Bowring

v.

The Commissioner Of Estate And Succession Duties

[FEDERAL SUPREME COURT - Civil Appeal (Hallinan, C.J.,

Rennie and Archer, JJ.) June 3, 5, 6 9, July 18, 1958]

[1958 - 60] 2 Barb. L.R. 14

Estate duty - Deceased settlor reserving right to amend or revoke trust - Any such amendment or revocation subject to consent in writing by trustees - Whether deceased competent to dispose of property - Estate and Succession Duties Act, 1941, ss. 3 and 20.

Facts: Lady Gilbert-Carter, by deed dated June 16, 1936 and amended on December 4, 1939 andJune 13, 1944, settled property upon trust to pay the net income to her from time to time as longas she should live together with such parts of principal as the trustees in their uncontrolled discretion shall deem advisable for her comfort and support. Paragraph 4, as amended, provided that:

"the donor during her life-time shall have the right at any time to amend or revoke this trust either in whole or in part by an instrument in writing provided, however, that any such amendment or revocation shall be consented to in writing by the trustees."

A paragraph provided for the trust to be governed by the laws of the Commonwealth of Massachusetts.

Lady Gilbert-Carter, who was domiciled in Barbados, died on November 12, 1953 without having revoked the trust and leaving a will dated March 15, 1952 in which the appellant was named one of the executors. Section 20 (1) of the Estate and Succession Duties Act, 1941, provided that the executor of the deceased shall pay estate duty in respect of all property of which the deceased was competent to [14] dispose at her death, and the executor was assessed as an accountable party in respect of the property comprised in the trust deed. The executor appealed against the assessment to the Vice-Chancellor who dismissed the appeal.

On appeal to the Federal Supreme Court:

Held: (Archer, J. dissenting) that under the laws of Massachusetts the trustees had a complete discretion to give or withhold their consent provided they acted honestly and from a proper motive. Such a discretion constituted a fetter on Lady Gilbert-Carter's favour so as to render her not competent to dispose of the trust property.

Appeal allowed**.**

Cases referred to:

(1) Re Phillips, Lawrence v. Huxtable, [1931] 1 Ch. 347.

(2) Re Watts, Coffey v. Watts [1931] All E.R. Rep. 786.

(3) Re Churston Settled Estates, Freemantle v. Churston (Baron) [1954] Ch. 334.

(4) Re Dilke, Re Dilke's Settlement Trusts, Verey v. Dilke [1921] 1 Ch. 34.

(5) Re Joicey, Joicey v. Elliot [1915] 2 Ch. 115.

(6) A.G. v. Charlton [1877] 2 Ex. D. 398.

(7) Re Parsons, Parsons v. A-G [1942] 1 Ch. 12.

(8) Edie v. Babington 3 IR. Ch. R. 568.

(9) Re Byron Williams v. Mitchell [1891] 3 Ch. 474.

(10) Re Fane, Fane v. Fane [1913] 1 Ch. 404.

(11) Charlton v. A-G (1879) 4 App. Cas. 427.

(12) Re Wellington (Duke), Glentanar v. Wellington [1947] 2 All E.R. 854; On appeal [1948] Ch.118.

(13) A.G v. Astor [1922] 2 K.B. 651; on appeal [1923] 2 K.B. 157.

(14) Eland v. Baker (1861) 29 Beav. 137.

(15) Cowley (Earl) v. Inland Revenue Comrs. [1899] A.C. 198.

Statutes referred to:

(1) Barbados Estate and Succession Duties Act, 1941, sections 3, 7, 20, 23.

(2) Finance Act, 1874, sections 22(2)(9) (U.K.).

(3) Revenue Act, 1845 (U.K.).

(4) Succession Duty Act, 1835 (U.K.).

Mr. J.S.B. Dear instructed by Messrs. Cottle, Catford & Co. for the appellant.

Mr. C.A. Burton, Attorney-General, instructed by the Crown Solicitor for the respondent.

HALLINAN, C.J.: Lady Gilbert-Carter settled the property which is the subject-matter of thiscase by deed of trust dated June 16, 1936, referred to in this judgment as the Boston Trust. The trustees under deed of trust were to pay the net income to the donor, Lady Gilbert-Carter. Underclause 4 of

the trust, the donor [15] was entitled to revoke or amend the trust in whole or in part by an instrument in writing delivered to the trustees.

The respondent seeks to charge Lady Carter's executor with liability for death duties on the property settled in the Boston Trust. The respondent does not claim under s. 7 (b) of theBarbados Estate and Succession Duties Act, 1941, which relates to the life interest of a deceased person, for the person chargeable there under is not the executor but the person to whom the benefit accrues. Owing to the circumstances of this case, the respondent must endeavour torecover death duties from the executor who under s. 20 of the Barbados Estate and SuccessionDuties Act of 1941 is only liable in respect of property of which the deceased was competent to dispose at her death.

The question which falls for decision in this case is whether the requirement that LadyGilbert-Carter should obtain the consent of trustees before revoking or amending the trust constituted such a fetter on her power to dispose of the property that she was not "competent todispose" within the meaning of that phrase in s. 20 and as defined in s. 3 (a) of the BarbadosEstate and Succession Duties Act of 1941.

The Commissioner of Estate and Succession Duties (the respondent) held that Lady Gilbert-Carterwas competent to dispose within the meaning of the section, and that death duties are payable onthe property settled by the deed of trust. Upon appeal to the Court of Chancery in Barbados theVice-Chancellor upheld the contention of the respondent and this appeal has been brought againstthat decision.

Section 3 of the Barbados Estate and Succession Duties Act of 1941 is for all purposes material to these proceedings the same as s. 22 (2) (a) of the Finance Act, 1894, and the respondent in this case has therefore relied on the official practice in England under statutes similar to the BarbadosAct. The position in England is concisely summarised in Hanson on Death Duties, 10th Edn., paragraph 549:

"A property over which the deceased had general power of disposition jointly with some other person is not within this subsection [s.22 (2) (a) of the Finance Act [1894], suchpower not being `such general power' as would enable `him' to dispose of the property `as he thinks fit.' Whether a general power exercisable with consent of some other person iswithin the subsection seems doubtful... It seems difficult to say that, where consent ofanother person is necessary, the deceased was competent to dispose of the property `as he thinks fit'; there seems little difference in substance between a power of this kind and a joint power."

