CONTROLLING DISCRETIONARY TRUSTEES[1]

It is of crucial interest to settlor, trustees and objects alike to appreciate the circumstances in which the court will interfere with the activities of discretionary trustees. If a settlor is to engage in a form of estate-planning that leaves a trustee or some other person with wide discretions to benefit designated objects of the settlor's bounty, then the question naturally arises how far those descretions can be controlled. It will be the aim of this article, therefore, to consider the nature of the obligations imposed upon fiduciaries in whom are vested discretions to distribute property.

At the outset it may be said that the whole history of this particular area of the law has been what may be called a history of well-meaning sloppiness of thought. A multitude of expressions has been used to circumscribe or define the wide discretions in question. It has been said that the trustees must exercise a 'sound and honest',[2] a 'proper and honest',[3] an 'honest and reasonable'[4] discretion; an 'honest and proper'[5] discretion; a 'fair and honest'[6] discretion; a 'sound'[7] discretion; an 'honest and prudent'[8] discretion; it has been said that the trustees must not act 'arbitrarily or unreasonably'[9] or 'capriciously';[10] they must not act 'improperly or unreasonably'[11] or 'mischievously or ruinously'[12] or 'wantonly or capricously';[13] they must not act 'in bad faith, oppresively, corruptly or with improper motive'.[14] None of

1 The article is based upon a chapter appearing in a forthcoming Butterworth's publication entitled DISCRETIONARY TRUSTS.
2 Costabadie v Costabadie (1847) 6 Hare 410; 67 ER 1225.
3 Ibid.
4 Ibid.
5 In re Hodges, Davey v Ward (1878) 7 Ch D 754.
6 Tabor v Brooks (1878) 10 Ch D 273.
7 In re Roper's Trusts (1879) 11 Ch D 272.
8 In re Bryant, Bryant v Hickley [1894] 1 Ch 324.
9 Tabor v Brooks (1878) 10 Ch D 273.
10 Ibid.
11 In re Courtier, Coles v Courtier (1886) 34 Ch D 136; In Radnor's Will Trusts (1890) 45 Ch D 402.
12 In re Brittlebank, Coates v Brittlebank (1881) 30 WR 99.
13 Pilkington v Inland Revenue Commissioners [1964] AC 612, 641.
14 Hawkins, *The Exercise by Trustees of a Discretion* (1967) 31 Conveyancer and Property Lawyer 117.

these generalizations is particularly helpful when it comes to determining whether a court will interfere in a particular case. None of them conveys much meaning to a settlor desirous of knowing precisely what freedoms he is allowing trustees and what protection he is affording objects. The ensuing discussion is designed to clarify the meaning behind the generalizations. It is divided into two parts: the nature of the trustees' duty of consideration and the occasions upon which the court will interfere with a considered exercise by trustees of their judgment.

A. THE TRUSTEE'S DUTY OF CONSIDERATION

Where a trustee is given a mere power of appointment, empowering him to diminish trusts in default of appointment in favour of the power objects, he must consider from time to time whether or not to exercise it.[15] In considering whether to exercise his power it is clear that a trustee should take into calculation claims actually made by objects, but he is not invariably obliged to survey the relative needs and merits of each and every object. All the objects may not be ascertainable.[16] In some cases the number of objects may be so small as to enable the trustee to consider the position of each relative to that of others. But in other cases the range of objects may be very wide. Then the trustee would consider cases of need which are known to him, claims which are actually made upon him, and make limited enquiries, depending on the means at his disposal, to ascertain the nature of the range of benefit and of needs within it. He might advertise the existence of the trust in order to allow information to be placed before him for consideration in the exercise of his discretion. The trustee should also consider the position of the takers in default of appoinment in determining whether to divest them of their interests.

The degree and extent of active consideration required of a trustee with a mere power will vary from case to case and, therefore, it may be true to say that the court 'cannot insist on the trustees applying a particular principle or any principle in reaching a decision'.[17] But it is doubtful whether it can be said that such trustees may, without breach of trust, neglect to seek information concerning substantial categories of objects.[18] That would not seem to accord with the rea-

15 See note 25 below.

16 See for example In re Gulbenkian's Settlements [1970] AC 508.

17 In re Manisty's Settlement, Manisty v Manisty [1974] Ch 17, 25 per Templeman J.

18 Ibid 25.

soning of Lord Wilberforce in *McPail v Doulton*[19] where His Lordship suggested that a trustee/mere power holder's duty of consideration varies only in degree from a trustee/trust power holder's duty of enquiry. The latter duty, as we shall see, involves the undertaking of detailed and systematic enquiry as to the composition and needs of the range of objects.

Should the trustee/mere power holder decide to distribute he would ensure that any proposed appointee is within the permissible range of selection and determine that any proposed grant is appropriate having regard to the quantum of distributable subject-matter and the number of other claimants or known cases of need.[20]

A trustee with a trust power, that is, a power which he is duty-bound to exercise in favour of the power objects, has a duty to inquire and investigate before making any distribution. In rejecting the idea that the trustee must, for the purposes of survey, be in a position where he can compile a list of objects,[21] Lord Wilberforce remarked, in *McPhail v Doulton,*[22] that a 'trustee with a duty to distribute, particularly among a potentially very large class, would surely never require the preparation of a complete list of names, which anyhow would tell him little that he needs to know. He would examine the field, by class and category; might indeed make diligent and careful inquiries, depending on how much money he had to give away and the means at his disposal, as to the composition and need of particular categories and of individuals within them; decide upon certain priorities or proportions, and then select individuals according to their needs or qualifications'.

Lord Wilberforce went on to say that the distinction between the duty to consider of a trustee/mere power holder on the one hand and a trustee/trust power holder on the other hand 'would seem to lie in the extent of the survey which the trustee is required to carry out: if he has to distribute the whole of a fund's income, he must necessarily make a wider and more systematic survey than if his duty is

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19 [1971] AC 424, 449, 457.

20 McPhail v Doulton [1971] AC 424, 449 per Lord Wilberforce.

21 A view put in In re Gulbenkian's Settlements [1970] AC 508, 524 per Lord Upjohn; McPhail v Doulton [1971] AC 424, 443 per Lord Hodson, 446 per Lord Guest; In re Ogden, Brydon v Samuel [1933] Ch 678; In re Gestetner Settlement, Barnett v Blumka [1953] Ch 672; Re Hooper's (1949) Settlement (1955) 34 ATC 3; Re Hain's Settlement, Tooth v Hain [1961] 1 All ER 848; Re Saxone Shoe Co Ltd's Trust Deed [1962] 2 All ER 904; In re Leek, Darwen v Leek [1969] 1 Ch 563.

22 [1971] AC 424, 449.

expressed in terms of a power to make grants . . . The difference may be one of degree rather than of principle'.[23]

With these general observations in mind concerning the nature and extent of the consideration which a trustee must give to the exercise of his power (be it a mere power or a trust power) it may be said more specifically that a discretionary trustee must not act arbitrarily, in capricious disregard of his power; nor may he allow another to take a decision on his behalf; he must exercise a personal discretion. Finally it is clear that he may not, in considering his power, act dishonestly or so as to commit a fraud on power.

(1) *No capricious or arbitrary conduct*

It is clear that the trustee will not have exercised a sound discretion if he purports to distribute property without stopping to consider (in the manner indicated above) before doing so.[24] If, having a mere power, the trustee fails to distribute, his conduct will not be unexceptionable if it is not considered conduct. 'It may be true to say that when a mere power is given to an individual he is under no duty to exercise it or even to consider whether he should exercise it. But when a power is given to trustees as such, it appears to me that the situation must be different. A settlor or testator who entrusts a power to his trustees must be relying on them in their fiduciary capacity so they cannot simply push aside the power and refuse to consider whether it ought in their judgment to be exercised.'[25]

It also follows that, if the trustee is bound to give consideration to the exercise of his power from time to time, he may not unauthorizedly release it.[26] For then he would be divesting himself of his responsibility not by virtue of neglectful disregard of his power but,

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23 Ibid.

24 See Wilson v Turner (1883) 22 Ch D 521; Re Powles, Little v Powles [1954] 1 All ER 516; Re Pauling's Settlement Trusts, Younghusband v Coutts & Co [1963] 3 All ER 1.

25 In re Gulbenkian's Settlements [1970] AC 508, 518 per Lord Reid. And see also In re Roper's Trusts (1879) 11 Ch D 272; Tempest v Lord Camoys (1882) 21 Ch D 571, 578; In re Gestetner Settlement, Barnett v Blumka [1953] Ch 672, 687-688; McPhail v Doulton [1971] AC 424, 449; Lutheran Church of Australia v Farmer's Co-operative Executors (1970) 121 CLR 628, 639, 652; Cock v Smith (1909) CLR 773. But here it is supposed that the objects constitute a class, ie that the power is special; see Hardingham (1975) 49 ALJ 7, 10 & 11.

26 See Re Eyre, Eyre v Eyre (1883) 49 LT 259; Saul v Pattinson (1886) 55 LJ Ch 831; In re Gestetner Settlement, Barnett v Blumka [1953] Ch 672; In re Mills, Mills v Lawrence [1930] 1 Ch 654; In re Wills' Trust Deeds, Wills v Godfrey [1964] Ch 219; Muir v Inland Revenue Commissioners [1966] 3 All

rather, by virtue of a deliberate act. The trustee may be empowered to release his power of distribution.[27] It has been argued that, where a mere power is given, exercisable in favour of a range of objects not constituting a loose class, the power is, by implication, releasable.[28] It is thought, however, that, since a release of power would lead to the destruction of the whole flexible discretionary trust machinery (with any accompanying taxation advantages), no such authority should lightly be conferred.

