THE RULE IN SAUNDERS v. VAUTIER

Donovan W.M. Waters

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THE RULE IN SAUNDERS v. VAUTIER

Terms of Reference

The writer was asked by the Director on behalf of the Institute of Law Research and Reform in his letter of 23 June, 1969, to "conduct research into the rule of Saunders v. Vautier with a view to assisting the Board to determine whether to make any recommendations to the Legislature for abolition or partial abolition or modification of the rule."

THE PRESENT LAW

1. What the rule is

The actual decision in Saunders v. Vautier,[1] and the rule which has come to be associated with it, differ somewhat, the rule being of greater scope than the actual decision, and consequently there are various ways in which the rule has been expressed. Theobald on Wills,[2] puts it this way: "Where there is an absolute vested gift made payable at a future event, with a direction to accumulate the income in the meantime and pay it with the principal, the court will not enforce the trust for accumulation, in which no person has any interest but the legatee." The outcome is that the donee, if he is of age and mentally capacitated, may call for the capital and any already accumulated income, regardless of the settlor's directions to accumulate until the time of an event which has not yet occurred. Underhill's Law of Trusts and Trustees,[3] therefore presents the rule

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1. (1841) 4 Beav. 115 (per Lord Langdale M.R.), aff'd. Cr. and Ph. 240, 41 E.R. 354 (Lord Cottenham L.C.)
2. 12th ed., 1963, para. 1539.
3. 11th ed., 1959, article 68.

in a wider perspective. "If there is only one beneficiary, or if there are several (whether entitled concurrently or successively), and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settlor or the trustees."[1]

It can therefore be said that there are three situations in which the rule in (or associated with) Saunders v. Vautier operates:

(1) A beneficiary who is sui juris, of sound mind, and entitled to the whole beneficial interest may require the trustee to transfer the trust property to him.

(2) Several concurrently interested beneficiaries who are all sui juris, of sound mind, and between them entitled to the whole beneficial interest may collectively compel transfer.

(3) Several beneficiaries who are entitled in succession, whether their interests are vested or contingent, may combine to require transfer provided they are all sui juris, of sound mind, and between them entitled to the whole beneficial interest.

An example of (1) would be: to A $50,000 payable on his 25th birthday, the income to be paid to him annually until he attains that age.

An example of (2) would be: to the children of X $40,000, the share of each payable on his 30th birthday. Each child

1. This was cited by Nemetz J. with approval in Re Johnston (1965) 48 D.L.R. (2d) 573, 575.

to be maintained out of the income arising from his share until he shall attain that age.

An example of (3) would be: to trustees $30,000 on trust for A provided that he attains the age of 26, but if he shall not attain that age to B absolutely.

In example (1) if A is 21 on the testator's death, he can immediately call for the $50,000. Or, if he is then a minor, on becoming 21 he can call for the $50,000. In example (2) the class, children of X, will be closed on the testator's death. If the youngest is already 21, or on his becoming 21, the class members can collectively compel transfer of the $30,000. In example (3) if A and B are each 21 on the testator's death, or as soon as the youngest becomes 21, they can combine and call for the $30,000. It is of no importance in this case whether, prior to his 26th birthday, A has a vested or contingent interest, and that B has only a contingent interest.

Where there is more than one beneficiary involved, however, as in examples 2 and 3, it is relatively rare to find the trust where all the possible beneficiaries are of age. Gifts over to take effect should the prior estate holder not attain the desired age will normally be found to include persons still in their legal infancy. For instance, the insertion in example 2, above, of a per stirpes clause permitting the children of any child of X dying under the age of 30 to take in lieu of the parent would be likely, due to the probable ages of the grandchildren, to prevent a Saunders v. Vautier termination. And in example 3 it is more customary to find the testator providing in his gift over for the children of A. Indeed, it is often the very fact that A has dependants, or may in the near future have dependants, which encourages the testator to delay the

vesting or payment of the capital of the gift until A attains an age of supposed greater maturity.

