

DOES THE TRUSTEE'S "DUTY OF IMPARTIALITY" EXTEND TO REAL PROPERTY?

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The equitable principle of which "The Rule in *Howe v. Lord Dartmouth*"¹ is an example has often been treated as an inconvenience whose operation the prudent draftsman would as a rule exclude.² Until recently, it has generally been applied to deny the life tenant under a trust the actual income of the trust property, where the income was regarded as excessive, allowing him only such income as would have been produced had the trust property been converted into authorized trustee investments.³ In recent times, due no doubt in part to the erosion of the value of the capital and income of many trusts because of the high rate of inflation, attempts have been made to require trustees holding property which is totally unproductive, or producing a low rate of return, to convert that property so as to increase the income payable to the life tenant.⁴ Such was the aim of the applicant in *Lottman v. Stanford*, and what was new in this case was that for the first time the argument was squarely presented that the rule in *Howe v. Lord Dartmouth* could apply to underproductive real property, for traditionally the sharp distinction between real and personal property has been maintained insofar as the application of this rule, and indeed of the surrounding principle, is concerned. In *Lottman v. Stanford*, a majority of the Ontario Court of Appeal⁵ was prepared to reject the distinction as irrelevant in Ontario today, but the Supreme Court of Canada⁶ unanimously reversed that decision and insisted on the traditional approach.

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¹ (1802), 7 Ves. 137, 32 E.R. 56.

² See e.g., *Re Hendrie* (1969), 3 D.L.R. (3d) 590, at p. 604, per Keith J.; Snell, *Principles of Equity* (27th ed., 1973), p. 22; Waters, *Law of Trusts in Canada* (1974), p. 705.

³ For the method of apportionment see Parker and Mellows, *The Modern Law of Trusts* (4th ed., 1979), pp. 316-318.

⁴ See e.g., *Re Smith* (1971), 16 D.L.R. (3d) 130, varied (1971), 18 D.L.R. (3d) 405 (Ont. C.A.); *Re Lauer and Stekl* (1974), 47 D.L.R. (3d) 286 (B.C.C.A.), aff'd. (1975), 54 D.L.R. (3d) 159.

⁵ (1978), 2 E.T.R. 1.

⁶ (1980), 107 D.L.R. (3d) 28, 6 E.T.R. 34, 31 N.R. 1.

In considering this case, I have four aims: to determine whether the change suggested by the Ontario Court of Appeal is desirable; to assess how the decision of the Supreme Court affects other aspects of a trustee's duties regarding equality between successive beneficiaries; to examine drafting practices in light of these duties; and to consider whether, assuming the change in the law advocated by the Court of Appeal to be desirable, the Supreme Court could and should have introduced this innovation itself, instead of relying on legislative action.

I. *Lottman v. Stanford*.

Mr. Lottman died in 1972 leaving property valued at \$341,000.00 for succession duty purposes, of which \$285,000.00 was attributable to real property, comprised of the testator's half interest in the matrimonial home, which his widow subsequently bought for some \$19,999.00,⁷ and two properties on Baldwin Street, Number 172 and Number 177-181. He made a number of cash bequests totalling \$30,000.00, and the payment of these and succession duties necessitated the sale of Number 172 Baldwin Street between the date of judgment in the Court of Appeal and the hearing before the Supreme Court. Thus the residue of the estate was comprised of Number 177-181 Baldwin Street and the surplus of the proceeds of the sale of Number 172. The residue was settled in succession upon the testator's widow, Emma Lottman, and after her death upon his four children, two of whom, Joseph and Judy, were children of his first marriage. The testator had, shortly before his death, let Number 177-181 Baldwin Street to his son Joseph for a period of ten years, renewable for a further ten years, at an annual rent of \$4,800.00. By the date of the hearing before the Ontario Court of Appeal this sum was insufficient to pay the annual taxes on the property, so that it was costing the estate money to keep it.⁸

The administration of the estate was governed by Clause III of the will. Clause III(d) directed conversion of the testator's personal estate with power to postpone such conversion, and Clause III(g) directed the trustees to keep invested the residue of the estate, paying the income to the widow, with power to encroach on capital to pay medical and other like expenses. Thus there was no trust to convert the real property, and this proved to be of crucial significance.

Dissatisfied with her originally meagre, and later non-existent, income from the estate, Mrs. Lottman commenced proceedings to determine whether the trustees were, by force of the rule in *Howe v.*

⁷ *Supra*, footnote 5, at p. 11.

⁸ *Ibid.*, at p. 15.

Lord Dartmouth, obliged to sell the realty and invest the proceeds in trustee investments. At first instance,⁹ Galligan J. held that no duty to convert arose because, even if the rule in *Howe v. Lord Dartmouth* applied to realty, this property was not unproductive, nor was it a wasting asset. On this basis, he distinguished certain earlier cases in the Ontario courts which it was argued applied the rule to realty.¹⁰ In the Court of Appeal, Wilson J.A. with whom MacKinnon J.A. concurred on this point, was prepared to extend the application of the rule to real estate: indeed the learned judge appeared to think that such an extension had already been effected by earlier decisions of the Ontario courts.¹¹ Weatherstone J.A. dissented, despite appearing to be in agreement with his brethren, on the basis that the will conferred no general power to sell the real estate: and if the trustees lacked the power to sell for the purpose of generating income, as opposed to the ordinary purposes of estate administration, then how could a duty to sell be imposed which they were not empowered to execute?¹²

Both at first instance and in the Court of Appeal, no distinction was drawn by the learned judges between what are often referred to as the two limbs of the rule in *Howe v. Lord Dartmouth*,¹³ but which are in fact separate rules.¹⁴ The rule itself provides that a duty to sell and convert trust assets bequeathed by the testator is sometimes imposed where the testator has not himself directed conversion. By this means a trustee is required to convert all personal property comprised in a residuary bequest to successive beneficiaries which is of a wasting, hazardous, reversionary or unauthorized nature. What is sometimes referred to as the second limb, but which is really a distinct rule,¹⁵

⁹ (1977), 1 E.T.R. 11.

¹⁰ *Re Cameron* (1901), 2 O.L.R. 756; *Re Rutherford*, [1933] O.R. 707 (C.A.).

¹¹ Cases cited *supra*, and *Re Clarke* (1903), 6 O.L.R. 551; *Re Prime* (1924), 25 O.W.N. 522; *Re Pears (No. 1)* (1926), 31 O.W.N. 235.

¹² See (1978), 2 E.T.R. 1, at pp. 20-21. The validity of this reasoning is questionable: see *Litman* (1978), 2 E.T.R. 1, at p. 8. Furthermore, while the Devolution of Estates Act, R.S.O., 1970, c. 129, does not confer an unlimited power of sale on personal representatives, s. 22(1) does permit its use for the purpose of "distributing or dividing the estate among the persons beneficially entitled thereto", without the consent of the beneficiaries, except where the sale is made "for the purpose of distribution only". It seems that a sale to generate income could come within this section, especially on the broad reading given to the identical s. 21(1) of the Devolution of Estates Act, R.S.O., 1914, c. 119, in *Re Kinross Mortgage Corporation and Central Mortgage & Housing Corporation* (1979), 22 O.R. (2d) 713 (H.C.).

¹³ For instances of this usage, see Pettit, *Equity and the Law of Trusts* (4th ed., 1979) p. 294; Lewin, *Trusts* (16th ed., 1964), ch. 12.

¹⁴ See Bailey (1943), 7 Conv. 128; Sheridan (1952), 16 Conv. 349. Even so, the two rules are obviously manifestations of the same principle: see Waters, *op. cit.*, footnote 2, p. 700, n. 27.

¹⁵ Established by Lord Eldon in *Gibson v. Bott* (1802), 7 Ves. 89, 32 E.R. 37. This judgment was rendered only three days before that in *Howe v. Lord Dartmouth*, hence

provides that when a duty to convert arises, either because the testator has so provided, or because of the operation of the rule in *Howe v. Lord Dartmouth*, then pending actual conversion the trustee is obliged to pay to the life tenant a notional income based on the capital sum that would have been realized had the express or implied trust for sale been executed in due time. If the actual income is greater than the notional income, the excess is added to capital; if less, the life tenant receives part of the capital when the underproductive asset is finally converted.¹⁶ Thus the second rule requires apportionment of either income or capital so that the parties are not prejudiced by the trustee's failure to execute the express or implied trust for sale. This is seen as an instance of the maxim "equity treats as done that which ought to be done".¹⁷

Had the express trust for sale contained in Clause III(d) of Mr. Lottman's will extended to real property, then it would have been unnecessary to invoke the rule in *Howe v. Lord Dartmouth* proper: the application of only the second rule just mentioned would have been in question. In England, the traditional view has been that neither rule applies to real property.¹⁸ This is not, however, the law in Canada, by virtue of the decision in *Re Lauer and Stekl*,¹⁹ which was affirmed by the Supreme Court of Canada, and by virtue of the earlier Ontario

the tendency to run the rules together. In any case it was *Howe v. Lord Dartmouth*, not *Gibson v. Bott*, which established the duty to apportion otherwise than under an express trust for sale. It is the rule requiring apportionment pending conversion which is often excluded: see Hanbury and Maudsley, *Modern Equity* (10th ed., 1976), p. 479.

¹⁶ It has not generally been required that the trustee sell to generate income. This has largely been because most unproductive property consisted of reversionary interests, where the loss taken by selling before the interest fell into possession would have been too great: see Hanbury and Maudsley, *op. cit.*, p. 473, n. 6.

¹⁷ See Snell, *op. cit.*, footnote 2, p. 40.

¹⁸ There is very little discussion of the applicability of the first rule to realty, all the definitions confining its operation to residuary personalty. The second rule has been held not to apply to realty, though not unanimously. *Re Woodhouse*, [1941] Ch. 332 is usually cited as authority in this connection; there Simonds J. (as he then was) cited only *Casamajor v. Strobe* (1809), 19 Ves. 390 n, and *Re Searle*, [1900] 2 Ch. 829. In the latter case Kekewich J. cited *Casamajor v. Strobe* as his only authority. *Casamajor v. Strobe* is a note to the case of *Walker v. Shore* (1809), 19 Ves. 387, 34 E.R. 561, wherein Sir William Grant M.R. would apparently have ordered apportionment but for the life tenant's express desire that the land be retained. In similar vein Sir John Romilly M.R. would have ordered apportionment in *Yates v. Yates* (1860), 28 Beav. 637, 54 E.R. 511, had there been a trust to convert. *Casamajor v. Strobe* may be explicable on the basis that the decree sought was to *compel sale* of the land in question, which was granted, and that the issue of who received the income in the interim was of secondary importance. The case is so badly reported as to be worth little as a precedent. It should be noted that Kekewich J. confined himself in *Re Searle* to the case where the trustee "without any impropriety" postponed sale: cf. *Wentworth v. Wentworth*, [1900] A.C. 163 (P.C.). See Cantlie (1976), 54 Can. Bar. Rev. 678.

¹⁹ *Supra*, footnote 4.

cases cited by Galligan J. and Wilson J.A.,²⁰ wherein apportionment of the proceeds of sale was ordered where there was an express trust for sale of unproductive realty and such sale had been postponed. It was, however, only the second rule mentioned above that was applied to realty in those cases. Unlike the judges in the lower courts, Mr. Justice McIntyre took precisely this point, that these cases had nothing whatever to do with the application of *Howe v. Lord Dartmouth* to real property.²¹ Having so held the learned judge, speaking for a unanimous Supreme Court of Canada, refused to innovate by extending the application of this rule to realty, and accordingly reversed the majority of the Court of Appeal, effectively denying the widow any income from the part of the estate still tied up in realty for the foreseeable future.

It appears that, viewed strictly in terms of the Canadian precedents, the reasoning of Mr. Justice McIntyre was correct. The distinction between the two rules is well established, and none of the cases relied upon squarely tackled the question of the applicability of the rule in *Howe v. Lord Dartmouth* to realty. Plainly the case of *Re Lauer and Stekl*²² did not raise this point, nor did it arise for decision in any of the earlier Ontario cases. *Re Cameron*²³ was the first such case, and was somewhat unusual in that it did not involve a simple trust for sale. The testator directed \$50,000.00 to be set aside and the income paid to his widow. Apart from unproductive real estate, he left only \$30,000.00. Street J. did not even question the existence of a duty to convert the real property, or such portion as would realize \$20,000.00, nor of a duty to apportion in order to provide income for the period which elapsed prior to actual conversion. His only concern was as to *how* the apportionment should work, and he felt that the approach taken in *Re Earl of Chesterfield's Trusts*²⁴ was appropriate. Then in *Re Clarke*,²⁵ the more usual case of a simple trust for sale, MacLaren J.A., though aware of the English approach denying apportionment with respect to land even where subject to a trust for sale,²⁶ considered *Re Cameron* as authority to the contrary in Ontario, and this view has been consistently followed.²⁷

²⁰ *Supra*, footnotes 10-11.

²¹ *Supra*, footnote 6, at pp. 33-34 (D.L.R.), 40 (E.T.R.), 6-7 (N.R.).

²² *Supra*, footnote 4.