If a trustee is authorised to release his power of distribution will the release of it bind his successors in office? Bukley J thought not in *In re Wills' Trust Deeds, Wills v Godfrey*:[29]

> A power granted to successive holders of an office is unlike trust property the entire ownership of which is vested in the trustees for the time being of the settlement and devolves on each change of trustee by succession. Where a power is granted to successive holders of an office all that is vested in the incumbent for the time being of the office is the capacity to exercise the power while he holds that office. In other words, the power is granted by the original donor directly to each successive holder of the office and none of them acquires the power of succession from his predecessor. It appears to me to follow that none of the successive holders of the office is capable of binding any subsequent holder of the office not to exercise the power. Accordingly, although . . . the present trustees of the founder's will can by releasing the power preclude themselves from exercising it, they cannot, in my

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ER 38; In re Abraham's Will Trusts, Caplan v Abrahams [1969] 1 Ch 463. In Re Eyre (supra) Kay J observed (at p 260) that 'A trustee who has a power which is coupled with a duty is, I conceive, bound, so long as he remains trustee to preserve that power, and to exercise his discretion as circumstances arise from time to time, whether the power should be used or not, and he could no more, by his own voluntary act, destroy a power of that kind than he can voluntarily put an end to or destroy any other trust that may be committed to him'. The cases mentioned indicate that the position has not been affected by the enactment of provisions such as Property Law Act 1958 (Vic) s 155 which stiplates that 'A person (including a married woman) to whom any power, whether coupled with an interest or not, is given may by deed disclaim, release or contract not to exercise the power, and after such disclaimer, release or contract shall not be capable of exercising or joining in the exercise of the power'. See Conveyancing and Law of Property Act 1884 (Tas) s 76; Conveyancing Act 1919-1972 (NSW) s 28 (1) (2); Law of Property Act 1936-1972 (SA) s 57 (1); Property Law Act 1969-1973 (WA) s 93; Property Law Act 1974 (Qld) s 205.

27 Muir v Inland Revenue Commissioners [1966] 3 All ER 38.

28 See Hardingham (1975) 49 ALJ 7, 10-11. See however Re Eyre, Eyre v Eyre (1883) 49 LT 259; In re Abrahams' Will Trusts, Caplan v Abrahams [1969] 1 Ch 463.

29 [1964] Ch 219, 238.

> judgment, by a release exclude their successors in office from being able to exercise it. They might by a complete exercise of it exhaust the power and so exclude their successors in office from being capable of any further exercise of it.'[30]

Buckley J's analysis is, it is submitted, not convincing. A settlor confers a power of distribution upon his trustee or trustees for the time being. But that does not mean to say that a trustee for the time being has a fraction of the power, other fractions of it being vested in prospective trustees. Obviously, as Buckley J. conceded, a trustee (for the time being) may terminate the power by exhausting it by means of a complete exercise. It may be argued, however, that a power which is exercisable from time to time, as and when income (say) arises, is appropriately to be regarded as a number of separate powers, and that while the trustee may release any single power vested in him during his trusteeship he will not be able to release future powers of which he is not yet in possession or which he is not yet called upon to consider. It is thought that such an argument underlies Buckley J's analysis. Some sympathy may be expressed with the view that a discretionary trust of income may be regarded as giving rise not to one single power but to a number of separate powers of distribution.[31] It must be noted, however, that the weight of authority is opposed to any such analysis.[32] If, therefore, it be accepted that a discretionary trust exercisable from time to time involves the conferral of one single power on the trustee or trustees for the time being, it is submitted that it is artificial to regard future trustees as receiving a grant of power in advance of assuming office. It is appropriate to regard the trustees for the time being as being in full control of the power vested in them. It follows that they may extinguish that power by release. The single power having been released, any successor trustee will be denied the ability to exercise it. A different view could lead to undesirable confusion. A trustee having a mere power may release it. A taker in default of appointment may not be certain of the consequent inde-

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30 This argument is supported by Hawkins, *The Release of Powers* (1968) 84 LQR 64.

31 Gray, RULE AGAINST PERPETUITIES (4th ed, 1942) 410.1-410.5; Lyons v Bradley 168 Ala 505, 33 So 244 (1910).

32 Cf In re Blew, Blew v Gunner [1906] 1 Ch 624; In re Bullen, Bowman v Bowman (1915) 17 WAR 73; In re Antrobus, Henderson v Shaw [1928] NZLR 364; In re Coleman, Public Trustee v Coleman [1936] Ch 528; Innes v Harrison [1954] 1 WLR 668; In re Allan, Curtis v Nalder [1958] 1 WLR 220; Re Hyne, Queensland Trustees Ltd v Marsland [1958] Qd R 431 and Kennedy v Kennedy [1914] AC 215.

feasibility of his interest in the relevant subject-matter for, within what may be regarded as a reasonable time, a successor trustee may be appointed who might purport to exercise the power. There would be little transactional certainty arising out of any purported release by a trustee of his power (in whole or part).

So far it has been argued that a trustee may not divest himself of a continuing responsibility to make decisions concerning the exercise of his power by pushing it aside or purporting to release it. So too he may not divest himself of a *continuing* responsibility of consideration by exercising a comprehensive discretion *nunc pro tunt*.[33] Where the trustee has, for example, a power to distribute income, as and when it arises, he must exercise a separate discretion as each occasion for distribution occurs.

Finally, it is essential that, in considering the exercise of his power of distribution, the trustee act in a state of mind contemplated by the settlor. That is, he must ask the questions appropriate to a consideration of power entrusted to him. His assessment of the answers to those questions will determine the manner in which he exercises his judgment. He may not make a determination based on some irrelevant or extraneous issue such as, for example, a spiteful reaction to the conduct of a particular object. There is no place for personal whim, caprice or spite in the consideration of a fiduciary power.[34] Again it follows that if a trustee is mistaken as to the nature of, or the terms of, his power, he may be unable to lend it the consideration it

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33 This proposition is supported by the release cases considered above. See also Dunstan v Houison (1901) 1 SR (NSW) Eq 212; Re Stephenson's Settled Estates (1906) 6 SR (NSW) 420; Re Hirst, Hirst v Wilson [1954] St R Qd 344; Oceanic Steam Navigation Co v Sutherberry (1880) 16 Ch D 236; Watson's Bay & South Shore Ferry Co Ltd v Whitfield (1919) 27 CLR 268, 277. See also Thacker v Key (1869) LR 8 Eq 408, 415; Palmer v Locke (1880) 15 Ch D 294, 301; In re Bradshaw, Bradshaw v Bradshaw [1902] 1 Ch 436; In re Evered, Molineux v Evered [1910] 2 Ch 147; In re Cooke, Winckley v Winterton [1922] 1 Ch 292. The latter cases support the proposition in holding that a fiduciary power exercisable exclusively by will may not be exercised irrevocably in advance by the donee covenanting that it will be exercised in a particular way. Note also that a separate discretion must be exercised in respect of each separate trust which each trustee is administering: Skinner v Trustees, Executors & Agency Co Ltd (1901) 27 VLR 218.

34 See Klug v Klug [1918] 2 Ch 67; In re Steed's Will Trusts [1960] Ch 407, 418 per Lord Evershed MR; Dundee General Hospitals Board v Walker [1952] 1 All ER 896, 903 per Lord Morton, 905 per Lord Reid, 906 per Lord Tucker; Lutheran Church of Australia, South Australia District Incorporated v Farmers' Co-operative Executors & Trustees Ltd (1970) 121 CLR 28, 639 per Barwick CJ. Cf AG v Trustees of National Art Gallery (1944) 62 WN (NSW) 212, 214. And see Watson v Cain (1890) 16 VLR 766, 768.

requires. He may not be fully apprised of the issues entrusted to his judgment and may not, therefore, be able to give them due consideration.[35]

(2) *A personal discretion*

Any determination reached by the trustee must be as a result of his own consideration and deliberation. His decision cannot be made for him. Thus a settlor cannot instruct his trustee how to exercise a discretion. But he may advise him of his wishes. Just as long as the trustee ultimately makes a decision himself, it will not be improper that he has received or sought advice from interested parties.[36]

It follows that, because a trustee is required to consider the powers entrusted to him personally, he may not delegate them to others[37] unless he be so authorised.[38] Any such authority may be expressed or implied. The conferral of a wide discretion—for example, to appoint among the objects in any manner whatsoever—will not, of itself, indicate the existence of an implied power to delegate.[39] Further, it is not thought that a trustee with a mere power exercisable in favour of a range of objects, not constituting a class, may delegate his power. Such a trustee, it has been argued,[40] owes a duty of consideration to

35 See generally Scott, LAW OF TRUSTS (3rd ed 1967) vol 3, 1521. RESTATEMENT OF LAW OF TRUSTS (Second), section 187, comment h. Garvey v Garvey 22 NE 889 (1889) provides a neat illustration of the proposition in question.