Hanson then mentions the case of Re Phillips [1931] 1 Ch. 347 and the case Re Watts [1931] AllE.R. Rep. 786 (to which I shall refer in this judgment) and he concludes this paragraph of this book as follows:

"The official practice is to claim duty in the Phillips type of case but not in the Watts type ofcase. In view of the observation of Roxburgh, J., in Re Churston Settled Estates [1954] 1Ch. at p. 334, the question seems an open [16] one."

Maugham, J. [as he was then], who decided Re Phillips, stated that the earlier case, Re Dilke, supported his view. Under a deed Dilke had a general power to appoint subject to the consent of his trustees. He, with the trustees' consent, appointed to such persons as he might by will appoint. It was held that the trustees were not required to approve of the persons who were to benefit under the exercise of the power, and, therefore, the appointment was good. But I do not think this case is

authority for the proposition that, if the trustees had refused to agree to such an arrangement and withheld their consent, then the court would have compelled them to give it.

In Re Phillips Maugham, J., went a step further. A testator with a general power of appointmentto be exercised with his trustees' consent made an appointment to his daughter. His creditors sued,as in equity they could recover out of the fund so appointed if the power was general andunfettered. Did the consent of the trustees create such a fetter? Maugham, J., held that it did not,because the trustees could only veto the exercise of the power but were not concerned in the selection of the objects of the power, so that the power was general. The judgment does not say so, but the logical implication of this decision is that where a trustee has no duty as to the selection of the objects, in this respect he has no powers either. This case, perhaps in order to give effect to the equitable rule in favour of creditors, went beyond Dilke's case. Phillips' case has beenfollowed in Re Joicey [1915] 2 Ch. 115. These cases are authority for the view that where asettlement does not indicate that the trustees are to exercise a discretion in the selection ofobjects, they have no power to withhold their consent to the objects selected by the donee.

In Re Phillips the main question was whether a power was general and unfettered so that a testator's creditors could benefit. In Re Watts the question was whether this power was or was not general since, if it was general, it would not infringe the rule against perpetuities; whereas if itwas, it would. The consent of the mother of the donee of the power was expressly required not only to revoke the trust of the settlement but to declare new trusts, and Bennett, J., distinguishing Phillips' case, held that it was a sufficient fetter to make the power not general or as he called it "special". In Re Churston Settled Estates the application of the rule against perpetuities to apower of appointment was again in issue and Roxburgh, J., followed the decision in Watts' case.

As indicated in the passage I have cited from Hanson, the observation of Roxburgh, J., in the Churston case has left open to doubt the soundness of the distinction between the powers and duties of trustees in cases like that of Re Phillips, on the one hand, and Re Watts, on the other. I share these doubts. I should be slow to adopt this distinction when interpreting the expression "competent to dispose" in a revenue statute. It seems to me that the position of a trustee whose consent is required for the exercise of a power of appointment resembles the position of the donee of a power of appointment to be exercised jointly, rather than that of a special power where the donee can only appoint among a restricted class. In A-G v. Charlton a joint power was held not tobe a general power because it required the concurrence of two minds: I consider that the same may be said of a [17] power requiring the consent of a trustee.

Furthermore, where the ordinary settlor creates a power of appointment subject to a trustee's consent without specifying anything more he would surely expect his trustee to veto the selection of objects of the power if the choice of the donee was foolish. That I should have thought was oneof the functions of a trustee. In my view Re Phillips introduces a highly artificial construction inorder to turn what should not have been a general power (because it required the concurrence of two minds) into a general power so as to save the equitable right of creditors to share in the fund appointed under the power. Phillips' case did this by deciding that it is not enough for a settlor to say "The trustee must concur before the donee appoints"; he must make it clear that the trustee isto exercise a discretion in the selection of objects by the donee. The law has been further confused by the decision in Watts' case, where a power that is subject to the consent of a trustee having a discretion to veto the selection of objects is called a special power. The term "special power" hitherto in English law has meant a power of appointment to a limited class, not a power subject to the veto of a trustee on the selection of objects. This last kind of power is not a general power but it is not a special power either, just as a power to be exercised jointly is not a general power but is not a special power.

Happily, the Boston Trust contains a provision that it is to be governed by the laws ofMassachusetts so that we need not decide whether the English practice of the Commissioners ofEstate and Succession Duties in applying the distinction between the Phillips' type of case and the Watts' type of case is correct; but I think that a consideration of the English authorities serves bycontrast to throw into relief the powers, duties and discretion of the trustees in this case according to the law of Massachusetts.

The learned Vice-Chancellor had before him two treatises by Professor Scott, an eminent authority on the law of trusts in Massachusetts, and these treatises and the application of the law as stated therein to the Boston Trust were expounded by three expert witnesses, all qualified lawyers from America, two being called by the appellant and one by the respondent.

The Vice-Chancellor found that the law of Massachusetts to be applied is as stated in Professor Scott's Restatement at s. 330, paragraph 1, a long passage headed "Where power to revoke withthe consent of the trustee" and which reads as follows:

"If the settlor reserves a power to revoke the trust only with the consent of the trustee, hecannot revoke the trust without such consent. Whether the trustee can properly consent tothe revocation of the trust and whether he is under a duty to consent to its revocation depends upon the extent of the power conferred upon the trustee by the terms of the trust.To the extent to which discretion is conferred upon the trustee, the exercise of the power is not subject to the control of the court, except to prevent an abuse by the trustees of his discretion. (See s. 187.)

If there is a standard by which the reasonableness of the trustee's [18] judgement can be tested, the court will control the trustee in the exercise of the power where he acts beyondthe bounds of a reasonable judgment, unless it is otherwise provided by the terms of the trust."

Then follow instances where the settlement either in express words or by implication limits the discretion of a trustee in giving or withholding his consent. Professor Scott then continues:

"On the other hand, the trustee may be authorised to consent to the revocation of the trust with no restriction, either in specific words or otherwise, imposed upon him in the exerciseof the power. In such a case there is no standard by which the reasonableness of the trustee'sjudgement can be tested, and the court will not control the trustee in the exercise of the power if he acts honestly and does not act from an improper motive (see s. 187 andComments i-k thereon). The power of the trustee in such a case to consent to the revocation of the trust is like a power to appoint among several beneficiaries."

The passage from Professor Scott concludes by saying that the purpose of the settlor in inserting the provision as to the trustee's consent may be important and instances the case where a settlor wishes to give an unrestricted power to the trustee in order to escape liability to tax - in suchcases this discretion would not be controlled by the court.

The Vice-Chancellor then applied this statement of the law of Massachusetts to the Boston Trust as follows:

"I can find no standard of duty expressed or implied in the trust instrument and I think thatin these circumstances the trustees owed a duty to the settlor to give consent to any revocation or amendment made by her and had no other duty provided they acted in good faith and from proper motives."