²³ *Supra*, footnote 10.

²⁴ (1883), 24 Ch. D. 643.

²⁵ *Supra*, footnote 11.

²⁶ It is noteworthy, in light of the discussion *supra*, footnote 18, that the best authority MacLaren J.A. could find for the statement that the rule in *Gibson v. Bott*, and hence the rule in *Re Earl of Chesterfield's Trusts* which is seen as arising out of it (see Bailey, *op. cit.*, footnote 14 p. 136), did not apply to real property was *Re Van Straubenzee*, [1901] 2 Ch. 779, which dealt with the applicability of the rule in *Howe v. Lord Dartmouth* to personalty settled *inter vivos*.

²⁷ See cases cited *supra*, footnotes 10-11, and *Re Irwin* (1912), 3 O.W.N. 936.

In the cases discussed by Mr. Justice McIntyre there are, however, indicia that some judges would apply the rule in *v. Lord Dartmouth* to real property. In *Re Rutherford*,²⁸ Rose C.J.H.C. held that the will imposed no trust for sale,²⁹ and that accordingly no apportionment could be ordered, but a majority of the Court of Appeal held that a trust for sale did arise³⁰ and would have ordered apportionment with respect to the real estate involved but for the conduct of the life tenant who was also a co-trustee.³¹ Middleton J.A., however, seemed to feel that only a power to convert had been given, for he stated that the trustees had with respect to sale "an uncontrollable discretion which they may exercise, not only in such manner but at such time as in their judgment they deem proper";³² whereas Mulock C.J.O. felt that the discretion conferred related only the *manner* and not to the *time* of conversion; hence, in his view, a duty to convert arose. Notwithstanding the "uncontrollable" discretion which Middleton J.A. felt had been conferred, he held that after actual sale apportionment should take place, on the principle of *re Earl of Chesterfield's Trusts*³³ and *Re Cameron*.³⁴ Since the duty to apportion did not arise from the positive directions in the will, Middleton J.A. must have based this conclusion on the general equitable principle. Then in *Re Bingham*,³⁵ Orde J.A. had to consider whether a clause directing conversion of "so much of my property as may be necessary for the purpose of carrying into effect the provisions of this my will" excluded the implied duty to convert under the rule in *Howe v. Lord Dartmouth* with respect to the rest of the estate. He held that it did not, and made some very general remarks about the breadth of the duty to convert.³⁶ It is not clear whether the estate in question had any real estate in it other than the deceased's residence which was specifically excepted from the direction to convert,³⁷ but the remarks of Orde J.A. were in no way restricted.

Despite these indicia, however, the conclusion of Mr. Justice McIntyre as to the existing state of the law seems justified on the basis of precedent. No previous case had held that the rule in *Howe v. Lord Dartmouth* did apply to real property, although it must be stated that

²⁸ *Supra*, footnote 10.

²⁹ *Ibid.*, at p. 712.

³⁰ *Ibid.*, at p. 718, per Mulock C.J.O., at p. 723, per Magee J.A.

³¹ *Ibid.*, at p. 719, per Mulock C.J.O., at p. 723, per Magee J.A.

³² *Ibid.*, at p. 726.

³³ *Supra*, footnote 24.

³⁴ *Supra*, footnote 10.

³⁵ (1930), 66 O.L.R. 121.

³⁶ *Ibid.*, at p. 125.

³⁷ *Ibid.*, at p. 123.

there was no prior decision establishing the contrary. What must be considered is whether the view advocated in the Court of Appeal should have been adopted or not.

II. Should the Rule in Howe v. Lord Dartmouth Extend to Realty?

Despite her failure to isolate the exact scope of the rule in *Howe v. Lord Dartmouth*, it seems quite clear that Wilson J.A. did wish to see the rule extended to realty, and why:³⁸

Real estate is not a "sacred cow" in Canada as it was in England when these equitable rules were developed. Sale of the family hereditaments is not fraught with the same trauma and disgrace. I see no reason why in the current social context in Canada a trustee's powers and duties in relation to realty should be any different from his powers and duties in relation to personality. I would therefore in an appropriate case apply the rule to unproductive or under-productive real estate.

The reasoning of Wilson J.A. suggests that the disgrace and trauma to which she referred were the reasons for the traditional nonapplicability of the rule in question to realty in England. A number of other rationales can be suggested: that because the rule in *Howe v. Lord Dartmouth* never applied to specific gifts, and because all devises, even general or residuary devises, were regarded as specific, hence the rule could never apply to realty:³⁹ that land by its nature was assumed to be an investment affording adequate protection to both life tenant and remaindermen,⁴⁰ since comparatively little of the land which in England would be held in trust was totally unused, so that not much of it was unproductive; and over-productive land was dealt with by the rules of waste.⁴¹ If the latter view were the real reason for the rule, it would also explain why apportionment was not ordered where conversion under an express trust for sale was postponed. Even if settled on trust for sale, the realty would still be presumed to provide adequate protection for both interests; and it might well be the settlor's intention that the property should not in fact be sold unless it became absolutely necessary, particularly if a discretionary power of retention were also given.⁴²

³⁸ *Supra*, footnote 5, at p. 14.

³⁹ This theory is attributed to Prof. Hogg by Prof. Litman in his annotation to the judgment of Galligan J. in *Re Lottman*: see (1977), 1 E.T.R. 11, at p. 15.

⁴⁰ Waters, *op. cit.*, footnote 2, p. 700.

⁴¹ See Megarry and Wade, *The Law of Real Property* (4th ed, 1969), pp. 103-109; Cheshire, *Modern Law of Real Property* (12th ed., 1976), pp. 267-271.

⁴² The trust for sale of land was often employed because it was not attended with the conveyancing difficulties involved in a strict settlement: see Cheshire, *op. cit.*, *ibid.*, pp. 81-82. In addition, after the enactment of the Settled Land Acts in 1882 and 1884, the only way to reserve the control over sale in a settlement to the trustees was by way of a trust for sale; otherwise a strict settlement arose and the power of sale belonged to the life tenant: Cheshire, *ibid.*, p. 208. Thus an intention to require actual sale, rather than

It is difficult at this distance to be sure what was the true reason for the nonapplicability of the rule to realty. It was possibly a mixture of all three of the elements suggested. In *Howe v. Lord Dartmouth* itself, Lord Eldon expressed the view that very often a "real security" would serve both interests very well;⁴³ and apart from investment in land the only authorized investment for trustees was in the Government consols.⁴⁴ What is noticeable furthermore is that it never seems to have been argued that the rule *should* apply to realty. Might this not suggest that life tenants, and indeed those entitled in remainder, were generally happy with their return from real property, and does this not buttress the view that land was then seen as an investment affording adequate protection to both interests? In addition, of course, the retention of land had an emotional appeal, which might have outweighed any economic disadvantage to the trust beneficiaries.

If any of these rationales did lie behind the rule, they hardly seem relevant in modern day Canada. The rule that all devises are specific, or at least the reasoning behind it, seems to have been abrogated by statute,⁴⁵ and the size of this country means that much land is unproductive. The place in society of the settlement of land and the retention of land for successive generations never was as prominent in Canada as in England. Apart from its obvious uses in providing a home or commercial premises from which to operate, land is today an investment like any other investments: it may be good or bad, productive or unproductive. From the point of view of a trustee managing an estate where there are income and capital beneficiaries to satisfy and protect, one must question why he should be entitled or required to

the treatment of the beneficiaries' interests as being in personalty, could not readily be ascribed to those employing a trust for sale, especially when, as was frequently the case, the consent of the beneficiaries to sale was required. For a full discussion of the history and effect of the trust for sale see Megarry and Wade, *op. cit.*, *ibid.*, pp. 285-288, 358-371. See also Hanbury and Maudsley, *op. cit.*, footnote 15, ch. 13.

⁴³ *Supra*, footnote 1, at pp. 150 (Ves.), 61 (E.R.). Note, however, that this was not expressed as a hard and fast rule, which is not surprising, as in those days the administration of the estate would often be conducted entirely under the direction of the court, so that these so-called "rules" were statements of the practice of the court, rather than rules to guide the conduct of trustees.

⁴⁴ For a discussion of the history of trustee investments in England see Waters, *op. cit.*, footnote 2, pp. 670-676.

⁴⁵ See Litman, *op. cit.*, footnote 39. It is not however beyond controversy that this change was effected in 1837 by the enactment of s. 26 of the Wills Act (U.K.) (now Succession Law Reform Act, S.O., 1977, c. 40, s. 22). See *Re Wilson*, [1967] Ch. 53, at pp. 68-69, where it is suggested that this change only came about in England by virtue of the Administration of Estates Act, 1925. The same reasoning would hold good in Ontario with respect to the application of the Devolution of Estates Act, *supra*, footnote 12, s. 5.

treat land he holds in any way differently from the other assets of an estate.⁴⁶

Faced with this broad question, Mr. Justice McIntyre simply stated that he was:⁴⁷

... not however persuaded that we should on this point venture into the field of judicial legislation so boldly. To begin with the restriction of the rule in *Howe v. Lord Dartmouth* to personal property is itself a rule of long-standing. It must be presumed that those engaged in the preparation of wills and the settlement of trusts under wills know and understand, and have known and understood, its operation and effect and have planned and set in motion many trusts under wills upon the premise that the rule will continue to apply in relation to personal estate but not real estate. Great inconvenience could be caused to many existing trust arrangements by a sudden extention and, in my view, this is not a step which should be taken in this fashion. This is not to say that rules may never be changed but rules dealing with estate administration of this nature should not be changed unless there is a positive reason for so doing. In such a case, it should be done by the Legislature which at the same time has the power to enact the necessary transition and protective provisions to avoid interference with existing trusts and with rights and obligations acquired and undertaken upon the reasonable expectation that there would be some degree of certainty in the law.

Furthermore, it should be borne in mind that we are here dealing with equitable rules relating to estate administration and not with dependants' [sic] relief legislation which enables a court to alter testamentary provisions in order to do justice between the testator and members of his family. Other legislative provisions deal with such matters and in Ontario may be found in the Succession Law Reform Act, S.O. 1977, c.40, particularly sections 64 to 88. The courts must not twist rules such as that expressed in the case of *Howe v. Lord Dartmouth* to interfere with testamentary dispositions for the purpose of remedying supposed injustice. I would not extend the rule beyond its present limits. Such a step should be left to the Legislature when and if it should consider it advisable.

This statement contains three "reasons" for refusing to change the law: because the rule is a rule of long standing, it should not be changed "unless there is a positive reason for so doing", and then only by the legislature; thirdly, it should be remembered that the equitable principle under discussion is distinct from dependants' relief legislation.

To deal first with the third justification advanced for retention of the existing rule, the comparison with statutory enactments permitting the courts to alter testamentary provisions is not immediately obvious, for in cases such as *Lottman v. Stanford* we are dealing with the exercise of discretion by trustees; whereas in dependants' relief cases, it is the choice of the testator in making his will which is impugned. The aim of the claimant in both cases is to receive fair

⁴⁶ This is especially true when the purchase of land, as opposed to lending money on the security of land, is not an investment authorized by trustees. See further *infra*, footnotes 57-58.

⁴⁷ *Supra*, footnote 6, at pp. 35 (D.L.R.), 41 (E.T.R.), 8 (N.R.).

treatment with the other beneficiaries, but the object of his criticism is different. The reference by Mr. Justice McIntyre to dependants' relief seems to indicate that in his view we are dealing in *Lottman v. Stanford* primarily with a case where the testator has failed to provide adequately for his dependants, and the court is being asked to rectify the situation. But is *Lottman v. Stanford* such a case? If the testator had consciously decided to provide his wife with nothing, neither income nor capital, from his estate, such a view would be warranted. But he did not do that, and, had he done so, his widow would have then realized that bringing application for dependants' relief was the only way in which she was going to receive anything from the estate.⁴⁸ What is involved in *Lottman v. Stanford* is not overtly the distribution of the deceased's estate, nor even a power given to the trustee concerning the distribution of the estate.⁴⁹ Ostensibly it is a discretion pertaining to the investment of the estate assets. It is clear, however, that investment decisions can and do substantially control, as between the income and capital beneficiaries, the distribution of the benefits of the deceased's estate, so that both interests may be reasonably served, or one prejudiced to the corresponding gain of the other. It is to avoid the latter outcome, and its "supposed" injustice, as Mr. Justice McIntyre would have it, that equity developed the rule in *Howe v. Lord Dartmouth* with its duty "to deal even handedly" between the successive beneficiaries. Although it is possible that a testator may wish his trustee to use his investment powers to the benefit of one beneficiary and the corresponding detriment of another, equity's presumption is the converse, that equal treatment is the goal.

The basic premise of the rule is that both income and capital beneficiaries should enjoy so far as is possible the same property, so that assets which are rapidly diminishing in value or are likely to diminish must be converted, and failing that, a portion of the income must be set aside as capital. Now it is of course always possible that full protection for both sets of beneficiaries is not the testator's main aim. For example, if a testator wishes to assure a suitable income from a wasting asset to a life tenant, he may well be content to give the

⁴⁸ Even though Mrs. Lottman did not apply within three months of the grant of probate, she could apply, in the court's discretion, for an allowance to be made out of the undistributed part of the estate: Dependant's Relief Act, R.S.O., 1970, c. 126, s. 4(2). (See now Succession Law Reform Act, *supra*, footnote 45, s. 68.) One may question whether a widow in Mrs. Lottman's position would be wise to make an application for dependants' relief at the outset if left a life interest if it seems the property subject to the trust may be unproductive.

