A NEW LOOK FOR TRUSTEES

By D. E. ALLAN*

It is all too easy for lawyers to fall into the habit of disclaiming responsibility for the law — the law is what others have made it; the function of the lawyer is merely to interpret, explain, and apply it. In jurisdictions which are not great centres of commerce and industry and in which lawyers are generally busy at their desks and are not particularly active politically, law reform may very easily become a lost cause. Law to the layman-politician is a matter of traffic rules, of fencing, of crime, of running-down actions. These receive constant and, some of us may think, too frequent attention from the legislature. Other areas have little glamour, are conceptually incomprehensible, lack influential pressure groups urging reform, and become forgotten wildernesses; there may be a suspicion that all is not well, perhaps taking the form of a sense of irritation with both the law and its practitioners. But few know and none care to experiment or suggest reforms. And meanwhile the bush takes hold.

Of all the unpopular and forgotten areas of the law, that relating to trusts is one of the most forbidding; and yet it may come to affect most members of the community. The law of trusts, and in particular the rules governing the administration of trust estates, was fashioned in England largely in the course of the eighteenth and nineteenth centuries against the background of the social organization, the economic conditions and beliefs, and the moral philosophies then and there prevailing. In that form, it was transplanted in the Australian States, generally with little thought to its suitability to a changed environment, and accepted as the best we could do. From time to time the emergence of some glaring anomaly or injustice has brought forth an *ad hoc* reform, but in some of the States at any rate the tremendous social and economic changes of the past century have left this branch of the law substantially untouched; and the longer the reform is postponed the more drastic it must ultimately appear to be. That the mute acceptance of the ideas and practices of Galsworthy's England is not the best we can do, is, it is hoped, demonstrated by the new legislation[1] enacted in Western Australia in 1962

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1 The new legislation in Western Australia consists of eight Acts:
The Trustees Act 1962;
The Married Women's Property Act Amendment Act 1962;
The Administration Act Amendment Act 1962;
The Testator's Family Maintenance Act Amendment Act 1962;
The Charitable Trusts Act 1962;
The Law Reform (Property, Perpetuities, and Succession) Act 1962;
The Adoption of Children Act Amendment Act 1962;
The Simultaneous Deaths Act Amendment Act 1962.

dealing with trusts and trustees. This work is evidence of what can be achieved through the co-operation of the Law Society, the Crown Law Department, and the University Law School, once all are convinced of the need for reform and are prepared to devote the necessary time to the patient research that is required and the formulation of desirable reforms.[2]

The purpose of this paper is to consider briefly the case for reform, as it appeared to the Law Reform Sub-Committee, and the objects which the Sub-Committee had in mind in preparing its proposals; and then to review some of the important changes in principle introduced by the legislation.

The Case for Reform

Before the enacting of the new legislation, the law relating to trusts and trustees in Western Australia was to be found principally in three Acts: The Settled Land Act 1892, the Administration Act 1903, and the Trustees Act 1900. The Settled Land Act was concerned primarily with trusts of land settled on persons entitled in succession. The Administration Act was, amongst other matters, concerned with the administration of the estates of deceased persons and regulated the powers, duties, indemnities and liabilities of personal representatives. The Trustees Act was of general application to trusts except where its provisions were overridden by either of the other two Acts. However, rather curiously, the definition of 'trust' and 'trustee' in section 3 of the Trustees Act omitted what was then the usual formula in other jurisdictions—'and include . . . the duties incident to the office of a personal representative of a deceased person'—with the result that in 1915 the Supreme Court of Western Australia[3] held that an administratrix became a trustee, and so entitled to seek the assistance of the Court under section 45 of the Trustees Act, only after payment of debts when she became a trustee of the surplus for the next of kin.[4] An attempt to cure this omission by legislation in 1927[5] was strangely misconceived in its method and can only be described as ignoring the bull and aiming at the outer. The result was that many provisions that are normally found in a Trustees Act also had to appear in the Administration Act, because the former did not in most cases apply to personal representatives. It was the opinion

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2 These reforms were in fact formulated by a special Law Reform Sub-Committee set up up for that purpose by the Law Society. It consisted of a number of legal practitioners, a draftsman assigned by the Crown Law Department, and a member of the Law Faculty of the University. The Committee studied at considerable length developments in this branch of the law throughout Australia, New Zealand, England and America, and considered these developments in the light of the existing law of Western Australia and of local conditions. Ultimately the Committee was able to formulate its proposals for reform and the Committee itself, with the consent of the Government, prepared the Bills necessary to give effect to those proposals. The Committee's Report and the Bills were submitted to the Minister for Justice, approved by Cabinet, and eventually passed by both Houses of Parliament with only a few amendments.

3 *In Re Matthews, Decd.* (1915) 17 W.A.L.R. 61.

4 By virtue of Administration Act 1903, s. 13 (W.A.).

5 Trustees Act Amendment Act 1927 (W.A.).

of the Law Reform Committee that the law would be considerably simplified if the provisions of these three Acts so far as they related to the offices of trustees and personal representatives could be consolidated in one general enactment.