36 See Hitch v Leworthy (1842) 2 Hare 200; 67 ER 83 and Fraser v Murdoch (1881) 6 App Cas 855, at p 867 especially.

37 Cf in re Triffitt's Settlement, Hall v Hyde [1958] Ch 852, 861; In re Boulton's Settlement Trust, Stewart v Boulton [1928] Ch 703; Re Morris's Settlement Trusts, Adams v Napier [1951] 2 All ER 528; In re Hunter's Will Trusts, Gilks v Harris [1963] Ch 372; Ingram v Ingram (1740) 2 Atk 88, 26 ER 455; Alexander v Alexander (1755) 2 Ves Sen 640, 28 ER 408; Carr v Atkinson (1872) LR 14 Eq 397; Webb v Sadler (1873) LR 8 Ch App 419; Burnaby v Baillie (1889) 42 Ch D 282; Williamson v Farwell (1887) 35 Ch D 128; In re Joicey, Joicey v Elliott [1915] 2 Ch 115; In re Greenslade, Greenslade v McCowen [1915] 1 Ch 155; In re McLean, Perpetual Executors & Trustees Association of Australia Ltd v Lawrence (1929) 35 ALR 216; Re Hume's Estate, Hume v Hume (1939) 34 Tas LR 22.

38 Pilkington v Inland Revenue Commisioners [1964] AC 612, 639 per Viscount Radcliffe. See also Trustee Act 1958 (Vic) s 30 giving trustees power to delegate their trusts and powers and discretions while absent from the jurisdiction. Cf Trustee Act, 1925-1970 (NSW) s 64; Trustee Act 1936-1968 (SA), s 17; Trustees Act 1962-1968 (WA), s 54; Trustee Act 1898 (Tas) s 25; Trusts Act 1973 (Qld) s 56.

39 See for example, Re Morris's Settlement Trusts, Adams v Napier [1951] 2 All ER 528; In re Triffitt's Settlement, Hall v Hyde [1958] Ch 852; In re Boulton's Settlement Trust, Stewart v Boulton [1928] Ch 703; In re Hunter's Will Trusts, Gilks v Harris [1963] Ch 372.

40 See note 28 above.

the takers in default of appointment. This duty, to consider before distributing, is personal to the trustee and may not be delegated without additional authorization.[41]

Three instances may be mentioned where a trustee may confer powers of distribution upon others without express authority to do so. First, if the trustee confers a general power of appointment upon the selected appointee, he will not be deemed to have unauthorisedly delegated his power nor to have exercised it excessively. In effect, the appointee may be regarded as the disponee of the appointed fund.[42] Second, it is legitimate for the trustee, when settling the fund by way of appointment, to give a power of advancement to the settlement trustees.[43] If in such a case a power of advancement is not expressly conferred, it may be implied by statute.[44] A power of advancement is here rationalized as 'purely ancillary power, enabling the [advancing] trustees to anticipate by means of an advance under it the date of actual enjoyment by a beneficiary selected by the appointor of the interest appointed to him or her, and it can only affect the destination of the fund indirectly in the event of the person advanced failing to attain a vested interest'[45] Third, a discretionary power, in the nature of a power to advance or benefit—such as may be implied into any trust by statute—impliedly authorises certain delegations of power by the trustee in whom it was vested.

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41 Cf a non-trustee donee of a general power: Combe's Case (1617) 9 Co Rep 75a, 77 ER 843; Sergison v Sealy (1743) 9 Mod 390, 88 ER 526; and see In re Triffitt's Settlement, Hall v Hyde [1958] Ch 852.

42 This proposition also extends to general testamentary powers. See In re McLean, Perpetual Executors & Trustees Association of Australia Ltd v Lawrance (1929) 35 ALR 216, 219 per Irvine CJ; and see also Bray v Bree (1834) 2 Cl & Fin 453; 6 ER 1225; Phipson v Turner (1838) 9 Sim 227, 59 ER 345; Slark v Dakins (1874) LR 10 Ch App 35; Morse v Martin (1865) 34 Beav 500, 55 ER 728. So in In re McLean (supra) Irvine CJ said (at p 219) 'Where the appointment gives to the appointee a general power to appoint, the appointment is good, as being in effect, not the delegation of a power but the gift of an interest, coming within the original power to appoint an absolute or any lesser interest.'

43 In re May's Settlement, Public Trustee v Meredith [1926] Ch 136; In re Mewburn's Settlement, Perks v Wood [1934] Ch 112. Cf In re Greenslade, Greenslade v McCowen [1915] 1 Ch 155, and In re Joicey, Joicey v Elliott [1915] 2 Ch 115.

44 See Trustee Act 1958 (Vic) ss 37 & 38; Trustee Act 1925-1970 (NSW) ss 43 & 44; Trustee Act 1936-1968 (SA), ss 33 & 33A; Trustees Act 1962-1968 (WA) ss 58 & 59; Trustee Act 1898 (Tas) s 29; Trusts Act 1973 (Qld) ss 61 & 62.

45 Re Morris's Settlement Trusts, Adams v Napier [1951] 2 All ER 528, 532 per Jenkins LJ.

Viscount Radcliffe commented upon the wide nature of a power to advance or benefit in *Pilkington v Inland Revenue Commissioners.*[46] The word 'benefit' is of wider signification than the word 'advance',[47] but, taken together, Viscount Radcliffe interpreted both words as comprehending 'any use of the money which will improve the material situation of the beneficiary',[48] such a use is obviously not confined to an immediate devotion of the money to the beneficiary in question. The money may be devoted to the use of non-objects as well as, or apart from, the beneficiary, provided that the material situation of the beneficiary is thereby improved.[49]

And it will not necessarily constitute an unauthorized exercise of such a power that the money is resettled upon new trusts and that the resettlement trustees are given powers of (say) maintenance and support. The question will always be whether the proposed disposition will improve the material situation of the beneficiary. Thus, in response to an argument that a delegation of power was involved in an exercise of a power to advance or benefit, Viscount Radcilffe said:[50] 'In fact I think that the whole issue of delegation is here beside the mark. The law is not that trustees cannot delegate: it is that trustees cannot delegate unless they have authority to do so. If the power of advancement which they possess is so read as to allow them to raise money for the purpose of having it settled, then they do have the necessary authority to let the money pass out of the old settlement into the new trusts. No question of delegation of their powers or trusts arises.'

Having regard to the wide meaning carried by the words 'advance or benefit' it is obvious that there is no logical stopping-place short of Viscount Radcliffe's conclusions. Similar reasoning may be applied to other specific varieties of discretionary power—for example, powers of maintenance and support. If a particular application of money can be shown to conduce to the maintenance or support of an object it should not matter that the money is not devoted *directly* to the use of the object.

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46 [1964] AC 612.

47 Ibid 634.

48 [1964] AC 612, 635. 'Advancement' was defined (at p 634) as meaning 'the establishment in life of the beneficiary who was the object of the power or at any rate some step that would contribute to the furtherance of his establishment'.

49 See [1964] AC 612, 636 citing Lowther v Bentinck (1874) LR 19 Eq 166 and In re Kershaw's Trusts (1868) LR 6 Eq 322.

50 [1964] AC 612, 639.

Thus, an intending settlor should be made aware of the fact that a power to *benefit,* or a power to *advance or benefit,* or a power to *maintain or support* is, to a certain extent, going to provide his trustee with greater flexibility of action than a simple power of appointment. Delegations and resettlements and, indeed, appointments, which otherwise may be regarded as excessive, will be authorised provided they can be shown to contribute to the improvement of the material position of the object in question or to his maintenance or support.[51] On the other hand, it will be argued in section B of this article that such powers impose more onerous obligations upon the trustees in whom they are vested than simple powers of appointment.

(3) *The trustee must not commit any fraud on the power*

The trustee must act honestly and not in fraud on the power committed to him. The concept of fraud on a power has been much discussed.[52] Briefly, it may be said that a trustee in receipt of a power of appointment will commit a fraud on that power if he exercises it, not with the primary intention of conferring benefits among the designated class of objects, but with the purpose of procuring the receipt of a material benefit[53] by some person not among the designated class and, to that extent, defeating or departing from the intention of the settlor/donor of the power.[54] The fraud may take the form of a bargain between the trustee and an object whereby a non-object is to benefit,[55] but to establish a fraud on a power it is

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51 Such a point occurred to Cross J in In re Hunter's Will Trusts, Gilks v Harris [1963] Ch 372. His Lordship, however, considered that he was obliged to declare that there was an unauthorized delegation of power by the Court of Appeal decision in Re Morris's Settlement Trusts, Adams v Napier [1951] 2 All ER 528. But the power in the latter case was not a power to benefit and thus was not as wide. Re Morris therefore was not precisely in point. See [1963] CLJ 46.

52 See for example Sugden, POWERS (8th ed 1861), Ch 12, s 2. Farwell, POWERS (3rd ed 1916) Ch X; Eblen, *Fraud on Special Powers of Appointment* (1936) 25 Kentucky Law Journal 3; Benas, *The Nature of Fraud on a Power in the Contemplation of Equity* (1947) 12 Conveyancer and Property Lawyer 106; Hanbury, *Frauds on a Power—An Opportunity for Stocktaking* (1948) 64 LQR 221; Sheridan, FRAUD IN EQUITY (1957) 116-124.