With respect, I think that the learned judge misdirected himself in finding that the trustees owedany duty to the settlor to give their consent. I can find nothing in the passage he cited from Professor Scott nor in the evidence of the expert witnesses to support this conclusion. All thesewitnesses agreed that under the terms of the Boston Trust the trustees had a complete discretion to give or withhold their consent provided they acted honestly and from a proper motive. If thesewitnesses considered that the trustees owed a duty to the settlor then they must have said that the court would control the trustees by forcing them to comply with the wishes of the settlor who isalso the donee of the power. It was perfectly clear from their evidence that in their view the courts of Massachusetts would not do so. On a plain reading of the Boston Trust and applying the learning of Professor Scott thereto I do not see how these witnesses could have said otherwise.

The difference between the law of Massachusetts and the English decision in Re Phillips and in ReJoicey may be put in this way: the powers and duties of [19] trustees according to the law of Massachusetts are only controlled by the court if either expressly or by implication the settlement indicates that in given circumstances the trustees must exercise their discretion within certain limits. If in such circumstances the trustees exceed those limits, the court will control them. But,where the settlement contains a simple provision that the donee of a power must obtain theconsent of a trustee to its exercise, then the court will not control the discretion of the trustees exercised honestly and from proper motives. The English decisions in Re Phillips and in ReJoicey, on the other hand, declare that when a settlement contains the simple provision just mentioned which does not either expressly or by implication indicate that the settlor imposes onthe trustee the duty to veto a selection of objects of which they disapprove, then the court will control the trustees if they attempt to veto such selection. In short, according to the English decisions, a trustee is assumed to have no duty (and I suppose therefore no power) to veto the selection of objects unless an intention to impose such duty is expressly or by implication contained in the settlement; whereas according to the law of Massachusetts a trustee is assumed to have powers of veto (including the power to veto the selection of objects) unless an intention tolimit such power is expressly or by implication contained in the settlement.

Since in the present case there is no such intention to be gathered from the Boston Trust, the trustees have, in my view, such a discretion to give or withhold their consent as constitutes a fetteron the power of the settlor-donee. She was not "competent to dispose" within the meaning of this phrase in s. 3 (a) of the Barbados Estate and Succession Duties Act, and therefore I consider that this appeal should be allowed.

The respondent is only entitled to recover from the appellant the sum of $17,386.99 together with interest in accordance with s. 23 of the Barbados Estate and Succession Duties Act of 1941.

RENNIE, J.: This appeal is from the judgment of the Vice-Chancellor of Barbados in an appealunder the Barbados Estate and Succession Duties Act, 1941.

The appellant is one of the executors of the estate of the late Lady Gertrude Codman Gilbert-Carter who at the time of her death was domiciled in Barbados. Included in the estate is property in the United States of America which may conveniently be referred to as the BostonTrust. This property is valued at B.W.I. $563,113.32. The Boston Trust was created by LadyGilbert-Carter by a deed of trust dated June 16, 1936. In paragraph 4 of that deed it is provided:

"The donor during her life and her said son after her death shall have the right at any time or times to amend or revoke the trust in whole or in part by an instrument in writing delivered to the trustees. If the agreement is revoked in its entirety the revocation shall take place upon the delivery of the

instrument in writing to the trustees, but any amendment or any partial revocation shall take effect only when consented to in writing by the trustees." [20]

This paragraph was subsequently amended on December 4, 1939, and remains in its amended form:

"The donor during her lifetime shall have the right at any time to amend or revoke this trust either in whole or in part by an instrument in writing provided, however, that any such amendment or revocation shall be consented to in writing by the trustees."

In paragraph 1 of the trust deed in its original form it is set out:

"To pay the net income to the donor not less often than quarterly as long as she shall live, together with such parts of principal as she may from time to time in writing request."

On December 28, 1939, this paragraph was amended to read:

"To pay the net income to the donor from time to time as long as she shall live."

On June 13, 1944, this paragraph was again amended in the amended form to read:

"To pay the net income to the donor from time to time as long as she shall live together with such parts of principal as the trustees in their uncontrolled discretion shall deem advisable for the comfort and support of the donor."

In paragraph 8 of the trust deed it is set out inter alia:

"This trust is executed in the Commonwealth of Massachusetts and shall be governed by the laws thereof."

At the hearing before the Vice-Chancellor and before this court it was agreed on both sides that the law applicable to the interpretation and construction of the trust deed and the rights, powers and duties conferred and imposed by it is the law of the Commonwealth of Massachusetts.

Relevant sections of the Barbados Estate and Succession Duties Act, 1941, are ss. 3 (a) and 20(1). They are as follows:

"3. For the purposes of this Act –

(a) a person shall be deemed competent to dispose of property if he has such an estate orinterest therein or such general power as would, if he were sui juris, enable him to disposeof the property, including a tenant in tail whether in possession or not; and the expression`general [21] power' includes every power or authority enabling the donee or other holderthereof to appoint or dispose of property as he thinks fit, whether exercisable by instrumentinter vivos or by will, or both, but exclusive of any power exercisable in a fiduciary capacityunder a disposition not made by himself or exercisable as mortgagee."

"20. (1) The executor of the deceased shall pay the estate duty in respect of all property ofwhich the deceased was competent to dispose at his death, on delivering the estate dutyaffidavit to the Commissioner, and may pay in like manner the estate duty in respect of anyother property passing on such death not under his control, if the persons accountable forthe duty in respect thereof request

him to make such payment; but an executor shall not beliable for any duty in excess of the assets which he has received as executor, or might but forhis own neglect or default have received."

As I see it this court is required to decide whether Lady Gilbert-Carter was competent to disposeof the property comprised in the Boston Trust. The appellant says she was not, because the law of Massachusetts gives the trustees a wide discretion in consenting or not consenting to the revocation of the trust: alternatively, if the law of Massachusetts is not to be applied in ascertaining the powers and duties of the trustees, then in our law, she was not competent to dispose of the property for the reason that the power she possessed was not a general power.

When dealing with the duty of the trustees under the law of Massachusetts the learnedVice-Chancellor said this:

"I can find no standard of duty expressed or implied in the trust instrument and I think that in these circumstances the trustees owed a duty to the settlor to give consent to any revocation or amendment made by her and had no other duty provided they acted in good faith and from proper motives. It seems to me that Lady Gilbert-Carter retained a power of control over the property in the Boston Trust. This is my view of the matter according tothe law of Massachusetts and according to it Lady Gilbert-Carter had and retained until her death such a power to revoke or amend as would enable her to dispose of the property inthe Boston Trust as she thought fit."

