This book is not a model of its kind at the formal level. There are many proof-reading errors, a few incomplete cross-references, some inconsistencies in citation. Professor Glasbeek's style would not always satisfy the purist.

In sum, Professor Glasbeek has not in this book proved his belief that a study of evidence reveals more about our legal system than a study of other subjects. What he has done is offer a substantially convincing and penetrating critique of the law within the terms of the present doctrines.

J. D. HEYDON*

Discretionary Trusts, by I. J. Hardingham and R. Baxt, Australia, Butterworths Pty. Ltd., 1975, 1 + 235 pp. (inc. index). $15.00.

The authors of this treatise are to be congratulated on producing an admirably comprehensive treatment of discretionary trusts, a subject which is nowadays very *a la mode* because of the manifold advantages which such trusts afford in estate planning.

After a short introductory chapter (pp. 1 - 4), the authors discuss the nature of the discretionary trust (Chapter 2). In this treatment of this aspect of the topic, there are no surprises. The authority of *McPhail* v. *Doulton*[1] is recognised — and, realistically, it would be odd if it were not. Three points might, however, require comment. The first concerns the assertion constantly made that the existence of an express trust in default of appointment always betokens a mere power rather than a trust power. This is said to be an "undisputed proposition" (p. 6), and both principle and authority would suggest that this is so. However, it overlooks the rather bizarre decision of the High Court in *Antill-Pockley* v. *Perpetual Trustee Co. Limited.*[2] (Perhaps wisely; the remarks of Gibbs, J. in that case are best forgotten, although Stephen, J. did join in them.) The second is that the authors are surely correct in rejecting the theory that the absence of an express trust in default of appointment is *prima facie* evidence of a trust in favour of the objects of the power. The third arises from the theory asserted but not argued by the authors, that, in the case of a mere power as distinct from a trust power, no object of the power can compel the holder of the power to perform his undoubted duty to consider whether or not to distribute, and if so to whom; no authority is cited in favour of the theory, and in principle it

* M.A., B.C.L.(Oxon.). Commissioner, New South Wales Law Reform Commission; Professor of Law, University of Sydney.

[1] [1971] A.C. 424.

[2] (1974) 48 A.L.J.R. 488.

seems incongruous that a fiduciary should owe a duty to a person who cannot enforce it otherwise than indirectly.

There follows a chapter (Chapter 3) on the requirement of certainty of object in a discretionary trust. This is an aspect of discretionary trusts which has received much — perhaps too much — attention in recent years. The pre-*McPhail* v. *Doulton* view used to be that whereas mere powers had to qualify on the so-called "criterion certainty" test, trust powers had to qualify on the so-called "list certainty" requirement. *McPhail* v. *Doulton* seemed to equate the tests: thenceforth "criterion certainty" would suffice both for trust powers and for mere powers. But there is a catch. Trust powers, according to *McPhail* v. *Doulton*, have to satisfy a second test, the requirement of "class certainty", the requirement that all the beneficiaries must belong to a loose class. The authors make it plain that this second test does exist, but they underestimate its importance. The central difficulty of the "class certainty" test is that it raises more difficulties than the "list certainty" test it replaced. What is a "class"? When is it too "loose"? What authority is there for the requirement? Why cannot one have a valid trust power in favour of such of the inhabitants of Greater London as one's trustees shall appoint?

The authors correctly reject the notion that the requirements of "class certainty" — whatever it means — applies to mere powers.

Chapter 4 is a straight forward account of the Rules against Perpetuities and excessive accumulations. It is, however, to be regretted that it does not deal with the conflict of laws aspects of these doctrines. The question whether one can avoid either doctrine by adoption of a foreign choice-of-law clause must await another book.

Chapter 5 deals, competently enough, with the standard rules governing a beneficiary's right to control the behaviour of the trustee of a discretionary trust.

Chapter 6, perhaps the most original and interesting in the book, deals with the nature of the "interest" of an object of a discretionary trust. Its central thesis is that, despite *Gartside* v. *I.R.C.*,[3] whilst no object of a discretionary trust has any equitable interest, in the strict sense, in the trust fund as a whole (or in any portion of it), the equitable right to insist on a correct administration of the trust may itself be "property" and may itself contribute an "interest" for some purposes, within the meaning to be assigned to those terms in current revenue legislation. Some such explanation must be correct: otherwise it would be impossible to account for decisions like *Attorney-General* v. *Heywood*.[4]

The last three chapters are devoted to the place of the discretionary trust in Australian revenue law. Chapter 7 deals with its income tax implications; Chapter 8 deals with its stamp duty and death duty

[3] [1968] A.C. 533.

[4] (1887) 19 Q.B.D. 326.

implications in Victoria; Chapter 9 deals with its stamp duty and death duty implications in New South Wales. The lesser States are ignored.

The book suffers from one major drawback — its style. One quite appreciates that an analysis of the discretionary trust does not readily incite the generation of deathless prose; but there is no reason why it should be couched partly in academic esperanto ("By way of postcript to the sections of this chapter concerning the duties of discretionary trustees and the role of the court in the administration of discretionary trusts reference must be made to the probability of the acceptance in Australia of the decision of the House of Lords in *McPhail* v. *Doulton*"), and partly in journalese ("Flexibility should be the keynote"). It is as if one took equal quantities of the late Sir Stephen Roberts and Mrs. Edna Everage and put them through a legal blender. Perhaps things will improve when the English translation comes out.

R. P. MEAGHER*

* Q.C., Challis Lecturer in Roman Law and Principles of Equity, University of Sydney.