

1976

Fiduciary Powers

Maurice C. Cullity

Osgoode Hall Law School of York University

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/scholarly_works



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Recommended Citation

Cullity, Maurice C. "Fiduciary Powers." *Canadian Bar Review* 54.2 (1976): 229-289.

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU CANADIEN

Vol. LIV

JUNE 1976 JUIN

No. 2

FIDUCIARY POWERS

MAURICE C. CULLITY*

Toronto

A power collateral is of the nature of an authority to deal with an estate, no interest in which is vested in the donee of the power. A power of that nature is wholly different from an estate or interest, and cannot without abuse of language be so designated. It may be conceded that such a power may in one sense be the subject of a trust, that is, it may be coupled with an obligation as to its exercise; and there may be a person entitled to insist on the performance of the obligation; and therefore by a metaphorical and incorrect use of language, such a power may be called the subject of a trust, the donee may be described as a trustee, and the person calling for the exercise of the power may be termed a cestui que trust. But if this be conceded, the subject matter of the trust still remains in its integrity as a simple power or authority to be distinguished from an estate or interest.¹

The notion that there are some powers which fall midway between duties and discretionary powers can be traced back at least as far as the decision of Sir John Verney M.R., in *Harding v. Glyn*.² It became firmly established as part of the conceptual framework of property law after the judgment of Lord Eldon L.C., in *Brown v. Higgs*³ and today it is deeply embedded in much of the law relating to powers which exist under trust instruments. Although it might now seem unduly optimistic to

* Maurice C. Cullity, of Osgoode Hall Law School, York University, Toronto.

¹ *Dickenson v. Teasdale* (1862), 1 De G.J. & S. 52, at pp. 59-60, per Westbury L.C.

² (1739), 1 Atk. 469.

³ (1801), 8 Ves. 561.

hope that lawyers will cease to speak of "trust powers" or "powers in the nature of trusts", the use of such language has been criticized.⁴ It is suggested that the criticism is justified not only on analytical grounds but also on the basis of the considerable confusion which the use of the traditional terminology has introduced into the substantive law. It is easily demonstrable that the terms have been used in a variety of senses and that the danger that counsel or judges will slip from one sense to another or fail to appreciate the meaning attributed to one or other of the terms in some earlier case is far from fanciful.

I. Powers and Duties.

When lawyers speak of powers which exist under trust instruments they do not normally intend the word "power" to mean simply a lawful ability to change the legal relationships which subsist under the trust. They intend to convey not only that the ability exists but also that the donee is under no duty to exercise it. The concept of a power is one which, in Hohfeldian terms, is coupled with a liberty or a privilege rather than a duty.

Powers are never imperative: they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted.⁵

Powers in this sense are often described as discretionary powers although that description is sometimes used more narrowly to refer to those powers which are expressed to be exercisable by reference only to the personal opinion or judgment of their donees. Analytically there appears to be no merit in the distinction but it has been used on occasion to justify a conclusion that a clause which was drafted in empowering terms imposed a duty⁶ or to justify an exercise of the court's supervisory jurisdiction over a power which was not discretionary in the narrow sense.⁷

⁴ E.g., *Dickenson v. Teasdale*, *supra*, footnote 1; *Palmer v. Locke* (1880), 15 Ch.D. 294, at pp. 302-303, per Cotton L.J.; Gray, Powers in Trust and Gifts Implied in Default of Appointment (1911-1912), 25 Harv. L. Rev. 1.

⁵ *A.-G. v. Lady Downing* (1767), Wilm. 1, at p. 23, per Wilmot L.C.J.

⁶ See, e.g., *Mortimer v. Watts* (1852), 14 Beav. 616.

⁷ See, e.g., *Tempest v. Lord Camoys (No. 4)* (1888), 58 L.T. 221. On this topic Professor Ronald Dworkin's analysis of the concept of judicial discretion is helpful: *Judicial Discretion* (1963), 60 J. of Phil. 624, *The Model of Rules* (1967), 35 U. of Chi. L. Rev. 14. Dworkin identifies and distinguishes three ways in which we speak of a person having discretion: (a) where he has a duty which is defined by standards that reasonable persons can interpret in different ways; (b) where he has power to make

Powers which exist under trust instruments are limited by the words which define the scope of the power and the circumstances in which it will become exercisable and by the principles which the courts apply in the exercise of their supervisory jurisdiction over all trusts. As far as limitations of the second kind are concerned there is an important distinction between powers which are given to trustees in their capacity as such and powers which are given to trustees in their personal capacities or to persons who are not trustees. A power which is vested in a trustee *qua* trustee is subject to a much greater degree of control by the court. Constructionally or otherwise the ambit of the power is likely to be affected by the trustee's general standard of care and by his duty to hold an even hand between the beneficiaries of the trust. His freedom is limited also by the standards which govern the mental process by which he arrives at a decision to exercise the power or to refrain from so doing: he must turn his mind to the existence of the power, his decision must not be arbitrary, he must consider all factors relevant to the power and only such factors and he must not attempt to exercise the power in order to achieve a purpose other than that for which it was given.⁸

In particular cases the existence of the supervisory jurisdiction will appear to blur the line between a trustee's duties and his discretionary powers in the wide sense. Consider, for example, a trust to accumulate income until the beneficiary attains the age of twenty-five years with a discretionary power to apply income for his maintenance in the meantime. Despite the existence of the

a decision which is final in the sense that no higher authority can set it aside; and (c) where on a particular issue there are no standards which are to be applied in reaching a decision. The discretionary powers of trustees involve discretion in the first sense. They will also contain discretion in the second sense if a court decides that sufficient attention has been paid to the relevant standards. A trustee's duty to apply a "reasonable" amount of income for the maintenance of a particular beneficiary will normally confer discretion in only the first sense as a court will usually review decisions made in the application of what it regards as an "objective" standard. A power of appointment given to a person who is not a trustee would seem to involve discretion in the third sense. Much of the uncertainty as to the status of the "absolute and uncontrollable" discretionary powers of trustees stems from the fact that judges have sometimes used language which might suggest that such powers involve discretion in the third and strongest sense. The standards which govern the discretions of trustees can be weakened by appropriate words in the instrument but any attempt to exclude them completely would be inconsistent with the fiduciary position of the trustee. See, generally, Cullity, *Judicial Control of Trustees' Discretions* (1975), 25 U. of T. L.J. 99.

⁸ See Cullity, *op. cit.*, *ibid.*

discretion it is conceivable that circumstances might exist in which a court would hold that a failure to apply any income for maintenance would be an abuse of discretion.⁹ In such circumstances the application of the standards which the court regards as governing an exercise of the power would abrogate the discretion or the liberty of the trustee and impose an enforceable duty.

Where the power is not given to a trustee in his capacity as such the court's supervisory jurisdiction is, in general, confined to an application of the doctrine of a fraud on the power. This doctrine imposes a duty on the donee not to exercise the power for an improper purpose but the duty is owed not to the objects of the power but rather to the persons entitled in default if it is not exercised.¹⁰ Apart from that obligation the donee owes no enforceable duty to anyone. Judicial statements that such a person holds the power as a fiduciary with a duty to exercise it are only explicable in terms of a quite different concept of legal obligation.¹¹

If one focuses one's attention on the normal concept of a legal duty which has as its correlative a legal right or claim in some other person, the distinction between the discretionary powers and duties which can exist under a trust is quite clear analytically. It may be difficult to determine whether on the construction of a particular instrument a discretionary power or a duty has been created and, as has been mentioned above, the application of the court's supervisory jurisdiction might in some circumstances abrogate a discretion and replace it with a duty but the conceptual distinction between a duty and a liberty or discretion remains clear. What is confusing about the terminology of trust powers or powers in the nature of trusts is that it tends to suggest that such powers are distinct juridical concepts which have some of the attributes of enforceable legal duties and some of those of discretionary powers. When the terminology is applied indiscriminately to powers which are, and to those which are not, vested in trustees *qua* trustees the possibility of confusion is increased considerably.

II. *Trust Powers: Background and Terminology.*

As the modern law of trusts began to emerge in the seventeenth and eighteenth centuries the development of the notion of the trust as a proprietary concept and the growth of the supervisory

⁹ *Cf.*, *Re Sayers & Philip* (1973), 38 D.L.R. (3d) 602; *Nickisson v. Cockill* (1863), 3 De G.J. & S. 622.

¹⁰ *Re Greaves*, [1954] Ch. 434, at p. 447, per Evershed M.R.

¹¹ See Harris, *Trust, Power and Duty* (1971), 87 L.Q. Rev. 31.

jurisdiction claimed by the court had a natural and understandable effect on the attitude of Chancery judges towards discretionary powers. While in principle the distinction between discretions and trusts may have been clear there was an increasing tendency to insist that some discretionary powers were affected and limited by the fiduciary capacity of the donee or simply by the fact that the power existed under a trust instrument. This tendency has been detected in the attitude of courts towards the administrative powers of executors and in particular in the ultimate recognition that such powers were not destroyed by the death of the executor named in a will.¹² It may be seen also in the court's willingness to exercise powers in certain cases and in the growth of the principle of a fraud on the power.¹³

The strong presumption in favour of non-exclusive powers and the doctrine of illusory appointments were more drastic examples of this process of assimilation while the ability of judges to glean an intention to create a trust from discretionary or precatory words was so acute that in several cases where valid powers might have been found the possibility was not considered.¹⁴

In the nineteenth century with the development of the principles of construction and a heightened awareness of their function there was a retreat from some of the developments which have been mentioned. The presumption in favour of non-exclusive powers and the doctrine of illusory appointments were abolished by statute,¹⁵ judges refused to extend the principle of a fraud on the power,¹⁶ the rules relating to the release of powers were

¹² Holdsworth, *A History of English Law*, Vol. 7 (1925), pp. 171-176.

¹³ *Ibid.*

¹⁴ See, for example, *Stubbs v. Sargon* (1838), 3 My. & Cr. 507. In the not uncommon case of property devised or bequeathed for such persons or purposes as the executors should select it was only on the rare occasion that judges in the eighteenth or nineteenth centuries would contemplate the possibility that a mere power had been created. *Gibbs v. Rumsey* (1813), 2 Ves. & B. 294 was one of the exceptions and was generally regarded as wrongly decided: see, Jarman on Wills (8th ed., 1951), pp. 500, 726 and 900. In some cases decided in this century judges have been more reluctant to find an intention to create an (invalid) trust in clauses of this kind: see, for example, *In re Howell*, [1915] 1 Ch. 241; *Re Pugh's Will Trusts*, [1967] 3 All E.R. 337; *Re Ogilvy*, [1938] O.W.N. 417; *Calcino v. Fletcher*, [1969] Qd. R. 8. The relevance of cases of this kind to the question of certainty of objects and the rule against delegation of testamentary power is considered *infra* at pp. 272 and 275 respectively.

¹⁵ (1830), 11 Geo. 4 & 1 Will. 4, c. 46; (1874), 37 & 38 Vic., c. 37.

¹⁶ *E.g.*, *Coffin v. Cooper* (1865), 2 Dr. & Sm. 365; *Palmer v. Locke*, *supra*, footnote 4.

relaxed by statute¹⁷ and a marked change occurred in the courts' attitude to precatory trusts.¹⁸ Despite these changes and the criticism which was occasionally directed at the notion that powers could in some important sense be regarded as fiduciary or as the subject matter of a "trust", the controversial decision in *Re Weekes' Settlement*¹⁹ and its acceptance in later cases ensured that the concept of trust powers would not lose all its significance. In this century the distinction between trust powers and discretionary powers received increasing emphasis in the context of the rules relating to certainty of the objects of a trust until the tide turned with the decision of the House of Lords in *Re Baden's Deed Trusts (No. 1)*.²⁰ Although that decision has deprived the concept of much of its importance in the context of certainty it raised a number of questions which are as yet unanswered and it did not bear directly on the significance of trust powers for other purposes.

Any attempt to enquire into the present importance of the distinction between trust powers and discretionary powers is confronted immediately by a considerable variation in terminology. The cases contain references to "trust powers", "fiduciary powers", "powers held in trust", "powers in the nature of trusts", "powers coupled with trusts" and "powers coupled with duties". An indiscriminate use of these terms would be unimportant if it were clear that they have always been intended to convey precisely the same meaning. This has not been the case and in the interests of clarity it is necessary to distinguish between some of the different senses in which one or other of the terms has been used.

(1) *Absence of discretion*

In some cases the terminology has been employed merely to indicate that an authority which had been given to trustees and which might or might not appear to be a discretionary power had in law no discretion attached to it. It involved in other words a duty coupled with a power in the Hohfeldian sense rather than a power coupled with a liberty or a discretion. In this sense the terminology merely emphasizes the existence of a duty rather than a discretion. In *Tempest v. Lord Camoys (No. 3)*,²¹ for

¹⁷ The Conveyancing Act 1881, 44 & 45 Vic., c. 41, s. 52 (U.K.); The Conveyancing Act, 1882, 45 & 46 Vic., c. 39, s. 6 (U.K.); *infra*, p. 281.

¹⁸ See Waters, *Law of Trusts in Canada* (1974), pp. 101-102.

¹⁹ [1897] 1 Ch. 289.

²⁰ [1971] A.C. 424.

²¹ (1882), 21 Ch.D. 571.

example, Jessel M.R., referred to a clause which declared that trustees should at their own discretion invest proceeds of a sale of the trust property in the purchase of real property.

In the present case there was a power which amounts to a trust to invest the fund in question in purchase of land. The trustees would not be allowed by the court to disregard that trust, and if [the trustee] had refused to invest the money in land at all the court would have found no difficulty in interfering.²²

(2) *Discretion overridden*

Occasionally the trust language has been used to justify the power of the court to exercise or to interfere with the exercise of a power which was intended to be discretionary. This was, for example, done in one nineteenth century case in which it was asserted that after an administration order had been made the court was entitled to exercise discretionary powers which could be regarded as part of a general scheme for the administration of the estate.²³

(3) *Powers conferred for the benefit of persons other than the donee*

One of the reasons which was commonly given for the rule that, at common law, a special power collateral²⁴ could not be released was that the donee had been entrusted with the power for the benefit of persons other than himself.²⁵ In that sense the power was often described as a fiduciary power, a power coupled with a duty or a power in the nature of a trust. This was so whether or not the donee was a trustee of the property which was subject to the power.

(4) *Fraud on the power*

By the middle of the nineteenth century it was established that the common power of a life tenant to appoint among his

²² *Ibid.*, at p. 578. See, also, *Mortimer v. Watts* (1852), 14 Beav. 616, at p. 622, per Romilly M.R.

²³ *Tempest v. Lord Camoys* (No. 2) (1882), 21 Ch.D. 576n; *cf.*, *Re Courtier* (1886), 34 Ch. 136; *Nickisson v. Cockill*, *supra*, footnote 9; *Re Bryant*, [1894] 1 Ch. 324, at p. 331, per Chitty J.

²⁴ The term "power collateral" is used here in its original sense—*viz.*, a power held by a person who had no interest in the property to which the power related: see, *e.g.*, *Dickenson v. Teasdale*, *supra*, footnote 1. For a recent shift in meaning see *infra*, p. 269.

²⁵ *Re Dunne's Trusts* (1878), L.R. 1 Ir. 516, *aff'd.*, (1880), 5 L.R. Ir. 76; *Re Eyre* (1883), 49 L.T. 259. *Cf.*, *Coffin v. Cooper*, *supra*, footnote 16, at p. 373 per Kindersley V.C.; *Re Little* (1889), 40 Ch.D. 418, at p. 422, per Kay J.

children could be released.²⁶ Despite the authorities, judges continued to affirm the proposition that fiduciary powers or powers in the nature of trusts could not be released. In view of the sense in which those terms had been used in the cases involving collateral powers²⁷ it is not surprising that there were still attempts to argue that some powers in gross were fiduciary and were not capable of release. In *Palmer v. Locke*,²⁸ Cotton L.J., dismissed such an argument in the following passage:²⁹

But a fiduciary power in this case one must consider as a power which is sometimes said to be given to the person as a trustee. Now I think a great deal of inaccurate argument arises from expressions undeveloped and not explained which may bear two senses. How can you say that a man is properly a trustee of a power? As I understand it, it means this, in the words of Lord St. Leonards, that it must be fairly and honestly executed. A donee of such a power cannot carry into execution any indirect object or acquire any benefit for himself directly or indirectly. That is, it is something given to him from which he is to derive no beneficial interests. In that sense he is a trustee, and he is liable to all the obligations of a trustee in this sense, that he must not attempt to gain any indirect object by the execution of the power in a way which in form is good, but which is a mere mask for something that is bad.

In this weak sense the notion of a fiduciary power which is vested in a person who is not a trustee simply recognizes the existence of the doctrine of a fraud on the power.