The major defects, however, lay in the Trustees Act 1900 (W.A.) itself. That Act was based largely on the English Trustee Act of 1893[6] which was itself unhappily drafted and ill-suited to twentieth century English conditions, as was demonstrated by the English Trustee Act 1925. Since the Western Australian Act was passed in 1900 it had been amended only six times, and most of those amendments had merely made minor variations to the investment power. The Law Reform Committee considered that this Act was hopelessly inadequate for modern conditions in the State. It was based on notions of property current in late nineteenth century England and failed to provide a reasonable and practical system to meet contemporary needs. When one considered, for instance, the narrow powers of investment in conjunction with the very limited powers to employ agents, one might well have been forgiven for believing that the Act had been conceived in an age when the proper method of dealing with trust funds and securities was to conceal them in a tin box up the chimney. On a comparison with the legislation of other jurisdictions and with current conveyancing practices, it became apparent that there were many gaps in the local legislation. Subjects that should have been dealt with were not to be found at all in the Act, whilst there were many provisions that could have no conceivable relevance or application in modern conditions. The result of these defects was firstly to make the preparation of wills and settlements a much more costly,[7] lengthy, and cumbersome business than it ever should have been, and secondly to render it difficult for conscientious and competent trustees to act in the best interests of the trust and of the beneficiaries without either having to take personal risks themselves or having to embark on costly applications to the Court to secure for themselves special powers that should have lain in the discretion of trustees as a matter of course.

The Objects of Reform — Policy Considerations

In view of the extent of its criticisms of existing legislation, the Law Reform Committee recommended that it would not be satisfactory to attempt to patch up the 1900 Act, but that a completely new Act should be prepared. In preparing this new Act, the Committee was aware of the need to do something better than 'a scissors and paste job' with the more recent Acts of other jurisdictions and, although naturally the

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[6] It was incidentally a very bad copy of the English Act. For example, when s. 31 (6) was being drafted as a direct copy of s. 26 (vi) of the English Act, eight words were inadvertently omitted. This made nonsense of s. 31 (6), but Parliament was never called upon to put the matter right. There were several other absurdities in the Act that could only be the result of careless copying of the English Act.

[7] No member of the Law Society has yet objected to the reforms, to my knowledge, on the ground that they are likely to reduce costs. Cynics may take this to mean that in the opinion of practitioners they won't!

Committee paid close regard to what had been done particularly in New Zealand,[8] Victoria,[9] and New South Wales,[10] and was content to follow much that had been satisfactorily settled in these jurisdictions, nevertheless the Committee preferred first to establish certain principles or objectives by which it would gauge the desirability of any proposed reform.

The objects, which the Committee kept in mind in preparing its proposals and in drafting the Bills, can be summarized as follows:

(a) To bring together in one place all the statutory provisions relating to trustees in order to avoid the need for trustees to have to consider the inter-action of several Acts that might vary in their application to them according to the nature of the property concerned, the circumstances in which the trust arose, or the nature of the transaction in which they wished to engage. The reasons for these distinctions were thought to be largely historical or local and to have no application in present-day Western Australia.

(b) To hold a reasonable balance between the interests (not necessarily competing) of the settlor or testator, the trustee and the beneficiary. On the one hand it was necessary to determine how far the testator or settlor should be permitted to control from beyond the grave both the distribution and management of his property. It was also necessary to consider the interests of the trustee in order to facilitate rather than to hinder his efficient administration of the trust and to protect him when he is acting prudently, reasonably, and honestly in the furtherance of the trust. Then there were the interests of the beneficiaries, the living generation, to whom the enjoyment of the property had been given. It was not thought desirable to determine any general policy governing the regulation of these interests, but instead to try to resolve particular conflicts as they arose in relation to particular problems. The committee did, however, appear to keep the following points in mind—

    (i) That it is legitimate for the settlor to dictate the disposition of his property within the broad limits which the law has traditionally imposed, and so that in particular he should not 'tie up' his property for a longer period than that measured by the duration of lives in being plus twenty-one years;

    (ii) that having stipulated the dispositions of his property, the settlor should be limited in his power to control the actual management and adminisration of the property

8 Trustee Act 1956 (N.Z.).
9 Trustee Act 1958 (Vic.).
10 Trustee Act 1925-1942 (N.S.W.).

and of the trust, so that in particular he should not be able to make the task of his trustee more onerous than necessary[11];

(iii) that justice and good sense require that the beneficiaries should derive the maximum benefit and advantage from the property;

(iv) that the interests of the beneficiaries are probably best served by ensuring that the trustees have full power to deal efficiently with the property without fear of actions for breach of trust when they are honestly endeavouring to act in the best interest of the trust; inadequate protection for the trustee produces an unwillingness to act which in turn results to the disadvantage of the beneficiary;

(v) that the ultimate control and hence the power to effect a proper balance of the various interests should rest with the Court.

(c) To ensure that the legitimate intentions of testators and settlors are not frustrated through technicalities which have lost what meaning or importance they may ever have had.

(d) To simplify the preparation of wills, trusts and settlements by ensuring that all those provisions which are normally inserted in every will or other trust instrument by the prudent and careful draftsman should now be found in the trustee legislation and therefore be of general application, subject to the right of the testator or settlor to modify or exclude them if this should be considered desirable.

(e) To reduce expense in the administration of trusts by permitting the trustees to exercise their powers as far as is practicable without prior reference to the Court. Applications to the Court in trust matters are often slow, cumbersome and technical proceedings and frequently they occur in matters in which the approval of the Court for the exercise of some power is little more than a formality. It was considered that if the settlor or someone appointed by him has selected the trustees as persons in whom he has confidence, then the law should follow the same policy of 'trusting the trustees' in the ordinary routine matters of the trust, and that the prior approval of the Court should be necessary only in extraordinary matters. Very often the trustee is a member of a professional body that requires certain standards of competent and honest behaviour of its members; in

11 The settlor was not excluded altogether from control over these matters. The Trustees Act 1962, s. 5 (W.A.) provides that the powers (but not the duties, indemnities, immunities, and protections) conferred on a trustee by or under the Act may be modified or excluded by the trust instrument. However, the Court has power under ss. 89 and 90 to vary both the administrative and dispositive provisions of the trust in the manner prescribed in those sections.