53 This does not necessarily have to constitute part of the trust fund. See, for example, Cochrane v Cochrane [1922] 2 Ch 230.

54 The foregoing statement is adapted from the Court of Appeal's judgment in In re Greaves, Public Trustee v Ash [1954] Ch 434, 445. See also the literature mentioned in note 52 and see especially Vatcher v Paull [1915] AC 372; Duke of Portland v Topham (1864) 11 HLC 32, 11 ER 1242; In re Crawshay, Hore-Ruthven v Public Trustee [1948] Ch 123.

clear that it is not necessary to prove a bargain between the trustee/donee of the power and the appointee.[56] Indeed, it is not necessary that the appointee should be a party to or know of the corrupt intention or purpose.[57] What is of overriding importance, and what the court looks to, is the intention or purpose of the trustee/appointor in making the appointment. If his intention is to defeat or depart from the intention of the settlor/donor in the manner indicated, fraud on the power will be established; and this, no matter how pure the trustee's motives. The establishment of common law fraud is not necessary for the establishment of fraud on a power.[58]

Three special problems concerning fraud on power will here be considered, the remaining body of law being reasonably clearly documented elsewhere. First, if the discretionary trustee is named as the taker in default of appointment, is he capable of committing fraud on his power? Second, if there be only one object at the time of appointment, is it true to say that the trustee cannot be guilty of fraud on his power in the absence of an express understanding, between himself and the object, that a stranger should benefit? Third, matters of primary intention not being readily susceptible of proof, upon whom is rested the onus of proof in relation to fraud on power?

In order that the first and second matters referred to may be adequately resolved, a further issue must be discussed: upon whom is it

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55 For bargains to benefit the donee of the power himself, see for example, Daubeny v Cockburn (1816) 1 Mer 626, 35 ER 801; Jackson v Jackson (1840) 7 Cl & Fin 977; Reid v Reid (1858) 25 Beav 469, 53 ER 716, 7 ER 1338; Farmer v Martin (1828) 2 Sim 502, 57 ER 876; Arnold v Hardwick (1835) 7 Sim 343, 558 ER 869; Askham v Barker (1850) 12 Beav 499, 50 ER 1152; Cloutte v Story [1911] 1 Ch 18; Aleyn v Belchier (1758) 1 Eden 132, 28 ER 634. Note that powers of jointuring were treated differently: Saunders v Shafto [1905] 1 Ch 126. And for bargains to benefit a third person being a stranger to the power, see for example Salmon v Gibbs (1849) 3 De G & Sm 343, 64 ER 508; Carver v Richards (1860) 1 De Gf & J 548, 45 ER 474; Lee v Fernie (1839) 1 Beav 483, 48 ER 1027; Knowles v Morgan (1909) 54 Sol J 117; Daubeny v Cockburn (1816) 1 Mer 626, 35 ER 801; Birley v Birley (1858) 25 Beav 299, 53 ER 651; Pryor v Pryor (1864) 2 De GJ & Sm 205, 46 ER 353; Redman v Permanent Trustee Co of New South Wales Ltd (1916) 22 CLR 84. See also generally Sheridan op cit 118 note 1.

56 See Sheridan op cit 119-120.

57 See for example, Lord Hichinbroke v Seymour (Lord Sandwich's Case) (1789) 1 Bro CC 395, 28 ER 1200; Keily v Keily (1843) 4 Dr & War 38, 55, 56; 65 RR 675; Gee v Gurney (1846) 2 Coll 486, 63 ER 826; Lord Wellesley v Earl of Mornington (1855) 2 K & J 143, 69 ER 728; In re Wright, Hegan v Bloor [1920] 1 Ch 108, and In re Crawshay, Hore-Ruthven v Public Trustee [1948] Ch 123, Sheridan op cit 120.

58 See Vatcher v Paull [1915] AC 372, 378 per Lord Parker.

appropriate to say that a fraud on a power is perpetrated? Three categories of person suggest themselves: the settlor, the taker or takers in default of appointment, and the objects as such. Sheridan has dismissed any suggestion that the fraud on the power may be described as a fraud on the donor of the power, by observing that 'the donor is generally dead by the time the power comes to be exercised. The expression "fraud on the donor" would then have the implication of the primitive and undesirable notion that the actions of the living are in some way controlled by the wishes of the dead'.[59] One may query the correctness of the first assumption in the context of discretionary trusts. It is by no means clear that a settlor of a discretionary trust will be dead by the time the power comes to be exercised. But even if he is dead surely it will be the case that the terms of his disposition (reflecting his wishes) will control the actions of the living after his death. Surely it is overstating the matter to describe all deadhand control as 'primitive and undesirable'. Deadhand control must, of course, be limited and the common law has evolved policies to limit it.[60] It may, however, be argued that a fraud on power is not appropriately regarded as a fraud on the donor/settlor for the following reason: in asking upon whom such a fraud is perpetuated one is asking to whom the donee of the power owes a duty not to exercise it fraudently. In the context of discretionary trusts that duty is not owed to the settlor/donor as such who, having created his disposition, ceases to have anything to do with its operation (except in so far as powers are reserved to him). The settlor ceases to be interested in his disposition's operation and has no standing to enforce its terms.[61]

But a fraud on a power may be regarded as a fraud on the person or persons entitled to default of appointment.[62] The taker in default of appointment takes (under a discretionary trust) subject to a valid exercise by the discretionary trustee of his power in favour of one or other of the objects.[63] It will undoubtedly constitute a fraud on the taker in default of appointment that he be divested of his interest by an exercise of power which ostensibly is valid but which is made with

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59 Sheridan op cit 124.

60 Most strikingly, of course, the rule against perpetuities.

61 See In re Astor's Settlement Trusts, Astor v Scholfield [1952] Ch 534, 542 and Scott, LAW OF TRUSTS (3rd ed 1967) section 200.

62 See In re Greaves, Public Trustee v Ash [1954] Ch 434 and Sheridan op cit 124. But cf In re Nicholson's Settlement, Molony v Nicholson [1939] Ch 11 (discussed below).

63 See Re Goldsworthy [1969] VR 843, 849 and Queensland Trustees Ltd v Commissioner of Stamp Duties (Qld) (1952) 88 CLR 54, 61-63.

the primary intention of defeating the limits imposed on the power. The trustee may not divest the taker in default of appointment of his interest otherwise than for the purposes, and in the way, limited by the donor of the power. Because the limitations in defaut of appointment may be looked upon as embodying the primary intention of the donor/settlor, a 'bargain or condition which leads to the fund going in default of appointment can never therefore defeat the donor's primary intention'[64] and will not constitute a fraud on power; but if the power be conferred upon a trustee he will nevertheless have to consider it (in the manner described above) before deciding in favour of the taker in default.[64a]

But it is also thought that a trustee in receipt of a power of distribution owes a duty to the *objects* (being objects constituting a loose class)[65] to exercise it for the purposes for which it was conferred. He will thus commit a fraud on *them* if he exercises it fraudently. Each such object, having a right to have the discretionary trust administered in an appropriate manner, has an interest (in a loose and popular sense) in the totality of the trust fund.[66] Each object is interested in securing a valid and sound exercise by the trustee of his discretion and each may demand that any appointment be validly made.[67] The objects' rights of due administration—the objects' 'interests' in the trust fund, will not be properly realised by a fraudulent appointment. Thus any fraud on the trustee's power will not only be a fraud on the takers in default of appointment but may also be a fraud on the objects. If the trustee's power is a trust power then, *ex hypothesi,* there will be no takers in default of appointment and any fraud on the power will be a fraud on the objects only.

In the light of the foregoing analysis, the first two questions may now be examined. If the discretionary trustee is also the taker in default of appointment, is he capable of committing fraud on his power or otherwise exercising his power invalidly? In answer to this question, Sheridan has observed: 'If the appointor is himself entitled

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64 Vatcher v Paull [1915] AC 372, 379 per Lord Parker. See also In re Greaves, Public Trustee v Ash [1954] Ch 434, 446.

64a Lutheran Church of Australia South Australia District Incorporated v Farmers' Co-operative Executors & Trustees Ltd (1970) 121 CLR 628, 653 per Windeyer J.

65 It has already been argued—see note 28 above—that a trustee owes no duty to objects not forming a loose class.

66 Cf Commissioner of Stamp Duties (Qld) v Livingston [1965] AC 694, 713-716 and see Gartside v Inland Revenue Commissioners [1968] AC 553, 617, 618.

67 See Hardingham (1975) 49 ALJ 7, 9, 10.

in default of appointment . . . an execution of the power will be valid even if in furtherance of a bargain that the appointee will benefit a third party, a non-object, out of the property[68] . . . He is in effect owner, and could himself make the effect more realistic by releasing the power.'[69] It is thought that it would be unsafe to import the preceding logic into the context of discretionary trusts. If a trustee is taker in default of appointment he will nevertheless have a duty to consider the exercise of the mere power, entrusted to his judgment, from time to time.[70] Because that power is entrusted to him as a general trustee he will be unable to release it.[71] He will be obliged to consider its exercise and to exercise it (if at all) in a non-fraudulent manner. This obligation will be owed to the objects. Of course, if the trustee is the taker in default of appointment, he and the objects, if the latter be *sui juris*, may agree as between themselves to dispose of the trust as they wish.[72] But, except with the agreement of the objects, the trustee will not, despite the fact that he is the primary beneficial taker of the trust fund, be able to deal with it as absolute owner and in dereliction of his fiduciary obligations. The trustee may, however, decide, after giving the matter *due* consideration, that the trust fund should remain indefeasibly vested in himself. He would then be free to deal with it as absolute owner.