(5) Powers given to trustees as an incident of their office

If the limitations inherent in the doctrine of a fraud on the power justify the application of the fiduciary terminology to powers which are not vested in trustees, the use of that terminology is even more appropriate to refer to any power which is vested in a trustee by virtue of his office. The terms have been used in this sense in some cases³⁰ and one of the important questions relating to the ability to release a power is whether it is only powers of this kind which are incapable of release in those jurisdictions which have legislation based on the English Conveyancing Acts of 1881 and 1882.³¹

²⁶ See *Re Radcliffe*, [1892] 1 Ch. 227, at p. 231, per Lindley L.J.; Sugden on Powers (8th ed., 1861), pp. 88-90.

²⁷ Case cited, *supra*, footnote 25, and see *Thacker v. Key* (1869), L.R. 8 Eq. 408.

²⁸ *Supra*, footnote 4.

²⁹ *Ibid.* See, also, *Scroggs v. Scroggs* (1755), Amb. 812; *Re Skeats* (1889), 42 Ch.D. 522; *Re Somes*, *supra*, footnote 16, at p. 255, per Chitty J.

³⁰ *E.g.*, *Re Eyre*, *supra*, footnote 25, at p. 260, per Kay J.

³¹ *E.g.*, Conveyancing and Law of Property Act, R.S.O., 1970, c. 85, s. 26; *infra*, pp. 281-283.

(6) *Discretionary trusts*

In recent years the terms "trust power" and "power in the nature of a trust" have been used most frequently in the context of the rules which specify the degree of certainty required for the objects of discretionary trusts.³² For the purpose of those rules the fiduciary terminology has been used to distinguish a trust under which the trustees have a duty to distribute income and a discretionary power which extends only to the selection of the persons who would receive it from one under which the trustees' discretion would extend also to the question whether income was to be distributed or retained as capital. Although in the early cases on certainty of objects³³ the significant distinguishing factor was the existence or absence of a duty to make a distribution, this factor is by itself inadequate to justify a conclusion that the discretionary trust involves a unique or peculiar blend of duties and powers. Precisely the same relationship between discretion and duty exists with respect to many of the powers which are commonly found in trust instruments. Consider, for example, a settlement which directs trustees to retain stock dividends as capital or to distribute them as income as the trustees in their absolute discretion should think fit. Here there is no duty to distribute but there is a duty to allocate stock dividends to capital or to income. Analytically, there is no significant distinction between the relationship of this duty to the discretionary power to decide whether the dividends are to be distributed to the life tenant or held for the remainderman and that which exists between the duty to distribute and the discretionary power of selection in the discretionary trust. Exactly the same relationship will often exist between administrative duties and discretionary powers as, for example, in the common case of a trustee's duty to invest proceeds of sale in investments to be selected by him at his discretion.

Nor will it help to isolate a special type of power if one describes the element of discretion in discretionary trusts as a discretion which relates to the manner in which a duty is performed. All discretionary powers which are given to trustees in their capacity as trustees can be so described.

In some of the cases on discretionary trusts judges have spoken more particularly and have emphasized not the duty to distribute but rather the duty to exercise the power of selection.

³² See Waters, *op. cit.*, footnote 18, pp. 73-76.

³³ *I.e.*, the cases decided before *Re Baden's Deed Trusts (No. 1)*, *supra*, footnote 20.

There is an obvious ambiguity and, consequently, a possibility of confusion when this language is applied to the discretionary powers of trustees. It is not at all unusual for lawyers to say that a trustee must exercise his discretions when all that is meant is that he must turn his mind to the existence of his discretionary powers and to consider whether or not to perform the acts which are authorized by the power. In this sense a trustee is under a duty to exercise all of his discretions.³⁴ Whether or not a power to select beneficiaries of income or capital is coupled with a duty to make a distribution, the trustees' obligations with respect to its exercise in this sense are now very much the same.³⁵ In each case, he must survey the range of objects and consider the claims of each. The only significant distinction appears to be that:

A wider and more comprehensive range of inquiry is called for in the case of trust powers than in the case of powers.³⁶

When, in the cases concerning certainty of objects, judges have referred to the duty to exercise the discretion as the distinguishing factor, it is clear that their notion of an exercise of the discretion has not usually been the one which has just been referred to. They have been pointing to the existence of a duty to make a selection. In this sense a trust power is one which imposes upon the donee a duty to choose one of the courses of action which are authorized by the power. Many of the administrative as well as the dispositive powers of trustees are of this kind. In determining whether such a duty exists the absence of imperative words is not necessarily decisive. In *Re Haasz*,³⁷ for example, a clause in a will read as follows:

I empower my trustees at their sole discretion to convert into money all or any of my Estate; or to retain all or any of my Estate in the form of asset in which it may be at my death; without their being held responsible for any loss resulting from their so doing.

Despite its empowering form this clause created precisely the same combination of duty and discretion as would be contained in a clause which creates a discretionary trust. The crucial factor is whether the instrument expressly, by implication or by presumption, indicates that if a decision to choose one of the courses of action which are authorized by the power is not made, something else is to be done. If no such indication exists — if the instrument indicates that the only authorized courses of action

³⁴ *Re Baden's Deed Trusts (No. 1)*, *ibid.*, at pp. 449 and 456; Cullity, *op. cit.*, footnote 7.

³⁵ *Re Baden's Deed Trusts (No. 1)*, *ibid.*, at p. 449.

³⁶ *Re Baden's Deed Trusts (No. 1)*, *ibid.*, at p. 457.

³⁷ (1959), 21 D.L.R. (2d) 12.

are those to which the discretionary power extends — the power is a trust power. It might be objected that trustees who have a duty to do A, subject to a discretionary power to do B or C, are in a position which is for all practical purposes no different to that of trustees who have a discretionary power to do A or B or C. The significance is, of course, that, if the trustees are unable to reach a decision in the first case, the duty to do A will prevail, while in the second case they will have no alternative but to apply to the court.³⁸ In each case the trustees must attempt to choose between A, B and C but if the power is a trust power their obligation will be more extensive. They will be under a duty to make the choice or to see that the choice is made with the aid of the court.

(7) *Where the donee is not a trustee: duty to execute the power*

The concept of trust powers to which Lord Eldon referred in *Brown v. Higgs*³⁹ appears to be essentially the same as that which has provided the focus of attention in the modern cases concerning certainty of objects. Lord Eldon was concerned with a power of selection which had been given to a trustee. In his judgment this factor received some emphasis:⁴⁰

[*Harding v. Glyn*] establishes this: that though upon a mere power this court will not interpose, if it is not executed, *yet if it is so given as to vest the power in the person having the whole legal interest*, and to call upon that person to execute the purpose, sufficiently expressed to make it the duty of that person, if he fails in that duty, the Court will execute it for him. . . . The principle of . . . all these cases, is, that, if the power is a power, which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, *who has given him an interest extensive enough to enable him to discharge it*, he is a trustee for the exercise of the power, and not as having a discretion, whether he will exercise it or not; and the Court adopts the principle as to trusts; and will not permit his negligence, accident, or other circumstances, to disappoint the interests of those, for whose benefit he is called upon to execute it.

The inappropriateness of describing a person other than a trustee as the donee of a trust power was recognized by Lord Alvanley,⁴¹ in the court below and by Eyre C.B., in the earlier case of *Bull v. Vardy*.⁴² That case concerned a will by which the testator devised several houses to his wife but gave her no other property. The litigation arose over the following clause:

³⁸ This is what occurred in *Re Haasz*, *ibid.*

³⁹ *Supra*, footnote 3.

⁴⁰ *Ibid.*, at pp. 573-574 (italics added).

⁴¹ (1800), 5 Ves. 495, at p. 507.

⁴² (1791), 1 Ves. 270.

I farther empower my wife to give away at her death one thousand pounds; 100 pounds of it to Elizabeth Turner; 100 pounds to Mrs. Bennet; the other eight hundred pounds to be disposed of by her will.

On the death of the widow, Elizabeth Turner claimed the sum of 100 pounds from the widow's executor. The Chief Baron said:⁴³

... where the absolute interest is given to one with any expression that the devisee shall dispose of the whole, or a part to a particular person, that does not amount to a devise properly; but will raise a trust for that person, which the court will execute after the death of the devisee. For Defendant it was truly observed, that this doctrine could not affect the present case; because the wife had not only no absolute interest in the 100 pounds, but none at all: *so there is nothing to raise a trust.*

In *Brown v. Higgs* Lord Alvanley distinguished *Bull v. Vardy*:

The testator did not give to his wife any interest in the general produce of the estate: so it was a mere power.⁴⁴

The restriction of the concept of trust powers to those which were given to a trustee of the property to which the power related appears to have been preferred by Lord St. Leonards⁴⁵ but there were some nineteenth century cases in which the concept and the reasoning in *Brown v. Higgs* were extended to powers in gross such as a life tenant's power to appoint among children. In *Burrough v. Philcox*,⁴⁶ for example, property was settled on trust for certain persons for life with a direction that the remainder interest should be disposed of among a class as the surviving life tenant should appoint. Lord Cottenham L.C., followed *Brown v. Higgs* and held that the donee had a duty to execute the power.

The concept of trust powers employed in cases such as *Burrough v. Philcox* is analogous to that discussed in *Brown v. Higgs* and in cases on certainty of objects. In either case on the construction of an instrument a conclusion is drawn that the donee was intended to execute the power — to choose one or more of the courses of action which were authorized by the power. The power was intended to be exercised in that sense. There is, however, an obvious and important limit to the analogy. A donee who is not a trustee is under no enforceable duty to "exercise" the power in either of the two senses which have been discussed above. If he refuses to turn his mind to the exercise of the power or if he states that he has no intention of exercising

⁴³ *Ibid.*, at p. 271 (italics added).

⁴⁴ *Supra*, footnote 41.

⁴⁵ *Op. cit.*, footnote 26, pp. 588-597; and see Gray, *op. cit.*, footnote 4, at p. 6.

⁴⁶ (1840), 5 My. & Cr. 72.

it no object will ordinarily have any legal remedy while the power continues in existence.⁴⁷

(8) *Where the donee is not a trustee: duty to consider*

In some cases in which judges have spoken of a duty to exercise a dispositive power when the donee was not a trustee it is not clear whether they have been referring to a duty to execute the power or merely a duty to consider whether it should be executed. In other cases the second meaning has been emphasized. In *Re Dunne's Trusts*,⁴⁸ for example, a testator directed his executors to divide the residue of his estate among his children in equal shares but empowered his widow at her discretion to limit the entitlement of one son to a specified amount. The widow was not a trustee of the property but was held to be a trustee of the power which was described as a power coupled with a trust or a duty. In reaching this conclusion it was stressed that the power was a collateral power which was intended "to be exercised by her up to the last moment of her existence".⁴⁹ It followed, and was held, that the donee's attempt to release the power was ineffective.⁵⁰ In this case as in the cases which concerned powers which fall within the preceding category judges were prepared to attach important consequences to the intention of the donor notwithstanding the fact that the existence of the intention imposed no enforceable obligation on the donee of the power. The donee had no enforceable duty to exercise the power in any sense but, because of the donor's intention that until her death she should consider whether it was to be executed, she was disabled from releasing it.

(9) *Farwell's terminology*

The influence of *Farwell on Powers*⁵¹ in the more recent cases has rivalled that of *Sugden on Powers* in the nineteenth century. For this reason and because Farwell distinguished three types of fiduciary powers the terminology employed in the work must be mentioned. Farwell used the term "trust-power" to refer to any power which was given to a trustee as "part of the machinery of the trust".⁵² If this was intended to comprehend both the administrative and dispositive powers of trustees a trust-

⁴⁷ See, *infra*, p. 257.

⁴⁸ *Supra*, footnote 25.

⁴⁹ (1878), L.R. 1 Ir. 516, at p. 523, per Chatterton V.-C.

⁵⁰ See, *infra*, p. 282.

⁵¹ A Concise Treatise on Powers (3rd ed., 1916).

⁵² *Ibid.*, at p. 524.

power would appear to be one which is given to a trustee in his capacity as such.

Perhaps the most potentially misleading term used in the treatise is "a power in the nature of a trust".⁵³ Being of the opinion that *Re Weekes' Settlement*⁵⁴ was wrongly decided, Farwell ignored the implications of the reasoning of Romer J., in that case and used the term to refer to any power to select among a class which was given to a person who was not a trustee and which was not coupled with a gift in default of appointment in favour of anyone other than the class. In this sense there would be a power in the nature of a trust if there was no express gift in default of the exercise of a power of selection or if there was an express gift in default in favour of the objects. This usage of the term appears to have caused some confusion in at least one modern case.⁵⁵

The other of Farwell's terms which has immediate relevance is "a power coupled with a duty". Although it is clear that Farwell did not regard this type of power as the same as that which he described as a power in the nature of a trust, the precise meaning which he intended to convey is obscure. The term "power coupled with a duty" was used to refer to those powers which remained incapable of release after some of the restrictions on the release of powers had been removed by statute. It seems that Farwell did not intend to confine the term to powers which were vested in trustees and it may be that he intended to refer to any power which was given for the benefit of persons other than the donee except "the ordinary power of appointment among children or issue, given to a tenant for life in a settlement".⁵⁶

III. Significance of the Concept of Trust Powers.

(1) Enforcement by the court

a) Where the donee is a trustee

A large body of judicial dicta supports the proposition that the court will enforce, and in certain circumstances will exercise, trust powers but not bare powers.⁵⁷ It is clear that when statements to this effect have been made the concept of a trust power

⁵³ Ch. 12 of the Treatise is concerned with such powers.

⁵⁴ *Supra*, footnote 19.

⁵⁵ *Re Wills' Trust Deeds*, [1964] Ch. 219; *infra*, p. 282.

⁵⁶ *Op. cit.*, footnote 51, p. 13.

⁵⁷ The proposition has been affirmed repeatedly during the last twenty-five years in the cases in which courts were concerned with the requirements of certainty of objects. In two of those cases it was accepted in the House of Lords: see, *infra*, pp. 251-253.

has usually been that which was discussed by Lord Eldon in *Brown v. Higgs*: the trustee has a duty to choose one of the courses of action which are authorized by the power. The court enforces the trust power by compelling the performance of that duty.

The assertion that bare powers cannot be enforced by the court is, of course, not inconsistent with judicial statements that a trustee has a duty to exercise all of his discretions. Such statements employ the notion of exercising a discretion in the weaker sense which has been referred to above.⁵⁸

Although it is axiomatic that a court will compel the performance of a trustee's duties, including the duty which distinguishes a trust power from a bare power, the practical significance of the distinction between trust powers and bare powers in the context of enforcement appears now to be much less than the emphasis it has received in the past would suggest. This can be demonstrated by considering the different methods by which a court can enforce trust powers in each of the situations in which it will normally have the opportunity to do so.

When a court is called upon to enforce the exercise of a trust power it will sometimes merely declare that the trustee is under a duty to choose one of the courses of action which are authorized by the power and leave the choice to the trustee. In addition it might remove one or more of the trustees and appoint new trustees. In some cases it will require that when the trustee has reached a decision it must receive the sanction of the court. On occasion, the court will actually exercise the discretion itself by indicating the appropriate course of action for the trustee to take.

The selection of one or more of these methods is usually required after an order for the administration of the trust has been made, when the court has held a trustee to have been in breach of trust or to have abused his discretion, or when, without any allegation of a breach of trust, a beneficiary or a trustee has applied to the court for advice and directions.

i) *Administration by the court*

The institution of an administration action does not prevent a trustee from exercising his discretionary powers.⁵⁹ Nor does the

⁵⁸ *Supra*, p. 238.

⁵⁹ *Talbot v. Marshfield* (1867), 4 L.R. Eq. 661, varied (1868), L.R. 3 Ch. App. 622.

making of an administration order have such an effect.⁶⁰ From the institution of such proceedings the court's supervisory jurisdiction is, however, more extensive than it was before that time. There is authority which suggests that the degree of supervision which the court will exercise after proceedings have been commenced varies considerably according to whether the power is a trust power or a bare power. Thus in *Tempest v. Lord Camoys (No. 3)*⁶¹ Jessel M.R., referred to the importance of the distinction:⁶²

It is settled law that when a testator has given a pure discretion to trustees as to the exercise of a power, the Court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly. . . . But in all cases where there is a trust or duty coupled with the power the court will then compel the trustees to carry it out in a proper manner and within a reasonable time.

Although the words of the Master of the Rolls have often been cited with approval they call for some comments. In the first place it is well established that while administration proceedings are pending a trustee's administrative discretions must be exercised under the eye of the court.⁶³ If the trustee chooses to perform one of the acts authorized by the power, the court will "require of him the clearest evidence that he exercised the discretion *bona fide* and after the most mature investigation".⁶⁴ After an administration order has been made any exercise of an administrative power requires the sanction of the court.⁶⁵ These rules are applicable to trust powers and bare powers alike.⁶⁶ In *Bethel v. Abraham*,⁶⁷ Jessel M.R., stated that in his opinion the court's sanction is not required for the exercise of dispositive discretions.⁶⁸ Whether this statement represents the modern law is uncertain. There were many cases in the early nineteenth

⁶⁰ *Re Gadd* (1883), 23 Ch.D. 134; *Webb v. Earl of Shaftesbury* (1802), 7 Ves. 481; *Tempest v. Lord Camoys (No. 3)*, *supra*, footnote 21; *Re McLaren* (1921), 51 O.L.R. 538.