> other cases there is frequently a 'professional' behind the ordinary trustee, advising, encouraging or restraining him as the circumstance may require. The role of the Court was therefore seen as being principally to deal with emergency or difficult situations as they arise rather than routine matters of administration. Nevertheless it was not always easy to mark the line dividing the extraordinary from the routine.[12]

It is not possible in this article to engage in a critical survey of all the new legislation. Instead it is proposed simply to draw attention to some of the major changes in principle.

Trustees Act 1962 (W.A.)

1. *Repeal of the Settled Land Act of* 1892 (W.A.)

The Settled Land Act of 1892 was based on the English Settled Land Act of 1882. The main object of the English legislation, which was passed as a result of a period of agricultural depression, was to secure the well-being of land which was settled on persons in succession and 'to prevent the decay of agricultural and other interests occasioned by the deterioration of land and buildings in the possession of impecunious life tenants'.[13] 'What the statute intended to do was to release the land from the fetters of the settlement—to render it a marketable article notwithstanding the settlement'.[14] Accordingly statutory powers to deal with the settled land and even to sell the whole legal estate were placed in the ultimate control of the life tenant, and the limited interests under the settlement were made liable to be 'overreached' by a sale of the land. The life tenant was selected, as the custodian of these powers, rather than the trustees, presumably on the basis that the trustees had been selected by the settlor as persons who would be likely to sympathize with his desire to preserve the family estates intact, whereas the life tenant would be much more likely to use these powers as he would profit by the increased efficiency in the management of the property.

There is no doubt that in its time and in its place the Settled Land legislation was most useful and effective, giving the death blow to forms of strict settlement designed to keep land within the settlor's family which generally led both to the impoverishment of the family and to the

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12 In one respect the jurisdiction of the Court has been increased. The new legislation confers on trustees far more extensive powers than they had ever enjoyed in the past apart from special powers conferred by the trust instrument. Normally the Courts will not review the exercise by a trustee of his discretion in relation to his admitted powers. However, as an additional safeguard against abuse of the new statutory powers, s. 94 of the Trustees Act 1962 (W.A.) permits any person aggrieved by any act or omission by a trustee in the exercise of his statutory powers, or any person who apprehends an act or omission by which he might be aggrieved, to apply to the Court for a review of the exercise or the proposed exercise of statutory powers. It is to be hoped that the Court will not take too restrictive an interpretation of its powers under this section.

13 *Bruce* v. *Ailesbury,* [1892] A.C. 356, 363 *per* Lord Watson.

14 *Id.* at 361 *per* Lord Halsbury L.C.

neglect and decay of the land. It is doubtful, however, whether conditions that would justify that legislation ever existed in Western Australia, and certainly they do not seem to exist in the mid-twentieth century. Nor, in Western Australia, does it seem to make very much difference in respect of the welfare of land, whether powers of control, management, and sale be vested in the life tenant or the trustees. Each of them has an interest in securing that the property is managed to the best advantage, but the trustee may be in a better position than the life tenant to weigh dispassionately the interests of life tenant and remaindermen, and he is frequently a person who is selected as trustee, not because he is likely to defer to the settlor's wishes more readily than the life tenant, but because of his greater business experience and skill.

To repeal the Settled Land Act, it seemed, would give recognition to the fact that, under modern conditions, it is artificial to treat trusts of land any differently from trusts of other forms of property. Trust property today may consist of all species of property and the subject matter of the trust may be constantly changing. We are therefore very near to the position, if we have not arrived already, of being able to say that land is merely one form of trust investment; it may, due to certain special characteristics, require some few special rules pertaining only to land, but these can most conveniently be inserted in the Trustees Act itself and there is no need for special legislation.

Accordingly, the Settled Land Act is repealed and full powers of management and control, including powers of leasing and selling, are vested in the trustee.[15] Life tenants who, immediately before the commencement of the new legislation, had powers of sale under the old Settled Land Act retain those powers. Moreover, where the trust property includes land, the trustee must exercise his statutory power of sale if so required by the person or persons beneficially entitled in possession under the trust.[16] Some useful provisions of the Settled Land Act, particularly in relation to infants' estates, have also been included in the Trustees Act.[17]

2. *Trustee Investments*

Rumour has it that an elderly lady once went into her bank and inquired of the cashier how much money there was in her account. '£75/12/3, Madam,' replied the cashier. 'Very well,' said the lady, producing her cheque book, 'I'll have it all.' The cashier counted out the money and handed it to her. The old lady took the money to a side table, carefully counted it herself, and then returned with it to the cashier. 'Very good, young man,' she said, 'It's all there—now you can put it back.'

Anyone who derived his knowledge of trustee investments solely from the investment sections of current trustee legislation might be

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15 Trustees Act 1962 (W.A.), s. 27.

16 *Id.* s. 27 (4).

17 *Id.* ss. 82, 109.

forgiven for presuming that ideally what a trustee should do with his trust funds is to reduce them all to money (preferably coin), lock it up in steel boxes, and deposit those boxes in a deep, fire-proof, burglar-proof vault in a survival shelter to which only he has the key, until such time as he is required under the trust to disgorge it.

It has been the practice of most jurisdictions in the past to provide a fixed list of fixed interest money stocks in which a trustee might invest, subject to any modification or enlargement of that list by the trust instrument. There has, however, been an awareness for some time that a list of that type is unsatisfactory for the protection of the trust property and of the interests of all classes of beneficiaries, and that it by no means provides today a reasonable investment policy for an ordinary trust estate—which is what a Trustees Act should do.[18] The result has been that competently prepared trust instruments have generally enlarged considerably the classes of securities in which the trustees have authority to invest; and it is only in the smaller estates in which no real thought or adequate planning has been considered necessary that the investment provisions have been limited to those prescribed by the Trustees Act.[19]

It must be appreciated, however, that the problem is not simply one of seeking investments that will provide a higher income return for the life tenant—for the most part today the return offered by the traditional authorized investments, taking into account that many of them offer an income tax rebate, is not inadequate. The major problem is to find investments that will guard the trust property against the risks of capital depreciation, and this is what the 'gilt-edged' securities generally fail to do.