The appellant is asking this court to say that there is no evidence on which the learnedVice-Chancellor could have come to that conclusion. In this it seems to me that the appellant is right. The burden of the evidence of the two expert witnesses (Perkins and Goodale) called by the appellant is that the trustees would not have been bound to give their consent whenever and in whatever circumstances they were asked to do so. They were in agreement with each other that the trustees [22] owed a duty to the beneficiaries under the trust. Then there is the evidence of the expert witness Kane who was called by the respondent and who said that if the trustees acted ingood faith and from a proper motive in refusing to give their consent to the revocation the courtwould not order them to give their consent even in circumstances where the consent was unreasonably withheld. Apart from the evidence of the expert witnesses there is also Professor Scott's Restatement of the Laws which was put in evidence. That restatement contains the following passage:

"On the other hand the trustee may be authorised to consent to the revocation of the trust with no restriction either in specific words or otherwise, imposed upon him in the exerciseof the power. In such a case there is no standard by which the reasonableness of the trustee's judgment can be tested and the court will not control the trustee in the exercise of the powerif he acts honestly and does not act from an improper motive (see s. 187 and comments i-kthereon). The power of the trustees in such a case to consent to the revocation of the trust islike a power to appoint among several beneficiaries."

The only conclusion one can come to on the totality of that evidence is that the trustees possessed a wide discretion in relation to their consenting to the revocation of the trust and that the courts of Massachusetts would not compel them to give their consent unless it could be shown that they acted dishonestly and from an improper motive. That restraining power of the trustee amounts inmy view to a fetter on Lady Carter's right to revoke the trust and is a sufficient fetter to render her not competent to dispose of the property as she thinks fit.

The foregoing reasons seem to me to be sufficient to dispose of this appeal, but I suppose I should go further and deal with the other arguments that were adduced in this case.

The other argument put forward by the appellant deals with the question of whether Lady Carterwas competent to dispose of the trust property quite apart from the application of the law of Massachusetts. This argument presupposes an inability in the court to determine the law of Massachusetts in relation to this matter. That being so, the question now turns on the construction to be given to the words "competent to dispose" in the Barbados Act. In Re Parsons ([1943] Ch.12 at p. 15) Lord Green, M.R., said:

"The phrase `competent to dispose' is not a phrase of art, and taken by itself and quite apart from the definition clause in the Act it conveys to my mind the ability to dispose including of course the ability to make a thing your own...

The matter is set beyond doubt by the definition in s. 22(2)(a) of the Finance Act, 1894. It isnot an exhaustive definition. It leaves the words `competent to dispose' to bear theirordinary meaning in the English language and merely adds certain types of competencewhich the legislature thought might be considered not to be included in the natural meaningof [23] the words. So far as is applicable to the present case the definition is: `A person shall be deemed competent to dispose of property if he has any power or authority enabling him to appoint or dispose of property as he thinks fit'."

Full weight can be given to this passage from the judgment of Lord Green, for s. 3 (a) of the Barbados Act is substantially the same as s. 22(2)(a) of the Finance Act, 1894. And the definition he applied to the case he had under consideration seems to me an apt one, for the instant case.

The learned author of Hanson's Death Duties, 10th Edn., at p. 212, writes:

"It seems difficult to say that where consent of another person was necessary the deceased was competent to dispose of the property `as he thinks fit'; there seems little difference insubstance between a power of this kind and a joint power."

The learned author then deals with the cases of Re Phillips and Re Watts and goes on to say:

"In view of the observations of Roxburgh, J. in Churston Settled Estates the question seems an open one."

In Phillips' case the headnote reads:

"Under a settlement a fund was given to such persons after the death of A. as he should with the consent of the trustees appoint by deed:

Held: that the power was a general power and that the power having been exercised, thefund was equitable assets for the payment of A.'s debts, notwithstanding that the consent ofthe trustees to the exercise of the power was necessary."

In that case the court was concerned with the rights of a creditor as against the claim of avolunteer. The court was also influenced by the decision in Re Dilke. Maugham, J., said "the matter is not untouched by authority" and he referred to Dilke's case. In Dilke's case a person ofunsound mind not so found by inquisition was given a power of appointment which was to be exercised with the consent and concurrence of trustees. He recovered and made a deed with theconsent and concurrence of trustees, whereby he appointed the trust funds to such person orpersons and

purposes as he should by will or codicil appoint. He subsequently made an appointment by codicil and it was held that on the true construction of the power the trustees were not required to approve of the persons who were to benefit under the exercise of the poweror to the extent to which they were to benefit, but that the exercise of the power was merely madeconditional upon the consent and concurrence therein of the trustees, and that the deed was avalid exercise of the power. [24]

The deed itself showed that Sir Charles Dilke at the date of the original deed was not of sound mind and it was argued that the real intention of the provision was that the question whether SirCharles was competent to exercise the power of appointment should be considered by the trusteesand that their consent to the execution of the deed testified by their concurrence in the deedshould be obtained before it could be contended that the power had been exercised. The judgment seems to uphold that argument and in effect says that the requirement of the trustees' consent wasa safeguard against the exercise of the power by a person of unsound mind. Once the disability was overcome, the need to have the trustees' consent was no longer real. On that basis the judgment would be an authority limited to the very special circumstances of the case.

Phillips' case, as I have already pointed out, is concerned with the claim of a creditor. In such cases it would seem that the court have not kept rigidly within the limits of general powers. The learned author of Farwell on Powers, 3rd Edn., at p. 8, writes:

"A power to appoint to whom the donee pleases except A. has been held to be a general power so as to make the appointed fund assets for the payment of debts (Edie v. Babington,3 Ir. Ch. R. 568) but not to be a general power within s. 27 of the Wills Act (Re Byron, Williams v. Mitchell [1891] 3 Ch. 474)."

It seems to me that better assistance can be had in solving this problem by looking at the cases dealing with the rule against perpetuities. In Re Fane ([1913] 1 Ch. 404 at p. 413, Buckley, L.J., said:

"General powers are exempt from the restrictions of the rule against perpetuities becausethe existence of a general power leaves the property in a position which for the presentpurpose, does not differ from that in which it would stand if there were an absolute owner.There exists by the existence of the power a present immediate and unrestricted alienability and there is no necessity to consider in that case how far a perpetuity may be created anymore than it is necessary to consider it in the case of an absolute owner."