⁶¹ *Supra*, footnote 21.

⁶² *Ibid.*, at p. 578.

⁶³ *Talbot v. Marshfield*, *supra*, footnote 59; *A.-G. v. Clack* (1839), 1 Beav. 467.

⁶⁴ *Ibid.*, at p. 670.

⁶⁵ *Re Furness*, [1943] Ch. 415; *Minors v. Battison* (1876), 1 App. Cas. 428, at p. 438; *Re Gadd*, *supra*, footnote 60.

⁶⁶ *Talbot v. Marshfield*, *supra*, footnote 59 concerned a bare power; in *Re Gadd*, *supra*, footnote 60, there was, in effect, a trust power.

⁶⁷ (1873), L.R. 17 Eq. 24.

⁶⁸ *Ibid.*, at p. 26.

century where the courts did much more than merely sanction the exercise of dispositive discretions after an administration order had been made.⁶⁹ A reference to a Master in order to ascertain the amounts that should be applied under a power of maintenance was made in many cases. This practice was confined by some judges to cases where the power was a trust power⁷⁰ but by the end of the century the increasing emphasis which was placed on the uncontrolled nature of a trustee's discretions appears to have led to a retreat from even this position.⁷¹

There is, however, no modern decision that the court's sanction is not needed for the exercise of a dispositive power after an administration order has been made and there are dicta which are inconsistent with those of the Master of the Rolls in *Bethel v. Abraham*.⁷² In what appears to have been the most recent case in which the necessity to obtain the sanction of the court was discussed the rule was stated in quite general terms:

In my judgment, after an order for general administration has been made, a trustee is not at liberty to sell, deal with or distribute the assets of the testator's estate without obtaining the sanction of the court.⁷³

If the distinction between trust powers and bare powers is of no relevance to the rule which requires the sanction of the court there is still the proposition that, even after an administration order has been made, the court will not force a trustee to exercise his bare powers as distinct from his trust powers. If such a rule exists it is clear that it is subject to exceptions. If a trustee's failure to exercise a bare power amounts to an abuse of discretion the court can exercise the discretion itself. This was done in *Klug v. Klug*⁷⁴ where one trustee refused to concur in the exercise of

⁶⁹ E.g., *White v. Grane* (1854), 18 Beav. 571; *Re Sanderson's Trusts* (1857), 3 K. & J. 497; *Ransome v. Burgess* (1866), L.R. 3 Eq. 773; *Windham v. Copper* (1871), 24 L.T. 793; *Thorpe v. Owen* (1843), 2 Hare 607; Hawkins, *Exercise by Trustees of a Discretion* (1967), 31 Conveyancer and Property Lawyer (N.S.) 117.

⁷⁰ See, for example, *Thompson v. Griffin* (1841), Cr. & Ph. 317 and the discussion of *Ransome v. Burgess*, *supra*, footnote 69, in *Wilson v. Turner* (1883), 22 Ch.D. 521.

⁷¹ In *Tempest v. Lord Camoys* (No. 3), *supra*, footnote 21, and *Re Gadd*, *supra*, footnote 60, Jessel M.R., denied that the court would substitute its own discretion for that of the trustee even where a trust power was administrative rather than dispositive in nature. The court would strike down an attempt to exercise a power improperly but it would not itself exercise the power.

⁷² *Supra*, footnote 67.

⁷³ *Re Furness*, *supra*, footnote 65, at p. 419; *Talbot v. Marshfield*, *supra*, footnote 59, was concerned with a dispositive power.

⁷⁴ [1918] 2 Ch. 67.

a bare power of advancement. Neville J., held that the refusal was actuated by an improper motive and directed that an advancement should be made.

Even where there is no suggestion that the trustee has abused his discretion the court has sometimes exercised bare powers of management. In *Tempest v. Lord Camoys (No. 2)*⁷⁵ for example, Lord Langdale M.R., overruled a trustee's refusal to exercise a power to grant a lease of the trust property. Although the Master of the Rolls is reported to have described the power as one coupled with a duty, there is nothing in the note of the case which would suggest that the instrument imposed a duty to let the property.⁷⁶ On the contrary, the power was expressed to be exercisable at the absolute discretion of the trustees. Lord Langdale's use of the trust power language would appear to amount to nothing more than an assertion of the court's power to interfere. An appeal from the decision was dismissed by Lord Cairns L.C., who described the power as nothing more than part of a general scheme for the management of the estate and denied that the court's jurisdiction in administering the trusts of the will did not extend to the exercise of the power.⁷⁷

Again, in *Re Brown*⁷⁸ trustees had an "uncontrolled" discretionary power to choose, vary and transpose the investments of the trust. Prior to the commencement of administration proceedings the trustees made certain investments on behalf of the trust. After the making of an administration order Pearson J., directed that the investments should be sold while recognizing that the trustees had not been guilty of a breach of trust.⁷⁹

It is difficult to discern the principle which distinguishes the powers in these cases from that in *Tempest v. Lord Camoys (No. 3)*⁸⁰ where the Court of Appeal refused to override one trustee's refusal to invest money of the trust in the manner desired by the other trustee. Clearly to describe powers of the former kind as trust powers or powers coupled with a duty is to depart from the concept of trust powers which was discussed in *Brown v. Higgs*

⁷⁵ *Supra*, footnote 23.

⁷⁶ *Cf.*, *Mortimer v. Watts*, *supra*, footnote 22; *Nickisson v. Cockill*, *supra*, footnote 9.

⁷⁷ *Supra*, footnote 23.

⁷⁸ (1885), 29 Ch.D. 889.

⁷⁹ See, also, *Butler v. Withers* (1860), 4 L.T. 736.

⁸⁰ *Supra*, footnote 21. This case involved a trust power in the traditional sense of the term: the trustee had a duty to invest with a discretion as to the selection of investments.

and is not helpful. In *Re Courtier*,⁸¹ Cotton and Bowen L.JJ., explained the distinction in terms similar to those employed by Lord Cairns in *Tempest v. Lord Camoys (No. 2)* and held that a power of sale was not part of a general trust for the management of the estate and was therefore one with which the court would not interfere. The attributes which served to distinguish the power from one which would be part of a general trust for management were not disclosed.

It is possible that the cases in which the court exercised a bare power in the course of its administration of a trust might be dismissed as examples of an attitude which was more consistent with those of judges in the earlier rather than the later part of the nineteenth century. There is, however, very little which can be said for a rigid application of Lord Eldon's distinction between trust powers and bare powers after an administration order has been made. If in such a situation the court will examine and can quash a trustee's decision to exercise a bare power in a particular way, why should its controlling jurisdiction not extend to the trustee's decision not to exercise the power? It is suggested that *Re Brown* and *Tempest v. Lord Camoys (No. 2)* illustrate that the answer to the question has not been obvious to all judges.

It is clear, of course that a court would find it easier to exercise some discretions than others and that, where a settlor or testator has placed particular confidence in the personal judgment of the trustee he has selected, a court should be reluctant to take the discretion out of his hands. Considerations of this kind and of those of convenience and efficiency, rather than the trust power — bare power distinction, would form a more satisfactory basis for the court's power of intervention after an administration order has been made.

ii) *Breach of trust*

Where a trustee's conduct with respect to his powers amounts to a breach of trust there would appear to be few situations in which the distinction between trust powers and bare powers is likely to have any bearing on the court's exercise of its supervisory jurisdiction. If the breach of trust flows from the trustee's mistaken opinion that his power is a bare power rather than a trust power, a court might justify its interference in terms of the distinction. Suppose, for example, the trustee has a duty to sell and to invest

⁸¹ *Supra*, footnote 23; see, also *Re Bryant*, *supra*, footnote 23, at p. 331.

the proceeds with a limited discretionary power to select the investments. If the trustee retains the original property in the belief that there was no duty to sell, the court's intervention might be described as based on its jurisdiction to enforce trust powers as distinguished from bare powers. A simpler and a more helpful statement would be that the court will always compel a trustee to perform the duties which the settlor has imposed upon him. Emphasis on the distinction in such cases can be misleading because, in most other cases where a trustee's conduct with respect to his powers amounts to a breach of trust, the ability of the court to interfere and the available sanctions appear to be in no way affected by the distinction between trust powers and bare powers.

In some cases a decision that the trustee has committed a breach of trust involves a conclusion that in the circumstances there was only one course of action which the trustee could lawfully take. This will be the position where, for example, the court holds that, despite the existence of a power to retain original assets for such period as the trustee should think fit, the trustee is liable for failing to sell the property. The intervention of the court might be justified on the ground that the trustee did not turn his mind to the exercise of his discretion, that he took irrelevant matters into account, that he acted in order to achieve an improper purpose, that he acted imprudently or that he failed to hold an even-hand between different beneficiaries. Whatever the ground, the classification of the power as a bare power or a trust power would be of no significance. In *Fales, Wohlleben et al. v. Canada Permanent Trust Co.*,⁸² trustees were removed and held to be liable for the injury caused to an estate by their imprudent exercise of a bare power of retention. In *Re Smith*⁸³ trustees were removed for failing to hold an even-hand between life tenant and remainderman when they failed to sell property under a trust power to sell or retain.⁸⁴ In cases of this kind whether one describes the court's action as overriding the discretion of the trustees, or as denying the existence of the discretion in the particular circumstances, it is clear that the court has in effect exercised the discretion in both the weak and the strong sense and has attached liability to the trustee for failing to act in precisely the same manner.

⁸² [1974] 3 W.W.R. 84, rev'd, in part, [1975] 3 W.W.R. 400.

⁸³ [1971] 1 O.R. 584, varied, [1971] 2 O.R. 541.

⁸⁴ See, also, *Re Nicholls* (1913), 29 O.L.R. 206; *Partridge v. Equity Trustees Executors and Agency Co. Ltd* (1947), 75 C.L.R. 149; *Elder's Trustee & Executor Co. Ltd v. Higgins* (1962), 113 C.L.R. 426.

In other cases where a trustee's conduct with respect to his discretions has been held to amount to a breach of trust the court's decision will not involve a conclusion that only one course of action was available to the trustee. The court might simply annul the trustee's choice of one of the actions which were authorized by the power or it might declare that the trustee's inaction was not properly motivated. In some such cases the court might remove the trustees and replace them with new trustees. In others it might simply instruct the trustees as to the matters relevant to the discretion and order them to turn their minds to its exercise in the future. In still other cases the court might take it upon itself to exercise the discretion by choosing one or more of the courses of action which were authorized by the power. It does not appear that the selection of the appropriate method of enforcement will be affected significantly by the classification of the power as a trust power or as a bare power.

Thus, in *Re Butler*,⁸⁵ where executors were directed to pay such sum or sums as in their sole and absolute discretion they might deem necessary and proper for the maintenance of a beneficiary, LeBel J., held that the trustees had not turned their minds to the proper exercise of their discretion and directed them to do so. He appears to have construed the instrument as conferring a trust power: a duty to provide for maintenance with a discretion only as to quantum. The power of the court to exercise the discretion if the trustees failed to do so in the future was recognized.⁸⁶

In *Re Sayers et al. and Philip*⁸⁷ the question concerned a statutory bare power given to a trustee to apply income for the maintenance or education of infants for whom he was holding property in trust. A request for maintenance having been unsuccessful, the guardians of the infants applied to the court. The Court of Appeal of Saskatchewan agreed with the judge at first instance that there had been no "real exercise of discretion" by the trustee and that the court was therefore in a position to take upon itself the exercise of the discretionary power. It was held that amounts should be applied for maintenance and the amounts which were appropriate in the existing circumstances were determined by the court. The court recognized the continued existence of the trustees' discretionary power to vary the amounts if the circumstances of the infants changed.⁸⁸

⁸⁵ [1951] O.W.N. 670.

⁸⁶ *Ibid.*, at p. 673.

⁸⁷ (1973), 38 D.L.R. (3d) 602.

⁸⁸ See, also, *Re Wise*, [1896] 1 Ch. 281, at p. 286.

It might be argued that these cases on powers of maintenance do not support any general rule that the court has a residual jurisdiction to exercise discretionary powers but that they merely reflect a continuation of the control which courts exercised over powers of maintenance in the nineteenth century. Even if such an argument were accepted it would not give any additional significance to the distinction between trust powers and bare powers. There is, however, no modern authority which suggests that powers of maintenance are to be regarded as in a special position as far as the court's controlling jurisdiction is concerned.⁸⁹ Nor would there appear to be any sound reason why the court's jurisdiction to remedy a breach of trust should vary according to whether an administration order has been asked for. There is nothing in the brief judgment of Neville J., in *Klug v. Klug*⁹⁰ nor in the notes of counsel's arguments which would suggest that the existence of the administration order was regarded as crucial or even as relevant to the decision in that case.⁹¹

The true position, it is suggested, is that the court will be very reluctant to take upon itself the function of making the choice authorized by a discretionary power when the trustee is in breach unless, of course, it is of the opinion that in the circumstances only one course of action could lawfully be taken. In the great majority of cases it will either remove the trustee and replace him with another or merely direct the trustee to turn his mind to the exercise of his discretion and to consider all relevant matters. Cases like *Re Butler*⁹² and *Re Sayers et al. and Philip*⁹³ support the view that the court has, however, a residual jurisdiction to exercise the discretionary power if it deems it desirable or expedient to do so. Although the court will always enforce the duty to make a choice which is inherent in a trust power, the cases do not support the proposition that it is more likely to make the choice itself than it would be in the case of a bare power. Except in the case where the trustee's breach of trust arises from his denial of the existence of the duty, the distinction between the two types of powers appears to have no significance for the question

⁸⁹ Any such suggestion would seem to be inconsistent with *Gisborne v. Gisborne* (1877), 2 App. Cas. 300 which is still the leading case on the "uncontrollable" discretions of trustees. See Cullity, *op. cit.*, footnote 7.

⁹⁰ *Supra*, footnote 74.

⁹¹ But see *Craig v. National Trustees Executors and Agency Co.*, [1920] V.L.R. 569.

⁹² *Supra*, footnote 85.

⁹³ *Supra*, footnote 87.

of the ability of the court to intervene and the method of its intervention.

iii) *Failure to exercise a dispositive power*

In recent years references to the court's jurisdiction to exercise trust powers have been most frequent in cases concerning the requirement that the objects of a trust should be described with certainty. In *Re Gulbenkian's Settlements*⁹⁴ Lord Upjohn emphasized the significance of the distinction between trust powers and bare powers for this purpose:⁹⁵

Again the basic difference between a mere power and a trust power is that in the first case trustees owe no duty to exercise it and the relevant fund or income fails to be dealt with in accordance with the trusts in default of its exercise, whereas in the second case the trustees must exercise the power and in default the court will.

It seems highly improbable that in his reference to an exercise of the power by the court, Lord Upjohn intended to suggest that a court would do anything other than compel an exercise of the power by the original trustee or by a substitute or order the property to be distributed among the objects in equal shares.

Since the beginning of the nineteenth century it had been recognized that the court would not take upon itself the exercise of the discretionary element in a power of appointment over capital. Lord St. Leonards devoted little space to the seventeenth and eighteenth century authorities to the contrary:⁹⁶

But these cases are not now law. The trustees' discretion was not only taken away, but the Court itself executed the power. Such a power is now disclaimed. The Court never exercises a discretionary power.

While this was the accepted practice it mattered little whether the court was to be regarded as exercising the power or implying a gift in default of its exercise. Until the decision in *Re Weekes' Settlement*⁹⁷ the court would almost invariably order an equal distribution in favour of the objects of a power unless the instrument contained a gift in default of appointment. This was so whether or not the words of the instrument revealed the donor's intention that the power was to be exercised. The consequences of that decision and its acceptance in later cases are considered

⁹⁴ [1970] A.C. 508.

⁹⁵ *Ibid.*, at p. 525.

⁹⁶ *Op. cit.*, footnote 26, p. 601.

⁹⁷ *Supra*, footnote 19.

below⁹⁸ where it is suggested that the traditional distinction between trust powers and bare powers does not provide an accurate test for predicting the circumstances in which the courts will order a distribution of property to objects in default of the exercise of a dispositive power.