⁴⁹ Some control can be exercised by the courts where such a power is given. For the basis and limits of judicial intervention in the exercise of powers, see the two articles by Cullity, (1975), 25 U. of T.L.J. 99, (1976), 54 Can. Bar Rev. 229.

entire income to the life tenant and let the remaindermen take the risk that there will be nothing left when their interest falls into possession. Conversely, if he wishes his estate to realize an anticipated increase in the capital value of unproductive property, he may well be content to let the life tenant go without income, until such time as the property is sold or developed. Thus, with a wasting asset the remaindermen will dread the longevity of a life tenant; whereas in the case of unproductive property, the life tenant will fear an early demise, before the anticipated gains are realized. It was to eliminate as much as possible this unpredictable and fortuitous element that the rule in *Howe v. Lord Dartmouth* came about. Certainly a testator could avoid the application of the rule, could expressly or impliedly indicate that it was his primary wish that the income beneficiaries should receive the actual income, or that the remaindermen should have the capital appreciation, and that only after this primary aim was satisfied should the other class benefit, but the onus was on the testator so to provide.⁵⁰ One way of accomplishing this was to provide that an asset should be held as an authorized investment, whatever its characteristics, thus entitling the life tenant to receive the actual income and the trustee to retain the asset indefinitely.⁵¹ Furthermore, if the testator settled specific property upon successive beneficiaries, he was taken to know the nature of the property, and whether it would show advantage to the capital or income beneficiaries, and thus to have consciously weighted the balance in favour of one or other of them.⁵² Likewise, authorized investments, which were neither wasting nor hazardous, comprised in a residuary bequest of personality were exempt from the rule, as they were assumed to provide the appropriate balance between the successive beneficiaries. Real estate was exempt if contained in a specific devise, and even if given in a residuary devise the nature and likely productive capacity of the land, particularly in England, was such that protection for both interests could be taken as reasonably assured. Moreover, both the capital of and income from authorized investments and land would be expected to retain their value after the testator's death during the subsistence of the trust.

Such is hardly the case today. Volatility in the stock exchange and the bond markets, and in the price of land, coupled with a rate of inflation that would have staggered someone living at the turn of the

⁵⁰ Much litigation has been generated in considering whether the will evinced an intention to oust the rule: see the cases collected in Halsbury's Laws of England (3rd ed, 1962), Vol. 38, para. 1486.

⁵¹ Again, much discussion has centred on whether a power to retain confers the power to retain *indefinitely*, and hence as an authorized investment: see e.g. *Royal Trust and McMurray v. Crawford*, [1955] S.C.R. 184.

⁵² See *Re Van Straubenzee*, *supra*, footnote 26.

nineteenth century have made nonsense of comfortable assumptions about the future worth or productivity of one's assets. It is, of course, possible for testators, or their draftsmen, to have the prescience to compensate for this change by requiring conversion of all assets which do not provide a reasonable return while preserving the capital. But the view might just as well have been taken that the testator of the eighteenth or nineteenth century could have done this with respect to residuary personality; but equity imputed an (eminently reasonable) intention to him even where he failed to provide for equal treatment. Since today's economic conditions would seem to make of land an investment vehicle as uncertain to carry out the presumed wishes of the testator as any other, should not the principle behind the rule in *Howe v. Lord Dartmouth* be applied likewise to real property?

When looked at in this light, there seems little to justify the continued exemption of real property from the operation of the rule in *Howe v. Lord Dartmouth*. It is not simply a matter of saying that because of enactments such as the Devolution of Estates Act⁵³ there should no longer be any difference between real and personal property, although obviously such an Act gives force to the contention that continued distinctions between real and personal property require justification. My contention is that the economic attributes of land, and the failure of testators to appreciate, because of the factors listed above, the future worth of their assets and the future need of their dependants for increased income because of inflation, mean that land is likely to be fraught with the same kind of problems as other investments, so that the law should not differentiate in controlling trustees' discretions with respect to investment, which the rule in *Howe v. Lord Dartmouth inter alia* serves to do.

If the true rule in *Howe v. Lord Dartmouth* were extended to realty it would require the conversion only of real property comprised in a residuary gift. This could be defended on the ground that the testator is presumed to understand and anticipate the consequences of settling specific unproductive property on successive beneficiaries. The property comprised in the residue of the estate may on the other hand be changed between the date of the will and the date of death. In addition, however, in many modern wills the purpose of the residuary clause is not merely to dispose of any assets which might happen to be left after the other dispositions have taken effect. As in *Lottman v. Stanford* the bulk of the estate is comprised in the residue, which is then expected to furnish a suitable return for the life tenant (generally the widow, occasionally the children) and then leave the capital, which will often under modern conditions depreciate considerably

⁵³ *Supra*, footnote 12.

during the life tenancy, to the children (or the grand-children if the children have the life interest). It is thus particularly desirable to stress as much as is possible the need to invest the residue in assets which produce a sufficient return while preserving so far as can be done the capital; this the rule in *Howe v. Lord Dartmouth* served to do, and would succeed more completely if it extended to real property.⁵⁴

The question would then arise of exactly *which* real property would require conversion. When personalty is under consideration, the distinction between authorized and unauthorized investments has usually been drawn,⁵⁵ although it would seem that even authorized investments which are of a wasting or hazardous character would have to be converted. No such distinction immediately appears in the case of real property.⁵⁶ Land (otherwise than as security for a loan⁵⁷) is not an authorized trustee investment,⁵⁸ and even if, as is often the case, the trustee is given wider powers of investment by the trust instrument, unproductive real property may well not be regarded as an

⁵⁴ For a case involving land where the duty of impartiality was applied to benefit the remaindermen, see *Re Zive* (1977), 77 D.L.R. (3d) 669 (N.S.S.C.), where Hart J. found there was a trust for sale with a power of retention which was exercised, and a direction for the payment of the "net annual income" to the life tenants. The learned judge found, however, that the testator in using the words "net annual income" would have contemplated their "ordinary business sense" (at p. 674), so that the trustees were empowered to establish reserves against depreciation, and the judge further held that on the facts they should have done so with the aim of treating all beneficiaries impartially, and ordered the interests to be adjusted in future accordingly. It is submitted that there is no reason why a different result should have been reached had there been only a power to convert. For a statutory power to establish depreciation reserves, see Trustee Act, R.S.P.E.I., 1974, c. T-9, s. 3(1). Cf. *Re Katz* (1980), 29 O.R. (2d) 81.

⁵⁵ Even though many trust instruments (including wills) permit investment in or retention of assets not included in the Trustee Acts, they often do so by permitting retention, either generally or of specified assets, or acquisition for a limited purpose (e.g. to participate in the reorganization of a company in which the estate holds shares), rather than by giving blanket discretion to trustees to ignore the usual limits. Thus the distinction between authorized and unauthorized investments retains some utility.

⁵⁶ Nor with respect to other types of property in jurisdictions which have adopted the "prudent man" rule as to investments: see Trustee Act, R.S.N.B., 1973, c. T-15, s. 2; Trustee Ordinance, R.O.N.W.T., 1974, c. T-8, s. 3. There is no reason to suppose that the rule in *Howe v. Lord Dartmouth* is abrogated by the enactment of such provisions, and it would apply to require conversion of investments which a man of "prudence, discretion and intelligence" would not make. It takes little ingenuity to construe this as including assets which prejudice one beneficiary or the other. This is the view expressed in the American Restatement of Trusts (1935), s. 227, comment y. Note also the specific duty to make the trust property productive, *ibid.*, s. 181, and see ss. 240-1.

⁵⁷ See, e.g. Trustee Act, R.S.O., 1970, c. 470, ss 26(b) and 30-31.

⁵⁸ It would be, however, in those jurisdictions, *supra*, footnote 56, which have adopted the "prudent man" rule. See also Trustee Act, R.S.N., 1970, c. 380, s. 7(1).

"investment".⁵⁹ Rather than concluding, however, that *all* real estate should then fall under the extended rule, one should perhaps consider a more flexible approach such as that postulated by Wilson J.A. in the Court of Appeal in *Lottman v. Stanford*:⁶⁰

Real estate may, I believe be properly viewed by the trustees as under-productive if the income received from it and the rate of return on authorized investments is so disparate that it is unfair to the life tenant that it be retained.

What this approach requires of the trustee is to investigate each asset and reach a discrete judgment about its productivity. No blanket formula to segregate those assets which must be converted would be available. As has been noted, the same position obtains with respect to all investments in jurisdictions which have adopted the "prudent man" rule.⁶¹ It will come then as no surprise that in the United States, where the "prudent man" rule is common,⁶² the duty of impartiality has been applied to real property⁶³ as well as personal property, since there is no distinction between them for investment purposes, and the "prudent man" rule is extended so as to govern retention of existing assets.⁶⁴ Once it is recognized that land is an investment like any other, and that the suitability of investments from the point of view of successive beneficiaries cannot be resolved by blanket formulae, then the dichotomy between real and personal property becomes hard to defend. What is most interesting is that there seems to be evolving in Canada an approach as individualized as the "prudent man" rule, but it is directed solely to the question of impartiality; to its consideration one must now turn.

III. *Re Smith and the Duty of Impartiality.*

This approach was first utilized in the Ontario courts in *Re Smith*.⁶⁵ There the trustee of an *inter vivos* settlement of shares in Imperial Oil held, on the court's interpretation of the trust deed, a power of sale coupled with a power of indefinite retention.⁶⁶ The rule in *Howe v.*

⁵⁹ See Waters, *op. cit.*, footnote 2, pp. 680-681.

⁶⁰ *Supra*, footnote 5, at p. 14.

⁶¹ *Supra*, footnote 56.

⁶² See Scott on Trusts (3rd. ed., 1967), para. 227.5 *et seq.*

⁶³ *Ibid.*, para. 240 (duty to convert) and 241 (duty to apportion). The latter point is not, however, free from controversy in the case of original assets of the trust: see para. 241.2. The Revised Uniform Principal and Income Act (1962) provides by s. 12 for the payment of a "delayed income" on unproductive property. S. 11 of the original Act (adopted in 1931) provided for actual conversion of unproductive property, but only where the trustee was already under a duty to convert.

⁶⁴ See Scott, *op. cit.*, footnote 62, para. 230.

⁶⁵ *Supra*, footnote 4.

⁶⁶ Clause 3(a) of the trust deed provided that the trustee might "Retain the Trust Fund in its present form, whether producing income or not".

Lord Dartmouth has never been applied to an *inter vivos* settlement,⁶⁷ and indeed no reference was made to that rule. It was, however, decided that the trustee should, in considering whether to exercise the power of sale, bear in mind the aim of equality between the beneficiaries. Since the return on the shares was only 2½%, and since the trustee had refused to consider sale, it was removed for its failure to consider adequately the exercise of its discretion.⁶⁸

The result in this case seems to lessen considerably the importance of the determination whether there is a duty to convert. Even if only a power to sell exists, the exercise of that power must be contemplated with the goal of equality in mind. Great inequality of treatment of the beneficiaries will signal an improper exercise of the discretion inherent in the power, and call for some judicial intervention. This would not necessarily involve removal, nor the court's deciding which course of action is preferable for the trustee,⁶⁹ although of late the courts have seemed rather too keen to take trustees' decisions for them.⁷⁰ If, however, the trustee genuinely has only two choices, and the court considers one course of action inappropriate, then ordering the trustee to think again and ordering him to take the other course of action may amount to the same thing. In other cases, the court may not totally take on the trustee's discretionary powers; it may, for instance, advise sale, but leave the details of the sale, the price, the purchaser and so on, to the trustee's discretion.

Whatever the mode of judicial intervention, it is plain that the approach seen in *Re Smith* could have wide application. Unless a testator or settlor forbids sale of a particular asset (hardly a measure to commend itself to the prudent draftsman, as the asset may always decline in value), the trustee will usually have a power of sale, by virtue of statute⁷¹ if not implicit nor made explicit in the trust instru-

⁶⁷ *Supra*, footnote 52.

⁶⁸ The new trustee would presumably not hesitate long in diversifying the trust portfolio. Even though the Court of Appeal stressed that it was the trustee's failure to consider its discretion which led to its removal, the extreme nature of the remedy, rather than an invitation to the trustee to consider its discretion, suggests that the court would have viewed even a considered refusal to sell as indefensible.

⁶⁹ A discussion of the range of choices available is involved in the discussion by Cullity in (1976), 54 Can. Bar Rev. 229, at pp. 243-257.