The problem of trustee investments was considered in England in 1952 in the Report of the Nathan Committee.[20] That Committee rejected the solution adopted in many American States of authorizing investment 'in the manner of a prudent man of affairs' as offering insufficient guidance both to trustees and to the Court. Instead the Nathan Committee proposed that trustees should be permitted to divide the trust property into two equal funds, one of which should be confined to 'gilt-edged' investments and the other to be available for investment in certain classes of equities. The Trustee Investment Act 1961 (Eng.) gave effect to these proposals in the United Kingdom. Whilst the Law

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18 What prudent man of business today, having regard to the interests of those for whom he is responsible, would limit investments to the traditional 'gilt-edged' securities? It may be significant that in 1961 the Commonwealth legislated, by the Income Tax and Social Services Contribution Assessment Act 1961 (Cth.), to woo superannuation, provident, and life insurance funds back to public and governmental securities by offering the incentive of special income tax concessions depending upon a minimum proportion of such securities held in the fund. The Parliamentary Debates concerning this measure contain much interesting information on recent trends in investment policies.

19 The suggestion that governments might look with disfavour on new investment provisions which might divert trust funds from investment in public and governmental securities failed to impress the Law Reform Committee, which saw no reason why governments should wax fat on the pittances of poor widows whilst larger fry slipped through the net.

20 Cmnd. 8710, paras. 277-293.

Reform Committee in Western Australia was broadly in agreement with these proposals, it considered, after studying the English Act, that the provisions relating to the management of two separate investment funds, the maintenance of some balance between the two funds, and the relationship between two separate sets of statutory investment powers and a possible third set in the trust instrument, were so complex that they were likely effectively to deter any trustee from attempting to exercise the wider powers conferred upon him. Moreover, it was thought that a rigid division of the trust property might tend to defeat the whole object of the extended power in that it might produce a shortage of available capital with which to take up bonus issues accruing to the wider-range investments.

It was therefore recommended that the range of authorized investments should be broadened to include certain types of equities without requiring any division of the trust property. Instead, it should be left to the trustee, with proper advice, to secure a suitable diversification of the investments. As this was a new and possibly controversial step, the Law Reform Committee recommended that the extension into the equity market should initially be a very limited one, with the object largely of gaining recognition of the principle involved, and in the hope that, if the reform did not bring about a collapse of the economy, the range of investments might be gradually extended in subsequent years.

Accordingly, section 16 of the Trustees Act permits trustees to invest, in addition to the traditional range of investments, in the preference or ordinary stock or shares of companies incorporated in Australia, or in the debentures of such companies, or on deposit with such companies. The companies are limited to those which have a paid-up share capital of one million pounds and have paid a dividend in each of the fifteen years immediately preceding the investment on all their ordinary stock or shares. Stock, shares, and debentures which are not quoted on a stock exchange in Australia are excluded, as also are shares or debenture stock which are not fully paid up, unless by the terms of their issue they are required to be paid up within nine months of their date of issue. The section also permits investment in unit trust schemes where there is in existence at the time of the investment an approved deed under the Companies Act 1961 (W.A.). A trustee seeking to exercise these new extended investment powers is required to obtain advice in writing from a person experienced in financial matters as to the suitability of the proposed investment to the trust and as to the adequate diversification of the different types of investment held by the trust. Moreover, a trustee who has exercised these powers should, from time to time, obtain similar advice in respect of his continued holding.

The Committee was aware that the paid-up share capital of a company is not necessarily the best test of its financial stability, but it is nevertheless convenient and, supplemented by the requirement of the payment of dividends in the previous fifteen years, should provide adequate security.

It is desirable to stress than this new investment power is not designed to encourage or even to permit a trustee to engage in speculation or 'to play the market' with trust funds. In fact, the section is specifically designed to rule out any such possibility and the trustee remains under his general duty to invest in the manner of a prudent man of affairs having regard to the interests of those for whom it is his duty to provide. The range of the new authorized investments is, in any event, so limited that it is hardly likely that a trustee would seek to 'buy in' to many of the companies that he may now consider, as the price would be extravagant in comparison with the actual yield; but the new powers will enable him to retain investments in such companies when they are included in the estate as he receives it.

A further extension of the investment power, by section 17 of the Act, permits the trustee to purchase land for the purpose of providing a dwelling house for a beneficiary under the trust. The problem raised by such a power is that its exercise renders the property unproductive so that, if the particular beneficiary is not exclusively entitled to the income of the trust funds used in the purchase of the house, the purchase may adversely affect other beneficiaries. Section 5 (*j*) of the Trustees Act 1900 (W.A.) required the consent of the Court for such a purchase, as a safeguard for the interests of other beneficiaries. However, section 17 follows section 4 (3) of the Trustee Act 1958 of Victoria and permits the trustee to charge the beneficiary rent in appropriate cases, thereby making the property productive.

Finally, section 25 permits a trustee, who holds shares in a company as part of the trust property, to take part in various company transactions in connexion with those shares and, in particular, subject to certain safeguards, to participate in company 'take overs'.