Greater significance was, however, attributed to the distinction in the reasoning of the majority of the House of Lords in *Re Baden's Deed Trusts (No. 1)*.⁹⁹ While in terms adopting and amplifying Lord Upjohn's statement of the effect of the distinction, Lord Wilberforce affirmed the existence of "the principle that a discretionary trust *can* in a suitable case, be executed according to its merits and otherwise than by equal division".¹⁰⁰ The court would, he said, execute a trust power in the manner best calculated to give effect to the donor's intentions. This might involve the appointment of new trustees, a direction that representative beneficiaries should prepare a scheme of distribution or even a direction that the property should be distributed in a particular manner.¹⁰¹

It is still too early to estimate the practical effect that this reasoning will have on judicial attitudes towards the enforcement of dispositive powers. On the whole it seems unlikely that courts will now adopt a regular practice of exercising the discretion inherent in a trust power. The enlarged jurisdiction is based on the supposition that a trustee has, for some reason failed to exercise a trust power. Whether or not such an omission amounts to a breach of trust it would seem likely that courts will not normally find it necessary or appropriate to exercise the power as distinct from compelling its exercise. If a trustee dies before exercising a trust power or culpably fails to exercise it, the most appropriate solution will usually be for the court to appoint a new trustee. This, of course, has been the practice with respect to both administrative and dispositive powers where the power was conferred upon a trustee in his capacity as such. If it continues to be the practice, Lord Wilberforce's assertion of a jurisdiction to exercise trust powers will have significance primarily as a major step in the reasoning which led the House of Lords to relax the requirements of certainty for the objects of a discretionary trust. When viewed against the background of the modern cases in which judges have claimed an ultimate jurisdiction to exercise both trust powers and

⁹⁸ At pp. 260-264.

⁹⁹ *Supra*, footnote 20.

¹⁰⁰ *Ibid.*, at p. 452.

¹⁰¹ *Ibid.*, at p. 457.

bare powers, there is nothing very startling about the statement that the courts *can*, in a suitable case, execute a discretionary trust by a method other than equal division.

One situation in which the reasoning and the conclusion of the House of Lords may give rise to difficulty is where a trust power has been conferred upon a trustee *nominatim*. Consider, for example, a residuary bequest of property to a surviving spouse on trust for the spouse for life with remainder to such of a class as he or she should appoint. If the spouse dies without exercising the power it will on orthodox principles be presumed to be intended not to survive¹⁰² and the court will not appoint a substitute trustee. Before the decision of the House of Lords the court would order the property to be distributed among the class in equal shares. If the entire membership of the class could not be ascertained such a distribution could not be effected and there would be an intestacy with respect to the remainder interest. After the decision of the House of Lords it would seem that, notwithstanding the inappropriateness of the solution, a court would have no option but to exercise the discretion itself.

iv) *Applications for advice and directions*

In the absence of an administration order or of any breach of duty or abuse of discretion by a trustee, the court will not normally indicate which of the actions authorized by a discretionary power should be performed. Since the decision of the House of Lords in *Gisborne v. Gisborne*¹⁰³ and irrespective of the classification of the power as a trust power or a bare power, a beneficiary who has asked the court to exercise a discretion in this way has almost invariably been met with the response that in the absence of *mala fides* the rule of the court is not to interfere.

*Re D'Epinoix's Settlement*¹⁰⁴ appears to be the only reported decision in this century which suggests that the rule is not inviolable when the trustee refuses to surrender his discretion to the court. In that case trustees had refused to exercise a bare power to vary investments they had chosen at an earlier date. On a summons for advice and directions Warrington J., stressed that there was no allegation of breach of trust but decided that he had jurisdiction to direct inquiries for the purpose of determining

¹⁰² *Infra*, at pp. 285-287.

¹⁰³ *Supra*, footnote 89.

¹⁰⁴ [1914] 1 Ch. 890.

whether the investments should be sold. The judge's reasoning is interesting. The summons had asked the court to order the trusts of the settlement to be executed to the extent that the court thought it necessary. Warrington J., reasoned that as he had jurisdiction to make an administration order and as he had no doubt that he would then have power to order the enquiries, he was satisfied that he could direct inquiries without ordering administration. There is obviously much force in his reasoning. The issue was very similar to that in *Re Brown*¹⁰⁵ and it is difficult to see why the making of a limited administration order on an application by originating summons should have any significant effect on the court's supervisory jurisdiction.¹⁰⁶

It is suggested that *Re D'Epinoix's Settlement* illustrates again that it can be misleading to speak in terms of the court's jurisdiction or lack of jurisdiction to exercise the discretionary powers of trustees. The court itself has a discretion to intervene even where there is no allegation of a breach of trust. It will be very reluctant to do so but on facts similar to those before Warrington J., the intervention would appear to be justified.

The significance of the decision is perhaps greater in England than in Canada. It is possible to argue that Canadian courts have shown themselves to be more ready to interfere with the discretions of trustees than have the courts in England.¹⁰⁷ On the facts of *Re D'Epinoix's Settlement* it is quite possible that a Canadian court would have found the trustees to have been in breach of trust and would have justified its intervention on that ground.¹⁰⁸

Even where the application to the court has been made by one or more of the trustees, the reported cases suggest that Canadian courts have usually refused to indicate which of the actions authorized by the power should be chosen.¹⁰⁹ A distinction has

¹⁰⁵ *Supra*, footnote 78.

¹⁰⁶ In Underhill's *Law of Trusts and Trustees* (12th ed., 1970), p. 619 it is stated that it is quite common in England to couple with an application for directions a claim for general administration so far as should be necessary.

¹⁰⁷ *E.g.*, in the English cases more significance appears to have been given to the draftsman's use of adjectives such as "absolute" and "uncontrollable". See Cullity, *op. cit.*, footnote 7, at pp. 112-113; *cf.*, Waters, *op. cit.*, footnote 18, pp. 664-665.

¹⁰⁸ Trustees had refused to dispose of mortgages in the face of evidence that the security was insufficient.

¹⁰⁹ See, *e.g.*, *Re Boukydis* (1927), 61 O.L.R. 561; *Re Fulford* (1913), 29 O.L.R. 375; *Re Banko*, [1958] O.R. 213; *Re Davis*, [1936] O.W.N. 146; *Re Collins* (1927), 61 O.L.R. 225; *Re Brown* (1929), 35 O.W.N. 335; Waters, *op. cit.*, footnote 18, pp. 755-758.

often been drawn between advice as to the construction of the instrument and the scope of discretionary powers on the one hand and advice as to the appropriate course of action to be taken in the execution of such a power.¹¹⁰

Where the question is directed at the scope of the discretion the distinction will not always be easy to apply. The court will normally tell trustees whether particular matters are relevant to the exercise of the discretion and whether particular acts would be within its ambit.¹¹¹ If, however, the question is tantamount to a request that the court should indicate which of the authorized actions should be performed, Canadian courts have in most reported cases declined to provide an answer.¹¹²

The reluctance of Canadian judges to assist trustees in this way contrasts with the approach of Buckley J., in *Re Allen-Meyrick's Will Trusts*.¹¹³ Trustees in that case had asked whether a discretionary bare power of maintenance could be surrendered to the court. The judge held that this could not be done in advance so as to free the trustees from the obligation of exercising the discretion in the future.

But that does not mean that they are not entitled to come to the court and say: "We are in doubt as to how we ought to exercise this discretion in respect of a particular fund of income which we have now got in hand, and in the particular circumstances which at present exist." It seems to me to be immaterial whether, in approaching the court, they place before the court a particular proposal as a basis for discussion. If they desired to surrender their existing discretion in respect of existing funds in relation to existing circumstances, I see no reason why they should not be permitted to do so, or why the court should not, in the light of the information placed before it by trustees, say what the court considers to be the right thing to do in relation to that fund and to those circumstances.¹¹⁴

Re Allen-Meyrick's Will Trusts was considered by Crockett J., in *Re Green*¹¹⁵ where trustees had asked whether a proposed exercise of a bare power of advancement would be improper. After at first expressing some doubt the judge decided that he had jurisdiction to express an opinion as to the propriety as distinct from the wisdom of the proposal. As a practical matter,

¹¹⁰ *Re Fulford*, *ibid.*, at p. 382; *Re Banko*, *ibid.*, at p. 217.

¹¹¹ As, e.g., in *Re Floyd*, [1961] O.R. 50, at p. 56.

¹¹² Cases cited, *supra*, footnote 109.

¹¹³ [1966] 1 All E.R. 740.

¹¹⁴ *Ibid.*, at p. 744.

¹¹⁵ [1972] V.R. 848; *cf.*, *Re Powles*, [1954] 1 All E.R. 516; *Re Moxon's Will Trusts*, [1958] 1 W.L.R. 165.

if the court is prepared to advise trustees that an exercise of the discretion in a particular way is within their powers and would not constitute a breach of trust, the distinction drawn by Crockett J., may be of little importance.

The reported Canadian cases do not appear to extend so far. The courts have been prepared to settle questions of construction and to tell trustees how far their discretion extends, but they have generally declined to decide whether a particular exercise of the discretion in the existing circumstances would be proper or improper. In view of the broad concept of an abuse of discretion which is currently being applied in Canada, this reluctance to assist trustees is difficult to justify. If the court is satisfied that all the material facts have been placed before it, then whether the power is a bare power or a trust power, there is much to be said for the conclusion of Buckley J., in *Re Allen-Meyrick's Will Trusts* at least where the trustees have made a *bona fide* attempt to exercise the discretion and have been unable to agree.¹¹⁶

In exceptional circumstances Canadian judges have been prepared to exercise discretions of trustees. In *Re Haasz*¹¹⁷ trustees could not agree as to the exercise of a discretion "to convert into money all or any of my estate; or to retain all or any of my estate in the form of asset in which it may be at my death". The Court of Appeal of Ontario recognized that the power was a trust power and ordered a sale of the property which was in issue. In *Re Fleming*¹¹⁸ the question was whether trustees who were directors of a company should cause the company to use its undistributed income to redeem preference shares held by the trust or alternatively to distribute it in the form of a cash dividend. The second alternative would have benefited a life tenant at the expense of remaindermen. Osler J., referred to the reluctance of the court to relieve trustees from their responsibility to exercise their discretions but held that the fact that the life tenant was one of the trustees was sufficient to justify his intervention. A redemption of the preference shares was ordered.¹¹⁹

¹¹⁶ See, also, *Re Ropner's Settlement Trusts*, [1956] 3 All E.R. 332, at p. 333; *Pilkington v. I.R.C.*, [1964] A.C. 612, at p. 640; and *Campbell v. Campbell* (1917), S.R. (N.S.W.) 229, at p. 233 where the ability of trustees to surrender their discretions to the court appears to have been accepted.

¹¹⁷ *Supra*, footnote 37.

¹¹⁸ [1973] 3 O.R. 588; Scane (1974), 1 Estates and Trusts Q. 105.

¹¹⁹ *Quaere* whether it would have been a breach of trust if the trustees had not sought the advice of the court and, in their capacity as directors, had declared a cash dividend: see Scane, *op. cit.*, *ibid.*, at p. 114.

From this review of the reported decisions, it appears that the distinction between trust powers and bare powers has little, if indeed it has any, bearing on judicial decisions to exercise or to refrain from exercising the powers of trustees. A court will always enforce the duty to choose one of the courses of actions which are authorized by a trust power but it will normally do this by the same methods as it uses to enforce the duty to consider the exercise of a bare power. However the power has been classified, it has been only in the exceptional case that the court has made the choice for the trustees.

b) *Where the donee is not a trustee*

Although the terminology of fiduciary powers has been extended to those which are vested in a person who is not a trustee in the strict sense, the court's supervisory jurisdiction over such powers is no greater than its jurisdiction with respect to any power which a trust instrument confers upon such a person. For the most part the ambit of the jurisdiction is coincident with that of the doctrine of a fraud on a power. The court can annul a fraudulent execution of the power but it will not as a general rule interfere if the trustee simply ignores the existence of the power or refuses to consider whether it should be executed. The court, it has been said, has no power to remove a donee of a dispositive power who is not a trustee,¹²⁰ and no power to dispense with the consent of a person whose participation is required for the exercise of a power of advancement.¹²¹ Despite such statements it must be at least doubtful whether a court would permit the management and administration of a trust to be frustrated by the failure of a donee of an administrative power to co-operate with the trustees. In such a case it is possible that an application to vary the trust so as to destroy the power would be successful and there was at least one Canadian case in which a donee who was not a trustee was divested of administrative power before the enactment of the legislation which permits variations to be made.

In *Re Rogers*,¹²² Orde J.A., relieved the trustees from a duty to consult with and to be governed by the advice of a specified person in all matters relating to a particular investment of the estate. The person named had placed himself in a position

¹²⁰ *Re Park*, [1932] 1 Ch. 580, at p. 582.

¹²¹ *Re Forster's Settlement*, [1942] Ch. 199.

¹²² (1928), 63 O.L.R. 180; cf., *Re Hart's Will Trusts*, [1943] 2 All E.R. 557.

where his personal interest conflicted with that of the trust and it was held that his behaviour indicated that he had lost sight of the fact that, as a quasi-trustee, his sole duty was to assist the trustees. The judge had no doubt that he had jurisdiction to make the order on an application for advice on directions:

He cannot surely have a status superior to that of a trustee, and if a trustee is subject to be removed by the Court (as he can be on a summary application) the Court is, I think, clothed with full authority under Rule 600 to deal summarily with the question whether or not in the circumstances the trustees are free to proceed with the administration and disposal of the assets in question without the consent or interference of Mr. Beaton.¹²³

(2) *Implication of gifts in default of appointment*

The principles which govern the implication of gifts in default of the exercise of a power of appointment were debated in many nineteenth century cases and were, of course, discussed at some length in the treatises of Lord St. Leonards¹²⁴ and Sir George Farwell.¹²⁵ With the contributions of those influential writers should be coupled the article by John Chipman Gray which appeared in the *Harvard Law Review* in the early years of this century.¹²⁶ The more recent periodical writing¹²⁷ indicates that if the principles are now less controversial and of less direct practical significance they still retain some fascination. This no doubt is in part attributable to the fact that it is no simple intellectual exercise to reconcile or even, perhaps, to comprehend all of the distinctions drawn in some of the important cases in the nineteenth century.¹²⁸ It is also explicable in terms of the influence which the reasoning in those cases continues to have

¹²³ *Ibid.*, at p. 183.

¹²⁴ *Op. cit.*, footnote 26, pp. 588-597.

¹²⁵ *Op. cit.*, footnote 51, Ch. 12.

¹²⁶ *Op. cit.*, footnote 4.

¹²⁷ Unwin, *Power or Trust Power* (1962), 26 *Conveyancer and Property Lawyer* (N.S.) 92; Hopkins, *Certain Uncertainties of Trusts and Powers*, [1971] *Cambr. L.J.* 68.

¹²⁸ One might ask, for example, whether judicial acceptance of the reasoning of Romer J., in *Re Weekes' Settlement*, *supra*, footnote 19, destroys the basis of the principles applied in *Lambert v. Thwaites* (1866), L.R. 2 Eq. 151. See Gray, *op. cit.*, footnote 4, at pp. 22-25. *Lambert v. Thwaites* has been accepted by some judges in this century: see, for example, *Re Creighton*, [1950] 2 W.W.R. 529; *Perpetual Trustee Co. Ltd v. Tindal* (1940), 63 C.L.R. 232, at pp. 248-249, per Latham C.J.; *Re Llewellyn's Settlement*, [1921] 2 Ch. 281, at p. 286. It was not followed in *Re Gilbert*, [1948] 3 D.L.R. 27; and see the comment of Dixon J., in *Perpetual Trustee Co. Ltd v. Tindal*, *supra*, at p. 267.

in other areas of the law relating to discretionary powers. The purpose of the following comments is simply to indicate how an indiscriminate use of the trust power terminology contributed to the uncertainty which surrounded the question of implied gifts in the nineteenth century and which has not entirely disappeared.

The starting point on this topic as on all of those which concern fiduciary powers are the cases of *Harding v. Glyn*¹²⁹ and *Brown v. Higgs*.¹³⁰ In each of those cases a trustee had a duty to select the beneficiaries of an estate from among a specified class. There was thus an enforceable obligation to choose one of the courses of actions which were authorized by the power. In *Brown v. Higgs* the obligation was enforced by the court's order that the property should be distributed among the class in equal shares.

The extension of the reasoning in *Brown v. Higgs* to cases where the donee of the power was not a trustee required, of course, a shift from emphasis on the existence of a legal duty to exercise the power to emphasis on a moral obligation or, which amounts to the same thing, on the donor's intention that the power should be exercised. In the nineteenth century some judges were prepared to make the extension and spoke of a duty to exercise a power even where the donee was not a trustee.¹³¹ Whereas, however, in cases where the donee was a trustee an equal distribution among the objects was sometimes explained in terms of an execution of the power by the court and sometimes in terms of an implied gift, the second explanation was invariably given when the donee was not a trustee.¹³² This was so irrespective of whether the power was described as one which the donee had a duty to exercise.¹³³

In his treatise on powers Lord St. Leonards seems to have preferred the theory of implied gifts and the restriction of the trust power terminology to powers which were given to trustees. At the same time he recognized the significance which the exis-

¹²⁹ *Supra*, footnote 2.

¹³⁰ *Supra*, footnote 3.

¹³¹ See, e.g., *Burrough v. Philcox*, *supra*, footnote 46; *Salisbury v. Denton* (1857), 3 K. & J. 529; and see Dixon J., in *Perpetual Trustee Co. Ltd v. Tindal*, *supra*, footnote 128, at pp. 261-262.