⁷⁰ Cullity, *op. cit.*, *ibid.*, at p. 257 concluded that only rarely would the court actually make the choice for trustees. Increasingly the courts seem prepared on applications for advice to suggest the appropriate course of action: see, e.g. *Re Fleming* (1973), 37 D.L.R. (3d) 512 (Ont. H.C.); *Re Zive*, *supra*, footnote 54. In addition there is now considerable authority from the courts of Ontario that the court *must* make the decision where trustees are deadlocked over the exercise of a power; for the cases and criticism of this development, see (1979), 5 E.T.R. 201, at pp. 206-219.

⁷¹ See Trustee Act, *supra*, footnote 57, s. 29; Trustee Act, R.S.A., 1970, c. 373, s. 11. If there are assets which do not fall within the power to convert conferred by these

ment. Logically this proposition could be applied to many types of property, if applicable to that held under an *inter vivos* settlement: property bequeathed *in specie* to successive beneficiaries; residuary property with respect to which the rule in *Howe v. Lord Dartmouth* has been excluded, or property subject to an express or implied trust for sale but with a direction that the actual income be paid to the life tenant;⁷² or real property in any of these categories. In all of these cases, the life tenant could argue that the particular asset, as governed by the provisions of the will, was producing an insufficient return, and that a trustee acting with due regard for his interests and the goal of equality would transpose the assets. A similar argument could be made by the remaindermen were the actual income excessive.

Indeed the beneficiaries would not be restricted to asking for sale in order to change the picture prospectively. If it could be shown that the trustee had improperly exercised his discretion by failing to sell at some point in the past, one could argue that this was a breach of trust, and that the trustee should be made liable for what the complaining beneficiary *should* have had, absent the breach. In the alternative, one could ask that an apportionment be made because of the breach of trust. Several English cases advert to this possibility. In none was such apportionment ordered, because in all there was an exclusion of the rule in *Howe v. Lord Dartmouth* by a direction for *in specie* enjoyment. It was stated, however, that knowingly to buy into a security which would show undue advantage to one beneficiary would be a breach triggering apportionment.⁷³ The effect of *Re Smith* would

sections, they would rarely form the subject matter of an *inter vivos* trust, and could be sold by a personal representative, if personal property under the representative's historical powers, see Halsbury's Laws of England (4th ed. 1976), Vol. 17, para. 1196, if realty by virtue of the powers conferred by the Devolution of Estates Act, see *supra*, footnote 12. The scope of the relevant Trustee Act section would, however, be crucial if the estate were fully administered and the assets vested in the former executors as trustees. For the English position on this see Halsbury, *ibid.*, at para. 1355-1356. The Canadian position is by no means as clear. One way around the problem is to regard a power to vary investments of whatever kind as inherent on the power to invest; see *Toronto General Trust Corp. v. Cobham*, [1944] 2 D.L.R. 207 (Ont. H.C.).

⁷² It might even be applied to a case where a notional income (based on a notional conversion of an asset) is being paid but the valuation on which the calculation of income is based (assessed either at the date of death or one year thereafter: see Waters, *op. cit.*, footnote 2, pp. 703-704) represents only a fraction of its present value, because of an increase in the paper value of the asset in the interim.

⁷³ The clearest statement to the effect is that of Harman J. in *Re Maclaren's Settlement Trusts*, [1951] 2 All E.R. 414, at p. 420. This was, however, the weakest case of this type for apportionment, as the assets with respect to which inequality of treatment might have arisen were treated with the consent of the life tenant as capital assets. See further *Re Kleinwort's Settlement Trusts*, [1951] Ch. 860; *Re Rudd's Will Trusts*, [1952] 1 All E.R. 254. In these cases the retention of shares upon which large dividends were declared, depleting the capital value enormously, was held not to be a breach of trust even if the trustees knew of the intended action, and could have sold *cum* dividend.

be to make the retention of existing investments just as much a breach as deliberate investment in securities which prejudice one party. If the finding of breach by the trustee is made, the court can always exonerate him under the appropriate section of the Trustee Act.⁷⁴ In a glaring case, however, where the failure to convert may have prejudiced one beneficiary without benefiting the other, or may have prejudiced both,⁷⁵ there should be no exoneration, and the trustee should be required to make good any deficiencies in the trust property. Then the trust property and any money coming from the trustee should be apportioned equitably.⁷⁶

It is noteworthy that there are cases in which apportionment has been ordered even though there was no breach of trust, but the trustees' perfectly legitimate action showed an advantage to one beneficiary. Such a case was *Lord Londesborough v. Somerville*.⁷⁷ The testator directed his consols to be sold for investment in realty. Suitable land was found and a contract made for completion on January 6th, 1850. Since consols could not be traded between 14th December, 1849 and 16th January, 1850 the trustees sold them in November 1849 *cum* dividend, so that a higher price was realized. The life tenant claimed that some allowance should be made from the capital to him, and his claim was upheld by Romilly M.R., who stated:⁷⁸

Cases have occurred frequently, showing the principle and view which equity takes of cases of this description. They rest upon the broad and general principle of doing justice as between the tenant for life and the persons entitled to an estate in remainder. . . .

It would seem preferable to adopt this kind of approach,⁷⁹ and so avoid making the finding of breach by the trustee a condition prece-

⁷⁴ See e.g., Ont. Trustee Act, *supra*, footnote 71, s. 35; Alta, *ibid.*, s. 36.

⁷⁵ For a celebrated instance (which involved a *trust* to sell and convert) see *Fales, Wohleben v. Canada Permanent Trust Company* (1976), 70 D.L.R. (3d) 257 (S.C.C.).

⁷⁶ In *Fales, ibid.*, the Supreme Court first held the corporate trustee in breach for failing to sell as soon as it could advantageously have done so. Logically, this should permit the fixing of a date from which the proceeds of sale should have produced income for the life tenant, so she could be awarded lost income on this basis. The Supreme Court, however, tersely rejected her claim (see at p. 275), on the basis that she was a co-trustee in breach, even though she had been exonerated from liability in respect thereof. This approach was not evident in *MacDonald v. Hauer*, [1977] 1 W.W.R. 51 (Sask. C.A.) where the "innocent" co-trustees whom the court exonerated (see at p. 77) were allowed to recover from their co-trustee. This latter view seems preferable, once the decision to exonerate has been made: on this see Waters, (1977-8), 4 Estates and Trusts Quarterly 12, at pp. 16-22.

⁷⁷ (1854), 19 Beav. 295, 52 E.R. 363.

⁷⁸ *Ibid.*, at pp. 298 (Beav.), 364 (E.R.).

⁷⁹ For other cases demonstrating this approach, see authorities cited in *Re Maclaren's Settlement Trusts, supra*, footnote 73. See also the approach of Middleton J.A. in *Re Rutherford, supra*, footnote 32.

dent to apportionment: but as has been noted, the potentially unpleasant consequences of this for the trustee can be mitigated if the court chooses to exonerate under the statutory power.⁸⁰

These approaches would deal with some of the problems raised by the decision in *Re Fleming*.⁸¹ In that case trustees held the residue of the testator's estate on trust for his widow for her life. Among the estate assets they held all the shares in Lincoln Properties Limited, of which they were the sole directors. The company had on hand the sum of \$125,000.00, which the directors proposed to distribute, so they sought the advice and direction of the court on the legal question of what the effect would be of the courses of action open to them, and which they should choose. The money could either have been paid out as a dividend on the common shares, or used to redeem issued preference shares. If the former route had been taken, the resulting money would, the court determined, have been income in the hands of the estate, and payable to the life tenant, whereas if the latter route were adopted, the money would have been held by the estate as capital.⁸² Relying on the principle of impartiality, Osler J. directed the executors to redeem the preference shares and effect a capital distribution.

This case raises interesting questions about the extent to which a court can and should interfere in the internal workings of a corporation controlled by trustees,⁸³ and about the trustees' liability had they refrained from seeking advice, and paid out the dividend as income. If they still retained the funds as *trustees*, the approach taken in *Lord Londesborough v. Somerville*⁸⁴ could be applied, or the trustees could

⁸⁰ This approach would avoid the difficulties inherent in *Hill v. Permanent Trustee Co. Ltd.* (1933), 33 S.R. (N.S.W.) 522, discussed in (1980), 30 U. of T.L.J. 151, at pp. 156-158.

⁸¹ *Supra*, footnote 70; see (1973-4), 1 *Estates and Trusts Quarterly*, p. 105.

⁸² It has been established at least since *Waters v. Toronto General Trusts Corp.*, [1956] S.C.R. 889, that the form of distribution which a corporation uses is binding for the purposes of classifying the benefits received by the estate as capital or income. The "form is substance" rule seems in this context to be entirely appropriate. Were the courts to go behind the corporate decision, how would they deal with a corporate decision to re-invest earnings without declaring any dividends? Could future earnings be apportioned into those which would have been earned in any event, and those attributable only to re-invested earnings? The correctness of the proposition however, does not preclude enquiry as to whether the trust funds should have been left in the particular stock if there was knowledge of a particularly large income distribution in the works: see *supra*, footnote 73. The problem will not be as grave if a capital distribution is effected, as the life tenant will derive income in future from the property so received, and equality of treatment will result. See however *Re Welsh* (1980), 6 E.T.R. 257, where the *Waters* approach was held to be inapplicable.

⁸³ For a full discussion of this problem, see *Trust Principles and the Operation of a Trust-Controlled Corporation* (1980), 30 U. of T.L.J. 151.

⁸⁴ *Supra*, footnote 77.

be held in technical breach but exonerated, and an apportionment then ordered. But what if the income had already been paid out? Perhaps the matter would be unlikely to reach this stage, as in many cases of payments of excessive income the complainants have got to court while the trustees still had the money, and interlocutory relief would presumably be available pending determination of the claimant's rights.⁸⁵ But if, for example, the remaindermen were ignorant of the corporate dealings, or were, as might happen in a family trust, all infants, no action might be contemplated until after the payment of income to the life tenant. If no finding of breach of trust were made against the trustee, that would be the end of the matter. In order to permit any relocation of rights between the beneficiaries, a finding of breach of trust would be essential. Ordinarily the remaindermen would be entitled to trace against the life tenant;⁸⁶ but only after exhausting their remedy against the trustee.⁸⁷ The trustee would then experience grave difficulties in recovering anything from the life tenant, as his only basis for doing so would be that the money was paid under a mistake of law.⁸⁸ Thus the remaindermen would have their entitlement, at least in part from the trustee, and the life tenant would be enriched to the extent that the trustee could recompense the remaindermen. Even if the trustee had acted improperly, this seems to be an unfair result, caused mainly by the inadequacy of the trustee's restitutionary remedy. But this result could be avoided. If the court wished, it could find the trustee in breach of trust, but then exonerate him under the relevant section of the Trustee Act.⁸⁹ The finding of

⁸⁵ In any event, few trustees would be so foolhardy as to pay out the income pending determination of the legal position.

⁸⁶ See Goff and Jones, *The Law of Restitution* (2nd ed., 1978), pp. 53-63. This of course requires the plaintiffs to be able to identify "their" property: *ibid.*, pp. 55-60. In addition, the remaindermen might be able to resort to the personal claim against the wrongly-paid volunteers allowed in *Re Diplock*, [1948] Ch. 465 (C.A.), *aff'd sub nom. Ministry of Health v. Simpson*, [1951] A.C. 251, though that case in terms covered only an action arising out of the administration of an estate, and did not specifically apply the remedy to cover breaches of trust. (This again may involve the question whether the estate is still under administration or has passed into the former representative's hands as trustee: see *supra*, footnote 71). Later cases suggest however that the remedy may be available in cases which do not involve administration of estates: see Goff and Jones, *op. cit.*, pp. 451-452.

⁸⁷ See *Re Diplock*, *ibid.*, at pp. 503-504. This restriction apparently applies both to the genuine tracing claim and the *Re Diplock* personal action: see Goff and Jones, *op. cit.*, *ibid.*, p. 60 and p. 453.

⁸⁸ See Goff and Jones, *op. cit.*, *ibid.*, pp. 98-99; *Re Diplock*, *ibid.*, at p. 480, approving Wynn-Parry J. in this respect: see [1947] Ch. 716, at p. 742. This is part of the wider point that the remedy of money had and received does not lie in respect of money paid under a mistake of law: see Goff and Jones, *ibid.*, ch. 4.

⁸⁹ *Supra*, footnote 74. Under the English equivalent, Trustee Act 1925, 15 & 16 Geo. 5, c. 19, s. 61, trustees have been exonerated for paying funds to the wrong person under a mistake of law: see *Re Allsop*, [1914] 1 Ch. 1; *Re Wightwick's Will Trusts*,

breach of trust would permit tracing, and exoneration would mean that the remaindermen's remedy against the trustee would be "exhausted", permitting full recovery from the life tenant. In this way, the potential impact of *Re Fleming* may be mitigated to some extent.⁹⁰ The foregoing analysis would apply only where a trust-controlled corporation decided to distribute some of its earnings, and to the manner of such distribution. This does not necessarily involve going further and requiring the trustee-directors to declare dividends, nor structure nor operate the corporation in a way beneficial to the life tenant.⁹¹ If, however, the company produced neither income nor capital distributed to the trust which would in future produce income, the trustees would have to consider sale of the corporate interest if the life tenant were in need of income, if they failed to run the corporation at some advantage to the life tenant.⁹²

Before leaving *Re Fleming*, one should notice that the assets of the trust-controlled corporation which were sold were real property. Yet the shares in the company were obviously personalty. There is no difficulty in applying *Re Smith* to shares in a corporation; should there be greater difficulty in applying this approach to real property held directly by the estate, as will be suggested is possible,⁹³ then the interposition of a company will be critical to the existence of the duty of even-handedness. What is, from the estate's point of view, essentially a question of form cannot justify this difference in result nor does the distinction between real and personal property.