3. *General Powers of Trustees*

The traditional policy of the law has been to deny trustees all but the barest minimum of powers to manage and deal with the trust property, so that the moment property became subject to a trust it was at a considerable disadvantage compared with property that was the subject of absolute ownership. The justification for this policy may well have been a desire to protect the property against the misdeeds of foolish, rash or criminal trustees, and where additional powers were legitimately required by trustees they could be conferred on an application to the Court. However, the Law Reform Committee considered that it is inherently wrong today to treat all trustees as though they were potential criminals—some few undoubtedly may be; but the majority of trustees are honest folk endeavouring to do their best in the interests of the trust, generally (and so far as the law allows) with appropriate professional advice and assistance. It seemed wrong, therefore, to handicap the honest and efficient administration of most trusts because of the possibilities that a few trustees may lack prudence or scruples. If trustees are persons who have been selected by the settlor, by the other trustees or

by the Court, as persons in whom trust and confidence might be reposed, it is unsatisfactory for the law to take a more suspicious view of them.

Moreover, broad powers are necessary for the protection of trustees. A trustee who attempted to 'work to rule' under the provisions of the Trustees Act 1900 (W.A.) would do very little at all. In practice, however, a trustee can do most things until he reaches a point at which either, to complete a transaction, he must produce his authority or a loss occurs to the trust property. At that stage he must show that he is acting honestly in the exercise of his powers. To deny the trustee adequate powers is to require him to act in the interests of the trust at his own peril.

Part III of the Trustees Act 1962 (W.A.) therefore confers upon trustees, save as may be modified by the trust instrument, extremely wide powers to deal with the trust property, and these powers are counterbalanced by the provision in section 94 enabling any person who is or may be aggrieved by a decision of a trustee in the exercise of his *statutory* powers to apply to the Court for a review of that decision.[21]

Some of these new statutory powers may be mentioned briefly:

(i) An unlimited power of sale of any property, which in the case of land must be exercised at the request of the life tenant, and powers of leasing for various periods (section 27).

(ii) Power to sell land on mortgage or on terms of deferred payment (sections 33 and 34).

(iii) Powers to repair, maintain, and improve property; power to subdivide land; power to appropriate property in or towards satisfaction of a legacy or annuity; power to set up a depreciation fund (section 30).

(iv) Power to raise money by sale or mortgage (section 43).

(v) Power to insure against any risks against which it would be prudent for a person to insure if he were acting for himself up to the full replacement value (section 46).

(vi) Powers in respect of valuations and audit (sections 50 and 51).

(vii) Power to employ agents. In the past the power of a trustee to employ agents has been confined to some few specific matters and to circumstances of necessity. The principle has always been that the trustee should if possible act personally and not through others. However, owing to the complexity of modern life and the highly specialized skills that are required for most matters today, and to the fact that a trustee is not necessarily a person of any special qualifications, it seems impracticable to insist today on a principle that a trustee should, with certain grudging exceptions, act personally. The interests of both the trustee and the trust require that wherever possible the trustee

21 *Supra*, n. 12.

should be at liberty to employ duly qualified agents. Section 53 therefore confers on trustees a general power to employ agents to transact any business in the execution or administration of the trust, including a power to employ agents in connexion with property situated outside the State. The trustee is not responsible for the acts or defaults of his agent, if the agent has been employed in good faith and without negligence.

(viii) Power to delegate trusts. Section 54 now permits a trustee to delegate the performance of his trust, when he is absent from the State or about to depart therefrom, when he is a member of Her Majesty's Forces, or when by reason of physical infirmity he is temporarily incapable of performing the trusts himself. The consent of any co-trustees, and of any person authorized by the trust instrument to appoint new trustees, is required for the delegation. In order that the trustee shall be encouraged to exercise this power in appropriate circumstances, it is provided that the trustee shall be under no liability for the acts or defaults of his delegate whom he appointed in good faith and without negligence.

(ix) Power to carry on a business forming part of the estate for such period as may be necessary or desirable for winding up the business, or for a period of two years from the death of the testator, or for such further periods as the Court may approve, together with the necessary ancillary powers for carrying on that business (section 55); and power to convert a business forming part of the estate into a company, or to promote a company to take over that business, with power to retain as authorized investments of the trust any shares or debentures of that company taken in consideration of the sale of the business to the company (section 56).

(x) Wide powers of maintenance and advancement, including power, in the discretion of the trustee, to make advances of capital on such terms as to repayment, payment of interest, giving of security, *etc.*, as the trustee thinks fit (sections 58-60).

(xi) Power to hand over chattels to life tenants or to infants. (sections 72 and 73).

4. *Distribution of Assets*

The new legislation introduces new provisions[22] (though in part through the extension of existing provisions) to enable the trustee to distribute the estate at the earliest possible moment without having to hold back part of the estate to meet possible future claims the existence of which he was unaware at the time of the distribution. The interests

22 These new provisions are based very largely on New Zealand legislation, for a detailed discussion of which see Barton: 'The Ascertainment of Missing Beneficiaries: The New Zealand Experience', (1961) 5 U. of West Aust. L. Rev. 257.

of such future claimants are protected by preserving and enlarging the rights of those claimants, subject to safeguards, to follow the trust property into the hands of the recipients. The new provisons distinguish clearly between the different types of claims that may be made upon the estate and must be considered by the trustee, and lay down a definite procedure for each.

Claims by creditors and others having claims subsisting against the estate by virtue of the Law Reform (Miscellaneous Provisions) Act 1941 (W.A.) are dealt with in section 63 by the usual procedure of authorizing the trustee to advertise for claimants and permitting him to distribute at the end of a period of notice having regard only to those claims of which he then has notice. The procedure has, however, been simplified, and it does not apply to claims by persons as beneficiaries or next of kin or as claimants under the Testator's Family Maintenance Act 1939 (W.A.), as it was not considered that these persons should be subjected to pressure to make their claims but should be entitled to the full time normally allowed by the law.