¹³² See, e.g., *Birch v. Wade* (1814), 3 Ves. & B. 198; *Moore v. Ffolliot* (1887), 19 L.R. Ir. 499; *Brown v. Pocock* (1833), 6 Sim. 257; *Re Caplin's Will* (1865), 2 Dr. & Sm. 527.

¹³³ In some of the cases it was said that a gift would be implied because of the court's inability to exercise the trust power which had been given to the donee: see the cases cited, *supra*, footnote 131. In *Penny v. Turner* (1848), 2 Ph. 493 Lord Cottenham explained his earlier decision in *Burrough v. Philcox* on this ground.

tence of the donor's intention that a power should be exercised had for the question whether a gift to the objects should be implied.¹³⁴ Towards the end of the nineteenth century it began to appear that the different approaches reflected in the cases might be dismissed as of no practical significance. In the absence of an express gift in default of the exercise of a special power of appointment there appeared to be a strong presumption in favour of a gift to the objects. This position was reflected in Farwell's treatise where the term "power in the nature of a trust" was used compendiously to refer to all cases in which the objects of a power were entitled equally in default of appointment.¹³⁵ These cases included those in which there was an express gift to the objects subject to a power of selection and exclusion, those in which there was no express gift but there was an indication that the donor intended the power to be exercised and those in which there was simply a power to appoint among a class with neither an express gift in default nor an indication of an intention that the power should be exercised.

The reasoning of Romer J., in *Re Weekes' Settlement*¹³⁶ was inconsistent with Farwell's treatment of gifts in default of appointment. Romer J., denied the existence of any presumption in favour of a gift in default to the objects:¹³⁷

In my opinion the cases shew . . . that you must find in the will an indication that the testatrix did intend the class or some of the class to take — intended in fact that the power should be regarded in the nature of a trust — only a power of selection being given, as, for example, a gift to A for life with a gift over to such of a class as A shall appoint.

Re Weekes' Settlement has received a considerable amount of attention in subsequent cases and in textbooks and in periodical articles. Farwell and Gray were emphatically of the opinion that it had been wrongly decided¹³⁸ and Farwell's statement of the law is supported by dicta in some later cases.¹³⁹ In other cases the decision in *Re Weekes' Settlement* has been followed¹⁴⁰ while in

¹³⁴ *Op. cit.*, footnote 26, pp. 592-593.

¹³⁵ *Op. cit.*, footnote 51, Ch. 12.

¹³⁶ *Supra*, footnote 19.

¹³⁷ *Ibid.*, at p. 292.

¹³⁸ Farwell, *op. cit.*, footnote 51, pp. 529-530; Gray, *op. cit.*, footnote 4, pp. 13-18.

¹³⁹ *Re Hughes*, [1921] 2 Ch. 208, at p. 214; *Re Scarisbrick's Will Trusts*, [1951] Ch. 622, at p. 635; *cf.*, *Re Llewellyn's Settlement*, *supra*, footnote 128.

¹⁴⁰ *Re Combe*, [1925] Ch. 210; *Re Perowne*, [1951] Ch. 785; *Re Ward*, [1952] O.W.N. 1; *Re Hall*, [1899] 1 I.R. 308; *cf.*, *Re Dowsley* (1958), 15 D.L.R. (2d) 560.

others judges have gone to some trouble to distinguish it.¹⁴¹ The views of Gray and Farwell have been referred to in the High Court of Australia but neither clear approval nor disapproval has been indicated.¹⁴²

As well as the doubt which has been cast on the validity of the principles which were applied in the case there has been some disagreement as to its correct interpretation.

On one view *Re Weekes' Settlement* stands for the proposition that there can be no gift to the objects in default of appointment unless the instrument in effect makes a direct gift to the objects subject to a power of selection in the donee. This appears to have been the way in which Gray interpreted the decision.¹⁴³ On the occasions when counsel have attempted to base an argument on this interpretation it has been rejected.¹⁴⁴ In *Re Lloyd*, Rose C.J.H.C., said:¹⁴⁵

... I do not read either *In re Weekes' Settlement* or *In re Combe* as authority for saying that when the intention to benefit the objects of the power seems, as it does in this case seem to me, to be evidenced by the words of the will, effect shall not be given to that intention unless there are found in the will some direct words of gift to the objects and the power itself is a mere power of selection of some or one of them or a mere power of apportionment amongst them. In this latter case — where there are direct words of gift to the objects of power — there is no need for the court to draw any inference: the testator has made the gift, and all that remains to be settled is the question of the distribution of the property among the donees. The case in which the necessity for drawing an inference arises is the case in which the testator has not made a direct gift; and upon the authorities it is clear that in a proper case the inference may be drawn.

Lewis Simes¹⁴⁶ understood Romer J., to be using the term "power in the nature of a trust" in the sense in which it has been used in the modern cases on certainty of objects. On this view the emphasis in construction would be placed on the presence or

¹⁴¹ *Re Lloyd*, [1938] O.R. 32; *Re Gilbert*, *supra*, footnote 128; *Re Braddock*, [1947] S.A.S.R. 329; *cf.*, *Re Catterns*, [1932] N.Z.L.R. 1402; *Re Creighton*, *supra*, footnote 128.

¹⁴² *Perpetual Trustee Co. Ltd v. Tindal*, *supra*, footnote 128, at p. 262, per Dixon J.; *Lutheran Church of Australia v. Farmers' Co-operative Executors and Trustees Ltd* (1970), 44 A.L.J.R. 176, at p. 188 per Windeyer J.

¹⁴³ *Op. cit.*, *supra*, footnote 4, at p. 13.

¹⁴⁴ *Re Lloyd*, *supra*, footnote 141; *Re Braddock*, *supra*, footnote 141.

¹⁴⁵ *Ibid.*, at p. 35.

¹⁴⁶ *The Law of Future Interests* (2nd ed. by Lewis M. Simes and Allan F. Smith, 1956), s. 1033.

absence of imperative words which indicated that the donor intended the power to be exercised. Such an interpretation receives some support in the judgment. In a passage which precedes the one quoted above Romer J., said:¹⁴⁷

Now apart from the authorities, I should gather from the terms of the will that it was a mere power that was conferred on the husband, and not one coupled with a trust that he was bound to exercise.

Similarly in *Re Combe*¹⁴⁸ in which the correctness of *Re Weekes' Settlement* was accepted, Tomlin J., formulated the issue in terms which might be understood to require the presence of words which indicate that the donor had intended the power to be exercised.¹⁴⁹ Simes stated that *Re Combe* "clearly lays down the rule that the power must be imperative if the property is to go to the class on failure of the donee to appoint".¹⁵⁰ This it is suggested is an unlikely interpretation of either of the decisions mentioned. In those as in some earlier cases it seems that the duty to which the judges referred was to be implied from any indication that the donor intended to benefit some or all of the class and not merely from the existence of imperative words which would impose no enforceable obligation. This approach appears clearly in the judgment of Lord Cottenham L.C., in *Burrough v. Philcox*:¹⁵¹

These and other cases shew that when there appears a general intention in favour of a class, and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails, from that selection not being made, the Court will carry into effect the general intention in favour of the class. When such an intention appears, the case arises, as stated by Lord Eldon, in *Brown v. Higgs*, of the power being so given as to make it the duty of the donee to execute it; . . .

The correct interpretation of the reasoning of Romer J., appears to be that a court will not imply a gift in default of appointment unless it finds in the instrument some indication that the donor had a general intention to benefit the objects.¹⁵² The difference between this interpretation and that which was advocated by Simes is simply that the preferred approach treats the existence of imperative words as only one of a number of possible

¹⁴⁷ *Supra*, footnote 19, at p. 292.

¹⁴⁸ *Supra*, footnote 140.

¹⁴⁹ *Ibid.*, at p. 218.

¹⁵⁰ *Op. cit.*, footnote 146, p. 503.

¹⁵¹ *Supra*, footnote 131, at p. 92.

¹⁵² "The test is whether the settlor has demonstrated an intention to benefit the class in any event": Keeton and Sheridan, *The Law of Trusts* (10th ed., 1974), p. 15.

indications that a gift in default was intended. Despite its historical development from the concept of a power in the nature of a trust which was discussed by Lord Eldon in *Brown v. Higgs*, the trust power in *Re Weekes' Settlement* is not limited to cases in which the words of the instrument indicate that the donor intended to impose upon the donee a duty to exercise the power. The difference is largely one of emphasis where the donee is not a trustee as in that case such a duty would be unenforceable. Nonetheless it may be crucial in cases such as *Re Lloyd*¹⁵³ where the testatrix merely empowered her husband to appoint among a specified class.¹⁵⁴ The reasoning in that case and in the English cases in which *Re Weekes' Settlement* was followed suggests that the question is to be approached in the same way as any other question of construction.¹⁵⁵ If the reasonable assumption is that the donor contemplated that some or all of the objects would ultimately have the property, it is not necessary to look for express words which indicate that the power was intended to be exercised or that the donor had turned his mind to the possibility that the donee might fail to do so. A general intention or assumption that the members of the class of objects and no one else would receive the property will be sufficient.

On this view the essential difference between the position of Farwell and that of Romer J., is simply that the former supported a strong presumption in favour of an implied gift¹⁵⁶ while the approach of the latter denies the existence of any such presumption. The court must be satisfied that the donor had the requisite intention to benefit the class, but neither *Re Weekes' Settlement* nor the later cases suggests that there is a strong presumption against the existence of the intention.¹⁵⁷

If the above discussion is correct a continued use of the trust power terminology in the context of implied gifts is likely to be misleading unless it is recognized that the concept of a power in the nature of a trust for this purpose is wider than that which has been employed in many of the more recent cases involving powers.

¹⁵³ *Supra*, footnote 141.

¹⁵⁴ See, also, *Perpetual Trustee Co. Ltd v. Tindal*, *supra*, footnote 128, where a majority of the High Court of Australia held that a gift to the objects was to be implied but did not agree on the composition of the class.

¹⁵⁵ *Re Combe*, *supra*, footnote 140; *Re Perowne*, *supra*, footnote 140.

¹⁵⁶ Farwell recognized that the presumption could be rebutted: *op. cit.*, footnote 51, p. 531.

¹⁵⁷ See the comments of Dixon J., in *Perpetual Trustee Co. Ltd v. Tindal*, *supra*, footnote 128, at p. 262.

The concept is essentially the same as that used by Farwell in that it includes all cases in which the property will pass to the objects if the power is not exercised.¹⁵⁸ The effect of *Re Weekes' Settlement* was simply to limit slightly the range of such cases.

(3) *Uncertainty of objects*

Much has been written about recent developments in the law relating to certainty of objects and it is not intended to review the whole subject again.¹⁵⁹ The general thrust of the decision of the majority of the House of Lords in *Re Baden's Deed Trusts (No. 1)*¹⁶⁰ was to assimilate the rules of certainty for trust powers to those which had been approved for bare powers two years earlier in *Re Gulbenkian's Settlements (No. 1)*.¹⁶¹ In either case the test is now to be whether it "can be said with certainty that any given individual is or is not a member of the class".¹⁶² Insofar as the majority judgments in *Baden (No. 1)* reflected a distaste for subtle technicalities and removed much of the significance which had previously been given to the distinction between trust powers and bare powers, the decision effected a welcome change in the law. It did not, unfortunately, deprive the distinction of all its relevance for questions of certainty.

At the end of his judgment Lord Wilberforce referred to a possible exception to the general rule:¹⁶³

There may be a third case where the meaning of the words used is clear but the definition of beneficiaries is so hopelessly wide as not to form "anything like a class" so that the trust is administratively unworkable or in Lord Eldon's words one that cannot be executed. . . . I hesitate to give examples for they may prejudice future cases, but perhaps "all the residents of Greater London" will serve.

The scope of the exception and the principle upon which it is based have been considered in two more recent cases but not

¹⁵⁸ "It is common usage to describe as a power in the nature of a trust one which is conferred in such circumstances that if it is not exercised the property subject to it passes to the objects in whose favour it is created": *Re Braddock*, *supra*, footnote 141, at p. 344, per Reed J.

¹⁵⁹ See Hanbury's *Modern Equity* (9th ed., 1969, Supplement 1971), pp. 125-130; Hopkins, *op. cit.*, footnote 127; Cohen, *Certainly Uncertain: The Discretionary Trust* (1971), 24 *Current Leg. Prob.* 133.

¹⁶⁰ *Supra*, footnote 20.

¹⁶¹ *Supra*, footnote 94.

¹⁶² *Re Baden's Deed Trusts (No. 1)*, *supra*, footnote 20. The test itself lacks certainty. For three different interpretations, see Sachs, Megaw and Stamp L.J.J., in *Re Baden's Deed Trusts (No. 2)*, [1973] Ch. 9 and for a comment see Christine Davies (1972), 50 *Can. Bar Rev.* 539.

¹⁶³ *Ibid.*, at p. 457.

defined with any great precision. If anything the question has become more obscure since those decisions and that in *Re Baden's Deed Trusts (No. 2)*.¹⁶⁴ In that case Brightman J., at first instance¹⁶⁵ and Sachs and Megaw L.JJ., in the Court of Appeal were of the opinion¹⁶⁶ that the same requirements of certainty were to be applied to trust powers and bare powers alike. If the statements to that effect were correct it would appear that either the exception mentioned by Lord Wilberforce applies to both types of powers or that it does not exist.¹⁶⁷

In *Blausten v. I.R.C.*,¹⁶⁸ a discretionary trust with respect to income had been created for the benefit of a specified class. Under the trust deed trustees were given a bare power to add to the class any person other than X. The power could only be exercised with X's previous consent in writing. It was argued, *inter alia*, that a bare power in such terms was void for uncertainty of objects. Although the case was disposed of in the Court of Appeal on other grounds, Buckley L.J., with whose judgment Orr L.J., agreed, expressed the opinion that the power was valid. After stating that the effect of the decision of the House of Lords in *Baden (No. 1)* was that "questions of validity depend on the same or similar tests whether the provision under consideration is a power or a trust",¹⁶⁹ Buckley L.J., concluded that the class was not "so wide or so indefinite that the trustees would not be able rationally to exercise the power".¹⁷⁰ Although his Lordship referred to the passage in Lord Wilberforce's judgment in which the necessity that the beneficiaries should constitute a class was emphasized, the test he applied was that derived from the judgment of Clauson J., in *Re Park*.¹⁷¹

If the class of persons to whose possible claims they would have to give consideration were so wide that it really did not amount to a class in any true sense at all no doubt that would be a duty which it would be impossible for them to perform and the power could be said to be invalid on that ground. But here, although they may introduce to the specified class any other person or persons except the settlor, the power is one which can only be exercised with the previous consent in writing of the settlor and, perhaps I may say in parenthesis, in my judgment

¹⁶⁴ *Supra*, footnote 162.

¹⁶⁵ [1972] Ch. 607, at p. 623.

¹⁶⁶ *Supra*, footnote 162, at p. 18, per Sachs L.J., at p. 23, per Megaw L.J.

¹⁶⁷ In *Re Baden's Deed Trusts (No. 1)*, *supra*, footnote 20, at p. 456 Lord Wilberforce said that the test for the validity of trust powers should be "similar" to that which had been approved for bare powers.

¹⁶⁸ [1972] Ch. 256.

¹⁶⁹ *Ibid.*, at p. 271.

¹⁷⁰ *Ibid.*, at p. 273.

¹⁷¹ *Supra*, footnote 120.

could only be exercised in the lifetime of the settlor. Therefore on analysis the power is not a power to introduce anyone in the world to the specified class, but only anyone proposed by the trustees and approved by the settlor. This is not the case in which it could be said that the settlor in this respect has not set any metes and bounds to the beneficial interests which he intended to create or permit to be created under this settlement.¹⁷²

It does not appear whether the conclusion would have been the same had the relevant clause contained a trust power and not a bare power.

Essentially the same question arose on similar facts in *Re Manisty's Settlement*.¹⁷³ Under a settlement similar to that considered in *Blausten*, the trustees had power to declare that "any person or persons, corporation or corporations, or charity or charities" other than specified persons should thenceforth be included in the class of beneficiaries. On an originating summons brought by the trustees it was held by Templeman J., that the power was not void for uncertainty. The learned judge was of the opinion that there was no distinction to be drawn between bare powers and trust powers as far as the principles governing certainty of objects were concerned. He deduced from the statements of principle and the width of the powers considered in *Re Gestetner Settlement*,¹⁷⁴ *Re Gulbenkian's Settlements (No. 1)*¹⁷⁵ *Baden (No. 1)*¹⁷⁶ and *Baden (No. 2)*¹⁷⁷ that a power cannot be uncertain merely because it is wide in ambit. He considered further an argument based on Lord Wilberforce's insistence on the necessity for a class and rejected it. In a most interesting part of the judgment he denied that the width of the kind of "intermediate" power with which he was concerned imposed special difficulties upon trustees in the exercise of their duty to consider and to survey the field. Such difficulties he declared were no different in kind and insignificantly different in degree than those which confronted the donees of a special power of the width of that in *Gestetner*.¹⁷⁸ The learned judge was not prepared

¹⁷² *Blausten v. I.R.C.*, *supra*, footnote 168, at p. 272.