The far-reaching impact of the approach manifested in *Re Smith* has not escaped notice,⁹⁴ and it may be thought to make life difficult for trustees, by requiring examination of each asset to ascertain its

[1950] Ch. 260, at p. 266. The question of recovery against the person wrongly paid was not, however, pursued. Presumably the plaintiffs (or the trustee) could ask that the enriched party be joined so that the rights of all parties might be settled in one action: see Ontario Rules of Practice, Rule 66; Alberta Rules of Court, Rule 46.

⁹⁰ The problem raised in the text may also be dealt with by making up the deficiencies in capital out of future income of the life tenant, as was done in *Re Zive*, *supra*, footnote 54. This will not always be possible. The problem would, however, remain that the life tenant would not then be entitled to the entire income from the trust property as required by s. 70(6)(b)(i) of the Income Tax Act, R.S.C., 1952, c. 148 as am., so that the property in question would not be held under a "spousal trust": see *infra*, footnotes 110-115 and accompanying text.

⁹¹ For fuller discussion of potential developments in this area, see *op. cit.*, footnote 83, at pp. 186-196.

⁹² If the trustees felt that the full potential of the corporation could only be realized by reinvestment of all income, then one must conclude that such an investment vehicle, whatever its other attractions, is not suitable for a trust where the income and capital interests are separated.

⁹³ *Infra*, text following footnote 102.

⁹⁴ For criticism, see Cullity (1972), 50 Can. Bar Rev. 116.

performance as compared with authorized investments.⁹⁵ However, the investment decisions of a trustee have already been complicated enormously by factors which have been mentioned, notably the unreliability of traditional investments, and the high rate of inflation. If one merely requests the trustee to place high on his list of priorities the preservation of equality between two sets of beneficiaries, and then asks him to make his investment decisions in that light, it will hardly make life much more difficult for him, and it may even make it somewhat easier. He will for example be quite justified in getting out of an investment which *might* increase substantially in value in the future, but which is at the moment unproductive, and purchasing authorized investments producing a steady return. If this is thought to be hard on the remaindermen, one can only ask why the life tenant should be expected to bear the loss, as was Mrs. Lottman. Plainly, in her case, a sale of the land subject to the lease, which was on very favourable terms to the lessee, would net nothing like as much money for the estate as a sale after the lease had run out.⁹⁶ It is, however, no answer to her complaint that she is getting nothing to tell her that if the land is sold and the proceeds invested, then the remaindermen will suffer. If the loss must be borne, then it should be borne as equally as possible, and Mrs. Lottman would suffer also, in that the capital sum from which she would hope to derive income would be considerably less than if she were able to wait until the land could be sold free from the lease.⁹⁷

⁹⁵ *Quaere*: in view of prevailing rates of interest, can a trustee invest or leave trust money in securities returning 4% per annum and falling within the Trustee Act list of investments: see Ont., *supra*, footnote 57, s. 27(1)(d) and (e); Alta., *supra*, footnote 71, s. 5(i) and (j)? Note that both sections carry the qualification that such investments are authorized "if the investment is in other respects reasonable and proper". As was suggested, *supra*, footnote 56, the requirement that the investment be proper could include the element that it protect both interests, which a 4% return might arguably not do.

⁹⁶ The case was complicated by the lessee's disputed claim that he had an option to purchase the reversion for \$85,000.00 over fifteen years: see (1978), 2 E.T.R. 1, at p. 11. If this were so it is difficult to see why the action was brought in the first place, since sale would effectively be impossible under these circumstances: see further, *op. cit.*, at p. 15.

⁹⁷ There is some English authority that the estate should not be required to take a large loss in order to ensure income for the life tenant: see e.g., *Re Charteris*, [1917] 2 Ch. 379 (C.A.). In that case, however, it appears that the market for securities was unduly low, and that the court was satisfied that the executors were acting fairly and properly "and in the interests of all parties entitled as beneficiaries under the will", per Swinfen Eady J., at p. 394. It is hard to see how assuring no income to the life tenant for fifteen years, by which time she might not be able to reap the rewards, can be described in these terms. The attempt to generalize *Re Charteris* into an absolution of personal representatives from the duty to maintain equality, evidenced in *Re Hayes' Will Trusts* [1971] 2 All E.R. 341, seems quite misconceived: see Halsbury's Laws of England (4th ed., 1976), Vol. 17, para. 1193; and *Re McClintock* (1976), 70 D.L.R. (3d) 175 (Ont. H.C.). See further Cullity, (1975), 25 U. of T.L.J. 99, at pp. 110-112.

If, however, as I have contended, the trustee should be required to investigate each asset on its own merits in order to determine whether conversion is necessary or not, it would also seem appropriate that the trustee take into account the means of the different beneficiaries. Mrs. Lottman was demanding an income from the estate and it may well be that she was in a difficult financial position without such assistance. On the other hand, she was obviously not totally without means, as she was able to put up \$19,000.00 to purchase her husband's share of the matrimonial home, although that had been five years earlier, and if her income were fixed its purchasing power would obviously have declined significantly. We do not know whether she was desperately in need of income from the estate, and if so, how much. But it is submitted that these factors cannot be made irrelevant to the question whether the trustee is acting evenhandedly as between the different beneficiaries. This may be thought to throw a further and intolerable burden on the trustee's shoulders, that he be required to assess the life tenant's needs and then arrange the investments so as to produce a sufficient income: but any other rule is apt to be just as mechanical as the present rule, requiring that all assets which are unproductive be converted, no matter how great the prejudice to the remaindermen, and how little the need of the life tenant for the resulting income. We are speaking here of equitable principles; and equity is not apt to be done by assuming that all cases are always alike. In any event it seems that in the reported cases the means and needs of the life tenant have sometimes weighed with the courts in reaching their determination whether a trust to sell, triggering the duty to apportion, or power of sale was imposed, and whether the trustee should be compelled to sell in the actual facts existing.⁹⁸ There would be little harm, it is submitted, and much benefit to be derived from articulating clearly that it is the trustee's duty in a family trust of this type to keep the well-being of the various family members, given their basic means, in the forefront of his mind, in the hope that he will thereby avoid frustrating the intentions of the testator.

⁹⁸ *E.g. Re Wright* (1976), 74 D.L.R. (3d) 504 (Ont. H.C.); *Re Price* (1979), 5 E.T.R. 194 (Ont. H.C.). In both cases the life tenant did not apparently need increased income from under-productive stock, and the court concluded that only a power to sell arose so that notional conversion did not take place. Particularly in *Re Wright*, the decision is hard to accept in the light of earlier cases on very similar clauses: see (1978), 56 Can. Bar Rev. 128, at p. 134 (D.W.M. Waters). Again in *Re Hendrie*, *supra*, footnote 2, the dispute was between those entitled to the estate of the life tenant and those entitled in remainder. As the life tenant no longer had any personal need of funds a determination in favour of the remaindermen seems understandable and in fact occurred, and the clause in question disclosed rather more of an intention to exclude the duty of impartiality than did the clauses in several other cases to which reference has been made: see further *Re Welsh*, *supra*, footnote 82.

Other beneficial effects flow from liberating the duty to maintain equality from arising only where there is an express or implied duty to convert. In *Lottman v. Standord*, Mr. Justice McIntyre enjoined the courts from twisting rules such as that in *Howe v. Lord Dartmouth* with a view to remedying supposed injustice. In fact, it has often been the case that the courts have by their construction "twisted" language used by testators with precisely this aim in mind.⁹⁹ The result in *Lottman v. Stanford* once again makes critical the primary determination by the court that the will creates either a trust or a power to convert. Since very fine shading of language is often involved in reaching this determination, it leaves much room for the judge to decide whether in fact the duty to be impartial arises or not. But other consequences may flow from this primary determination. If a trust for sale arises, the trustee will be in breach if he fails to sell as soon as he could advantageously do so;¹⁰⁰ in other words the onus is upon him to show why he has not converted into authorized investments. If, however, a power to sell is given, the beneficiary who is complaining of the trustee's action, or lack of it, will need to show that the trustee has failed to exercise or has improperly exercised this discretion. Thus the trust-power distinction may well be crucial in a case where maintaining equality is not directly the issue. There may then be good reasons for conferring a power to convert, even though the testator does not wish to exclude the duty to act impartially. It is thus desirable to permit such a duty to arise even in the absence of an express or imposed duty to convert. If the testator does wish all his assets to be converted, he could employ the trust for sale, and then the apportionment rules would apply, unless excluded; but in the case of a power also apportionment could be triggered by a breach of the more generalised duty to act even-handedly. If *Re Smith* were accepted as good law, so that draftsmen were aware that, even if freed from a blanket duty to convert, trustees would still be subject to some constraint upon their freedom to act to the prejudice of one or other beneficiary, it might well be that we would soon see a majority of wills employing equal powers to sell and to retain, as opposed to the apparently still popular trust to sell with a power to retain added afterwards, which can only generate confusion as to which is to be paramount.¹⁰¹

⁹⁹ See cases cited, *supra*, footnote 98. This trend can be traced as far back as *Royal Trust and McMurray v. Crawford*, *supra*, footnote 51, and seems to be the only way to explain differences in the construction of apparently similar clauses in wills.

¹⁰⁰ The importance of this was emphasized in imposing liability in *Fales, Wohlleben v. Canada Permanent Trust Co.*, *supra*, footnote 75.

¹⁰¹ See cases cited *supra*, footnote 98-100; Waters, *op. cit.*, footnote 98. It is not however, absolutely clear that merely empowering conversion and retention ousts the rule in *Howe v. Lord Dartmouth*: see (1979), 5 E.T.R. 201. It would therefore still be wise to exclude the specific rule, but leave operative the approach in *Re Smith*.

In the light of these observations, one may be tempted to conclude that we should welcome the Supreme Court's decision not to extend the rule in *Howe v. Lord Dartmouth* to realty, since that would savour of a general duty to convert all real property, except that which plainly protects both interests, instead of requiring the beneficiary, as I have argued he should be free to under *Re Smith*, to show that he is being prejudiced by the retention of specific assets. What is disturbing about the judgment of Mr. Justice McIntyre is what it leaves unsaid. The whole current of the law, from the bulk of the cases on construction to such clear innovations as *Re Smith* and *Re Lauer and Stekl*,¹⁰² has been to maximize the importance of even-handed treatment. This has now suffered a reverse, in the highest court in the country, and moreover on the basis that it is for the legislators and not the judges to advance the law in this area. Since *Re Lauer and Stekl* was affirmed by the Supreme Court, it is presumably immune from attack: but what of *Re Smith*? In particular, how would the Supreme Court treat an application to compel a trustee to exercise a power of sale over unproductive real property, or to remove him for failure to sell, on the basis that it would be an improper exercise of discretion to retain such land in view of the life tenant's need for income? One can as well require any "innovation" here (for it would be innovatory to hold against the trustee) to be by legislation; but a distinction between land and other property for this purpose seems wholly without foundation. This may cast doubt on *Re Smith* itself, in whatever context that decision is sought to be applied. Would the Supreme Court overrule that case? Or would it perhaps feel that it was not innovating in applying the case in the same or a different situation, given that the decision was reached ten years ago?^{102a}

Perhaps the clearest indication of the way forward in this area would have come if the applicant in *Lottman v. Stanford* had argued that *Re Smith* applied instead of the rule in *Howe v. Lord Dartmouth*. Since she did not¹⁰³ the personal preference of this writer would have been for the Supreme Court to have allowed her claim. As has been pointed out, the major change this would cause in what seems to be the present state of the law would be that the onus would be placed upon

¹⁰² *Supra*, footnote 4.

^{102a} I do not agree with Prof. Hogg's contention, in (1981) 5 *Estates and Trusts Quarterly* 181, at p. 194, that *Re Smith* must be regarded as overruled. Since the Supreme Court of Canada deliberately took the narrowest view possible of the issue before it, it should be taken as having said nothing about issues which were not before it. Its decision means that the question of conversion was to be left entirely to the trustees' discretion: how that discretion should be exercised is a different matter.

¹⁰³ Presumably she could now argue that *Re Smith*, rather than the rule in *Howe v. Lord Dartmouth*, requires actual aconversion if she were brave (or foolhardy) enough to risk another trip to court.

the trustees to show that their retention of original assets was justified by their income-production, instead of requiring the beneficiary, as does the result in *Re Smith*, to show that she is suffering unfairly by the trustees' lack of action. At this price we would have seen continued the current of the decided cases in favour of even-handedness, which would, it is submitted, have been highly desirable. It would have been no more difficult to exclude the specific rule in *Howe v. Lord Dartmouth* than it now is: since many wills leave residuary realty and personalty in one mass, the exclusion of the rule with respect to personalty would generally apply also to realty; and if the present rule is not excluded, it is quite possible that the testator would be happy to see it applied equally to real property. It is, at any rate, an odd assumption that a testator decreeing equality of treatment with respect to personalty is really happy, in the absence of any positive indication thereof, to permit inequality of treatment with respect to realty. Continued distinctions between realty and personalty are more apt to operate as a trap, for both testators and draftsmen, than as a welcome respite from unwelcome rules.

