enacting section 47(1) for this provision applies only to a diabetic who suffers an attack of hypoglycaemia. The diabetic who suffers an attack of hyperglycaemia,[55] a condition which apparently may be equally dangerous to other road-users, can be convicted only of the lesser offences of driving without due care and attention or driving recklessly or in a manner dangerous to the public, prescribed by the Road Traffic Act 1961-1964, ss. 45, 46, respectively.

It is submitted therefore that a separate offence relating to diabetic drivers be enacted. As in the case of the offence of driving under the influence, in the interest of certainty it may be desirable that the legislature should indicate whether or not this offence is one of strict responsibility.

W. B. FISSE.*

TRUSTS

Tracing the profits of trust money in a mixed fund

In *Scott* v. *Scott*[1] the High Court was presented with an opportunity to discuss an area of the law which, although the subject of academic speculation, has never been directly considered in an authoritative case. The issue raised was the availability of a proprietary remedy to a beneficiary when a trustee has, by investment of trust funds mingled with his own, acquired property which has increased in value. The existence of a proprietary remedy enabling the beneficiary to participate in that increased value has long been settled in America, but only recognised with respect to severable property in English and Australian law. Certain fundamental principles of equity would, however, appear to be relevant, and on reference to these the extent of the High Court's decision seems to be justifiable neither by the reasoning advanced nor the exigencies of the facts.

The original action in the Supreme Court of Victoria[2] was brought against the executrix of the estate of a deceased trustee, W. H. Scott.

55. See *supra* n. 4.

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1. *Scott* v. *Scott* (1964) 109 C.L.R. 649; [1964] A.L.R. 946. A single judgment was delivered by a Court composed of McTiernan, Taylor and Owen JJ.
2. *Scott* v. *Scott* [1964] V.R. 300.

In 1940 he was by the will of his wife appointed co-trustee with his brother-in-law, A. Scott, of property and personalty to be held for W. Scott for life and then on trust for conversion and distribution between the children of the marriage. The most substantial asset of the estate was a house valued at £1,400, which for reasons of convenience W. H. Scott wished to sell and replace with another. After the sale of the house in 1942 for £1,125 he made a deposit on another property as trustee, and the contract was originally drawn up as between the vendors and the co-trustees of the estate. On being informed by their solicitors that such a purchase of real estate would constitute a breach of trust, and following their advice, the trustees recast the transaction so that the purchase was effected in the name of W. H. Scott only. The trust estate, however, advanced the sum of £1,014 towards the purchase price of £1,700; A. Scott contributed £500 and the remainder of the price came from the personal funds of W. H. Scott. The advances were secured by a registered mortgage to A. Scott, in respect of which he executed a declaration of trust to the effect that he stood possessed of the mortgage for the benefit of the trust estate to the sum of £1,014; W. H. Scott executed a similar declaration in respect of the house. At a later date W. H. Scott borrowed £2,000 on mortgage and the amount of the advances was repaid to the trust estate of A. Scott. Before his death in 1959 W. H. Scott retired from the trust and his place was taken by the plaintiff in the case, who claimed that the executrix of the former trustee's estate held the house, at the time of commencement of the action valued at £5,450, for the benefit of the trust estate, subject to the mortgage for £2,000.

The defendant conceded that a breach of trust had taken place when the trust funds were advanced, but contended that all liability for that breach had been extinguished by the repayment of the £1,014. She denied that there was any liability to account for profits derived from the employment of trust money in cases other than those concerning investments in trading concerns, and particularly those where the profits were represented by unrealised capital accretions to inseverable property.

Hudson J., after an extensive examination of authorities, concluded that the liability of a trustee to account for profits is not confined to cases where the trust money is employed in a trading concern[3] but includes every profit derived from the employment of a mixed

3. He relied particularly on *Docker* v. *Somes* (1834) 2 My. & K. 655, a case concerned with trading profits, where Lord Brougham expressed the proposition in very broad terms.

fund for the trustee's own advantage.[4] The order which Hudson J. made on this basis raises analytical difficulties which are not considered in his judgment or by the High Court in approving it. The actual remedy was a charge placed over the house to secure the same proportion of the increase in value as the amount of the trust money invested in the estate bore to the full purchase price, that is, 1014/1700 of the increase; from this it would seem that where the principal sum has not been repaid to the trust fund, the beneficiaries would be entitled to a charge over property purchased with a mixed fund to the extent of the proportion of trust money employed in its purchase.