Claims by persons claiming to be entitled to share in the estate as beneficiaries or next of kin are dealt with separately in section 66. The chief problem for the trustee here is to discover the existence and identity of all such persons and accordingly the section authorizes him to advertise for this information and then if necessary to apply to the Court for an order enabling him to distribute the estate on the basis of such information as he may have acquired and protecting him against any claims that may later be made.[23]

Where a trustee wishes to dispute any claim of which he has received notice either under section 63 or section 66, he may call upon the claimant to take proceedings within three months to enforce his claim and if the claimant fails to do so he may apply to the Court under section 64 for an order barring the claim or enabling the estate to be dealt with without regard to the claim.

Claims under the Testator's Family Maintenance Act 1939 (W.A.) are dealt with by a new section 9A inserted in that Act. This in effect requires the trustee to wait six months after the grant of Probate or Administration if he suspects that any such claim may be made. Accordingly, if there is any possibility of such a claim, a distribution can be made within the six months only if the trustee obtains the consent of the prospective claimants under the Testator's Family Maintenance Act 1939 (W.A.) or if the distribution is for the maintenance and support of those who were dependent upon the testator at the time of his death. After distribution the trustee is protected but the claimants may then follow the assets.

In respect of calls on shares not fully paid up, the trustee is relieved from liability by section 74 once he has procured the registration of some

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23 In effect, s. 66 prescribes a statutory form of 'Benjamin Order'. See *Re Benjamin* [1902] 1 Ch. 723.

other person as holder of those shares although the company or its liquidator may still be able to exercise any right they may have to follow the assets into the hands of persons amongst whom they have been distributed. The usual procedure for protecting a trustee against claims under leases that form part of the trust estate is continued and expanded by section 62.

So far as claimants who can no longer sue the trustee are concerned, the law itself in most cases provides adequate means to enable them to follow the assets. However, for the avoidance of doubts and to ensure that there is always an adequate remedy, section 65 provides a new statutory right to follow assets, in addition to any other right which the claimant may have.[24] This new right is available to all classes of claimants, including claimants under the Testator's Family Maintenance Act 1939 (W.A.), provided there is nothing in any Act to bar their claims. Action will lie at the suit of such claimants against any person to whom those assets were distributed, or his personal representative or any other person who received an interest in those assets otherwise than as a *bona fide* purchaser for value. The time in which a claim may be made under this section is in general limited to the time in which the original claim could have been brought against the estate in the hands of the trustee. Moreover, all remedies against the assets must be exercised before any personal claim that might subsist against the trustee is made. Finally, the Court may take into account the relative circumstances of the claimant and of the person who will be required to restore the assets and may, whether the claim is made under section 65 or otherwise, deny the relief in whole or in part if the person to whom the assets were distributed has so altered his position in reliance on the validity of the distribution that it would be inequitable to insist on repayment; and the Court may direct that restitution be made by periodic payments or by instalments and may fix the rate thereof.

5. *The Role of the Court*

As has been explained earlier, the role of the Court is seen largely as a supervisory one with power to intervene, at the instigation of anyone in any way interested under the trust in emergency situations and to remodel the trust if, in the light of circumstances prevailing at the time of the application, this is desirable. Much of Part VII of the Act, dealing with the powers of the Court, follows the traditional pattern in these matters, but the following points call for some comment.

(i) The power of the Court to authorize various dealings with the trust property[25] is couched in the usual terms except that it has been made clear that the Court may authorize these transactions notwithstanding anything to the contrary in the trust instrument. It was considered that the testator or settlor should not be entitled to oust this jurisdiction of the Court to deal with

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24 *E.g.*, under *Re Diplock* [1948] Ch. 465.

25 S. 89.

situations and matters which he might probably not have foreseen at the time he created the trust.

(ii) The Court is empowered to authorize variations of the trust by section 90 in terms similar to section 64A of the New Zealand Trustee Act 1956 and the English Variation of Trusts Act 1958. This legislation arose out of the decision of the House of Lords in *Chapman* v. *Chapman*[26] in 1954 in which the House held, somewhat to the surprise of the Chancery Bar, that a court of equity had no general and inherent jurisdiction to sanction variations of the express terms of a trust. The House saw in such a jurisdiction the makings of an unseemly conflict between the courts and the taxation authorities. Nevertheless, on the recommendation of the Law Reform Committee,[27] the Variation of Trusts Act 1958 (Eng.) was passed to legalize the previous practice and to permit the Courts to approve on behalf of various classes of persons (under disabilities, unborn or unascertained) any arrangement varying or revoking all or any of the trusts or enlarging the powers of the trustees. That legislation has now been followed in Western Australia with only two small changes:

(a) In England the Court cannot give its approval unless the arrangement is for the benefit of those persons on whose behalf the Court is acting. This seemed a little too restrictive in that it could prevent the Court's approving on behalf of beneficiaries who were not seriously affected either way by the proposed variation. Accordingly the New Zealand pattern has been followed of permitting the Court to give its approval if the arrangement is not to the detriment of those persons, and stating expressly that in determining this matter the Court may have regard to 'the welfare and honour of the family'.[28]

(b) The English legislation is silent on the problem of whether the order of the Court approving the variation is sufficient itself to vary the trust or whether any further action or document is required.[29] The Western Australian Act states expressly that the re-arrangement approved by the Court is binding on all persons on whose behalf it was approved and thereupon, if all other beneficiaries have consented, the trusts take effect as re-arranged.

(iii) Section 98 authorizes the Court to allow to any person who is or has been a trustee by way of remuneration such commission

26 [1954] A.C. 429.