If there be only on object at the time of appointment, is it true to say that the trustee cannot be guilty of fraud on his power in the absence of an express understanding, between himself and the object, that a stranger should benefit? This question was answered affirmatively in *In re Nicholson's Settlement, Molony v Nicholson.*[73] In that case the donee of a power was tenant for life of a fund which, in default of her issue, was to pass to relations of hers in England. The donee had for some years lived with friends in Oregon and their future

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68 Sheridan, op cit 122 citing Wright v Goff (1856) 22 Beav 207, 52 ER 1087. In fact Wright v Goff does not support the proposition as, in that case, the appointee, and *not* the *appointor,* was the taker in default, apart from being the only object. Thus the appointee could agree (with the appointor) to do what she wished with the fund, it being, in effect, her own.

69 Sheridan, op cit 124.

70 See above.

71 See above note 26. Cf In re Mills, Mills v Lawrence [1930] 1 Ch 654 where Romer LJ observed, in relation to the facts of that case, that (see p 669) 'It is not contended . . . ,and it could not be contended, that the power is conferred upon him as one of the general trustees of the will.'

72 See In re Smith, Public Trustee v Aspinall [1928] Ch 915; In re Nelson, Norris v Nelson [1928] Ch 920 n.

73 [1939] Ch 11.

welfare was her serious concern. She had power to appoint a life interest in the fund to a husband. When she was a spinster over eighty years of age she had endeavoured to arrange with her relations that she should have a portion of the capital placed at her free disposal, on the terms of her releasing her power of appointment in favour of a husband. She had mentioned, at the same time, the possibility of her marrying and exercising the power in favour of her husband. No arrangement was made. In May, 1934, she married and in July, 1934, exercised the power of appointment in favour of her husband. She died in 1936. The takers in default—the English relations—contested the validity of the appointment. It was held that, on the evidence, there was no bargain, arrangement or understanding between the donee and her husband in any way fettering his complete control over the income appointed to him. Nevertheless it was pointed out that it was 'easy to infer that when she appointed in her husband's favour she had it in mind that some of the income would find its way to the friends whose future welfare was her serious concern'[74] The appointment was considered not to be fraudulent.

Re Nicholson[75] could easily have been disposed of by the Court of Appeal on the ground that there was insufficient evidence to establish that the donee made her appointment to her husband for the primary purpose of benefiting non-objects, namely the friends in Oregon. For it is clear that if the appointor appoints to an object of the power, hoping that the appointee will so dispose of the appointed property as to benefit non-object or non-objects, but intending to benefit the object whatever disposition he may make of the appointed property, the appointment will be valid.[76]

But the Court of Appeal distinguished two types of power: a power to appoint to a single object filling a particular qualification and thereby to diminish a disposition to takers in default of such appointment; and a power to appoint to one or other of the members of a class of objects and thereby to defeat a disposition in default of appointment to some or other of the members of the class. In the case of either type of power, it was held, the appointment will or may be vitiated, either wholly or *pro tanto,* if it is shown to have been made upon a bargin, arrangement, or understanding which fetters the

74 Ibid 18.
75 [1939] Ch 11.
76 See especially In re Dick, Knight v Dick [1953] Ch 343.

appointed interest in the appointee's hands in favour of a stranger to the power. Such was not, however, the present case.

It has already been observed that a bargain is not an essential element of a fraud on a power.[77] But the Court of Appeal observed that the cases establishing this principle were cases concerning the second type of power mentioned and held that the principle has no application where the power is of the first kind. 'While therefore it may well be that in the case of powers of the second type defined above the Court may inquire into the ultimate object which the appointor hopes to achieve and where that object is collateral may invalidate the appointment, there is no authority for the proposition that such an inquiry is appropriate or permissible in the case of a power of the first type defined above; and we can discern no principle which would justify such an inquiry.'[78] The reasoning in support of the foregoing conclusion seems to suggest that a collateral purpose in relation to an appointment under the second type of power would improperly defeat the entitlements of other object/takers in default while a collateral purpose in relation to an appointment under the first type of power would not, there being only one object.[79] But what this analysis overlooks is the position of the takers in default of appointment under the first power, of the English relations in the instant case. Surely they (just as the other object/takers in default under the second type of power) are entitled to demand that the donee exercise his or her power, and so divest them of their interests, *bona fide* in accordance with its purposes. Therefore, if it be established that the donee did not appoint with the primary intention of benefiting the object, the appointment will be fraudulent. It may have been made with the primary intention of benefiting non-objects to whom it was known that the object would pass the fund,[80] or with the primary intention of benefiting non-objects to whom it was known the object would give the fund as a result of the application of strong moral pressure,[81] or with the primary intention of taking a transfer back of

77 See Sheridan, op cit 119-120.
78 [1939] Ch 11, 20-21.
79 Ibid.
80 Cf Pryor v Pryor (1864) 2 De GJ & S 205, 46 ER 353; In re Crawshay, Hore-Ruthven v Public Trustee [1948] Ch 123.
81 Cf Duke of Portland v Topham (1864) 11 HLC 32, 11 ER 1242; Topham v Duke of Portland (1869) LR 5 Ch App 40; Re Marsden's Trust (1859) 4 Drew 594, 62 ER 228; In re Crawshay, Hore-Ruthven v Public Trustee [1948] Ch 123.

the fund by operation of law on the object's death.[82] It will be fraudulent in so far as the takers in default of appointment are concerned. Any bargain would merely constitute evidence of such fraud. Of course, if the donee of *the* power is the taker in default of appointment[83] or the object (being *sui juris*) is the *only* person entitled,[84] the result may be different. But, it is submitted, the broad generalization made by the Court of Appeal was completely misconceived. It is also thought that the more extended conclusion drawn by Sheridan from *Re Nicholson*[85] is, for similar reasons, misconceived: that an appointment to D (being an object of a class comprising B, C and D) by way of divestment of an interest in E with the intention (without a bargain) that A or F should benefit would be unobjectionable.[86]

It has been observed that what is of decisive importance in determining whether there has been committed a fraud on the power is the primary intention or purpose of the appointor/trustee in making the appointment. The court must conclude that it was the primary intention or purpose of the trustee to defeat the terms of the power. The issue of onus of proof is of the utmost significance in this context for matters of purpose and intention may be difficult of proof. ' "[T]he purpose and intention" of the appointor is to be ascertained as a matter of substance and not solely by analysing the effect of the appointment, though, of course, that is important. One must try to discover his genuine intention'.[87] It is clear that suspicion will not be conclusive of fraud;[88] nor will improper motive, for example, anger or resentment;[89] improper purpose not simply improper motive must be

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82 Cf Lord Hinchinbroke v Seymour (Lord Sandwich's Case) (1789) 1 Bro CC 395, 28 ER 1200; Keily v Keily (1843) 4 Dr & War 38, 55, 56, 65 RR 675; Gee v Gurney (1848) 2 Coll 486, 63 ER 826; Lord Wellesley v Earl of Mornington (1855) 2 K & J 143, 69 ER 728.

83 Then the donee of the power and the object (being *sui juris*) could agree to do whatever they liked with the fund.

84 See Wright v Goff (1856) 22 Beav 207, 57 ER 1087.

85 [1939] Ch 11.

86 Sheridan, op cit 122. See also section C on p 123.

87 In re Burton's Settlements, Scott v National Provincial Bank Ltd [1955] Ch 82, 100.

88 See Henty v Wrey (1882) 21 Ch D 332; and see Beere v Hoffmister (1856) 23 Beav 101, 53 ER 40; in In re De Hoghton, De Hoghton v De Hoghton [1896] 2 Ch 385 it was held that an appointment by the donee to himself as guardian of an object under a power to maintain was valid in the absence of proof of fraud as opposed to suspicion of it; In re Boileau's Will Trusts [1921] WN 222; M'Queen v Farquar (1805) 11 Ves Jun 467, 32 ER 1168; Re Merton's Settlement, Public Trustee v Wilson [1953] 2 All ER 707.

89 See Vane v Lord Dungannon (1804) 2 Sch & Lef 118, 130; 9 RR 63, 71.

found to exist.[90] It is the generally accepted position that the onus will be upon any party impugning conduct of a trustee falling within the apparent terms of his power to show that a proper discretion has not been exercised[91] and this wide rule has been applied in the context of fraud on a power.[92] On at least three occasions, however, the court has countenanced a situation in which the onus of proof may shift to those seeking to uphold the appointment to demonstrate its rectitude: where a subsequent appointment is made to the same appointee, the original appointment being invalid as fraudulent;[93] where a corrupt intention is shown to exist at some time prior to the appointment in question;[94] and where the appointment is improper because of conditions attached to its fulfilment, and a question arises whether the appointment is entirely invalid, as being fraudulent, or only partly invalid, as being excessive.[95]

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90 Perhaps the execption enunciated by P O Lawrence J in In re Wright, Hegan v Bloor [1920] 1 Ch 108 is more apparent than real. At p 118 His Lordship suggested that improper motive would be decisive of fraud despite impeccable purpose where the donee appoints absolutely to an object to the exclusion of other objects on the strength of a bribe given or promised. But it may be queried whether such a donee's intention or purpose is to benefit an object pursuant to an honest exercise of the power. He is not exercising the power for the primary purpose of benefiting the objects but rather for the primary purpose of dishonest self-enrichment.