In the case of Re Watts a power was given to revoke a settlement with the consent of the donee's mother and to appoint and declare any new or other trust powers and provisions with the consent of the mother - Held: it would not be right to hold that the donee of the power was in substance the owner of the property and consequently free to deal with it in any way she pleases and that the power was a special power.

Dilke's case and Phillips' case were both considered and distinguished in Watts' case, which bearsa much closer resemblance to the instant case than either Dilke's case or Phillips' case. In Watts'case as in the instant case the power was one to revoke a settlement with the consent of another party.

In Re Churston Settled Estates, Freemantle v. Churston (Baron) Roxburgh, J. [25] followed thedecision in Watts' case. It is true that he severely criticised some of Bennett, J.'s reasons but heapproved of what he regarded to be the fundamental basis of Bennett, J.'s decision which was thatit would not be right to hold that the donee of the power was in substance the owner of theproperty and consequently free to deal with it in any way she pleased.

The decision in Watts' case and in Churston's case seem to me to do no more than apply thedictum of Lord Selforne in Charlton v. A-G. (4 App. Cas. 427 at p. 446):

"If, however, the substance of the first branch of the section is regarded it certainly points tothat kind of absolute power which is practically equivalent to property and which may reasonably be treated as property for the purpose of taxation. That is the case with a general power exercisable by a single person in any way which he may think fit. But it is not thecase when a power cannot be exercised without the concurrence of two minds, the onedonee having and the other not having an interest to be displaced by its exercise."

The review of the cases I have made shows Dilke's and Phillips' on the side of the power being ageneral power, and on the side of its being a special power are the dictum in Charlton's and the decisions in Watts' and Churston's. Dilke's case in my view was decided on very special circumstances and its authority must necessarily be restricted. Phillips' case concerned the claimof a creditor and it would appear that special considerations are given to such claims. On the other hand, Watts' case bears a close resemblance to the instant case and not only was the decision against the power being a general power but Dilke's case and Phillips' case were considered and istinguished. That is sufficient to satisfy me that the power is not a general power but there is theadded authority of Churston's case.

In my view the appeal should be allowed.

ARCHER, J.: Lady Gilbert-Carter, who was domiciled in Barbados, died in the United States ofAmerica on November 12, 1953, leaving a will dated March 15, 1952, of which the appellant wasnamed as one of the executors. She had in 1936 created a settlement of certain property by a trust deed executed in Boston, Massachusetts, in the United States of America, under clause 4 of which she reserved to herself the right to revoke the entire trust without the necessity of obtaining theconsent of the trustees to such revocation and also the right, but only with their consent in writing, to amend the trust or partially revoke it. Clause 1 of the trust deed specified the purposes of thetrust. Under that clause Lady Gilbert-Carter (hereinafter sometimes refereed to as "the settlor") became the sole beneficiary during her lifetime and was entitled to the net income of the trusttogether with such parts of the principal as she might from time to time in writing request.

The trust deed was amended on December 4, 1939, and the consent of the trustees to totalrevocation of the trust was thereby provided for. It was further [26] amended on December 28, 1939,

when the settlor waived and surrendered her right and privilege to request any part of principal and retained only her right to receive the net income of the trust. On June 13, 1944, the trust deed was again amended and the trustees were given uncontrolled discretion to pay such parts of the principal to the settlor as they should deem advisable for her comfort and support. Her right toreceive the net income of the trust continued as before and clause 4 of the trust deed as amendedon December 4, 1939, remained in its amended form. The settlor died without having revoked the trust and the respondent called upon the appellant to pay estate duty on the property comprised therein (hereinafter called "the trust fund") on the footing that the settlor at her death had been competent to dispose of it.

The appellant takes the stand that the settlor was not competent to dispose of the trust fund at her death and that his accountability on which his liability is dependent is limited under s. 20 (1) of the Estates and Succession Duties Act, 1941, to the property described in his estate duty affidavit

exclusive of the trust fund. On this behalf it has been submitted that in the discharge of their functions under clause 4 of the trust deed as it stood at the settlor's death the trustees, in giving or withholding consent to amendment or revocation of the trust, were bound to exercise fiduciarydiscretion and that this fetter on the power of the settlor to recover the trust fund was sufficient torender her not competent to dispose of it within the meaning of the Barbados Estate andSuccession Duties Act, 1941. A great deal of the argument has been concerned with the measure of control which the courts of Massachusetts would in the settlor's lifetime have been able to exercise over the trustees' discharge of their functions under clause 4 of the trust deed and the circumstances in which these courts would compel them to act, or restrain them from acting, in acertain way. For the respondent it has been contended that the trustees had a bare power of vetounder clause 4, that they had no right to interfere with the settlor's selection of the persons tobenefit from the trust fund, and she was therefore, for the purposes of the Act, competent todispose of it.

It has not been disputed that the law applicable to the interpretation and construction of the trustdeed and to the powers of the trustees is the law of Massachusetts if it exists and is ascertainable.There has further been an area of agreement between the parties, namely, that the legal estate inthe trust fund vested in the trustees on June 16, 1936, the date of the original trust deed; that fromDecember 4, 1939, their consent was necessary to either amendment or revocation of the trust; that they were under no compulsion to give that consent; and that in giving or withholdingconsent they were bound to act honestly and from proper motives.

Evidence as to the law of Massachusetts on the subject of trusts with particular reference to thenature and extent of the fiduciary duties imposed on the trustees and to the power and authorityreserved to herself by the settlor was given by three expert witnesses all of whom were familiar with two treatises by Professor Scott entitled Scott's Law of Trusts and the Restatement of theLaw of Trusts, both of which, these witnesses averred, were held in high regard by the courts ofMassachusetts. In addition to extracts from the works of Professor Scott and the expert evidence, the Vice-Chancellor had to consider the numerous cases and [27] authorities from which theexpert witnesses refreshed their memories. He found as a fact that the relevant law ofMassachusetts was as stated in Scott's Restatement, s. 330, paragraph 1, and in his Law of Trusts,s. 330, paragraph 9, including those portions on which the appellant's expert witnesses made definite reservations. It is to be observed that he did not unreservedly accept the evidence of the respondent's expert witness. This witness based himself squarely on Professor Scott's works but itmay be that his application of the law stated therein to hypothetical cases put to him did not always reflect a perfect understanding of it. Both of the expert witnesses for the appellant disputedthe passage in Scott's work which deals with the absence of a standard by which the reasonableness of a trustee's judgment can be tested and the inability of a court to control him inthe exercise of his power to consent or to refuse to consent to the revocation of a trust and one ofthese witnesses was prepared to go so far as to challenge the opinion of the Supreme Court of theUnited States of America if it differed from his own.