27 Sixth Report (1957), Cmnd. 310.

28 A rather high-sounding and pompous expression, but how else do you get over that it is not to be regarded as detrimental to the children that some provision should be made for their widowed mother.

29 *E.g.*, *Viscount Hambleden's Will Trusts* [1960] 1 All E.R. 353.

or percentage, not exceeding in all five per cent. of the gross value of the trust property, as is just and reasonable. The principle that a trustee should not derive any profit from his trust but should act gratuitously seemed totally unrealistic today and inroads had already been made into it by the Settled Land Act 1892 (W.A.)[30] and the Administration Act 1903 (W.A.).[31] The provision for remuneration is now therefore of general application. The section also authorizes a trustee who is engaged in any profession or business to make his usual professional or business charges in respect of any business he transacts for the estate, although such charges will be taken into account in determining his entitlement to commission.

6. *Miscellaneous*

The opportunity has been taken in the Trustees Act to amend various particular rules applying to trusts.

Section 102 deals with what have come to be known as 'imperfect trust provisions'. It is a basic rule of equity that a trust for charitable purposes is valid only if every purpose to which the trustees could without breach of trust apply the trust property is necessarily charitable; and the extent of this hazard can be appreciated only if it is also understood that no clear, satisfactory and comprehensive definition of charity has ever been achieved. The problem is well illustrated by such cases as *Oxford Group* v. *I.R.C.*,[32] *Ellis* v. *I.R.C.*,[33] and *Chichester Diocesan Fund* v. *Simpson*[34] (the *'Diplock Case'*). In the last case, a trust for 'charitable or benevolent' objects failed entirely on the ground that the word 'benevolent' could include objects which were not necessarily charitable and therefore the whole limitation was void for uncertainty; and this was so even though the estate had been distributed among acknowledged charities. The trustees and the charities were therefore faced with a claim at the suit of the testator's next of kin for repayment of approximately £250,000.

Legislation had existed for many years in Victoria, New South Wales and New Zealand dealing with this problem by limiting the purposes to those which are necessarily charitable. In England the Nathan Committee Report[35] in 1952 drew attention to the problem but recommended that, as there was no longer any excuse for lawyers not recognizing the danger of such provisions, any validating legislation should be limited to trusts created before the date of the Nathan Report. The English Charitable Trusts (Validation) Act 1954 gave effect to this recommendation. The Western Australian Law Reform Committee rejected the English Act

30 S. 51.
31 S. 143.
32 [1949] 2 All E.R. 537.
33 (1949) 93 Sol. Jo. 678.
34 [1944] A.C. 341.
35 Cmnd. 8710, Ch. 12.

as a precedent. Firstly, the restriction to pre-1952 trusts seemed hopelessly inadequate; it is one thing to assert that all lawyers should now recognize the trap, but it is a very different matter (owing to the confused state of the law on the definition of charity) to expect them to avoid it. Secondly, English decisions on the 1954 Act[36] showed that it might be further restricted by authorizing a mere 'blue pencil' deletion of non-charitable purposes instead of a genuine confinement to charitable purposes. Accordingly, section 102 is based on existing Australian legislation[37] which applies to all trusts whenever declared and which is capable of severing a composite expression embracing both charitable and non-charitable purposes as well as merely deleting non-charitable purposes listed separately.[38]

The Trustees Act 1962 (W.A.) also deals with a number of the apportionment rules affecting trusts:

(i) A new apportionment rule is introduced by section 103[39] on the sale or purchase of fixed interest securities. This provides that, where securities bearing interest at a fixed rate are sold at a time when interest has accrued but is not yet due, the purchase price should not be credited entirely to capital but the equivalent of the accrued interest should be treated as income. Similarly, where a trustee purchases securities on which interest has accrued at the time of the purchase, the trustee should treat that amount of accrued interest when it becomes due as purchase money repaid.

(ii) As most will-draftsmen today expressly exclude the application of the rule in *Allhusen* v. *Whittell*,[40] section 104 provides that the rule shall not apply unless the will directs that it should. Instead the executor should pay debts and testamentary expenses entirely out of capital, although interest accruing on such debts and expenses after death will be borne by income. This of course affects only the rights of beneficiaries *inter se*. Creditors may still have recourse against all parts of the estate.

(iii) Similarly, section 105 provides that the apportionment rules of *Howe* v. *Lord Dartmouth*[41] and *Re Chesterfield's Trusts*[42] should no longer apply in the absence of a contrary direction in the will. The rule in *Howe* v. *Lord Dartmouth* normally applies where there

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36 *E.g., Re Gillingham Bus Disaster Fund* [1958] Ch. 300; *Re Harpur* [1961] 3 W.L.R. 924.

37 Conveyancing Act 1919 (N.S.W.), s. 37D; Property Law Act 1958 (Vic.), s. 131.

38 See *Leahy* v. *Attorney-General for N.S.W.* [1959] A.C. 457.

39 Following the Trustee Act 1958 (Vic.), s. 25 (3) and (4); and also Trustee Act 1925-1942 (N.S.W.), s. 24, and Trustee Act 1956 (N.Z.), s. 83.

40 (1867) L.R. 4 Eq. 295. This rule applied whenever residuary personality was settled on persons in succession and required that, in the absence of a contrary direction in the will, the executor should be treated as paying debts and testamentary expenses with such portion of capital as, together with the interest after deduction of tax on that portion for one year, would be sufficient for that purpose; the balance being paid out of income.

41 (1802) 7 Ves. 137.