¹⁷³ [1974] Ch. 17.

¹⁷⁴ [1953] Ch. 672.

¹⁷⁵ *Supra*, footnote 94.

¹⁷⁶ *Supra*, footnote 20.

¹⁷⁷ *Supra*, footnote 162.

¹⁷⁸ The class in *Re Gestetner Settlement*, *supra*, footnote 174, included named individuals, their living and future descendants, the widow or widowers of the individuals and the descendants, specified charities, ex-employees of the settlor or his wife, the present and future employees

to accept any implication in the judgment of Buckley L.J., in *Blausten* that the power in that case would have been void had the consent of a particular person not been required. Lord Wilberforce's reference to the necessity that there be a class of beneficiaries was explained on the ground that a power exercisable in favour of the residents of Greater London would be capricious as the membership would be "accidental and irrelevant to any settled purpose or to any method of limiting or selecting beneficiaries".¹⁷⁹

While the judgment represents a valiant attempt to deal with the difficulties which arise from the decision and the reasoning of Lord Wilberforce in *Baden (No. 1)* it is not evident that "caprice" was the vice at which Lord Wilberforce's dictum was directed. Nor does the notion of caprice introduce much clarity into an already murky subject.

A power to benefit "residents of Greater London" is capricious because the terms of the power negative any sensible interpretation on the part of the settlor. If the settlor intended and expected the trustees would have regard to persons with some claim on his bounty or some interest in an institution favoured by the settlor or if the settlor had any other sensible intention or expectation, he would not have required the trustees to consider only an accidental conglomeration of persons who have no discernible link with the settlor or with any institution. A capricious power negatives a sensible consideration by the trustees of the exercise of the power. But a wide power, be it special or intermediate, does not negative or prohibit a sensible approach by the trustees to the consideration and exercise of their powers.¹⁸⁰

If a power to appoint to any person other than X is valid, it is difficult to see why a settlor's attempt to confer benefits on the residents of a specified area should be regarded as negating any sensible intention on his part and any sensible consideration of the objects by the donees of the power. Administrative unworkability arising from the width of the definition rather than caprice appears to have been the vice at which Lord Wilberforce's comments were directed.

Apart from the difficulty of predicting whether a court would hold that the objects referred to in any particular instrument do not form "anything like a class" there is also some doubt whether the exception applies to bare powers as well as to trust powers

and directors of a named company and their spouses and the present and future employees or directors of any company that shared a director with the named company and the spouses of such persons.

¹⁷⁹ *Supra*, footnote 173, at p. 29.

¹⁸⁰ *Ibid.*, at p. 27.

and whether it is confined to powers which have been given to trustees.

In *Re Manisty's Settlement* Templeman J., inclined to the view that the requirement of a class applied only "to trusts which may have to be executed and administered by court and not to powers where the court has a very much more limited function".¹⁸¹ It is to be hoped that this view will be followed and it is suggested that, given the existence of Lord Wilberforce's exception, it is only on this ground that the decision in *Re Manisty's Settlement* can be supported.¹⁸²

Whether the exception applies to powers which are given to persons who are not trustees depends in the first place upon whether anything in Lord Wilberforce's judgment was intended to apply to such powers. Despite the extension of the trust power terminology to the powers of persons other than trustees there appear to be no cases in which the pre-Baden rules of certainty were held to determine the validity of such powers. If, indeed, the correct analysis of cases such as *Burrough v. Philcox*¹⁸³ is that the court was executing the "trust" imposed upon the donee rather than implying a gift in default there would be some logic in applying the same rules of certainty to all trust powers regardless of whether the donee was a trustee. If, however, the correct view is that in such cases the court found an implied gift in equal shares from the words of the instrument¹⁸⁴ equality will presumably continue to be the rule. There would, however, be no reason why the invalidity of the implied gift in default should affect the validity of the power.

The principles which govern gifts in default of appointment have not received much consideration in the cases in which it has been argued that a power given to a person who was not a trustee was invalid for uncertainty of objects. They were not mentioned in *Re Park*¹⁸⁵ in which Clauson J., upheld a power

¹⁸¹ *Ibid.*, at p. 29.

¹⁸² If the requirement that the objects should constitute a class applies to bare powers it would seem that *Re Park*, *supra*, footnote 120 and *Re Jones*, [1945] 1 Ch. 105 were wrongly decided. The correctness of these decisions has been doubted in Australia (see, *infra*, at p. 278), but *Re Park* seems to have received the approval of Lord Upjohn in *Re Gulbenkian's Settlements (No. 1)*, *supra*, footnote 94, at p. 521. Similar powers were treated as valid in *Re Eyre*, *supra*, footnote 25 and *Re Abraham's Will Trusts*, [1969] 1 Ch. 463.

¹⁸³ *Supra*, footnote 131.

¹⁸⁴ *Supra*, p. 262.

¹⁸⁵ *Supra*, footnote 120.

to select the beneficiaries of income from any charitable institution or person other than the donee. The fact that the donee was not a trustee was emphasized by the judge but he did not say that the strictor rules of certainty which were applicable to the trust powers of trustees would never be applied to donees who were not trustees.¹⁸⁶ In *Re Jones*¹⁸⁷ where the residue of an estate was given in trust for such persons living at the death of the donee as the donee should by will appoint, the power was upheld without any reference to the presence or absence of an express gift in default of appointment.¹⁸⁸ If there was no such gift the power would appear to have been a trust power and the case would be some authority for the proposition that the trust powers of persons other than trustees are not subject to the rules of certainty which govern the trust powers of trustees. These cases were decided before the significance of the distinction between trust powers and bare powers for the purposes of certainty had been clearly defined.¹⁸⁹

In *Re Gestetner Settlement*,¹⁹⁰ the decision which began the line of cases which were considered in *Baden (No. 1)* Harman J., distinguished between powers which trustees were bound to exercise and "a power collateral, or a power appurtenant, or any of those powers which do not impose a trust upon the conscience of the donee . . .".¹⁹¹ The introduction of the old classification of powers into those which were appurtenant, in gross or simply collateral was unfortunate and makes it very difficult to determine whether the judge was referring to legally or morally enforceable duties. The use of the term "power collateral" to refer to a power which a donee was under no duty to exercise was most unusual as in the earlier cases the term was often applied to powers which were coupled with a duty in some sense.¹⁹² The terminology

¹⁸⁶ In *Re Gulbenkian's Settlements (No. 1)*, *supra*, footnote 94, at p. 521, Lord Upjohn said that the existence of a gift in default of appointment was fundamental to the decision in *Re Park*.

¹⁸⁷ *Supra*, footnote 182.

¹⁸⁸ The reports do not indicate whether the instrument contained such a gift.

¹⁸⁹ Although there were many earlier cases in which trusts were held to fail on the ground of uncertainty of objects there was no attempt to provide a precise description of the requisite certainty until the decision of Harman J., in *Re Gestetner Settlement*, *supra*, footnote 174.

¹⁹⁰ *Supra*, footnote 174.

¹⁹¹ *Ibid.*, at p. 684.

¹⁹² As, e.g., in *Re Dunne's Trusts*, *supra*, footnote 25. In *Re Mills*, [1930] 1 Ch. 654, at p. 668, Lawrence L.J., described a power collateral as "the most common form of power coupled with a duty".

employed in *Re Gestetner Settlement* was adopted by Roxburgh J., in *Re Coates*¹⁹³ and again it does not appear whether the concept of a power coupled with a duty was thought to be confined to powers which are held by trustees. There is a similar obscurity in the later cases in which the term "power collateral" was used to refer to powers which were not coupled with a duty.¹⁹⁴ As in most of these cases the courts were concerned with powers which had been given to trustees, the failure to deal with the question is understandable. In *Re Gulbenkian's Settlements (No. 1)*¹⁹⁵ Lord Upjohn distinguished between the trust powers of trustees and the bare powers of "trustees or others" but did not indicate whether he thought that for the purposes of certainty all powers given to persons other than trustees would be classified as bare powers.

If it is correct that there is as yet no clear authority¹⁹⁶ for the proposition that the rules of certainty which apply to the trust powers of trustees are also applicable to the trust powers of persons other than trustees, it is to be hoped that courts will not find it necessary to accept that proposition in future cases. Quite apart from the difficulty in applying Lord Wilberforce's requirement that the objects must constitute a class of some kind, assimilation of all trust powers for the purposes of certainty would create practical problems of enforcement where the donee was not a trustee. Unless the court was prepared to assert a jurisdiction to remove such a person¹⁹⁷ it could be called upon to exercise a trust power to select the beneficiaries of income in every year. There would appear to be no method by which the court could force the donee even to turn his mind to the existence of the power.

A more fundamental objection to the assimilation of the trust powers of trustees and others for the purposes of certainty, is the quite unsatisfactory nature of the distinction between trust powers and bare powers where the donee is not a trustee. Consider two cases: In the first the donee is directed to appoint

¹⁹³ [1955] 1 Ch. 495.

¹⁹⁴ See, for example, *Re Gulbenkian's Settlements (No. 1)*, [1968] Ch. 126, at p. 133, per Lord Denning M.R.; *Re Sayer*, [1957] Ch. 423, at p. 431, per Upjohn J.

¹⁹⁵ *Supra*, footnote 94.

¹⁹⁶ Lord Upjohn's comment on *Re Park*, *supra*, footnote 186, may have been intended to suggest that the rules of certainty which applied to the trust powers of trustees were also to be applied to powers which persons who were not trustees were intended to exercise.

¹⁹⁷ *Supra*, pp. 257-258.

capital or income to such of a class as he should think fit with an express gift in default to the class in equal shares; in the second case the provision is the same except that there is no express gift in default. The orthodox doctrine is that, while the second power would normally be construed as a trust power, the existence of an express gift in default indicates that the first power should not be so construed. The distinction makes no sense at all. If the basic question is whether the donor intended a selection to be made the presence or absence of an express gift over to the class should not be decisive. The express gift might indicate merely that the donor recognized that the donee could not be forced to exercise the power and that for any of a number of reasons he might not do so.

If the presence or absence of an express gift to the class in default of appointment cannot be decisive, a court considering a power of the first kind would have to estimate the relevant significance of the imperative words and the existence of the express gift in default. The task could be extraordinarily difficult and it is submitted that to require the court to embark upon it would be to attribute excessive importance to the possible presence of an unenforceable moral obligation. It is suggested that if the class is uncertain, in each of the two hypothetical cases mentioned, the express gift in default in the first case and the implied gift in the second should be void, but the power in each case should remain valid and exercisable. The existence of imperative words can be regarded as an important factor in the search for an implied gift in the second case but as those words impose no legal obligation their existence should not affect the validity of the power and the definition of the applicable rules of certainty.

The decision in *Baden (No. 1)*¹⁹⁸ is clearly inconsistent with any suggestion that a similar approach could be taken to the trust powers of trustees. The courts will not imply a gift in default of the exercise of such a power. By one method or another they will ensure that the power is exercised and if the above submissions are correct, the requirement that the objects should constitute a class of some kind is one respect in which the distinction between trust powers and bare powers remains important. For at least two reasons this is to be regretted. In the first place the requirement is of most uncertain scope and must inevitably be productive of litigation. The second reason is simply

¹⁹⁸ *Supra*, footnote 20.

that it is inconsistent with the same considerations of policy which led the House of Lords to repudiate a rule which would require that all the beneficiaries of trust powers should be ascertainable. When applied to particular instruments the distinction between trust powers and bare powers can be extraordinarily narrow and artificial and as Lord Wilberforce said:¹⁹⁹

It does not seem satisfactory that the entire validity of a disposition should depend upon such delicate shading.

Consider two cases: In one the instrument directs the trustees to distribute income among such of A, B, and C as they should select and in a separate clause gives them power to add to the class any person other than themselves; in the other case, the instrument simply directs the trustees to distribute income among such of A, B and C and any other person other than themselves as they should select. The decisions in *Blausten v. I.R.C.*²⁰⁰ and *Re Manisty's Settlement*²⁰¹ indicate that the power to add persons in the first case would be a bare power. The power in the second case would appear to be a trust power and to be invalid if there is any substance in the requirement that the beneficiaries should constitute a class of some kind. An attempt to justify such a result on the ground that in the second case "a wider and more comprehensive range of inquiry is called for"²⁰² than in the first would surely represent the ultimate in technicality.²⁰³

If the existence of the requirement of a class for trust powers is unfortunate it is still possible to appreciate why it was thought necessary to give it some recognition in *Baden (No. 1)*. A complete assimilation of the rules of certainty for the trust powers and bare powers of trustees would have required the repudiation of cases in which it had been held that trust powers in favour of such persons other than the trustees as the trustees should select are invalid.²⁰⁴ While there is some authority for the proposition

¹⁹⁹ *Ibid.*, at p. 449.

²⁰⁰ *Supra*, footnote 168.

²⁰¹ *Supra*, footnote 173.

²⁰² *Re Baden's Deed Trusts (No. 1)*, *supra*, footnote 20, at p. 457.

²⁰³ "But the client must not be penalized for his lawyer's slovenly drafting": *Re Gulbenkian's Settlements (No. 1)*, *supra*, footnote 94, at p. 517, per Lord Reid.

²⁰⁴ *Yeap Cheo Neo v. Ong Cheng Neo* (1875), 6 P.C. 381; *Stubbs v. Sargon* (1838), 3 My. & Cr. 507; *cf.*, *Re Booth* (1917), 86 L.J. Ch. 270.

that bare powers of this type are valid²⁰⁵ the courts have in this area as in others consistently refused to treat invalid trusts as valid powers.²⁰⁶ The most they have been prepared to do is to treat the size and indefinite nature of the range of objects as one factor to be considered in determining whether the settlor or testator intended to create a trust or a power.²⁰⁷

It would seem, therefore, that any further assimilation of the rules of certainty for trust powers and bare powers will probably require legislative intervention. In those jurisdictions which enact provisions similar to section 16 of the Perpetuities Act of Ontario²⁰⁸ there will be a statutory precedent for treating invalid trusts as valid powers.²⁰⁹ Where such provisions are in force a trust for a specific non-charitable purpose that creates no enforceable interest in a specific person will be upheld as a valid power. It is arguably anomalous that in such jurisdictions trust powers for such persons as the trustee shall appoint cannot be upheld as bare powers. If legislation were so, to provide the very technical distinction between trust powers and bare powers would cease to have any significance for questions relating to certainty of objects.

(4) *Delegation of testamentary power*

The principle that a man cannot delegate his power to make a will is a precept of the civil law which was adopted by the law of England. At the end of the sixteenth century, Swinburne wrote:²¹⁰

²⁰⁵ *Re Abraham's Will Trusts*, *supra*, footnote 182; *Re Eyre*, *supra*, footnote 182; *Re Wootton Decsd.*, [1968] 1 W.L.R. 681; *Re Manisty's Settlement*, *supra*, footnote 173; *cf.*, *Cook v. Duckenfield* (1743), 2 Atk. 562; *Re Ogilvy*, *supra*, footnote 14; in *Re Abraham's Will Trusts* Cross J., said that it was irrelevant that the donee in *Re Park*, *supra*, footnote 120, was not a trustee. See also, *Meagher v. Meagher* (1915), 34 O.L.R. 33; *Re Hayes*, [1938] O.W.N. 417; *Re McCuag* (1924), 25 O.W.N. 712; *Calcino v. Fletcher*, *supra*, footnote 14 and *Re McEwan*, [1955] N.Z.L.R. 574 where it was held that general powers had been created.

²⁰⁶ *Re Pugh's Will Trusts*, *supra*, footnote 14; *Re Wootton Decsd.*, *ibid.*

²⁰⁷ See, *e.g.*, *Re Dowsley*, *supra*, footnote 140; *cf.*, *Re Combe*, *supra*, footnote 140; *Re Perowne*, *supra*, footnote 140.

²⁰⁸ R.S.O., 1970, c. 343.

²⁰⁹ At the time of writing Alberta appears to be the only jurisdiction which has legislation of this kind: Perpetuities Act, S.A., 1972, c. 121, s. 20.

²¹⁰ Swinburne, *A Treatise of Testaments and Last Wills* (1590), Part I, s. 3.

Wherefore if the testator should refer his will to the will of another; as if he should say, I give thee leave and authority to make my will, and to make executor who thou wilt, *etc.* if hereupon thou didst make a will in his name, and didst name an executor for him, yet this will is void in law. For as thy soul is not my soul, so thy will is not my will, nor thy testament my testament.

In this century the principle has been affirmed on several occasions in the House of Lords,²¹¹ the Privy Council²¹² and the High Court of Australia.²¹³ It has received some recent recognition in the Supreme Court of Ontario.²¹⁴ Notwithstanding its antiquity and its recognition by tribunals of high authority, its scope and in particular its effect on discretionary powers of appointment created by will is not altogether clear.