IV. Drafting in Inflationary Times.

The problem encountered in *Lottman v. Stanford* is really part of a larger one; how to provide, in an unsettled economic climate, for those who are dependent upon the testator for their support, and then transfer his accumulated wealth to the next generation. The preferred vehicle for achieving these aims has been to provide a trust for the widow for life and thereafter for the children, the subject-matter of which is the bulk of the testator's property, and draftsmen seem content to provide for the many and varied contingencies which may arise with respect to various types of assets simply by providing very wide administrative discretions to the trustees. The thrust of the foregoing discussion of *Re Smith* was that the courts have not been permitting trustees to use essentially administrative discretions to affect unfairly the allocation of benefits under the trust, and this trend seems likely to continue, subject to the doubts which I submit the Supreme Court has cast on the further development of the approach seen in *Re Smith*. Many of the problems which have been litigated arose precisely because of an injudicious combination of different types of property, concerning which the testator might have had varying aims, in the belief that wide discretion to the trustee will solve all potential problems. Draftsmen should, however, consider whether in today's unsettled economic conditions trustees might not appreciate some guidance, rather than a blanket discretion to do as they see fit and be subject to *ex post facto* judicial criticism. In the light of the present law, such guidance should, in the context of a family trust for

successive beneficiaries, concern primarily the extent to which the trustees do not need to maintain an even hand.

How then should draftsmen indicate that equality of treatment is not desired? The safest step, it is submitted, would be to exclude completely from the life tenancy-remainder formula any assets intended to benefit predominantly one interest or the other. Unproductive assets intended to be held for capital appreciation could be given outright to the remaindermen,¹⁰⁴ or held in trust for them alone, and assets the entire income of which is for the life tenant could likewise be given to her absolutely.¹⁰⁵ The obvious drawback is a lack of flexibility. What if the capital value of the former asset appreciates quickly; should the life tenant be excluded from the benefit, particularly if inflation erodes the value of the original income? What if she dies soon after the testator; why should she have power of disposition over assets intended only to secure her income? The latter problem is not so grave in the typical case, for the life tenant is the widow, and could reasonably be expected to distribute the property among those whom the testator would choose as remaindermen in any event.¹⁰⁶ If the testator refuses to trust his widow this far, and insists on controlling his property from the grave, he is apt to make life difficult for somebody, either his widow, his children, or his trustees. Unproductive assets might be dealt with by directing the trustees to retain the property until they in their discretion should decide that *in the best interests of the remaindermen alone* sale is desirable, and that the income from the invested proceeds, or the property itself if it becomes productive, should be paid to the life tenant, if still living, from that time onwards.¹⁰⁷

A second approach is to leave the estate in trust to provide the widow with a fixed income, which will increase annually by the percentage increase in the cost of living. Excess income can be added to capital: if the income falls short, it can be made up out of capital.

¹⁰⁴ In this case there would be a deemed disposition within s. 70(5) of the Income Tax Act, *supra*, footnote 90, but if the capital appreciation is still anticipated, rather than actual, then the tax consequences of such disposition may not be significant.

¹⁰⁵ There would be no tax on capital gains payable on an outright transfer to the spouse: Income Tax Act, *ibid.*, s. 70(6) (a).

¹⁰⁶ The volume of litigation involving *Re Walker* (1925), 56 O.L.R. 517, will, one hopes, convince draftsmen not to attempt to give outright to the widow but then give "whatever is left at her death" to the children, or use similar wording. For recent comments on this problem, see (1973-4), 1 Estates and Trusts Quarterly 117; (1978), 2 E.T.R. 108. There is nothing, however, to prevent the insertion of precatory wording suggesting but not imposing a particular course of devolution.

¹⁰⁷ Outright transfer to the spouse may be preferable in cases where a spousal trust does not enjoy the advantages of a transferee spouse: See, *e.g.*, Income Tax Act, *supra*, footnote 90, ss 70 (5.1), 146 (8.8) and 146.2 (10).

There are two problems here: fixing the dollar value of the income to be paid in the first year after death, when the testator may live for another ten years, by which time the figure may be far too low;¹⁰⁸ and the possible depletion of the capital over time if the actual income is too low, leaving the widow without *any* income if she lives long enough. The second problem can be attacked by requiring the trustee to purchase an annuity, the payments under which will increase annually in line with the rate of inflation. It is understood that some insurance companies now offer this service. If the estate assets prove insufficient to purchase an annuity in the desired base amount,¹⁰⁹ then the trustees should be directed to purchase as large an annuity as possible. Another possible solution is to give the trustee discretion to fix the life tenant's income from year to year, payable partly from capital if necessary, but keeping in mind the need to preserve capital for the future benefit of the widow as well as that of the remaindermen. Both of these possibilities might, however, give rise to tax difficulties, as either directing payment of a fixed though increasing amount or leaving discretion with the trustee to determine the amount of income would prevent the trust from qualifying as a spousal trust within the meaning of section 70(6) (b) of the Income Tax Act,¹¹⁰ assuming that section to be otherwise applicable, since the widow would not be entitled to all the income arising before her death, as required by section 70(6) (b) (i).

The existence of a duty to apportion the actual income between life tenant and remainderman might also prevent this section from operating. Hence the exclusion of the duty to apportion may be thought necessary for tax purposes even if the draftsman is not on the whole opposed to the trustees being under a duty of impartiality. The duty to apportion would not generally arise if power only to sell is given, except in a case such as that discussed earlier where, for example, the trustee allows the trust funds to remain in shares of a corporation which declares extremely large dividends and significantly diminishes the capital value of the shares, or where the trustee runs the corporation so as to produce this result, where an apportionment might be ordered *ex post facto*.¹¹¹ Such a result might be avoided by empowering the trustees to decide for themselves whether to treat any moneys received as income or capital, although such a clause would

¹⁰⁸ Regular updating by way of codicil would help, but can easily be forgotten.

¹⁰⁹ Which would again require regular updating. In all these cases a formula providing for increases in line with those in the Consumers Price Index could be inserted.

¹¹⁰ *Supra*, footnote 90, as amended S.C., 1970-71-72, c. 63 and subsequently.

¹¹¹ *Supra*, text accompanying footnotes 83-92. As was noted *supra*, footnote 101, it is possible that the rule in *Howe v. Lord Dartmouth* will not be excluded merely by giving a power of sale to the trustee.

hardly serve itself to satisfy section 70(6) (b) and the validity of such clauses has been questioned.¹¹² The trustees should in any event be required to exercise this power, as others, with due regard for the interest of all beneficiaries,¹¹³ so that even if the will contains such a clause it may not permit the trustee to pay the entire income to the life tenant, if tax considerations dictate this to be desirable, which may not, of course, be the case. In such circumstances, it may be that fiscal implications would justify the payment of even grossly excessive income to the widow, as she can always pass it on to the remaindermen if she so chooses.¹¹⁴ But if that is the bottom line, then perhaps she should be given the whole estate outright, and her discretion trusted as to its devolution after her death. If it is thought necessary, for the purposes of the Income Tax Act, to provide that even excessive income arising be paid to the spouse and thus to exclude the duty of apportionment, one would not have to deal likewise with underproductive property: for if the capital thereof has to be apportioned after sale, this would in no way prevent section 70(6) from applying. Thus one might provide that the widow receive the actual income on all investments, but if any produce less than a given rate of return (for instance 2% less than that paid on money on deposit in a regular savings account^{114a}) for more than a specified period of time (for instance two years) and the widow is in need of increased income, then such assets should be converted and the capital reinvested, and if need be apportioned¹¹⁵ to make up for past deficiencies.

The trust has been a durable and flexible institution; the foregoing remarks illustrate, however, that even its flexibility has limits. In inflationary times, it may be too much to expect that a spousal trust serve as a tax deferral device, a means of maintaining one's widow, and a vehicle permitting investment manipulation designed to maximize the future capital value of the fund. The testator before his death may be used to doing all these things; it is extremely difficult after

¹¹² *Re Wynn*, [1952] Ch. 271. Such a clause was treated as valid in *Re Zive*, *supra*, footnote 54.

¹¹³ See *Re Zive*, *ibid*.

¹¹⁴ If the tax advantages were sufficient, presumably whichever interest (income or capital) would suffer from the form of a distribution where the trustees control the company would be prepared to see the route prejudicial to them adopted in return for other considerations.

^{114a} It may be suggested that such a formula produces too high a rate of return for the income beneficiary, since the very high interest rates of the last few months give a rate of return beyond the rate of depreciation in the value of the capital caused by inflation. In fairness, such a return should be apportioned to compensate the remaindermen for the diminution of the value of their interests in real terms. Once again, however, the desire to have a qualifying spousal trust would restrict the flexibility required to achieve fairness.

¹¹⁵ Under the rule in *Re Earl of Chesterfield's Trust*, *supra*, footnote 24.

one's death to expect them all to be achieved, as the trustee would need the flexibility of an absolute owner to accomplish these goals. He is not, however, the absolute owner of the property, and attempts to clothe him with all the incidents of ownership are apt to be construed restrictively.¹¹⁶ Certainly the law should strive to effectuate the testator's intention, but it will be rare that the testator's mind would have turned to the specific problem at hand. Typically all we know of his intentions are general aims: carrying on the administration of his assets as he had done, obtaining a suitable return for the widow, and protection of the capital for the children. But what if these aims come into conflict? Searching for what the testator wanted, or what he would have done, is unlikely to furnish a clear solution, and one is back to the basic premise: both sets of interests are supposed to benefit, and systematic and sustained prejudice to one interest is inconsistent with this premise. If, even after excepting as suggested earlier assets intended to benefit one interest to the prejudice of the other, the duty of impartiality is still thought to be too great a restraint, then it would probably be because of the need for a potential maximisation of income, rather than the protection of the capital, and in this case an outright gift of the property to the intended income beneficiary may be preferable.

All these problems would, of course, disappear if all the beneficiaries of a family trust could agree with the trustees on the estate's administration. Then the wording of the trust instrument would in a sense be irrelevant, as any action inconsistent with it could be approved by the beneficiaries, unless they were minors.¹¹⁷ But as the number of litigated cases attests, it would be pious and foolish to expect that such cooperation will invariably exist. In the event of disagreement, the trustees and beneficiaries need to know their true powers and rights. If the trustees are to be empowered to prefer such beneficiaries as they choose, provision for this should be made specifically in the form of discretionary *dispositive* powers over income and capital, and not in the form of administrative powers; but this may have unfavourable fiscal ramifications. As long as discretionary administrative powers are the vehicle the draftsmen uses to permit adjustment between beneficiaries, the courts will, I submit, continue to assume that such administrative powers are to be exercised fairly, and not with a view to varying the disposition of assets.

¹¹⁶ Along the lines of the argument advanced in *Re Wynn*, *supra*, footnote 112. I am speaking here only in the limitations on the trust. Other devices, a corporation for example, might be employed which would place more control with less restraints in the hands of those charged with the administration of the deceased's assets.

¹¹⁷ In this case an application might be made under the Variation of Trusts Act, R.S.O., 1970, c. 477, but this procedure could be cumbersome and the proposed action might not in fact benefit the persons on whose behalf consent is sought.

So the choice will have to be made whether to give discretion only with respect to administrative matters or also with respect to the distribution of benefits. If the former route is taken, it will be very difficult to exclude completely the duty of impartiality¹¹⁸ without overtly permitting the trustees to arrange the investments to the complete prejudice of one interest or the other, which may be difficult to do without making the permission appear repugnant to the life tenancy-remainder formula,¹¹⁹ and which may in any event be quite contrary to the testator's wishes.

If the foregoing paints a bleak picture of the impossibility of drafting for every contingency and of warring beneficiaries going off to court at the drop of a hat, it is only to underscore the point that the traditional trust becomes a far less effective device when it must run for several years and protect disparate interest in inflationary times. As was suggested earlier, draftsmen should ask their clients to consider seriously giving their estate outright to their spouse, unless it is plainly large enough to satisfy all the needs it may have to meet. If the estate is large enough then consideration of the various alternatives outlined above, and indeed of the whole range of estate planning devices will be warranted. But the cost of such an operation may simply be too high given the value of the estate. In such cases, if the life tenancy-remainder formula is employed, one can impose equality of treatment by means of a trust for sale, or empower sale or retention, in which case the trustee will be required to act even-handedly in the exercise of these powers. Except insofar as imposing upon the trustee the burden of showing that particularly residuary realty should not be converted, the decision of the Ontario Court of Appeal in *Re Lottman* would not really have changed the law from what it now is and has been. It is, however, in the insistence of the Supreme Court of Canada upon legislative action as the only permissible method of change, and the doubt cast thereby on the decision in *Re Smith*, the more general duty of impartiality and its possible extension to realty, that the real drawback in *Lottman v. Stanford* lies.