91 See In re Brittlebank, Coates v Brittlebank (1881) 30 WR 99 and Gordon v Australian & New Zealand Theatres Ltd (1940) 40 SR (NSW) 512, 517 per Jordan CJ.

92 See for example, Gilbert v Stanton (1905) 2 CLR 447, 462; Redman v Permanent Trustee Co of NSW (1916) 22 CLR 84, 94; Askham v Barker (1853) 17 Beav 37, 51 ER 945; Cochrane v Cochrane [1922] 2 Ch 230, 246. Farwell op cit 469-470; Hanbury op cit 226; Benas op cit 111, Halsbury, LAWS OF ENGLAND (3rd ed) 30, 276.

93 Topham v Duke of Portland (1869) LR 5 Ch App 40; Re Chadwick's Trusts, Shaw v Woodward [1939] 1 All ER 850; Farwell 231. In the former case, Giffard LJ said (at p 62) that 'where an appointment has been set aside by reason of what has taken place between the donee of the power and an appointee, a second appointment by the same donee to the same appointee cannot be sustained otherwise than by clear proof on the part of the apointee that the second appointment is perfectly free from the original taint which attached to the first'.

94 Humphrey v Olver (1859) 28 LJ Ch 406; In re Wright, Hegan v Bloor [1920] 1 Ch 108. In the latter case P O Lawrence J observed (at p 120) that 'if a corrupt intention is shown to have ever been entertained the burden of showing that it was abandoned previously to the execution of the power lay upon those who supported the appointment'.

95 Redman v Permanent Trustee Co of NSW (1916) 22 CLR 84, 94 per Isaacs J. His Honour said: 'The initial burden of proving the invalidity of the appointment undoubtedly lay on the plaintiff [that is the party

The approach adopted in the authorities cited in support of the three mentioned situations is, it is submitted, undesirable. The onus should remain throughout upon those arguing the invalidity of the appointment to show that it is fraudulent. The circumstance in each of the situations mentioned will afford evidence (of varying cogency according to the circumstances of each case) of fraudulent purpose. But at no stage should fraud be presumed. 'Fraud, improper motives, intentions, objects, or purposes, ought not to be presumed, they must be proved.'[96] In *In re Crawshay, Hore-Ruthven v Public Trustee*[97] the Court of Appeal adopted this approach to the problem of establishing fraud on a power:

> Mr. Myles advanced a seventh proposition, which was as follows: 'If corrupt intention is shown ever to have been entertained, the burden of proving that it was abandoned previously to the execution of the power lies upon those who support the appointment.' Mr. Montgomery White admitted that the pre-existing intention was evidence, and in some cases cogent evident, of the intention at the date of the exercise of the power, but submitted that there was in this court no question of onus. The court must reach a decision on the evidence as a whole unbiased by any consideration of alleged onus. Mr. Myles' seventh proposition was also based on *In re Wright*,[98] but on this point P. O. Lawrence J. based himself on a decision of this court in *Humphrey v. Olver*.[99] It is to be observed, however, that in that case only Turner LJ based his decision on the question of onus; Knight Bruce LJ reached his conclusion on the evidence as a whole. We prefer this method of approach, recognizing that the cogency of the inference drawn from the proof of intention must largely depend on the length of the period that elapses between the date as at which the intention is proved and the date on which the

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impunging the validity of the appointment]. But, as against Redman [the stranger to the power whose benefiting from the power subject-matter was a condition of appointment] and Mrs Hage [the appointee], the admissions severally made by, and therefore admissible against, them establish that the appointment as it stands was upon a condition which, if it permeates the whole appointment, clearly invalidates it . . . *Prima facie* the admission in the case shows that the condition does permeate the whole. Then, assuming, without deciding, that the admitted condition is capable of qualifications which would preserve the appointment in whole or in part, the burden of proof is shifted to the defendants who are affected by the admission.'

96 Henty v Wrey (1882) 21 Ch D 332, 354 per Lindley LJ.

97 [1948] Ch 123, 137-138.

98 [1920] 1 Ch 108.

99 (1859) 28 LJ Ch 406.

power is exercised and on what has happened in the meanwhile.'[100]

While the Court did not make mention of the first or third situations (as exemplified by *Topham*[101] *and Redman*[102] respectively), nevertheless it is clear that the Court's logic applies to them. Indeed *Topham*[103] was a case not dissimilar to *Crawshay*[104] in that in the former case, as in the latter, a corrupt intention was shown to have existed at a point of time earlier than the appointment under consideration and the question in both cases concerned the nature of the inference to be drawn from that fact. Isaacs J's reasoning in *Redman*[105] is also covered by that of the Court of Appeal. The situation contemplated by Isaacs J is the weakest of the three in that it seems to give rise to a shift of onus even where antecedent fraud is not conclusively demonstrated to exist. The Court of Appeal has provided the desirable approach. The court must reach its conclusion on the evidence as a whole, unfettered by any artificiality or inflexibility brought about by the assignment of a shifting onus of proof and consequent shifting presumption of fact.

It is not clear whether the Court of Appeal, in the cited passage, was suggesting that matters of onus should be abandoned altogether so that one should not even speak of the onus of proving the impropriety of an appointment being on the person seeking to establish that position, or whether it was simply saying that the court must make its assessment having regard to the evidence as a whole as presented by the person seeking to attack the appointment. It is thought that the Court was putting the latter position only. There is too much authority to the contrary for it now to be asserted that there is no initial onus of proof in this context. And it is in no way inconsistent with what has been said hitherto to argue that it is desirable that an initial onus should be so imposed. If someone wishes to allege that a trustee, acting within the apparent scope of his power, is acting improperly, and so should be removed, he should be required to make good his allegation.

Thus, by way of summary, it may be said that the onus of proving fraudulent purpose will be upon the person alleging it. The court will

100 [1948] Ch 123, 137-138.
101 (1869) LR 5 Ch App 40.
102 (1916) 22 CLR 84, 94.
103 (1869) LR 5 Ch App 40.
104 [1948] Ch 123.
105 (1916) 22 CLR 84, 94.

make its assessment having regard to the totality of the evidence placed before it. The court will at no stage presume the existence of fraud thus countenancing a shift in the onus of proof to those seeking to uphold the appointment. The court will simply consider circumstances which might, arguably, have created an inference one way or the other, along with the totality of evidence.

B. THE TRUSTEE'S DUTY TO MAKE A REASONABLE DECISION

It is fundamental that the court will not interfere with the exercise of a power or discretion simply because it may feel that, put in the trustee's position, it would have acted differently. The court will not, on this ground alone, purport to improve on the trustee's judgment. But the court may consider that the discretion has been exercised so unreasonably that the trustee could not have been acting honestly for the benefit of the objects or could not have addressed his mind to the appropriate question.[106]

But the 'possession of full power of wide discretion by a trustee means the kind of power and discretion which inheres in a fiduciary relation and not that illimitable potentiality which an unrestrained individual possesses respecting his own property. There is an implication, when even broad powers are conferred, that they are to be exercised with that soundness of judgment which follows from a due appreciation of trust responsibility. Prudence and reasonableness, not caprice or careless good nature . . . furnish the standard of conduct'.[107] Thus it is accepted in the United States of America that the court will interfere if the facts show that the trustee's decision constitutes an unreasonable means of carrying out the *terms* of the trust.[108] The

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106 See In re Beloved Wilke's Charity (1851) 3 Mac & G 440, 42 ER 330; Gisborne v Gisborne (1877) 2 App Cas 300; Cock v Smith (1909) 9 CLR 773; Re Green [1972] VR 848. See also Brophy v Bellamy (1873) LR 8 Ch 798; and In re Bryant, Bryant v Hickey [1894] 1 Ch 324.

107 Corkery v Dorsey 111 NE 795, 796 (1916) per Rugg CJ.

108 See Scott, LAW OF TRUSTS (3rd ed 1967), section 187.2; RESTATEMENT OF THE LAW OF TRUSTS (Second), section 187, comment i (and see the authorities to the comment cited on the appendix volume); Halbach, *Problems of Discretion in Discretionary Trusts* (1961) 61 Columbia Law Review 1425. And see, for example, Scholfield v Commerce Trust Co 319 SW 2d 275 (1958); Buck v Cavett 353 P 2d 475 (1960); Stallard v Johnson 116 P 2d 965 (1941); In the Will of Hafemann 62 NW 2d 561 (1954); Rinker's Adm'r v Simpson 166 SE 546 (1932); Rowe v Rowe 347 P 2d 968 (1959).

latter proposition presupposes the existence, as part of the trust, of external factual standard against which the reasonableness of the trustee's decision may be measured.[109] Where, for example, a trustee is given a power to maintain and support out of a fund, the external factual standard, constituted by the minimum degree of assistance by way of maintenance and support reasonable in the circumstances, may be considered against the trustee's decision. If the trustee has given appropriate consideration to the right issues, but nevertheless sees fit to deprive the object in question of a minimum allowance by way of maintenance—when such allowance could, without inconvenience, have been afforded—one might very well conclude that he has exercised his discretion unreasonably. It may be argued that his decision was unreasonable because, taking into account the nature of other claims on the distributable fund in his hands, a minimum amount necessary for the relevant object's support was available; and the relevant object may be seen to be in need of such sum. The assumption of such a jurisdiction by the court does not deprive a trustee of his discretion. He will have a wide area in which to exercise his judgment. The jurisdiction simply acknowledges that a person, given a fiduciary power to maintain or support, must exercise his power prudently and may not, through imprudence or 'careless good nature', subvert the expressed terms of the trust. Further, where a trustee has a power to maintain as he sees fit—or to support—as opposed to an unqualified power of distribution it is not an undesirable development that the courts should adopt a protective attitude towards the objects whose welfare has been entrusted, to a certain extent, to the trustee's care.