Before the High Court counsel for the appellant argued, very properly in the light of the absence of authority or reasoning to support such an order, that the charge over the property could only extend to the amount of trust moneys used in its purchase, citing *In Re Hallett's Estate*[5] and *Brady* v. *Stapleton;*[6] also that a charge for that amount was the only remedy in the case of inseverable property. On this reasoning any liability of W. H. Scott to the trust estate was satisfied on the repayment of £1,014 representing the trust moneys misused. The High Court, however, approved the order of Hudson J. without adding to his reasoning.

The adoption of this novel technique of restitution would seem to have required some discussion. No justification by authority is possible, since no authority exists;[7] but the need for some stage of reasoning intermediate between establishing the existence of a duty to account for profits and the imposition of a charge emerges on reference to the nature of the charge device in the context of the equitable rules on tracing. The occasion for considering this question arose through the contention of counsel for the defendant before Hudson J. and the High Court that the charge existed only to secure a personal liability, so that relief was available under the Trustee Act 1958, s. 67 (Vic.).[8] This was briefly dismissed, but a more

4. The High Court considered this to be a particular instance coming within the general principle stated by Lord Porter in *Regal (Hastings) Ltd.* v. *Gulliver* [1942] 1 All E.R. 378 (H.L.) 395: 'The legal proposition . . . may be broadly stated by saying that one occupying a position of trust may not make a profit which he can acquire only because of his fiduciary position, or, if he does, he must account for the profit so made.'
5. *In Re Hallett's Estate* (1880) 13 Ch. D. 696 (C.A.).
6. *Brady* v. *Stapleton* (1952) 88 C.L.R. 322.
7. *Mant* v. *Leith* (1852) 15 Beav. 524 sufficiently illustrates the previous limits within which charges were imposed.
8. Cf. Trustee Act 1936-1953, s. 56 (S.A.); Trustee Act 1925-1942, s. 85 (N.S.W.); Trustees and Executors Act 1897-1961, s. 51 (Qld.); Trustees Act 1962, s. 75 (W.A.); Trustee Act 1898 (as amended), s. 50 (Tas.); Trustee Act 1925, s. 61 (Eng.). The effect of the section would have been to relieve the trustee of any personal liability.

extensive consideration is illuminating. The equitable charge is, like the other remedies available to trace trust money, only available against property in which the plaintiff has an equitable proprietary interest. This proposition is implicit in the reasoning of Jessel M.R. in *In re Hallett's Estate,*[9] but is strongly emphasised in *Sinclair* v. *Brougham*:[10] 'Their [the depositors'] claim cannot be *in personam* and must be *in rem,* a claim to follow and recover property with which, in equity at all events, they had never parted.'[11]

The Court of Appeal in *Re Diplock*[12] accepted this as the correct statement of the principle. The charge is not, in this branch of the law, used in an arbitrary manner; it attaches only to definite property which is identifiable as representing, in whole or in part, the plaintiff's misappropriated money.[13] It would, therefore, seem incorrect to speak of a personal liability secured by a charge. Hudson J. recognises that the charge in this case is an independent proprietary remedy, but does not pursue the implication that some reasoning is required which leads to the conclusion that, in this case, the plaintiff was beneficially interested in the property to the extent not only of the trust money invested, but to a similar proportion of the unrealised accretion in value. The effect of the proposition enunciated above is, however, that the plaintiff must have a beneficial interest co-extensive with the charge imposed; the chief difficulty of the case is that the High Court considered this point unnecessary for decision when it was raised by the respondent's argument.[14]

It is notable that counsel for the respondent in the High Court, rather than relying on Hudson J.'s order (or, perhaps, having realised the hiatus in the reasoning discussed above, considering that this was the only justification for such an order), persisted in his original argument that the respondent was entitled in equity to a share of the estate proportionate to the amount of trust money invested in purchasing that estate, supporting his contention by reference to the American law and general principles of tracing. Academic discussion on the question of tracing profits has previously resolved itself into this question.[15] The High Court inclined to view this remedy favour-

9. (1880) 13 Ch. D. 696 (C.A.).
10. *Sinclair* v. *Brougham* [1914] A.C. 398 (H.L.).
11. *Id.* at 418, *per* Viscount Haldane L.C. See also Lord Parker at 441, 442.
12. *Re Diplock* [1948] Ch. 465 (C.A.) *passim,* especially at 530-543.
13. On the importance of identifiability see *Re Diplock, supra* n. 12, at 521; *Frith* v. *Cartland* (1865) 2 H. & M. 417; 71 E.R. 525.
14. In a puzzling passage ((1964) 109 C.L.R. 649, 662), the High Court suggests that the question of beneficial interests is irrelevant when discussing profits. In the light of *Sinclair* v. *Brougham* these remarks must be confined to the question of personal liability to account for profits.
15. See, *e.g.,* Maudsley: 'Proprietary Remedies for the Recovery of Money' (1959) 75 L.Q.R. 234.

ably, but considered any final decision unnecessary; since, however, the present submission is that the inclusive charge can only be supported by such an equitable proprietary interest, the matter would seem to require further examination.