V. "Legislation" by the Supreme Court.

Thus one must turn to the question, a critical one in the mind of Mr. Justice McIntyre, of which body should introduce an advance in the

¹¹⁸ As suggested, *supra*, footnote 72, the exclusion of the rule in *Howe v. Lord Dartmouth* will not be effective for this purpose. A clause such as that suggested by Prof. Waters in (1978), 56 Can. Bar Rev. 128, at p. 145, to permit as an exception indefinite retention of assets otherwise subject to a trust for sale as the trustee "shall think best accomplishes the benefit of" the spouse and children will not preclude the courts from examining the trustee's decision if he seems to be acting for the benefit of one only of the two interests.

¹¹⁹ *Supra*, footnote 116.

law such as that contended for by Wilson J.A.: the Supreme Court, or the various provincial Legislatures. Mr. Justice McIntyre was quite opposed to judicial legislation on this point, primarily on the basis that rules such as those regulating the administration of estates are regularly relied upon in the preparation of trusts and wills, and to change them is liable to upset detailed plans long since made.¹²⁰ The learned judge did not assert that judges should never legislate, and indeed such a position is extremely hard to defend,¹²¹ as no jurisprudential analysis of law seems to require judges to forbear completely from innovating and changing the law. The realist position is, of course, that judges frequently "make law", at least insofar as the characterization of "the issue", the selection of appropriate precedents, and, perhaps most important, the finding of "the facts" in the case are concerned. At the other extreme, a positivist such as Austin who sees law as a series of commands issued by a sovereign or his appointed subordinate, need by no means require either the sovereign or the appointed subordinate to apply consistently his earlier decisions.¹²² If the decision of the subordinate, here the court, acquires the force of law by the tacit consent of the sovereign,¹²³ then plainly we have only to wait and see if the sovereign will tacitly consent when the subordinate refuses to act as he has done before. In other words, if the various provincial Legislatures were to dislike a change wrought by the Supreme Court, they have the remedy available to them.

If one chooses to analyze the question of judicial legislation exclusively from the perspective of the courts' ability to overrule their own earlier decisions, then it is inevitable that judicial legislation is both possible and permissible. It has recently been demonstrated in this review that the choice of a court to stand by its own previous decisions is nothing more than a matter of practice "notwithstanding what it may have said in the past and notwithstanding what a higher court may say".¹²⁴ Furthermore, the Supreme Court has in fact

¹²⁰ *Supra*, footnote 47. It is noteworthy that the same judge did not apparently have as much sensitivity about departing from the accepted view of the law in *Re Lauer and Stekl*, *supra*, footnote 4, although there was admittedly support for the position he adopted in the cases from Ontario cited *supra*, footnote 11 even though he did not place reliance on them.

¹²¹ For the extra-judicial recognition by the present Chief Justice of Canada of the creative role of the judiciary, see (1975), 53 Can. Bar Rev. 469, at pp. 477-478. That his view may not be shared by other members of the Supreme Court may be gleaned from his minority position in cases such as *Murdoch v. Murdoch* (1973), 41 D.L.R. (3d) 367.

¹²² For Austin's endorsement of judicial legislation, see *The Province of Jurisprudence Determined* (ed. Hart, 1954), p. 191.

¹²³ *Ibid.*, pp. 30-33. See further Hart, *The Concept of Law* (1961), pp. 44-48.

¹²⁴ Bale, *Casting off the Mooring Ropes of Binding Precedent* (1980), 58 Can. Bar Rev. 255, at p. 275, citing Glanville Williams, *Learning the Law* (10th ed, 1978), p. 82.

shown a recent willingness to depart from its own earlier decisions, as well as those of the Privy Council.¹²⁵ Obviously such legislative power should be used sparingly: the experience both in Canada and in England suggests that it is used rarely, if at all. In Canada, in particular, the Supreme Court is far more given to "distinguishing" its own earlier decisions,¹²⁶ even though the grounds of distinction are sometimes illusory.¹²⁷

In *Lottman v. Stanford*, however, the Supreme Court was not asked to overrule earlier decisions of any persuasive force. Rather than being faced with the obstruction of an earlier precedent, the Supreme Court was asked to change what had hitherto been the common understanding of all those involved with this area of the law. This is, if anything, cause for even greater trepidation in changing the law. If the point of law had been so controversial as to require a judicial determination to settle it, such determination would not in all likelihood have brought a complete end to the controversy: thus the Supreme Court may, with the benefit of further thought, be perfectly entitled to reopen the question.¹²⁸ But where there has been such a degree of unanimity that no-one has even thought it worthwhile to argue the point, a reticence to innovate is both understandable and commendable. Even allowing for this, however, it may well be that in a particular case such reticence can be overcome, and that *Lottman v. Stanford* was such a case.

The Supreme Court of Canada occupies, by virtue of the federal system in Canada, a position which is arguably even more important than that of the House of Lords in England, in that it is charged with two functions which the House of Lords does not have. These are first, the adaptation to the Canadian milieu of the body of laws and

¹²⁵ See Bale, *op. cit.*, footnote 124, at p. 257, and cases cited *infra*, footnotes 128 and 141.

¹²⁶ Of the many cases which substantiate this point a good example is *Rathwell v. Rathwell* (1978), 83 D.L.R. (3d) 289. Three members of the court would have overruled the court's earlier decision in *Murdoch v. Murdoch*, *supra*, footnote 121 (see at p. 313, per Dickson J.), whereas the other two members of the majority were content to distinguish the case (at p. 297, per Ritchie J.), while the dissenting judges followed it (at p. 291, per Martland J.). Even in the latest case, *Becker v. Pettkus* (1980), 117 D.L.R. (3d) 257, the court did not expressly overrule *Murdoch*.

¹²⁷ Of many cases bearing out this view, examples are *Barnett v. Harrison* (1975), 57 D.L.R. (3d) 225, where the affirmation by the Supreme Court (40 D.L.R. (3d) 160 n) of the Ontario Court of Appeal's decision in *Beauchamp v. Beauchamp* (1972), 32 D.L.R. (3d) 693 was distinguished (57 D.L.R. (3d) at p. 248), and *Sunshine Exploration Ltd. v. Dolly Varden Mines Ltd.* (1969), 8 D.L.R. (3d) 441, and the treatment therein of *Cotter v. General Petroleum Ltd.*, [1950] 4 D.L.R. 609.

¹²⁸ See e.g., the treatment of *Gehrmann v. Lavoie* (1975), 59 D.L.R. (3d) 634 in *Keizer v. Hanna* (1978), 82 D.L.R. (3d) 449, at pp. 458-459, 465-469. See further cases cited *infra*, footnotes 141 and 148.

principles inherited from England, and secondly, the preservation of uniformity among the laws of at least the common law provinces.¹²⁹ The first of these aims has emerged only since the abolition of appeals to the Privy Council.¹³⁰ Formerly, any attempt on the part of the Supreme Court to innovate and hold inapplicable accepted rules of English law would quite possibly have led to appeal and the application by the Privy Council of the English law, unless such could be held to be "inapplicable" to Canadian conditions within the meaning of the relevant reception statute.¹³¹ There have been indications, however, since 1950 that the Supreme Court is prepared to look more critically at the application of English precedents, even those which are of long standing, or which, though recent, articulate long settled principles of law. An excellent example of this approach was the judgment of Mr. Justice Judson in *Fleming v. Atkinson*.¹³² That case concerned the liability of the owner of some cows which were straying on the highway when the plaintiff collided with them. The House of Lords had held as recently as 1947 that the owner owed no duty to users of the highway to prevent such animals from straying thereon.¹³³ Mr. Justice Judson refused to apply this rule in Ontario, reasoning first that the immunity conferred upon the owner of land adjoining the highway was inappropriate in Ontario, where public rights upon the highway derive not from dedication by the neighboring land owner, but by the original ownership of the Crown,¹³⁴ and secondly that the fact that no cause of action could have arisen before the advent of fast moving traffic did not confer an immunity in perpetuity if the realities of life had changed markedly. This was the first time that this issue had come before the Supreme Court of Canada; and that court took the opportunity of departing from the English precedent and adapting the law to the Canadian context. There had been, it is true, no settled practice of applying the "English" rule in Canada, from which the Supreme Court then departed, because in several earlier cases the owners of animals had been held liable under relevant statutory provisions or by-laws.¹³⁵ Such reliance on statute-law may indicate that no liability would have otherwise

¹²⁹ That this is and should be a function of the Supreme Court has been articulated by several commentators: see e.g., Laskin, *op. cit.*, footnote 121, at p. 473.

¹³⁰ Accomplished by S.C., 1949 (2nd sess.), c. 37, s. 3.

¹³¹ For discussion see Côté, (1964), 3 Alta L. Rev. 262.

¹³² [1959] S.C.R. 513.

¹³³ *Searle v. Wallbank*, [1947] A.C. 341.

¹³⁴ See *Ricketts v. Markdale* (1900), 31 O.R. 610.

¹³⁵ *McMillan v. Wallace* (1929), 64 O.L.R. 4 (App. Div.); see further *Johnson v. Giffen* (1921), 62 D.L.R. 635 (Alta S.C., App. Div); *Desmond v. Scott*, [1951] 3 D.L.R. 418 (N.B.S.C.)

been imposed; but the view espoused in *Searle v. Wallbank*,¹³⁶ which denied the liability of the owners, may not have been as entrenched in Canada prior to the decision in *Fleming v. Atkinson* as has the limitation on the rule in *Howe v. Lord Dartmouth* hitherto. One may still ask, however, whether the Supreme Court might not, since this was the first time that the question has come before it, have taken the opportunity to adapt the rule to the present conditions in Canada, especially when one of the factors considered in *Fleming v. Atkinson* was the developments in the methods of transportation available: changed economic factors and attitudes towards land might have been thought to have warranted a similar departure from the traditional English view.

One may object that this approach to judicial legislation leaves too much to chance. What if there had been an earlier Supreme Court decision, reached in more stable economic times, where the court had refused to extend the rule in *Howe v. Lord Dartmouth* to realty? The court could not then rely on "adaptation to the Canadian context" as its justification for changing the law. But surely the development of the law frequently depends upon the contingencies of which cases are litigated and which are not. The Supreme Court itself has in at least one recent case shown little regard for what the position would have been had an earlier case on the same point been litigated before it. In *Brule v. Plummer*,¹³⁷ the court was required to pass upon the meaning of the word "children" in the definition of "preferred beneficiaries" in the Insurance Act of Ontario.¹³⁸ This Act was first enacted in 1865,¹³⁹ and despite the attempts of Laskin C.J.C. to convince one to the contrary, it seems quite likely that at the time of its enactment the word "children" would have been construed, had the point arisen for decision, to include only legitimate children. A majority of the Supreme Court felt that as there was no prior decision of that court compelling it to restrict "children" to legitimate children then it was free to come to its own conclusion on how to construe the Act.¹⁴⁰ Despite the probability that, had the issue come before the court in an earlier age the decision would have gone the other way, the court rightly felt itself free to reach an interpretation of the Act which was consistent with the needs and expectations of members of

¹³⁶ *Supra*, footnote 133.

¹³⁷ (1979), 94 D.L.R. (3d) 481.

¹³⁸ R.S.O., 1960, c. 190, s. 164 (2).

¹³⁹ Though the expression "preferred beneficiaries" first appeared in S.O., 1897, c. 36, s. 159(2).

¹⁴⁰ *Supra*, footnote 137, at pp. 493-494. For interesting discussions on the application of such an approach to the question of reception, see Côté, *op. cit.*, footnote 131, and Bouck (1979), 57 Can. Bar Rev. 74. Neither commentator would, however, regard an earlier decision on the point as an insurmountable obstacle.

our modern society. In any event, as the Supreme Court is free to depart from its own previous decisions in an appropriate case, the fact that such a decision was, or might have been, reached is not of conclusive importance. All an earlier decision really means is that the court should be that much more cautious about initiating change.

Another recent Supreme Court decision furnishes an illustration of the latter problem. In *A.V.G. Management Science Limited v. Barwell Developments Limited*,¹⁴¹ the Supreme Court was asked to decide whether the rule in *Bain v. Fothergill*¹⁴² applied in British Columbia. That was a decision of the House of Lords and had been followed by the Supreme Court of Canada in *Ontario Asphalt Block Co. v. Montreuil*.¹⁴³ The decision in *A.V.G.* was that even if the rule did apply in British Columbia, one of the exceptions to the rule was applicable;¹⁴⁴ but Laskin C.J.C. went on to consider whether the rule in *Bain v. Fothergill* should apply at all in Canada today, and reached the conclusion that it should not. The earlier decision of the Supreme Court was regarded as no obstacle to this conclusion, as it was "decided at a time when [the] Court was still subject to the Privy Council and through it to the House of Lords in matters of common law."¹⁴⁵ The main reason assigned for this change in the law was that the advent of a land titles or Torrens system of registration made sympathy for the vendor who failed to make good title indefensible.¹⁴⁶ It is interesting to note that another reason touched on by Laskin C.J.C. for discontinuing reliance on *Bain v. Fothergill* was that the value of land is liable to fluctuate in price:¹⁴⁷ this lessening in the reliability of the value of land was one of the reasons adverted to earlier to justify the extension of the rule in *Howe v. Lord Dartmouth*.