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109 See Scott op cit section 187.2; Restatement op cit section 187 comment i; but cf the view put by Halbach op cit 1429. In Rowe v Rowe 347 P 2d 968 (1959) the Court interfered with a discretion which it considered was exercised unreasonably despite the absence of criteria to guide the trustee (and the Court) in its judgment. The Court observed that 'When the specific purpose or purposes of the settlor can be ascertained the trustee's choice of action, if it is to constitute a reasonable judgment, must be within the limits set by the settlor's purpose. The difficulty in many if not in most of these cases is finding the purpose of the settlor with sufficient definiteness to be helpful in marking out the limits beyond which the trustee should not be permitted to go in dealing with the trust property.' The Court in the instant case, arbitrarily it is thought, spelt a purpose based on need out of a power left entirely to the trustee's 'own judgment and discretion' in order to test the reasonableness of its exercise.

The matter is put in the following terms by the American Law Institute's Restatement of the Law of Trusts, Second:[110]

> If there is a standard which the reasonableness of the trustee's judgment can be tested, the court will control the trustee in the exercise of a power where he acts beyond the bounds of a reasonable judgment, unless it is otherwise provided by the terms of the trust . . . Thus, if the trustee is empowered to apply so much of the trust property as he may deem necessary for the support of the beneficiary and the trustee does not apply at least the minimum amount which could reasonably be considered necessary for the beneficiary's support, the court will compel the trustee to pay the beneficiary at least that minimum amount. Similarly, if the trustee applies more than the maximum amount which could reasonably be considered necessary for the beneficiary's support, the court will interpose.'

If, however, the trustee's discretion is expressed to be 'uncontrollable' or 'absolute' or 'irresponsible' the courts are prepared to desist from interfering with a *bona fide* exercise of the discretion on the ground of unreasonableness.[111] The trustee must exercise a discretion, but the reasonableness of it will not be impugned. Thus, in stipulating that a trustee's discretion is to be 'uncontrollable' (say), the settlor is saying that, while the trustee must exercise a discretion in good faith in relation to the matter submitted to his judgment, the prudence of his judgment will not be questioned.

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110 Section 187 comment i.

111 See Scott op cit section 187. 2, Restatement op cit section 187, comment j; see also Gisborne v Gisborne (1877) 2 App Cas 300. In re Hodges, Davey Ward (1878) 7 Ch D 754; Tabor v Brooks (1878) 10 Ch D 273; Re Boys, Boys v Hardy (1896) 41 Sol J 111; In re Gulbenkian's Settlements [1970] AC 508, 518; McPhail v Doulton [1971] AC 424, 441. And see Tempest v Lord Camoys (1882) 21 Ch D 571; Re Brown, Brown v Brown (1885) 52 LT 853; In re Schneider, Kirby v Schneider (1906) 22 TLR 223; In re Charteris, Charteris v Biddulph [1917] 2 Ch 379 and In re Kipping, Kipping v Kipping [1914] 1 Ch 62. Cf Halbach op cit 1430-1433 where it is argued that an unreasonable exercise of such a discretion would nevertheless be interfered with. It is difficult to see, if this view be correct, what the grant of an enlarged discretion, by the use of words such as 'absolute' or 'uncontrollable', would achieve. Halbach also conceded that cases in which the courts have interfered with the exercise of enlarged discretions 'can be interpreted as coming within the Re-statement formulation [section 187 comment j] requiring the trustee to act in the "state of mind . . . contemplated by the settlor", and the modern opinions, almost without exception, have expressed their results in these terms when interfering with the trustee's judgment.' (see p 1432).

These principles, accepted in the United States of America, find some support in the English cases:[112]

In *In re Hodges, Davey v Ward*[113] a testator gave a legacy of £3,000 to three children, or the survivors or survivor, who should attain twenty-one; but if all three died under twenty-one there was a gift over. The will contained a direction to the trustees to apply the whole or such parts as they should think fit of the income of the legacy of the maintenance and education of the legatees while under twenty-one. Malins VC considered that the trustees acted improperly in allowing only £60 per year to be appropriated for the support of the children. It was agreed that had the trustees' discretion been expressed to be 'absolute' or 'uncontrollable' then there could have been no interference. But this was not the present case. Malins VC observed that 'I do not think the exercise of the discretion before me proper. I do not think it to the interests of the wards that they should be left uneducated or that the father should incur debt for the purpose of their education when they have the means of maintaining themselves, and therefore, in the proper exercise of my discretion . . . I . . . order . . . the whole income of $100 a year for the maintenance of these infants.'[114] If Malins VC was merely attempting to improve upon the trustees' discretion *In re Hodges*[115] is incorrectly decided. If, however, Malins VC concluded that the trustees' discretion had been exercised unreasonably having regard to the terms of the trust, to the external factual standards provided by the testator, and, not being expressed to be absolute or uncontrollable, could be overridden by the Court, the decision is correct and is desirable in effect and accords with the American learning set out above.[116]

In *Tabor v Brooks*[117] the trustees of a marriage settlement had power to apply the income of the settled fund for the maintenance and personal support of the husband and wife and their children as they should 'in their uncontrolled and irresponsible discretion think proper'. The hubsand and wife were, at the time of the proceedings, living apart. The huband was a 'a drunkard of the worst description'. The wife was practically destitute but the trustees insisted on con-

112 See the cases discussed and mentioned below.
113 (1878) 7 Ch D 754.
114 Ibid 762.
115 (1878) 7 Ch D 754.
116 See also the reasoning of Malins VC in Tabor v Brooks (1878) 10 Ch D 273; Marquis Camden v Murray (1880) 16 Ch D 170; In re Lofthouse, An Infant (1885) 29 Ch D 921 (the decision of Bacon VC at first instance).
117 (1878) 10 Ch D 273.

tinuing to pay all income to the husband. Malins VC intimated that, had the trustees' discretion not been enlarged, he would have interfered with it on the ground of unreasonableness and have divided the income between husband and wife equally. But as a 'general rule, the Court will not interfere with the discretion of trustees where it is fairly and honestly exercised . . . But if they exercise their discretionary power in an arbitrary and unreasonable manner, the Court will control them, as I did in *Davey v Ward,*[118] where trustees capriciously persisted in not letting a father have the whole of a small income for the education and support of his children, though it was urgently needed on account of his limited means . . . But here the power or discretion is to be uncontrolled and irresponsible, and [reliance was placed] upon the decision of the House of Lords in *Gisborne v Gisborne*[119] to shew that such a discretion cannot be controlled by the Court . . . I think that case is conclusive that under such a power or discretion as this the Court cannot interfere with the trustees so long as there is no *mala fides* on their part'.[120]

But as recently as 1970 Lord Reid, in *In re Gulbenkian's Settlements,*[121] considered an 'absolute discretion' in trustees to apply property 'for the maintenance and personal support or benefit' of all or other or any of a range of objects. His Lordship suggested that the enlarged discretion conferred upon the trustees gave them an added immunity from judicial interference. Yet they still were obliged to (a) decide (b) decide in good faith (c) decide in good faith from time to time and (d) they could not 'simply push aside the power and refuse to consider whether it ought in their judgment to be exercised'.[122] All this suggests that a trustee whose discretion is expressed to be absolute or uncontrollable must exercise a discretion from time to time in good faith in relation to the matter submitted to his judgment, but that an actual exercise of discretion will not be interfered with on the ground of unreasonableness. If it be contended[123] that the court has no jurisdiction to interfere where a power (say) to maintain or support is exercised unreasonably but can only intervene where no discretion is exercised by the trustee at all (or where he has acted *mala fide*) it is difficult to see what extra force the words 'absolute'

118 (1878) 7 Ch D 754.
119 (1877) 2 App Cas 300.
120 (1878) 10 Ch D 273, 277-278.
121 [1970] AC 508, 518.
122 Ibid.
123 As it was by Sheridan—see Discretionary Trusts (1957) 21 Conveyancer & Property Lawyer 55.

or 'uncontrolled' could add to a grant of such power. What would they permit a discretionary trustee to do that otherwise he is not allowed to do?[124]

Finally, it is thought that in Australia legislation should be introduced overcoming any doubts that the courts may have the jurisdiction to interfere being considered in this section. The increased use of discretionary trusts (due to estate-planning considerations) makes the introduction of some clarificatory legislation desirable. Briefly, it may be provided that a discretionary power—and here reference is being made to trust powers and mere powers—will be presumed not to be left to the arbitrary discretion of the trustee but may be controlled by the court if it is not reasonably exercised. A settlor or testator may, however, signify that he does not want the prudence of the trustee's decision to be questioned in any case by clearly conferring upon the trustee an 'absolute' or 'uncontrolled' discretion. Thus the positions of the trustee and the objects respectively may be made reasonably clear.[125]

In Western Australia there is in force a provision, contained in section 94 of the *Trustees Act,* 1962-1968, which confers a jurisdiction on the court to review acts and decisions of trustees. It is similar, in its terms, to section 8 of the *Trusts Act* 1973 (Qld) and to section 68 of the *Trustee Act* 1956 (NZ). It reads as follows.