In Re Duke of Wellington, Wynn-Parry, J. said ([1947] 2 All E.R. 854 at p. 858:

"In a case involving the application of foreign law as it would be expounded in the foreigncourt, the task of an English judge, who is faced with the duty of finding as fact what is therelevant foreign law and who is for that purpose notionally sitting in that court, is frequentlya hard one. But it would be difficult to imagine a harder task than that which faces me,namely, of expounding for the first time either in this country or in Spain the relevant law ofSpain as it would be expounded by the Supreme Court of Spain which up to the presenttime has made no pronouncement on the subject, and having to base that exposition on evidence which satisfies me that on this subject there

exists a profound cleavage of legal opinion in Spain, and two conflicting decisions of courts of inferior jurisdiction."

Wynn-Parry, J. had the difficult task of deciding whether or not a certain doctrine was recognisedby Spanish law, there being no express provision in the Spanish Civil Code, nor any expressdecision of the Spanish Supreme Court, on the point, and the expert witnesses being of opposite views. He resolved the difficulty by himself interpreting an article of the Spanish Civil Code in the light of the expert evidence and thus arrived at a conclusion.

There had been no evidence in this case that according to the jurisprudence of Massachusetts thelaw of Massachusetts until expounded resides in the breast of the judge awaiting exposition. Itmay be so; it may be that the law of Massachusetts abhors a vacuum: on the other hand, it mayequally well be that a particular law comes into existence only when it is first expounded by acompetent authority. It is common ground between the parties in the case that the point in disputebetween them, namely, how far control of the trustees by the courts of Massachusetts extended, isnot covered by any express decision of those courts and therefore awaits exposition. For the reason I have given I feel unable to say with any confidence that the law of Massachusetts on thepoint can be ascertained, but I shall assume for the purposes of this judgment that it can. On that assumption, there was, in my view, evidence upon which the Vice-Chancellor, who had to [28]contend with opposing views which were categorically expressed, could have found that it was ashe stated it to be, that is to say in Scott's works, and I apprehend that I am not concerned to inquire further. I do not trouble to wonder whether Professor Scott would have qualified in any way what he has written if the appellant had been allowed to supplement the evidence, as he sought to do, by an affidavit of Professor Scott. I would merely observe that presumably the courts of Massachusetts in drawing upon the learning of Professor Scott would ordinarily rely upon his written and not his spoken word and in that respect be no safer from liability to errorthan the Vice-Chancellor.

The question then arises as to whether or not the fetter on the settlor's power to revoke the trust as described by Professor Scott negatived her competency to dispose of the trust fund.

Counsel for the appellant has submitted that the Vice-Chancellor's finding that the trustees are notrequired to conform to any standard of duty, express or implied, when exercising their functions under clause 4 of the trust deed results in an increase in the size of the fetter upon the settlor's powers of revocation and amendment and a corresponding diminution in her competency to dispose of the trust fund. He criticised that part of the judgment in which the Vice-Chancellor said:

"I can find no standard of duty express or implied in the trust instrument and I think that in these circumstances the trustees owed a duty to the settlor to give consent to any revocation or amendment made by her and had no other duty provided they acted in good faith and from proper motives."

It is by no means clear to me that the Vice-Chancellor was doing more that stating his final conclusion, namely, that the trustees were not concerned with any change of destination of the trust fund and that for practical purposes their function under clause 4 consisted in giving consentto amendment or revocation of the trust deed in the course of which they must have acted in good faith and from proper motives.

Counsel for the respondent relied on the cases of Re Dilke and in Re Phillips, and contended thatwhatever the fetter upon the power of the settlor to revoke or amend the trust deed, it did notoperate upon the selection of the beneficiaries of the trust fund and in consequence could not have impaired the settlor's competency to dispose of the trust fund. Counsel for the appellant cited

numerous authorities for the purpose of showing their inapplicability to the ascertainment of the settlor's powers. In my view, many of those authorities are in point and cannot be summarily disposed of as counsel for the appellant was wont to do. I propose to deal very briefly with someof the cases to which he referred and to record my observation on them.

Re Dilke was a decision on the validity of the exercise of a power. Interpretation of the provisions of the law corresponding to the Barbados Estate and Succession Duties Act, 1941, was notinvolved in the decision, but it would be quite inaccurate to say that the decision had nothing whatever to do with the question of competency to dispose. As Lord Green, M.R., said inParson's v. A-G. ([1943] 1 Ch. [29] at p. 15):

"The phrase `competent to dispose' is not a phrase of art, and, taken by itself and quite apartfrom the definition clause in the Act, it conveys to my mind the ability to dispose, including, of course, the ability to make a thing your own."

And further on in his judgment he says that the words are wide and, in a sense, popular inmeaning. It is, in my judgment, therefore, fallacious to attempt to proscribe Re Dilke and other cases not decided under the Finance Acts or to keep cases decided under particular enactments in watertight compartments for they afford considerable guidance as to the meaning of competency to dispose as contemplated by the Barbados Estate and Succession Duties Act, 1941. Sankey, J.in A.-G v. Astor equated "power to dispose" in s. 4 of the Revenue Act of 1845 with "power toappoint or dispose as he sees fit" in s. 22(a) of the Imperial Finance Act of 1894 which is identicalwith s. 3(a) of the Barbados Estate and Succession Duties Act, 1941, and it will be seen thatRoxburgh, J., in Re Churston Settled Estates prayed in aid language used by Lord Selborne in Charlton v. A.-G. which he interpreted as being of a general application although the case dealtwith a joint power of appointment and taxation and he was considering the rule against perpetuities.

The validity of the exercise of the power in Re Dilke depended on the construction to be placedupon certain words in a settlement deed under which a general power of appointment which wasconferred was to be exercisable with the consent and concurrence of the settlement trustees (notbeing less than three) or of a majority of three or four trustees. It was held both in the court offirst instance and in the Court of Appeal that upon the natural meaning of the words creating thepower it was impossible to say that the trustees had to exercise a discretion as to the persons to bebenefitted by the exercise of the power, that their consent was merely to the exercise of the powerby the donee of the power and that it had been properly given.

In Re Phillips a settlement fund was given to such persons, after the death of the settlor, as heshould, with the consent of the trustees, appoint by deed. The settlor appointed to certain personsbut died owing a large sum of money to his creditors which his free estate was insufficient tomeet. It was held that his power under the settlement was a general power which he had exercisedand that the settlement fund was equitable assets for the payment of his debts although the consent of the trustees to the exercise of the power was necessary because that consent, while directed tothe exercise of the power, did not involve the trustees in the selection of the objects by the doneeof the power. The testator's competence did not depend on the circumstance that the trustees hadconsented to the appointment.

