of thwarting the overlord, now resident in Washington : trusts are a prominent tax avoidance device". (Charles Rembar, *The Law of the Land—The Evolution of Our Legal System*, Simon & Schuster, New York, p. 298). The official version, reproduced at n. 6, p. 190, corroborates these findings.

As for the redistributory effect of the estate duty levy in the UK, the Royal Commission on the Distribution of Income and Wealth (Cmnd 6171, published in 1975) pointed out that in 1960, 63.1 per cent of the total wealth of England and Wales was owned by 10 per cent of the population. Despite the fact

that the estate duty ranged upto 80 per cent, the Commission found in 1973 that 10 per cent of the population still owned 50.9 per cent of the wealth of the country. Trusts and settlements are the convenient strategies employed for so arranging one's affairs that the least duty is paid under the law on one's death. See n. 51 p. 149.

According to Riddall, the majority of applications to the court for variation of trusts in the UK under the Variation of Trusts Act, 1958 have been made with a view to reducing the tax which would become due if the trusts remained unaltered: J. G. Riddall, *The Law of Trust*, 1982, 2nd ed., Butterworths, p. 250.

The Law Reform Committee, on whose report the Variation of Trusts Act 1958 was based, saw no objection to such tax-induced variations (*Sixth Report*, 1957, Cmnd 310, para 16). Courts have not, however, been unanimous on the propriety or otherwise of a variation on this ground : see Tinker's Settlement (1960) 1 WLR 1011, 1013 (not in public interest). Variations were sanctioned in several cases on the ground that they were of advantage to the beneficiaries : Re. Holinden's Settlement Trusts (1966) 1 Ch 511, on appeal (1968) AC 685; Re. Holt's Settlement (1969) Ch 100; Re. Drewe's Settlement (1966) 2 All ER 844, (1966) 1 WLR 1518; Re. Clitheroe's Settlement Trusts (1959), 3 All ER 789 (1959), 1 WLR 1159. Lord Denning did not consider that it would be for the benefit of children to be uprooted from England and transported to Jersey simply to avoid tax : Re. Weston's Settlements (1969) 1 Ch 223 (1968) 1 All ER 338. Migration to Canada, swayed by the same purpose, was, however, approved by the court in the case of Seale's Marriage Settlement (1961) Ch 574 (1961) 3 All ER 135.

The Indian experience has, by and large, been similar. It is a trite saying that laws are like cobwebs, where the small flies are caught and the great break

through. Courts are constrained to proceed on the basis of the letter of the law; and if this results in leakage of revenue, it is for the legislature to amend the law suitably, vide Lord Wilberforce's emphasis on the decisive importance of the legal form (p. 137).