The American law, referred to as that in *Scott on Trusts*[16] and the *Restatement*,[17] has adopted the constructive quasi-trust[18] as a remedial device in cases of restitution where flexibility is desirable. The plaintiff is not confined to a charge over a fund or property for the amount of his money used, but may elect to take a proportional share; the exercise of this election is naturally influenced by the value of the property at the time when the election arises. When its value has fallen, it is more advantageous to rely on a simple charge; when the value of the fund or property has increased, a share is more desirable. The American doctrine of beneficial ownership is broader that the English in that any profit derived from an abuse of a fiduciary position may be recovered in this way; the American law developed without reference to the principle in the case of *Lister* v. *Stubbs*,[19] which stands for the proposition that a fiduciary principal is not necessarily the beneficial owner of profits derived from the abuse of a fiduciary relationship. It is submitted, however, that the principle of the case is not relevant where a share of property is sought; the plaintiff is claiming in equity the share of the property bought with *his* money, which on realisation may include profits, rather than seeking to establish that he is the beneficial owner of particular profits, as would be the case where profits existed independently of the main fund or were separately invested.[20]

The general principles discernible in the law on tracing would also seem to support the validity of the constructive quasi-trust. In the simplest case, where property has been purchased wholly with trust money, the plaintiff may elect to have a charge on that property or to take it so long as the property is identifiable.[21] Where the

16. *Scott on Trusts* (2nd ed. 1956) iv, 3289, s. 516.
17. *Restatement of the Law, Trusts* (2nd ed. 1959), s. 202.
18. This term, adopted by Maudsley, *op. cit., supra* n. 15, is useful in distinguishing the right to a share in the equitable ownership of property from both the personal liability to account for profits and the right to a charge against property.
19. *Lister* v. *Stubbs* (1890) 45 Ch. D. 1 (C.A.).
20. There seems in principle no reason why the plaintiff should not have an equitable proprietary interest in separate profits so as to support a proprietary remedy; in the light of *Lister* v. *Stubbs, supra* n. 19, it may, however, be argued that only an account of profits is available.
21. *In Re Hallett's Estate* (1880) 13 Ch. D. 696 (C.A.). For a reconciliation of this case with the constructive quasi-trust see *Primeau* v. *Granfield* (1911) 184 Fed. R. 480.

plaintiff's money is part of a mixed fund, or a mixed fund has been used to buy severable property, the plaintiff may have a charge on the fund or take a proportional share of the severable property, and this election will usually be influenced by considerations of value. This was established in *Brady* v. *Stapleton*,[22] amplifying remarks of Jessel M.R. in *In Re Hallett's Estate*.[23] Various *dicta* of Dixon C.J. and Fullagar J. are directed at distinguishing the kinds of remedy appropriate to severable property on the one hand, and inseverable property on the other:

> The real distinction which equity draws is between the case where it is, and the case where it is not, practicable to give effect to the rights of the *cestui que trust* by appropriating to him a specific severable part of the available property.[24]

Using shares and a horse as illustrations of the respective problems raised by the different kinds of property, their Honours seem to suggest that the apportionment of inseverable property is beyond the confines of practicability. It may well be difficult to attribute specific portions of a horse to trust money; the plaintiff cannot merely take his property, as may be done with shares or money, but an undivided share in, for instance, a successful racehorse might be preferable to a charge for the amount invested in its purchase from the point of view of an increase in its value. Whether such an undivided share would also be preferable to an inclusive charge will be discussed at a later stage.