42 (1883) 24 Ch.D. 643.

is a residuary bequest of personal estate to be enjoyed by persons in succession and it provides that, where the trust property consists of unauthorized investments which the trustee is under a duty to sell and convert into authorized investments, pending that conversion the tenant for life is not entitled to the whole of the income produced by those investments but to a 'fair yield' which is generally taken as the income that would have been produced had the property been invested in Consols. Any excess over this is apportioned to capital, although if in any year the actual income fails to reach the 'fair yield' it may be made up out of excess income in future years. Similarly under the rule in *Re Chesterfield's Trusts*, on the eventual sale of reversionary interests and on the falling in of outstanding personal estate, an apportionment must be made between capital and income. In defence of these rules it can be said that they have served a useful purpose in holding a balance between life tenant and remaindermen and that they mitigate the consequences of a breach of trust where the trustee retains unauthorized investments which might otherwise give an unduly large income to the life tenant to the detriment of the remainderman if the investment is of a wasting or speculative nature. However, it is rapidly becoming standard practice for wills to exclude the application of these rules, and where they are not excluded (frequently through sheer oversight) they seem to cause trouble, injustice, and sometimes litigation. Where the rules do apply their effect is usually to reduce the income of the life tenant (generally a widow or other dependant) and enhance the capital value of the property; and it is for this reason that most testators desire to exclude them. The effect of section 105 therefore is that pending any sale, calling in or conversion of settled property the entire income of property that is producing income will go to the life tenant, and on the sale, calling in or conversion of the property no part of the proceeds will be applied as past income. Although there is now a statutory power in section 27 (1) to postpone the sale or conversion of any property that the trustee is under a duty to sell, in the case of assets of a wasting or speculative nature this is limited to the time that is reasonably necessary to permit their prudent realization; beyond that the trustee's duty to convert remains. The testator may still, of course, direct by his will any apportionment that he desires.

Charitable Trusts Act 1962 (W.A.)

The Charitable Trusts Act 1962 (W.A.) deals with three matters pertaining to charities:

1. *Recreational Charities*

Part II of the Act adopts broadly the provisions of the English Recreational Charities Act 1958 which was passed to remove the doubts

cast by the House of Lords in *I.R.C.* v. *Baddeley*[43] on the validity of trusts for the provision of recreational facilities and leisure-time occupation in the interests of social welfare.

2. *Schemes in Respect of Charitable Trusts*

Part III of the Act widens the application of the *cy-pres* doctrine to charitable trusts along lines similar to those in the New Zealand Charitable Trusts Act 1957. It does this firstly by extending the circumstances in which *cy-pres* application is permitted beyond cases of impossibility and impracticability to cases of inexpediency, inadequacy of the amount, illegality, uselessness, and uncertainty. Similarly, it permits the *cy-pres* application of surplus amounts. Secondly, it removes the requirement that the settlor must have displayed a general charitable intention, as it was considered that the case law on this point was highly artificial and generally made the decision of *cy-pres* or no *cy-pres* an extremely arbitrary one. Accordingly, where the settlor has indicated that part of his property should be devoted to charity, whether generally or not, he will thereafter retain no interest in that property himself. Thirdly, in approving the new scheme, the Court is not limited to objects approximating as closely as possible to those selected by the settlor. A detailed procedure for bringing schemes before the Court is prescribed in the Act.

3. *Supervision of Charitable Trusts*

It was considered that the condition of charitable trusts in Western Australia did not warrant a scheme for the compulsory registration of charities. However, to ensure that charitable trusts continue to work effectively in the public interest and do not fall into decay, the powers of the Attorney-General to inquire into the affairs of charitable trusts and to enforce them have been considerably enlarged.

LAW REFORM (PROPERTY, PERPETUITIES, AND SUCCESSION) ACT 1962 (W.A.)

This Act makes extensive alterations to a number of branches of law related to trusts. There is not space in this article to do more than note briefly the changes.[44]

On the rule against perpetuities, the Act adopts most of the recommendations of the English Law Reform Committee.[45]

In general those reforms should not make much difference to conveyancing practice but merely remove many of the hazards of the rule that lie in wait for the unwary. There is every indication, however, that the new alternative perpetuity period of such period of years not exceeding eighty as is specified in the instrument creating the limitation will prove both useful and popular. Further, the repeal of the Accumulations

43 [1955] A.C. 572.

44 The writer has prepared a detailed review of the new perpetuities provisions which, under the title 'The Rule Against Perpetuities Restated', is intended for publication in the issue of the University of Western Australia Law Review for June 1963. The reforms are also discussed in Morris and Leach: *The Rule Against Perpetuities* (2nd edn.).

45 Fourth Report (1956). Cmnd. 18.

Act 1800, with the substitution of the ordinary perpetuity period for accumulations of income, has gladdened the hearts of the estate planners and is not thought likely to produce the evils generally envisaged by the critics of Peter Thellusson.

Among the miscellaneous matters dealt with by the Act are the following:

(i) The usual provision that a will expressed to be made in contemplation of marriage is not revoked by the celebration of that marriage;[46]

(ii) A statutory substitutional gift in favour of the issue of deceased children of the testator, in place of section 33 of the Wills Act 1837;

(iii) A provision that, where relief is sought in respect of a payment of money under mistake and the relief could be granted if the mistake were wholly one of fact, relief shall not be denied on the ground that the mistake is wholly or partly one of law;[47]

(iv) The prohibition of future restraints on anticipation. The Law Reform Committee wished to abolish existing restraints too, but, with a fitting sense of the propriety of the matter, Parliament had the last word.

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46 It was a little disturbing to discover how many people thought we already had such a provision.

47 This follows a new s. 94A introduced in 1958 into the New Zealand Judicature Act 1908. Its appearance in this context in the Western Australian legislation was likened by the Hon. Mr. Justice Jacobs of the Supreme Court of New South Wales (at the 1963 Law Summer School in Western Australia) to the famous 'town clerk's divorce' clause in the private local Act.