One type of case to which the principle undoubtedly applies is where the testator authorizes some other person to draft the will without giving instructions as to its terms and then signs the will without knowledge and approval of its contents. In *Hastilow v. Stobie*²¹⁵ it was argued that such a delegation was permissible. As, by definition, a will represents the deliberate expression of the intentions of a competent testator with respect to the succession to his property, it was held that in the absence of his knowledge and approval of its contents such a document would not reflect the "will" of the testator and, therefore, would not be his will and testament.

Where a competent testator executes a will which, with his full knowledge and approval, confers a discretionary power of selection upon some other person, there is no conflict with the requirement that the will should contain his intentions and not those of some other person. To an extent, however, it is clear that he has delegated the power of determining the ultimate dis-

²¹¹ *Houston v. Burns*, [1918] A.C. 337; *A.-G. v. National Provincial Bank*, [1924] A.C. 262; *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson*, [1944] A.C. 341; Gordon, Delegation of Will Making Power (1953), 69 L.Q. Rev. 334; Hardingham, The Rule Against Delegation of Will-Making Power (1974), 9 Melb. U. L. Rev. 650.

²¹² *A.-G. of New Zealand v. New Zealand Insurance Co.*, [1936] 3 All E.R. 888; *Leahy v. A.-G. for New South Wales*, [1959] A.C. 457, at p. 484.

²¹³ *Tatham v. Huxtable* (1950), 81 C.L.R. 639; *Lutheran Church of Australia v. Farmers' Co-operative Executors & Trustees Ltd*, *supra*, footnote 142; *A.-G. for New South Wales v. Donnelly* (1958), 98 C.L.R. 538, *aff'd sub nom. Leahy v. A.G. for New South Wales*, *ibid.*

²¹⁴ See *Re Lysiak* (1975), 7 O.R. (2d) 317.

²¹⁵ (1869), L.R. 1 P. & D. 64; *cf.*, *In Bonis Smith* (1869), L.R. 1 P. & D. 717.

position of his property and the question is whether his expression of an intention to do this will be sufficient.

In all Commonwealth jurisdictions it is accepted that some discretionary powers of selection may be created by will. General powers of appointment, special powers where the potential objects are all ascertainable and powers to distribute property between bodies or purposes each of which is exclusively charitable will not be invalid on the ground that they involve a delegation of testamentary power.²¹⁶ With respect to other powers the position is less clear.

In the ultimate analysis the question is whether some discretionary powers which can be created by deed cannot be validly created by will. A number of factors contribute to the present difficulty of finding an answer in English law. *First*, in none of the English cases in which testamentary powers have been declared to be invalid on the ground of delegation would the decision have been different if the power had been created in the lifetime of the donor.²¹⁷ *Second*, most of the relevant dicta in those cases are clearly too wide and would, if applied literally, invalidate general powers or special powers in favour of an ascertainable class.²¹⁸ *Third*, in the line of cases which would seem to involve the most complete delegation, powers have been declared invalid on the ground of uncertainty without any reference to the principle which forbids delegation.²¹⁹ *Fourth*, in the most recent decision in which the House of Lords considered the rules relating to the certainty of the objects of trust powers created *inter vivos*, cases concerning testamentary powers were treated as relevant without any reference being made to the rule against delegation.²²⁰

²¹⁶ *Re Hughes*, *supra*, footnote 139, at p. 212; *Re Neave*, [1938] Ch. 793, at p. 798; *Tatham v. Huxtable*, *supra*, footnote 213, at pp. 646-647 per Latham C.J. (diss.).

²¹⁷ Cases cited, *supra*, footnote 211.

²¹⁸ See, e.g., *Chichester Diocesan Fund and Board of Finance (Incorporated) v. Simpson*, *supra*, footnote 211, at pp. 348, per Viscount Simon and 371, per Lord Simonds. See the comments of Cross J. in *Re Abraham's Will Trusts*, *supra*, footnote 182, at p. 474.

²¹⁹ Where property has been left to executors on trust to dispose of as they should think fit the trust has been held to fail for uncertainty of objects in many cases: e.g., *Vezey v. Jamson* (1882), 1 Sim. & St. 69; *Buckle v. Bristow* (1864), 10 Jur. N.S. 1095; *Re Gilkinson* (1930), 38 O.W.N. 26, aff'd. (1931), 39 O.W.N. 115; *Re Hollole*, [1945] V.L.R. 295; contrast *Re Howell*, *supra*, footnote 14; *Meagher v. Meagher*, *supra*, footnote 205; *Re Hayes*, *supra*, footnote 205.

²²⁰ *Re Baden's Deed Trusts (No. 1)*, *supra*, footnote 20.

On the basis of the existing authorities it would seem likely that in English law no bare powers of selection which may be validly created by deed will infringe the rule against delegation if they are created by will. It has been recognized in a number of cases at first instance that a testator may confer upon a trustee or upon some other person a power to appoint to any person other than himself or other specified persons.²²¹ One of these cases has been cited with apparent approval in the House of Lords.²²² It appears improbable that these decisions, of which *Re Park*²²³ appears to be the first in which the delegation principle and the sweeping dicta which support it were considered, will now be overruled. As they concerned almost the widest form of delegation short of the creation of a general power, it would seem that, as applied to bare powers, the principle against delegation requires only that the objects be described with the certainty required for powers which have been created *inter vivos*.

The effect of the principle on trust powers created by will is less certain. Prior to the decision of the House of Lords in *Baden (No. 1)*²²⁴ it does not appear that the principle had any independent significance for such powers. As the relevant rules relating to certainty of objects required that all the objects of a trust power, whether created by deed or will, should be ascertainable²²⁵ and, as trust powers in favour of an ascertainable class did not infringe the delegation principle, that principle could at the most serve as an additional but rather empty reason for invalidating a testamentary trust power of selection exercisable among an unascertainable class. The repeated references to the principle in cases decided in the first half of the twentieth century²²⁶ are understandable in view of the fact that it was not until the decision of the Court of Appeal in *Inland Revenue Commissioners v. Broadway Cottages Trust*²²⁷ that the strict requirements of cer-

²²¹ Cases cited, *supra*, footnotes 182 and 205; but see *Re Denley's Trust Deed*, [1969] 1 Ch. 373, at p. 387. In *Re Wootton Decsd*, *supra*, footnote 205, Pennycuik J., was clearly of the opinion that the same rules govern the validity of testamentary bare powers and bare powers created *inter vivos*.

²²² *Supra*, footnote 182.

²²³ *Supra*, footnote 120.

²²⁴ *Supra*, footnote 20.

²²⁵ *I.R.C. v. Broadway Cottages Trust*, [1955] 1 Ch. 20, overruled, *Re Baden's Deed Trusts (No. 1)*, *supra*, footnote 20.

²²⁶ Cases cited, *supra*, footnotes 211 and 212.

²²⁷ *Supra*, footnote 225.

tainty for trust powers contained in settlements *inter vivos* were clearly stated.

In view of the relaxation of the rules of certainty which was accomplished by the decision in *Baden (No. 1)* for trust powers created *inter vivos*, it is possible that the requirements of those rules no longer coincide with those imposed by the delegation principle and that it must still be shown that all the objects of a testamentary trust power are ascertainable. If this is not the case, the requirement that the objects of a trust power should constitute a class of some kind will become all-important in the type of case where a testator leaves property to his executors on trust for such persons as they shall select. Similarly, a testamentary trust for such charitable institutions or persons as the trustee shall select will be valid unless it is held that the unqualified reference to persons infringes the requirement that there be a class of objects. Despite the fact that, in *Baden (No. 1)*, the House of Lords was concerned with a trust power contained in an *inter vivos* settlement and, despite the absence of any discussion of the delegation principle, the indiscriminate citation of cases involving trust powers created in wills suggests that the substantial assimilation of the rules relating to trust powers to those relating to bare powers was intended to apply whether the powers were created by deed or by will.

If the above suggestion is correct, the fact that a bare power or a trust power is created by will and not by deed is, in English law, of no significance for the purpose of certainty of objects and the delegation principle has no independent importance or significance with respect to such powers. It is at the most an additional reason for requiring that the rules of certainty applicable to trust powers which have been created *inter vivos* should be applied to those created by will.

In two decisions of the High Court of Australia much greater significance has been given to the delegation principle.²²⁸ In *Tatham v. Huxtable*²²⁹ a testator attempted to dispose of the residue of his estate in the following terms:

I hereby authorize and empower in law my executor . . . to distribute any balance of my real and personal estate which may at the time of my decease be possessed wholly or in part by me, to the beneficiaries in this my Will and Testament, in addition to amounts already specified,

²²⁸ See Hardingham, *op. cit.*, footnote 211. The principle has been applied to unrestricted powers of encroachment: *ibid.*, at pp. 661-664. It would seem most unlikely that this would be followed in Canada.

²²⁹ *Supra*, footnote 213.

or to others not otherwise provided for who, in [the opinion of the executor] have rendered service meriting consideration by the testator.

By a majority the court held that the bequest infringed the rule against delegation and was invalid. Fullagar J., explained the basis of the principle in words which recognized a distinction between the requirements for the validity of dispositions *inter vivos* and those which apply to dispositions by will:

It is inherent in the very nature of the power so given that it cannot be delegated or exercised by an agent for the testator, and it seems to me necessarily to follow that some powers of appointment, which would be perfectly good in any instrument other than a will, are ineffective in a will for the simple reason that they do not amount to a testamentary "disposition" of property, or indeed to any "disposition" of property at all. It seems quite consistent with legal principle to say that the creation by will of a general power of appointment (which has been said to confer the equivalent of ownership) is a testamentary disposition of property.²³⁰

On this view the delegation principle has considerable importance and cannot be regarded as merely an additional justification for the application to testamentary powers of the rules relating to the certainty of the objects of powers created in a settlement *inter vivos*. In the view of the learned judge a testamentary power of selection could be valid only if it was: (a) completely general so that it might be regarded as equivalent to property; or (b) in favour of a class of objects defined with certainty; or (c) in favour of objects which were exclusively charitable. He recognized that in the absence of a trust in default of appointment, a special power to appoint among members of an ascertainable class might involve no disposition by the testator.²³¹ To say that there is a valid testamentary disposition in such a case was, he said, a departure from principle which represents "a natural enough 'latitude' of view, which is perhaps characteristic of a system which has never regarded strict logic as its sole inspiration".²³² In his opinion, such latitude could not be extended to embrace cases where the class was not designated with certainty. Although he did not indicate precisely the sense in which the class must be described with certainty, he expressed his disapproval of decisions such as *Re Park*²³³ in which a testamentary bare power in favour of anyone other than the donee of the power was held not to infringe the delegation principle.

²³⁰ *Ibid.*, at p. 649.

²³¹ *Ibid.*

²³² *Ibid.*

²³³ *Supra*, footnote 120.

It seems probable that Fullagar J., intended to restrict the class of special or hybrid powers which can be validly created in a will to those in which the objects are all ascertainable. Clearly, however, his reference to *Re Park* which was a case of a bare power, indicates that he did not believe that the delegation principle required any distinction to be drawn between the rules governing such powers and those applicable to trust powers. Similar although slightly less emphatic views were expressed by the other member of the majority, Kitto J.²³⁴

The effect of the delegation principle on attempts to create discretionary powers in wills came before the High Court of Australia again in *Lutheran Church of Australia v. Farmers Co-operative etc. Ltd.*²³⁵ One issue in this case was whether the following residuary clause in a will was valid:

My Trustees have discretionary power to transfer any mortgages, and property, and Shares in Companies invested in my name to the Lutheran Mission . . . for building Homes for Aged Blind Pensioners after All expenses paid, and I desire that there shall be no subsequent adjustment or apportionment therefore between any of the beneficiaries under my will.

In the Supreme Court of South Australia, Bray C.J., held that the clause was ineffective to dispose of any proprietary interest of the testator and that it therefore infringed the rule against delegation of testamentary power and was invalid.²³⁶ On appeal the High Court was equally divided and, in consequence, the decision of Bray C.J., was affirmed.

In a joint judgment McTiernan and Menzies JJ., agreed with the conclusion of Bray C.J., that the words did not effect any gift of property. They referred to the reasoning of Fullagar J., which has been discussed above, and held that the clause did not fall within the "latitude" allowed to special powers which contain no gift in default of appointment. This conclusion is quite startling. If latitude is to be extended to a discretionary power to appoint among a class of specified individuals, it is very difficult to see why a discretionary power to appoint to one specified object alone should be treated any differently. In this respect the reasoning of the learned judges extends the principle stated in *Tatham v. Huxtable* and, at the same time, makes the distinction between bare powers and trusts of crucial importance in a case where there is only one object of the power.

²³⁴ *Supra*, footnote 213, at pp. 655-656.

²³⁵ *Supra*, footnote 142.

²³⁶ [1969] S.A.S.R. 115 (*sub. nom., Re Stapleton*).

If the decision in *Lutheran Church of Australia* and the reasons given by McTiernan and Menzies JJ., widen the gap between the English and Australian law relating to the principle against delegation, Barwick C.J., and Windeyer J., while not to any extent affirming or denying the correctness of the decision in *Tatham v. Huxtable*, were emphatic that the delegation principle was not infringed by the clause in the will before them. Their reasons were powerful and, it is submitted, compelling. They referred to the absence of any uncertainty as to the object of the power, the validity of bare powers in favour of a class in the absence of a gift over or trust in default and, for the purposes of the delegation principle, the complete lack of any justification for a distinction between a bare power to appoint to X with an express gift in default to a testator's next of kin and a similar power with an implied gift or resulting trust to the next of kin.²³⁷

It is to be hoped that the approach which prevailed in *Tatham v. Huxtable* and in the *Lutheran Church* case will not be accepted in Canada and that the rule against delegation will not be regarded as adding anything to the requirements of certainty which apply to powers which have been created *inter vivos*. Although the rule has been referred to on occasion there appears to be nothing in the reported Canadian cases which would suggest that it has any independent significance.²³⁸ In *Re Bethel*,²³⁹ at first instance Grant J., quoted a statement of the rule by Viscount Simon L.C., but clearly regarded it as adding nothing to the principles governing certainty of objects. In the Court of Appeal²⁴⁰ Gale C.J.O., dissenting, regarded the test of certainty approved in *Re Baden (No. 1)* as applicable to the bequest at issue and there is some indication that the other members of the court agreed. On a further appeal the principles in *Re Baden (No. 1)* received a measure of approval in the Supreme Court of Canada.²⁴¹

If the *Baden* test is to be applied to testamentary dispositions there seems no room for the proposition that in Canada the rule

²³⁷ Cf., *Cowper v. Mantell* (1856), 22 Beav. 231.

²³⁸ See, Sheard and Hull, *Canadian Forms of Wills* (3rd ed., 1970), pp. 271-272.

²³⁹ [1970] 3 O.R. 745, at p. 750.

²⁴⁰ [1971] 2 O.R. 316, at p. 321.

²⁴¹ *Sub. nom.*, *Jones v. T. Eaton and Co. Ltd.*, [1973] S.C.R. 635, at p. 651. See also, *Re Lysiak*, *supra*, footnote 214; L. Stevens, *Certainty and Charity — Recent Developments in the Law of Trusts* (1974), 52 *Can. Bar Rev.* 372.

against delegation will invalidate powers of selection or appointment which would otherwise be valid. Bare powers will be valid if it is possible to say whether any given individual is within the class. Trust powers will be valid if they satisfy the same test and if in addition the objects constitute a class. Trust powers for such persons other than the donee or other specified persons as the donee shall select will continue to be invalid whether they appear in a will or in a deed. Whether the ground of invalidity in the former case is described in terms of uncertainty or of the rule against delegation will be a matter of indifference.

(5) Release of powers

Some Canadian provinces have legislation which permits a donee of a power to release it.²⁴² In other provinces the possibility of releases is governed by rules of common law and equity. These rules permit the release of powers appurtenant and powers in gross but not the release of collateral powers or powers which are vested in trustees in their capacity as such.²⁴³ The legislation enacted first in the United Kingdom in 1881²⁴⁴ and subsequently adopted in some Canadian provinces permits the release of at least some collateral powers but not the release of the powers of trustees. In Halsbury it is stated that even where the statutory provisions are in force a power coupled with a duty or in the nature of a trust cannot be released.²⁴⁵ There are some *obiter dicta* which suggest that this exception is not confined to powers which are held by trustees and that it extends to powers which are coupled with a duty in some other sense.²⁴⁶ Halsbury's definition of a power in the nature of a trust is a power that is fiduciary "in the sense that the donee of the power is a trustee of it, and has an interest extensive enough to allow of its exercise".²⁴⁷ The reference to the donee's interest quite obviously reflects the language of Lord Eldon L.C., in *Brown v. Higgs* and does not seem appropriate to cover cases in which the donee of a power collateral is not a trustee.

²⁴² Conveyancing and Law of Property Act, *supra*, footnote 31, s. 26; Property Act, R.S.N.B., 1973, c. P-19, s. 55.

²⁴³ Sugden, *op. cit.*, footnote 26, Ch. 3; Farwell, *op. cit.*, footnote 51, Ch. 2; *Montreal Trust Co. v. Minister of Finance (B.C.)*, [1974] 1 W.W.R. 231.