A further example of the same approach is to be found in the decision of Estey J. in *Asamera Oil Corp. Ltd. v. Sea Oil and General Corp. et al.*¹⁴⁸ The case turned on the appropriate measure of damages resulting from a failure to return shares to the plaintiff. The bulk of

¹⁴¹ (1978), 92 D.L.R. (3d) 289.

¹⁴² (1874), L.R. 7 H.L. 158.

¹⁴³ (1916), 27 D.L.R. 514.

¹⁴⁴ *Supra*, footnote 141, at p. 296.

¹⁴⁵ *Ibid.*, at p. 298. It is noteworthy that the respondent argued that the court should leave it to the Legislatures to abolish the rule (at p. 296), and that B.C., whence the *A.V.G.* case came, had unproclaimed legislation (S.B.C., 1978, c. 16, s. 33) abrogating it. Nonetheless the Chief Justice, speaking for a unanimous court, plainly indicated the court would be loath to follow the case in future: at p. 301.

¹⁴⁶ The Chief Justice took a similar view of the rule's operation in jurisdictions with a registration of deeds system: *supra*, footnote 141, at pp. 301-302.

¹⁴⁷ *Ibid.*, at p. 297.

¹⁴⁸ (1978), 89 D.L.R. (3d) 1.

authority, both English and Canadian, permitted recovery in a rising market to be based on the price at the date of trial,¹⁴⁹ though some cases opted for an even higher measure.¹⁵⁰ Some dissatisfaction with either test had already been expressed,¹⁵¹ and Estey J. opted for a more flexible approach,¹⁵² which seems to be in line with other developments in the law of remedies,¹⁵³ and would instead require the deprived party in a case such as *Asamera* to mitigate his losses, not necessarily at the date of the original breach, but "within a period thereafter which is reasonable in all the circumstances".¹⁵⁴ Again, one reason assigned for departing from the old English rule, and those Canadian cases which had followed it was that:

The pace of the market place and the complexities of business have changed radically since this rule or principle was developed in the early 19th century.¹⁵⁵

Cases such as *Brule v. Plummer*, *Asamera* and *A.V.G.* are rather closer in kind to *Lottman v. Standford* than was *Fleming v. Atkinson*. *Brule v. Plummer* and *Asamera* in particular involved rules of law on which people were liable to rely in ordering their affairs:¹⁵⁶ yet the Supreme Court of Canada felt little reticence in retroactively altering in the one case an established rule of law, and in the other an accepted view of the construction of a statute. Certainly the concern for predictability and continuity expressed by Mr. Justice McIntyre is by no means irrelevant, but the requirement of certainty and observation of established rules is only one value that we aim for in our legal system, and may be outweighed by others in appropriate cases.

¹⁴⁹ *Shepherd v. Johnson* (1802), 2 East 211, 102 E.R. 349; *Harrison v. Harrison* (1824), 1 Car & P. 412, 171 E.R. 1253; *Dawson v. Helicopter Exploration Co. Ltd.* (1956), 20 W.W.R. (N.S.) 359 (B.C. S.C.); and see *Hoefle v. Bongard & Co.*, [1945] S.C.R. 360, at pp. 372-374, per Rand J.

¹⁵⁰ The highest value reached by the stock between the dates of conversion and trial; see *Archer v. Williams* (1846), 2 Car. & p. 26, at p. 28, 175 E.R. 11, at p. 12. This measure had been applied in Canada, but only where the wrongdoer was regarded as being a trustee, even though the action was one of detinue: see *McNeil v. Fultz* (1906), 38 S.C.R. 198, at p. 205; *Toronto General Trusts Corp. v. Roman* (1962), 37 D.L.R. (2d) 16 (Ont. C.A.), aff'd. (1963), 41 D.L.R. (2d) 290 n.

¹⁵¹ See *The Queen in Right of Alberta v. Arnold* (1970), 14 D.L.R. (3d) 574, at p. 591, per Spence J. (S.C.C.).

¹⁵² This approach was foreshadowed in cases such as *Williams v. Peel River Land & Mineral Co.* (1886), 55 L.T. 689 (C.A.); *Sunderland v. Solloway Mills & Co. Ltd.*, [1930] 3 W.W.R. 641 (B.C. S.C.).

¹⁵³ See e.g., *Malhotra v. Choudhury*, [1979] 1 All E.R. 186 (C.A.), which was referred to with apparent approval in *Johnson v. Agnew*, [1979] 1 All E.R. 883, at p. 896, per Lord Wilberforce (H.L.).

¹⁵⁴ *Supra*, footnote 148, at p. 23.

¹⁵⁵ *Ibid.*, at pp. 13-14.

¹⁵⁶ This element was less strong in *A.V.G.*, as reliance on the rule in *Bain v. Fothergill* is always apt to be risky.

As has been observed earlier, the present law on the trustee's duty of impartiality can hardly be said, particularly after the decision of the Supreme Court in *Lottman v. Stanford*, to be absolutely certain, especially insofar as the status of *Re Smith* is concerned. Even if the "rules" were certain, difficulties of construction, and the judge's view of whether the trustee has properly exercised his discretion, to name but two factors, added to the *ex post facto* appraisal of his conduct in a changeable economic situation, will combine to produce great uncertainty about the likely outcome of any litigation, and indeed about any specific investment decision that may be contemplated. Thus a refusal to extend the rule in *Howe v. Lord Dartmouth* as the Court of Appeal wished really fails to meet the major aim which Mr. Justice McIntyre articulated. If one is concerned about upsetting the plans of testators, and overthrowing their legitimate expectations at the time of drafting their wills, then economic forces have already conspired to do that, and the best the courts can do is to try, by stressing the trustee's duty to act impartially, to maintain some sort of balance in the present difficult situation. The testator in *Lottman v. Stanford* died in 1972, and since that time the value of money has diminished by almost 50%. Whatever his expectations were about the future needs of his widow, unless he was a man of unusual foresight, he probably failed to take into account the economic activity of the intervening years. It is in addition possible that his will was drawn some considerable time before 1972, and very many of the disputes between beneficiary and trustee which are likely to be litigated in the next few years will arise under wills drafted ten or more years ago. In these circumstances, we may have a crying need for a rule which is retroactive,¹⁵⁷ for one hopes that testators preparing their wills today are being advised to take into account possible increases in the paper value of their assets, and corresponding decreases in the purchasing power of the income generated by such assets. If and when the legislatures feel able to move on this point, the problem, one hopes, will have resolved itself to the extent that it is capable of solution by legal rules and legal drafting techniques.¹⁵⁸

One must also consider the cost involved in solving a problem such as this by legislation, assuming that there is a problem requiring a solution: Mr. Justice McIntyre never made plain in his judgment in *Lottman v. Stanford* whether he felt the law should be changed in the manner advocated by the Ontario Court of Appeal; and even if the

¹⁵⁷ I do not pause to consider how valuable the ability of judges to change the law only prospectively might be, as even if this power existed I would still contend that in *Lottman v. Stanford* retroactive change was necessary.

¹⁵⁸ I can not be so optimistic as to believe that the problem will be resolved by a massive fall in the rate of inflation.

Supreme Court were not prepared to act, such an indication of its views on the desired state of the law might have been of assistance, for a provincial Attorney General's department or law reform organization would have had the benefit of the opinion of the highest court in considering whether to initiate change. If the law is now to be altered, it will require action by nine provincial Legislatures, probably at the instance of one of the organs of government already mentioned. Nine pieces of legislation will have to be drafted, either with or without a prior report, and time set aside in the Legislatures to enact the appropriate legislation. If this is done, it will take far longer, and involve a much greater expenditure of public money than would have been involved in preparing an opinion of the Supreme Court introducing such a change, which expenditure was in any event required by the opinion under discussion. Admittedly it might have taken the learned judge longer to prepare and write his judgment had he been considering whether such a change were necessary and why, but it would seem that even allowing for this there would be a significant net saving in solving this particular problem by judicial legislation. It is becoming fashionable to subject legal rules to an economic analysis to see whether they promote efficiency or not;¹⁵⁹ given that the courts of necessity have the power to legislate, it seems wasteful to require changes such as this to be implemented by statutory reform, particularly in a federal system.

It may be objected that the Supreme Court has too heavy a workload already, without taking on an onerous legislative programme on the supposition that it is cheaper for it to change the law than for the Legislatures. One must reiterate that the legislative power which the courts do indisputably possess should be and is used very sparingly. Judicial legislation, it is submitted, is particularly suitable where the rules the reform of which is advocated are judge-made rules,¹⁶⁰ and where the proposed reform occasions a minimum of interference with other legal rules. One criterion to use in determining whether this is so could be how involved the amending statute would need to be. A statute implementing the change canvassed in *Lottman v. Stanford* could be extremely simple indeed.¹⁶¹ Obviously changes in other areas of law may be advocated which would require lengthy and skilful drafting; the courts should obviously not attempt to institute such changes on their own. But since the Supreme Court was required

¹⁵⁹ The *locus classicus* is Posner, *Economic Analysis of Law* (2nd ed., 1977); see in particular ch. 20.

¹⁶⁰ The factor that a particular rule is judge-made was stressed by Laskin C.J.C. in *A.V.G., supra*, footnote 141, at p. 298.

¹⁶¹ The following wording could for example have sufficed: "The duty of impartiality imposed upon a trustee with respect to personal property held for successive beneficiaries shall extend and be deemed always to have extended to real property."

to produce a judgment in the case at hand, it is unfortunate that we did not get greater value from the expenditure involved in its preparation; as it is, the court could as well have allowed the appeal at the end of arguments without giving reasons. If the court is content to hear appeals from innovatory judgments of the provincial courts of appeal, and then reverse them without giving any substantial reasons for doing so, then it would perhaps be better for the Supreme Court simply to refuse leave to appeal in these cases, and allow the provincial courts to amend their own laws if they should feel this to be desirable. Then the individual provincial Legislature can decide to nullify such attempts at judicial legislation or not as it sees fit. This would be likely to promote enormous differences in the law between the various provinces: that is, however, in any event a likely result of a decision such as that in *Lottman v. Stanford*. It is possible that some provincial Legislatures will move to change the law; it is unlikely in the extreme that all will do so. By refusing to take a legislative function upon itself, the Supreme Court may well create a lack of uniformity, which is contrary to what it was submitted earlier should be one of the aims of the court.

Conclusion

Does the trustee's duty of impartiality extend to real property, in the absence of an express trust for sale? The answer is no more clear after *Lottman v. Stanford* than before. The rule in *Howe v. Lord Dartmouth* does not extend to residuary realty: but can the approach exhibited in *Re Smith* be applied to residuary or specifically devised realty? Perhaps not, unless by legislative intervention. It is unfortunate that the Supreme Court passed up the opportunity to develop the law in this area, particularly when the rule of law under consideration is a judge-made rule, created under different social and economic conditions, and which continues a distinction now discarded for most purposes, when, furthermore, the Supreme Court has shown a recent willingness to innovate¹⁶² and where it could do so more efficiently than can the Legislatures.

Certainly the decision in *Lottman v. Stanford* in no way bars a testator from requiring even-handed treatment with respect to realty; but one should not be lulled into thinking that the content of the legal rule or presumption is therefore irrelevant, being simply the starting-

¹⁶² Martland, Ritchie, Dickson and Estey JJ. were the other judges in *Lottman v. Stanford*. It is hard to understand why they displayed such reticence in developing the law when Ritchie, Dickson and Estey JJ. joined in the decision in *A.V.G.*, *supra*, footnote 141, and Martland and Dickson JJ. joined with Estey J. who wrote the judgment in *Asamera*, *supra*, footnote 148. Martland and Ritchie JJ. concurred with Dickson J. in *Keizer v. Hanna*, *supra*, footnote 128.

point from which the draftsman works.¹⁶³ Not all wills are professionally drawn; not all professional draftsmen are unfortunately as well acquainted with the legal rules in areas such as this as they should be, and even if they are may not foresee trouble ahead resulting from economic factors; and the costs of requiring even-handedness may exceed what the cost of excluding the duty would be were the rule reversed, as equality of treatment will be desired in many cases. This is one reason why the content of the rule is not neutral; but of greater importance, I would submit, is that the principle and rules discussed above are not merely technical formulae to be inserted or discarded at the draftsman's whim; they contain and prescribe standards of fairness, and without that aim they would in truth be pointless. If the Supreme Court chooses to look at the rules we have inherited as mere accidents, whose development owes nothing to context, then it will doubtless conclude that their application today is equally accidental, and their unfortunate impact in the context of today no cause for judicial as opposed to legislative concern. Fortunately, many of the cases cited above show the court acting quite differently, and one is left to hope that the approach manifested in *Lottman v. Stanford* is as much an aberration as the restriction on the duty of impartiality that it perpetuated.

¹⁶³ I say this with due respect for the contrary view of Prof. Cullity, *op. cit.*, footnote 94, at p. 121.