> 94.(1) Any person who has, directly or indirectly, an interest, whether vested or contingent, in any trust property, and who is aggrieved by any act, omission or decision of a trustee in the exercise of any power conferred by this Act, or who has reasonable grounds to apprehend any such act, omission or decision of a trustee by which he will be aggrieved, may apply to the Court to review the act, omission or decision, or to give directions in respect of the apprenhended act, omission or decision; and the Court may require the trustee to appear before it, and to substantiate and uphold the grounds of the act, omission or decision that is being reviewed, and may make such order in the premises as the circumstances of the case may require.
>
> (2) An order of the Court under subsection (1) of this section shall not—
>
> (a) disturb any distribution of the trust property, made without breach of trust, before the trustee became aware of the making of the application to the Court; or

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124 This was not made clear in the article referred to in the preceding note.

125 Similar statutory provisions in force in USA are mentioned in Scott op cit 1518, note 11. See also Trustees Act, 1962-1968 (WA), s 94, Trusts Act 1973 (Qld), s 8, and Trustee Act 1956 (NZ) s 68 discussed below.

(b) affect any right acquired by any person in good faith and for valuable consideration.

(3) Where any application is made under this section, the Court may,—

(a) if any question of fact is involved, direct how the question shall be determined; and

(b) if the Court is being asked to make an order that may adversely affect the rights of any person who is not a party to the proceedings, direct that that person shall be made a party to the proceedings.

This provision, in the terms in which it is presently drafted, does not provide a suitable model for reform in the immediate context. First, section 94(1) confers standing only upon beneficiaries or objects having 'an interest, whether vested or contingent, in any trust property', This does not countenance objects (as such) of a discretionary trust who clearly have no such interest. But each object (being an object of a power exercisable in favour of a loose class of objects) does have a right of due administration in respect of the discretionary trust in which he is interested.[126] If section 94(1) were amended to confer standing to complain upon any person 'who has a right of due administration in respect of any trust' it would be more acceptable. Second, the section only countenances the review of powers conferred by the Act itself. In most discretionary trusts, the powers held by the trustees will be conferred, not by any Act, but by the instruments creating them. Once again, the provision could be made more acceptable by amending it so that it extends to 'any power conferred by this Act or by the instrument (if any) creating the trust'. Such words are to be found in the Queensland provision. Finally, section 94(2)(a) gives rise to difficulties in that, once again, it leaves open the question as to what sort of conduct on the part of the trustee amounts to a breach of trust in this context. Will the trustee be in breach for making an *unreasonable* decision?

Rather than attempt to recast the provisions of section 94 it is thought that legislatures would do well to consider the very simple provision contained in section 2269 of the California Civil Code. That section provides that

> A discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, but may be controlled by the proper court if not reasonably exercised, unless an absolute discretion is clearly conferred by the declaration of trust.

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126 See note 67 above.

This provision concedes a jurisdiction to the court to interfere with the exercise of their powers by trustees when such powers are exercised unreasonably. Questions of standing to complain,[127] the nature of the action the court may take if it concludes that the conduct complained of is unreasonable, and limitations upon such action,[128] are left for resolution by the common law (as modified by any other pertinent statutory provision). The provision also preserves the common law rule that unreasonableness will not constitute a ground for interference with a trustee's decision where the settlor has so stipulated. Thus, if the settlor, having faith in his trustees and wishing to fetter their discretion as little as possible, confers upon them an 'absolute' or 'uncontrollable' power, the court will not interfere because of conduct which is nothing more than unreasonable. Of course, in making reference to a 'discretionary power conferred upon a trustee', the Code provision is comprehending powers the exercise of which is left to the discretion of the trustee. Such powers necessarily include trust powers and mere powers.

* * *

It is submitted, therefore, that legislation drafted on the pattern of section 2269 could usefully be enacted in each State of Australia. In determining whether any decision made by the discretionary trustees is unreasonable the court will look at a number of factors including the size of the distributable fund, the nature of other claims to it, and the existence of any external factual standards provided by the settlor himself. In other words, the court will consider such factors as should have been the subject of investigation by the trustee whose conduct is impugned.

Where it is shown that the conduct of the trustees does not amount to a sound exercise of their discretion several courses are open to the court. If the power in question be a trust power the court may, apart from ordering an equal division of the trust fund among the objects, act in any one of a number of ways indicated by Lord Wilberforce in *McPhail v Doulton*:[129] 'the court, if called upon to execute the trust power, will do so in the manner best calculated to give effect to the settlor's or testator's intentions. It may do so by appointing new trustees, or by authorising or directing representative persons of the

127 Ibid.
128 See below.
129 [1971] AC 424, 456-457.

classes of beneficiaries to prepare a scheme of distribution, or even, should the proper basis for distribution appear by itself directing the trustees so to distribute'. If the power in question be a mere power then the court may order the removal of the trustees in breach of trust. Where however the mere power is in the nature of a power to advance or maintain the court has shown an inclination to exercise the power itself as a matter of urgency rather than to remit the matter to the consideration of newly appointed trustees.[130] If the trustees encounter difficulties in the exercise of their powers, rather than neglect them they should seek advice from the court in relation to a proposed distribution.[131] The court, having provided guidance, may suggest that a scheme of distribution be placed before it for ultimate approval.[132]

If any loss is occasioned to the trust by a fraudulent or otherwise improper appointment the trustee will, of course, be liable to make it good.[133] But if the trustee makes an improper distribution of the trust fund, those entitled to a due and proper administration of the trust will be able to proceed against not only the trustee but the appointee. Not only will the latter be personally liable in respect of his receipts[134] but the claimants will also be able to trace the distributed fund in accordance with the relevant equitable doctrines.[135] No tracing will be permitted, of course, where the fund has passed into the hands of a *bon fide* purchaser for value without

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130 In relation to a situation where the trustee did not exercise any discretion at all, see In re Roper's Trusts (1879) 11 Ch D 272; In re Wise, Jackson v Parrott [1896] 1 Ch 281, 286; Where the trustee did not exercise a discretion in accordance with the relevant issue entrusted to his judgment, see Klug v Klug [1918] 2 Ch 67; where the trustee exercised an unreasonable discretion, see In re Hodges, Davey v Ward (1878) 7 Ch D 754, In re Lofthouse, An Infant (1885) 29 Ch D 921. For a general discussion of the role of the court in the execution of discretionary trusts, see Hawkins, The Exercise By Trustees of A Discretion (1967) 31 Conveyancer and Property Lawyer 117.

131 See Re Allen-Meyrick's Will Trusts, Mangnall v Allen Meyrick [1966] 1 All ER 740.

132 See Brunsden v Woolredge (1765) Amb 507, 27 ER 327; Bennett v Honywood (1772) Amb 708, 27 ER 459; Supple v Lowson (1773) Amb 729, 27 ER 471; and cf Costabadie v Costabide (1847) 6 Hare 410, 67 ER 1225; see also Re J Bibby & Sons Ltd Pensions Trust Deed [1952] 2 All ER 483, 486 per Harman J.

133 Cf Re Deane, Bridger v Deane (1889) 42 Ch D 9.

134 See In re Diplock, Diplock v Wintle [1948] Ch 465 affirmed sub nom Ministry of Health v Simpson [1951] AC 251.

135 See especially In re Diplock, Diplock v Wintle [1948] Ch 465.

notice of the fraud or other impropriety. But if any transferee of the fund does not fall into this category, the fund will be traceable into his hands.[136]

It was observed in the preceding paragraph that 'those entitled to a due administration of the trust' will be able to proceed to recover the trust property. This group contemplates not only takers in default of appointment but objects having a right of due administration without an interest, in a strict sense, in the individual assets comprising the trust fund. It is not necessary that the claimants should have such an interest for 'while they assert the beneficiary's right of remedy, they assert the estate's right of property, not the property right of creditor or legatee'.[137] Thus the 'basis of such proceedings is that they are taken on behalf of the estate and, if they are successful, they can only result in the lost property being restored to the estate for use in the due course of administration."[138]

I. J. HARDINGHAM*

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136 Ibid. Note that legislative provisions such as Property Law Act 1958 (Vic) s 157, Property Law Act, 1969-1973 (WA) s 95, Conveyancing Act, 1919-1972 (NSW), s 29A, and Property Law Act 1974 (Qld) s 204, apply where the appointed property comprises only an equitable interest, the appointment being entirely void. (See Cloutte v Storey [1911] 1 Ch 18), a subsequent purchaser having, at common law, only such defences as are available to a subsequent purchaser of an equitable interest without notice against a prior equitable title.

137 Commissioner of Stamp Duties (Qld) v Livingston [1965] AC 694, 714.

138 Ibid.

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