²⁴⁴ *Supra*, footnote 17.

²⁴⁵ Halsbury's Laws of England (3rd ed., 1959), Vol. 30, p. 283.

²⁴⁶ *Re Mills*, *supra*, footnote 192, at p. 669; *Re Wills' Trust Deeds*, *supra*, footnote 55, at pp. 446-447.

²⁴⁷ *Op. cit.*, footnote 245, at p. 210.

From the early years of the nineteenth century to the present day the trust power terminology has been used in a bewildering variety of different senses in cases in which the ability to release a power was in issue.²⁴⁸ It seems quite clear that the fact that a gift to the objects will be implied in default of the exercise of a power of appointment which has been given to a life tenant will not prevent the power from being released. Although such a power was and is often called a power in the nature of a trust, it was also a power in gross and by the middle of the nineteenth century it was established that such powers could be released.²⁴⁹ Despite the previous authorities on this point the confusion in the terminology appears to have misled Buckley J., in *Re Wills' Trust Deeds*²⁵⁰ in which it was said that a power to appoint to a class with an express or implied gift in default to the objects cannot be released.²⁵¹

Where there are no statutory provisions which permit release it would seem unnecessary to ask whether powers in the nature of trusts can be released. Rather one merely has to ask whether the power is appurtenant or in gross on the one hand or, on the other hand, whether it is collateral or held by a trustee in his capacity as such.

In jurisdictions in which legislation modelled on the provisions of the United Kingdom Conveyancing Act of 1881 is in force there appear to be no decisions which have held that the collateral powers of persons other than trustees cannot be released.²⁵² In view of the generality of the statutory language there would seem to be no reason for assuming that the legislature intended to incorporate a distinction between some powers collateral which can be released and some which, although not given to trustees, are to be regarded as powers in the nature of

²⁴⁸ *Supra*, pp. 235-241.

²⁴⁹ *Supra*, footnote 26.

²⁵⁰ *Supra*, footnote 55.

²⁵¹ *Ibid.*, at p. 236.

²⁵² *Re Eyre, supra*, footnote 25, *Weller v. Ker* (1866), 15 L.T. 96 and *Saul v. Pattinson* (1886), 55 L.J. Ch. 831 concerned powers which were held by trustees. *Re Dunne's Trusts, supra*, footnote 25, is sometimes cited for the proposition that some powers collateral of persons other than trustees cannot be released. The case was, however, decided before the enactment of legislation which extended the range of releasable powers. In *Re Somes, supra*, footnote 16, at p. 255, Chitty J., distinguished the first three cases mentioned on the ground that each of them concerned a power held by a trustee — "a fiduciary power in the full sense of the term".

trusts in some unspecified sense and which are therefore incapable of release.

In *Re Mills*²⁵³ in which at least one judge accepted the proposition that some powers of persons who are not trustees are incapable of release it was said that the fact that the donee did not intend the power to be released was not decisive.²⁵⁴ In other cases it has been held that the fact that the power was conferred for the benefit of persons other than the donee did not make it incapable of release.²⁵⁵ In still other cases in which releases were held to be effective it was stressed that the objects could not compel the donee to exercise the power.²⁵⁶ Despite the dicta to the contrary, the decisions seem to leave little room for the application of any concept of a trust power which is not simply a power vested in trustees in their capacity as trustees. If this is correct, a continued use of the trust power terminology in this context is obviously undesirable.

(6) *Assignments by objects*

The distinction between trust powers and bare powers appears to have no bearing on the ability of an object of a dispositive power to assign his status as an object to some other person. Whatever the classification of the power, whether it is given to a trustee or some other person and whether it relates to capital or income, the object *qua* object has no proprietary interest which he can transfer.²⁵⁷ If a purported assignment is made for value it may be construed as a contract to assign whatever the object receives under an exercise of the power. Even in this case it does not give the assignee the status of an object:

The payment of a money consideration cannot make a stranger become the object of a power created in favour of children. He can only claim under a valid appointment executed in favour of some, or one, of the children.²⁵⁸

²⁵³ *Supra*, footnote 192.

²⁵⁴ *Ibid.*, at p. 666.

²⁵⁵ *Coffin v. Cooper*, *supra*, footnote 25. *Re Radcliffe*, *supra*, footnote 26; *Palmer v. Locke*, footnote 4.

²⁵⁶ *Re Greaves*, [1954] Ch. 434, at pp. 446-447; *Re Somes*, *supra*, footnote 16, at p. 255; *Re Mills*, *supra*, footnote 192, at pp. 670-671.

²⁵⁷ See *Re Rule's Settlement*, [1915] V.L.R. 670; *Gartside v. I.R.C.*, [1968] A.C. 564; *Re Weir's Settlement Trusts*, [1971] Ch. 145; *cf.*, *National Provincial Bank Ltd v. Ainsworth*, [1965] A.C. 1175, at pp. 1247-1248; *Re McCreath*, [1973] 1 O.R. 771, *aff'd*, [1973] 3 O.R. 413n, *rev'd*, S.C.C., Feb. 25, 1976 not yet reported; *Hawkins, A Discretionary Object's Interest*, [1968] British Tax Rev. 351.

²⁵⁸ *Daubeny v. Cockburn* (1816), 1 Mer. 626, at p. 638.

Thus in *Re Coleman*²⁵⁹ one of a class of beneficiaries under a trust power to distribute income purported to assign for value all the "income property . . . estates and interests" to which he was entitled under the instrument which created the power. It was held, *inter alia*, that the trustees continued to be entitled to apply the income for the maintenance, education or advancement of the assignor and that the assignee was entitled to no interest in the income except such part of it as was paid, delivered or appropriated to the assignor by the trustees.

If all the objects of a trust power which is held by a trustee are *sui juris* and in agreement they may direct the trustees as to the manner and shares in which income is to be distributed and may effectively assign the beneficial interest.²⁶⁰ Similarly, if the objects of a bare power are entitled in default of appointment they may assign their interests in default. By itself such an assignment will not deprive them of their status as objects of the power²⁶¹ and would not prevent them retaining any property which the donee chose to appoint to them.

One situation in which the distinction between bare powers and trust powers could be relevant to the question of assignments would be where one of a class of objects purports to make a voluntary assignment of his interest in default of appointment. If the power is a bare power with an express or implied gift in default to the objects, the assignment would be effective. If the power was a trust power which was held by a trustee in that capacity there would seem since the decision in *Baden (No. 1)* to be no room for any gift in default of appointment. There would be simply a trust which the court would enforce in favour of the objects and, as was mentioned above, no object as such would have any proprietary interest which he could assign. Whether the position will be different where the donee of a trust power is not a trustee depends again upon the theoretical basis upon which the court will order a distribution in default of its exercise. If, as is suggested,²⁶² the better view is that the court does not execute a "trust" which imposes no enforceable obligation upon the donee but simply implies a gift in equal shares in default, an object's interest in default should be capable of assignment.

²⁵⁹ (1888), 39 Ch.D. 443.

²⁶⁰ *Re Smith*, [1928] Ch. 915; *Re Nelson*, [1928] Ch. 920n.

²⁶¹ *Sweetapple v. Horlock* (1879), 11 Ch.D. 745.

²⁶² *Supra*, at pp. 259-260.

(7) *Survivorship of powers*

Questions concerning the survival of powers can arise in a number of situations. The power may have been conferred upon a single donee and there may be a question whether it can be exercised by his personal representative. If the power was originally to have been exercised by a number of persons jointly there may be a question whether it can be exercised by the survivor or survivors of those persons. The power may have been conferred upon the occupant of some office or position and the question may be whether it passes to succeeding occupants.

In the modern law the answer in every such case will depend upon the intention of the donor of the power. For the purpose of ascertaining the intention there are a number of rebuttable presumptions which are supported by authority of some antiquity. Consistently with the development in most parts of the law affecting powers, the change in judicial attitudes towards questions of construction has deprived some of these presumptions of much of the weight which was given to them in cases decided in the eighteenth and early nineteenth centuries. Others have been confirmed by statute.²⁶³

Prima facie, powers given to trustees as such and powers vested in persons by virtue of some other office will survive the death or retirement of one or more of the donees.²⁶⁴ Such powers are presumed to have been annexed to the trust or office so that they would remain exercisable by the trustee or other occupant from time to time. Bare powers which have been given to individuals in their personal capacities are presumed not to survive.²⁶⁵ It is clear that this principle was recognized at least as early as the beginning of the seventeenth century²⁶⁶ and it has been applied in relatively recent Canadian cases.²⁶⁷

The original concept of a bare power or "naked authority"²⁶⁸ as it was sometimes called for the purposes of the principles

²⁶³ *E.g.*, in Ontario as in most jurisdictions powers given to trustees and personal representatives as such are presumed to survive: Trustee Act, R.S.O., 1970, c. 470, ss 3, 7, 25 and 46.

²⁶⁴ *Re Wills' Trust Deeds*, *supra*, footnote 55; *Re Bayley-Worthington and Cohens Contract*, [1908] 1 Ch. 26, *aff'd.*, [1908] A.C. 97; *Re Bacon*, [1907] 1 Ch. 475; *Re Smith*, [1904] 1 Ch. 139.

²⁶⁵ *Re Harding*, [1923] 1 Ch. 182; *Roach v. Roach*, [1931] S.C.R. 512; *Re Simonton* (1920), 53 D.L.R. 399; *McKenzie v. McKenzie* (1924), 56 O.L.R. 247; *Re Ward*, *supra*, footnote 140.

²⁶⁶ Co. Litt. 113a.

²⁶⁷ Canadian cases cited, *supra*, footnote 265.

²⁶⁸ *Mansell v. Mansell* (1757), Wilm. 36, at p. 49.

relating to survivorship appears to have been similar to that of a power collateral: a power with respect to property in which the donee had no estate or interest. The rule that such powers would be presumed not to survive was weakened when it was recognized that the presumption would not apply where a power was given to a person in his capacity as the occupant of some office²⁶⁹ and in the most recent English cases the tendency has been to ask simply whether the power was conferred upon the donee by virtue of some office or, alternatively, in his personal capacity.²⁷⁰ If the power is given to all the trustees or executors it will be presumed to be given to them *virtute officii*²⁷¹ and "the testator's reliance on the individuals to the exclusion of holders of the office for the time being must be expressed in clear and apt language".²⁷² If the powers are conferred by name upon only some of the trustees the presumption will probably be against survival.²⁷³ All the presumptions mentioned are, of course, rebuttable and it has been recognized that an instrument may indicate even that powers which have been conferred upon trustees in their capacity as trustees are not intended to survive.²⁷⁴

It would appear then that, if there is in the modern law any principle that a bare power is presumed not to survive, the term "bare power" must be understood to refer to a power which is given to a person in his personal capacity and which relates to property in which he has no interest. A statement that powers of this kind are presumed not to survive is not incorrect but is also not particularly helpful as it is now the capacity in which the donee was given the power and not the absence of his interest which affects the presumption.²⁷⁵ In this respect the terminology in the older cases and even in the more modern treatises can be misleading. The most obvious possibility for confusion lies in the modern usage of the term "bare power" which is intended

²⁶⁹ Sugden, *op. cit.*, footnote 26, p. 128.

²⁷⁰ See, e.g., *Re Beesty's Will Trusts*, [1966] Ch. 223; *Re Smith*, *supra*, footnote 264.

²⁷¹ *Crawford v. Forshaw*, [1891] 2 Ch. 261; *Re Smith*, *supra*, footnote 264.

²⁷² *Re Smith*, *supra*, footnote 264, at p. 144.

²⁷³ See *Roach v. Roach*, *supra*, footnote 265; *Re Ward*, *supra*, footnote 140; *Paterson's Trustees v. Finlay*, [1918] S.C. 714.

²⁷⁴ *McKenzie v. McKenzie*, *supra*, footnote 265; *Crawford v. Forshaw*, *supra*, footnote 271, at p. 268; *Re Smith*, *supra*, footnote 264, at p. 144.

²⁷⁵ In *Re Beesty's Will Trusts*, *supra*, footnote 270, a power given to executors in their personal capacities was described as a "bare power" but the presumption against survival was held to be rebutted on the construction of the instrument.

to indicate that the power is not a power in the nature of a trust in some one or other of the senses in which the latter term has been employed. It might, for example, be thought that, as a gift to such of a class as A and B shall appoint is a power in the nature of a trust in the sense in which that term was used in *Re Weekes' Settlement*,²⁷⁶ it cannot be a bare power and will be presumed to survive the death of one of the donees. There appears to be no case in which this conclusion has been reached but the real possibility of terminological confusion can be discerned in the judgments in two Canadian cases in which it was thought necessary to state that a power which was held not to survive was not a power in the nature of a trust.²⁷⁷

IV. Conclusion.

Over half a century has elapsed since Gray launched his attack on the notion of powers in trust. The proposition he attempted to sustain was that "whenever property, in default of appointment, passes to the objects of a power, it passes by implied gift, and not by an exercise of the power".²⁷⁸ Whether or not the donee of a power was a trustee the power itself was not held in trust and the courts could not execute it. *Brown v. Higgs*²⁷⁹ with its dicta to the contrary had been "a chief cause of confusion on this topic".²⁸⁰

Although modern developments in Anglo-Canadian law have made Gray's thesis untenable as far as the powers of trustees are concerned, the soundness of his belief that the use of the trust power terminology can engender confusion has been amply demonstrated. This has been most evident when the ability of a donee to release a power has been in issue. The fact that terms such as "a power coupled with a duty" have been described as terms of art²⁸¹ should not mislead anyone into thinking that the duty is of a single unvarying character. If the trust power in *Brown v. Higgs* was in all significant respects the same as that discussed in *Re Baden (No. 1)*²⁸² and *Tempest v. Lord Camoys*

²⁷⁶ *Supra*, footnote 19.

²⁷⁷ *Roach v. Roach*, *supra*, footnote 265; *Re Ward*, *supra*, footnote 140. An unsuccessful attempt to rely on the terminology of fiduciary powers was made by counsel in *Re Harding*, *supra*, footnote 265.

²⁷⁸ *Op. cit.*, footnote 4, at p. 3.

²⁷⁹ *Supra*, footnote 3.

²⁸⁰ *Op. cit.*, footnote 4, at p. 3.

²⁸¹ *Re Gestetner Settlement*, *supra*, footnote 174, at p. 684, per Harman J.

²⁸² *Supra*, footnote 20.

(No. 3),²⁸³ the concepts referred to in *Palmer v. Locke*,²⁸⁴ *Re Weekes' Settlement*,²⁸⁵ *Re Dunne's Trusts*²⁸⁶ and *Tempest v. Lord Camoys (No. 2)*²⁸⁷ are each quite separate and distinct. To this extent the use of the terminology has created what Julius Stone has described as a "legal category of concealed multiple reference".²⁸⁸ In cases such as *Tempest v. Lord Camoys (No. 2)* it is very difficult to discern any meaning at all in the court's use of the fiduciary language. In form it might appear as a justification for the court's intervention; in substance it reflects nothing more than the court's assertion of its jurisdiction to intervene.²⁸⁹

Where courts are faced with problems concerning releases, the implication of gifts in default, assignments, survivorship or delegation of testamentary power the fiduciary power terminology is unhelpful where it is not misleading. In cases which raise questions relating to certainty of objects the distinction between trust powers and bare powers is now only of significance in the situation where the objects do not form a class of some kind.²⁹⁰ The continued importance of the distinction in this situation is to be regretted.

The one type of problem in which the need to distinguish between trust powers and bare powers might be regarded as of major importance is where the court's jurisdiction to exercise a power is in question. Even here it seems that the degree of importance is often exaggerated. A court will always order a trustee to perform his duties but only rarely will it take the discretion involved in a trust power out of the hands of the trustee. The fact that its residual jurisdiction to exercise the discretion is not confined to cases of trust powers and the emphasis which Canadian courts have placed on a trustee's duty to turn his mind to the existence of all his discretions are matters which detract further from the importance of the distinction. Where it is alleged that a trustee's failure to exercise a power involved him in a breach of trust it will only be in the case where the trustee has

²⁸³ *Supra*, footnote 21.

²⁸⁴ *Supra*, footnote 4.

²⁸⁵ *Supra*, footnote 19; discussed at pp. 260-264.

²⁸⁶ *Supra*, footnote 25; discussed at p. 241.

²⁸⁷ *Supra*, footnote 23; discussed at p. 235.

²⁸⁸ Stone, *Legal System and Lawyers' Reasonings* (1964), pp. 246-248.

²⁸⁹ Stone's "legal category of meaningless reference", *ibid.*, pp. 241-246.

²⁹⁰ In jurisdictions in which trusts for specific non-charitable purposes are invalid powers to apply property for such purposes may be upheld: see *Re Wootton Decsd, supra*, footnote 205, at p. 688.

mistaken a duty for a power that the distinction will be important. In such cases and in others in which the same point of construction is in issue it must be very doubtful whether a solution is facilitated or the basic distinction between duties and discretions is clarified by importing the ambiguous language of fiduciary powers.