These two cases received the attention of Roxburgh, J. in Re Churston Settled Estates. Hecriticised portions of the judgment of Bennett, J. in Re Watts, in which Bennett, J. Distinguished Re Dilke and Re Phillips, but he approved of a passage in the judgment which seemed to him to be the fundamental basis of the decision. [30] That passage reads:

"It seems to me that it would not be right to hold that, upon the terms of the powerscontained in the marriage settlement which I have to construe ... (the daughter) was insubstance the owner of the property, and consequently free to deal with it in any way shepleased."

Re Watts was also a decision on the rule against perpetuities. Under a marriage settlement a wifewas empowered to revoke by deed during the life of her mother the trusts declared by thesettlement, and to appoint and declare (with the consent of her mother) any new or other trusts,powers and provisions concerning the premises to which the revocation should extend. Bennett, J.held that the power was a special power and said that regard must be had to the fact of themother's consent in writing being given both to the exercise of power of revocation and to theexercise of the power of new appointment. Roxburgh, J., felt unable to appreciate the relevance ofthis part of the judgment. He said [1954] 1 All E.R. at p. 730:

"Again I cannot appreciate the bearing of that. The two things are different. I, therefore,cannot say that I can see any real ground of distinction on those facts between Re Watts andRe Phillips. As far as I can make out neither Re Dilke nor Re Phillips really threw anyparticular light on the question."

He then proceeded to discuss two statements in Key and Elphinstone's Precedents inConveyancing, namely:

(a) "a power to two or more to appoint as they think fit is a general power for the purpose of therule (against perpetuities)."

(b) "a power to X to appoint generally but with the consent of Y. will be general or special for thepurpose of the perpetuity rule, according to whether on the true construction Y. has merely a bareveto on an appointment or is under a duty to consider the beneficial interests which X. proposesto appoint, and the interests of those who take in default of appointment. If he has such duty thepower is special."

He rejected the former statement and found the distinction which the latter statement drew to beunsupported by authority. Instead, he deduced from the authorities what he conceived to be thetrue underlying principle of the distinction, namely, whether upon the terms of the power thedonee of the power was in substance the owner of the property, and consequently free to dealwith it in any way he or she pleased. He drew comfort from passages in the judgment of James,L.J., in A.G v. Charlton and of Lord Selborne when that case reached the House of Lords. James,L.J., had said (2 Ex.D. at p. 412): [31]

"A joint power of appointment is, in my opinion, an entirely different thing in intention andpractical operation from a general and absolute power of appointment in one individual. Inthe latter case it is really and practically

the equivalent of property - when exercised the property becomes assets. In the other case,it is what purports to be - a form of remoulding a settlement according to the exigencies ofthe family."

Lord Selborne had said (4 App. Cas. at p. 446:)

"If, however, the substance of the first branch of the section (of the Succession Duty Act,1853) is regarded, it certainly points to that kind of absolute power which is practicallyequivalent to property, and which may reasonably be treated as property, for the purpose oftaxation. That is the case with a general power exercisable by a single person in any waywhich he may think fit. But it is

not the case when a power cannot be exercised without theconcurrence of two minds; the one donee having, and the other not having, an interest to bedisplaced by its exercise. Nothing could well be conceived more unreasonable, in a practicalpoint of view, than to treat a joint power like that now in question in a family settlement asequivalent in substance to joint property in the two donees."

Roxburgh, J., was dealing with joint powers of appointment. The question he had to decide waswhether certain limitations affecting the settled estates infringed the rule against perpetuities.Some of his criticisms of Bennett, J.'s reasoning in Re Dilke appear to me to be sound, but withdue deference to him, I think that Re Dilke and Re Phillips, in particular the latter case, do shedmuch light on the problem which he had to consider. There is all the difference in the worldbetween consent which is necessary merely to the validity of the exercise of a power and consentto the choice of persons to be objects of power. That distinction was pointed out in Re Phillips,and the fund was held to be equitable assets for division among creditors because the testator hadnot been fettered in the selection of the objects of the power he was exercising although thetrustees could not have vetoed the exercise of the power. In Re Dilke the exercise of the powerwas held to be valid because the trustees had nothing to do with the choice of beneficiaries. I findnothing in the judgments of James, L.J., and Lord Selborne in conflict with this conception,despite the generality of language which Roxburgh, J., ascribes to Lord Selborne. Lord Selborne'sconcurrence of two minds directed to the selection of objects is far different from the concurrenceof two minds directed to the mere exercise of the power.

In Eland v. Baker a marriage settlement gave to the parents a power, with the consent of thetrustees, to make void the trusts, and of appointing the estate to new uses. This power wasexercised for the purpose of mortgaging the estate to one of the trustees for a sum advanced tothe father. The estate was afterwards sold under a power of sale contained in the mortgage deed.It was held that a good title could not be made under it. Sir John Romilly, M.R., said (29 Beav.137 at p. 140): [32]

"I do not think I can make the purchaser take this title. I do not dispute the proposition thata person may in a marriage settlement introduce a proviso which shall simply put an end tothe deed; for instance, that with the consent of the parties to the deed there shall becontained in it a power to revoke all the trusts and uses of the settlement, exactly as if thesettlement had never been executed, and that such a power may be made perfectly distinctfrom the deed. But I do not so read the power of revocation here contained. It is a power tothe father, the son-in-law and the daughter, with the consent in writing of the trustees forthe time being, `absolutely to revoke and make void all or any of the uses,' etc. If it hadstopped at the end of the sentence, then it would simply have given the property back to thefather, but it goes on to say, 'and by the same or any other deed or deeds to be by them dulyexecuted and attested, to limit and declare new and other uses, trusts, powers, provisos anddeclarations in lieu of and in substitution for the uses, trusts, powers, provisoes anddeclarations which shall have been so revoked and made void, anything hereinbeforecontained to the contrary notwithstanding.

I read this as a power of revocation for the purpose of relimiting the estate, and relimitingthe estate to any new trusts and declarations. How must the estate be relimited? To whattrusts and with what declarations? The answer is, to trusts for the benefit of the personswho are the cestuis que trust of the instrument, according to the true scope and intention ofthe deed itself. Here is an agreement upon marriage that certain land of the father of the ladyshall be settled to the uses therein contained, that is to say, to the use of the husband andwife and to the children of the marriage. My impression is this must mean a resettlement forthe benefit of the persons who are the parties to the marriage and that the consent of thetrustees must be given for that purpose."