Further support for the validity of the constructive quasi-trust can be obtained from the principles and decision in *Lord Provost etc. of Edinburgh* v. *Lord Advocate*,[25] a case concerning the apportionment of profits on mingled trust funds where the guiding principle in such cases was expressed to be:

> . . . The rule which is common in cases of this kind, namely, that a *cestui que trust* whose funds have been dealt with without his consent has a right to take the result of that dealing in the manner most favourable to himself.[26]

Such considerations, it is submitted, should determine the issue of whether the constructive quasi-trust exists as an independent remedy which may be the object of an election by the plaintiff. It is not difficult to construct situations in which a share of property might be

22. (1952) 88 C.L.R. 322.
23. (1880) 13 Ch. D. 696 (C.A.).
24. *Brady* v. *Stapleton* (1952) 88 C.L.R. 322, at 338 *per* Dixon C.J., and at 339 *per* Fullagar J.
25. *Lord Provost etc. of Edinburgh* v. *Lord Advocate* (1879) 4 App. Cas. 823 (H.L.).
26. *Id.*, at 841.

more advantageous than an inclusive charge for a fixed sum. The imposition of such a charge crystallises the plaintiff's rights; it would seem that in principle he could have no further claims against the property for increases in value or subsequent profits. A share in the equitable ownership of the property would, however, encompass further increases in value before realisation and provide an equitable interest which might be the basis for a claim to profits accruing after the election. The issue of the nature of the remedies for claiming actual profits rather than capital accretions is still outstanding, but a part-owner in equity could at least have an action for an account of such profits. The case for the creation of the inclusive charge as an independent remedy is less obvious; it seems little more than a dilution of the American doctrine with the worst features of the English charge, in particular its rigidity. The possibility of an election between an inclusive charge and a constructive quasi-trust might be significant in one situation—where the property was of a speculative nature the plaintiff could enforce an inclusive charge imposed at a time when its value was high although the value later diminished; the equitable part-owner would be subject to the risk of such a diminution after his election had been made.

The inclusive charge seems to be established as a remedy by *Scott* v. *Scott*,[27] rendering obsolete the simple charge in the context of claiming property which has increased in value. Its merit as a sole remedy could be open to doubt, for the reasons explained above, but an election between the inclusive charge and a constructive quasi-trust would be a potent method of giving effect to the rights of the beneficiary in accordance with the principles of *Lord Provost etc. of Edinburgh* v. *Lord Advocate*.[28]

One interesting feature of the case is that there seems no necessary reason why such complex issues should have been raised. The right to an account of profits comprehends more situations than the proprietary remedies subsumed under the head of tracing and there should have been little difficulty in establishing the liability of the appellant to account for profits in the light of the English cases;[29] once such a liability was established the reasons for the claim to a proprietary remedy are obscure. The only limitations of an action for an account stem from its personal nature;[30] in the event of a supervening bankruptcy the plaintiff's claim has no priority over those of other creditors. In the case of property purchased wholly

27. (1964) 109 C.L.R. 649.
28. (1879) 4 App. Cas. 823 (H.L.).
29. See *Regal (Hastings) Ltd.* v. *Gulliver, supra* n. 4.
30. *Lister* v. *Stubbs* (1890) 45 Ch. D. 1 (C.A.), *per* Lindley L.J.

with trust money, or severable property, the plaintiff who has established some equitable proprietary interest may take that property out of the bankruptcy; a charge secures the plaintiff's claim against those of the general creditors. There seems to have been no urgent reason for requiring such protection, since it was not suggested that the estate was insolvent; at all events the distinction between the various remedies and their nature was never clearly related to the issues.

J. M. HAYNES.*

ADMINISTRATIVE LAW

Jurisdiction of the courts over domestic tribunals — natural justice

The English courts have long displayed an unwillingness to interfere in the affairs of 'voluntary associations'. The jurisdiction they have exercised over their affairs has been a limited one. This attitude was exemplified by Brett L.J. in *Dawkins* v. *Antrobus*:

> . . . In my opinion there is some danger that the Courts will undertake to act as Courts of Appeal against the decisions of members of clubs, whereas the Court has no right or authority whatever to sit in appeal upon them at all.[1]

Such an attitude was, no doubt, designed to discourage club members from transferring their private feuds to the courts, and it may well be that such matters are better left to the clubs themselves. It is more questionable, however, whether all the organisations classed as 'voluntary associations' should be allowed the same degree of autonomy in their internal affairs.

In *Beale* v. *S.A. Trotting League (Incorporated)*[2] the association was the S.A. Trotting League, an incorporated body constituted in accordance with the provisions of the Lottery and Gaming Act 1936-1956, s. 22(a) (S.A.). The objects of the League are 'to govern control supervise and regulate trotting and trotting racing in the State of South Australia'. The League consisted of one delegate from each club affiliated with the League. The plaintiff Beale was a

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1. (1881) 17 Ch.D. 615 (C.A.), 630.
2. [1963] S.A.S.R. 209.