This case is instructive for two reasons. It indicates the form of words appropriate to a power ofrevocation simpliciter where consent of trustees is required and also a form of words which bindsthe settlor to resettle the property: in the former case the settlor can resume the property as if nosettlement had even been made; in the latter case he is not free to do so and the trustees canexercise control over him in his treatment of the cestuis que trust.

Counsel for the appellant placed considerable reliance on A.G. v. Astor and on judgments of theCourt of Appeal in the same case. Despite some obscure language in the judgments the decisioncan, I think, be supported on grounds consonant with decisions in Re Phillips and Eland v. Baker.Paragraph 2 of the Information by the Attorney-General which appears in [1922] 2 K.B. at p. 652refers to clause 8 of the settlement which was the subject of inquiry but does not set it outverbatim. Counsel for the appellant in this case contended that the consent of the trustees was notnecessary to new appointments under the Astor settlement but only to revocation of the settlementand trust. I do not so read the paraphrase of Clause 8 of the settlement. If it is an accurateparaphrase (and I know of no source from [33] which the actual wording of the clause can beobtained) the consent in writing of the trustees was necessary to new appointments. If the consentof the trustees had been necessary only to revocation I would have expected paragraph 2 of theAttorney-General's Information to read "...it should be lawful for him to revoke with the consentof the trustees the settlement and the trust thereby created...and to appoint...such new and othertrusts...." I consider therefore that the Astor case is governed by Eland v. Baker and is similar toRe Watts, where although there was power to revoke with consent there had to be appointment tonew uses and both the daughter and her mother were concerned with persons to benefit under thesettlement.

Roxburgh, J., in Re Churston Settled Estates, after quoting with approval the passage fromBennett, J.'s judgments in Re Dilke, to which I have referred, compared the position of a personhaving a general power of appointment with an owner and decided that the doctrine that a personhaving a common general power is to be treated as though he were for all practical purposes theowner ought not to be applied to a joint power of appointment, or to a power of appointment towhich the consent of somebody is required. He then continued:

"After all, what is the underlying broad principle of the rule against perpetuities? It is thatproperty should not be tied up beyond a certain period of time. If the property ceases to betied up, or, in other words, if it vests in a beneficial owner, then the mischief of the rule isavoided."

In this case it can, with equal propriety, be asked: What is the underlying broad principle of theFinance Act of 1894 on which the Barbados Estate and Succession Duties Act, 1941 is based?

Lord Macnaughten in Cowley (Earl) v. Inland Revenue Comrs. (1899) 13 A.C. 198 at p. 210)said:

"The principle on which the Finance Act, 1894, was founded is that whenever propertychanges hands on death the State is entitled to step in and take toll of the property as itpasses without regard to its destination or to the degree of relationship, if any, that mayhave subsisted between the deceased and the person or persons succeeding."

The appellant does not, of course, say that no estate duty is payable by anybody on the trust fund,but he is concerned to pay estate duty at the lowest possible rate, and, in this connection, it isdifficult to see why the respondent did not rest his case on the passing of the trust fund and on theappellant's liability to pay at the higher rate of duty to the extent of the assets in his hands. Thecase, has, however, been argued solely on the footing of competency to dispose and I say no moreabout passing of the property.

Roxburgh, J. was not, nor was Lord Selborne, dealing with the case of a single donee of a powerwho can only validly exercise that power if the trustees consent, but who is not subject todictation or control in the choice of objects of the power. In my view, his criticism of the secondstatement which he quoted from Key and [34] Elphinstone's Precedents in Conveyancing andwhich he assumed to have been based upon Re Dilke did not take account of Eland v. Baker.Lady Gilbert-Carter was the sole owner of the property which she handed over to trustees in1936. Only she could initiate revocation of the trust and after revocation she was not obligated toresettle the property. The trustees had no duty towards beneficiaries nor could any beneficiaryresist revocation.

There is no evidence as to the reason for amendment of clause 4 of the trust deed in December,1939, but whatever the reason, she did not, in my opinion, thereby forfeit her right to retrace hersteps. Her competency to dispose of the trust fund is not, in my view, to be determined byreference to the competency of the trustees to prevent her from disposing of it. Before thesettlement she was competent to dispose of it, by the terms of the settlement she took a step thatwas not irrevocable, for under it she could with the consent of the trustees regain the property. Itseems to me that the argument that she was not competent to dispose after December, 1939involves the proposition that nobody was competent thereafter to dispose in her lifetime for thetrustees had no power to dispose. It was not, as it might have been, that it could not be establishedthat the settlor at her death had been competent to dispose.

Alternatively, the argument must be that "competent to dispose" means competent to transfer inany way and to whom she pleases without the intervention of anybody. I see no justification forqualifying the expression in this way. I think that the criterion should be: was there a way in whichshe could have made the property once more her own? - and not: was there a way in which thetrustee could have frustrated her attempt to regain her property? If she had obtained the consentof the trustees to a total revocation of the trust, there being no provision for resettlement, therevocation would have been unquestionably valid and there could not in that event have been anyquestion as to her competency to dispose. There is no warrant for importing the concept ofunreasonable trustees in the matter: there is equally good, if not sounder, reason for assuming thatthe trustees would have been reasonable persons and I do not believe that the determination of thesettlor's competency can be made to depend on any such hypothesis. The weapon of veto wasundoubtedly a fetter upon a settlor's power of revocation but so was it upon the power ofappointment in Re Dilke and Re Phillips and yet repeated references to these cases continue to bemade in recent decisions. The distinction between the authority of a trustee to give or withholdconsent to the exercise of a power where his consent is necessary to the validity of the exercise ofthe power and his authority where his discretion as to the selection of objects of the power iscalled into play seems to me to be well recognised. In my judgment, Lady Gilbert-Carter wascompetent to dispose because she could have made the trust fund her own as if no settlement hadever been made. I am not concerned with what the trustees could, still less might, have done. Ithink that in popular language she was for practical purposes the owner because by revoking thetrust she was free to deal with the trust fund in any way she pleased.

I would have dismissed the appeal.

Nothing has been said in the course of the argument about the nature of the property constitutingthe trust fund. Although the trust deed was printed with the [35] record the Schedule to it wasnot. Clause 2 of the trust deed refers to "the trust fund" and clause 7 to "both real and personalproperty in the trust fund." Having regard to the definition of property in s. 2 of the BarbadosEstate and

Succession Duties Act, 1941, the accountability of the appellant should be restricted tothat portion of the trust fund which consists of personality and his liability assessed accordingly.[36]