Saunders v. Vautier comes most into prominence, therefore, when it is invoked by a sole beneficiary as a means of terminating a trust. And it is with respect to this aspect of its operation that Mr. Field feels the most concern in his Report on Various Rules established for the Interpretation of Wills which defeat the Intention of the Testator and are now Archaic.

For the rule to apply, however, it is necessary for the beneficiary to have a vested and indefeasible interest in the whole beneficial property. If the beneficiary is the final remainderman taking an absolute interest after a number of successive limited estates, e.g. to A for life, remainder to B for life, remainder to C absolutely, he clearly satisfies the rule. Similarly, if A as the life tenant acquires the interest of B, the sole and absolutely entitled remainderman, the beneficial or equitable interest is 'at home' in A, and he can call upon the trustees to convey the capital to him. But these are not really cases where the rule is important; in each case the trust has either run its course or successive vested interests have been merged into one. The rule is invoked and attracts attention in those cases where the trust has not run its course because the beneficial gift is conditional, and the required future event has not yet occurred. Though the required event has not occurred, and the condition remains unsatisfied, nevertheless in certain circumstances, to be discussed, the rule in Saunders v. Vautier can be employed as a means of terminating the trust and thereby of frustrating the clear intentions of the settlor.

A draftsman seeking to avoid a future situation where, e.g., the prodigal, on coming of age can immediately call for the capital of the gift under Saunders v. Vautier, is confronted with complex construction rules, and in applying those rules a court may come to a different conclusion from himself as to the effect of the words he has used. These construction problems may be said to arise in four respects :

(a) The difference between vested and contingent interests.

(b) Different rules applying as between the vesting of conditional gifts of realty, and the vesting of similar gifts of personalty.

(c) The distinction between a gift and a direction to pay.

(d) The significance of the form in which interim interest is made available to the beneficiary of a conditional gift.

(a) The difference between vested and contingent interests.

It is a time-worn common law rule that a gift subject to a condition precedent is contingent upon the occurrence of that condition. A contingent interest is clearly not a vested and indefeasible interest, and therefore the rule in Saunders v. Vautier cannot be invoked by the beneficiary . One of the most familiar of such conditions is that the beneficiary attain a certain age before he take the property donated to him, and therefore a gift to a person 'at', 'if', 'as soon as', 'when' or 'provided' he attains a certain age is prima facie contingent.

Over the centuries, however, this logical and easily understood rule of construction has been partly eroded by the inclination of the courts to favour early vesting. The reasons for this are now largely historical, but the effects remain with us. In the case of remainder interests a gift which could be construed as vested thereby avoided the destructibility which lay in wait for contingent remainders. As for immediate interests subject to a condition (i.e., those not supported by a particular estate), early vesting avoided among other things the snares of the perpetuity rule.

The result is that in the context of the wording of the entire deed or will the court may construe a condition as being a condition subsequent, and therefore as giving rise to a gift which is vested but defeasible on the non-occurrence of the required event. Indeed, if there is a gift over, there is a strong assumption that the settlor intended the prior estate subject to a condition to be vested: Phipps v. Ackers[1] (realty), applied to personalty in Re Heath[2]. Applied in Canada, Re Barton Estate[3]. The reasoning is that, if the settlor went so far as to give the property to another to take effect should the required event not occur, he must have intended the prior estate beneficiary to take at once all the settlor gave him, subject, of course, to the defeasance.

As to whether a condition is precedent or subsequent in the setting of a particular will, there can be distinct

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1. (1842) 9 Cl. & F. 583.

2. [1936] Ch. 259.

3. [1941] S.C.R. 426.

differences of opinion, even among members of the same court, as Eastern Trust Co. v. McTague[1] demonstrated. And this is so despite the fact that the courts lean in favour of finding conditions to be subsequent rather than precedent. This policy is a further reflection of the desire for early vesting, though it is also a response to the common law rule that the failure of a condition precedent for uncertainty, public policy, etc., invalidates the entire gift, whereas a void condition subsequent is merely struck out.

In determining whether an immediate interest is contingent or vested, the courts, as we have seen, may examine any language in the deed or will. This in itself gives considerable scope for differing judicial interpretations of the meaning intended by the maker or testator, and the rules of construction which have arisen from the courts' preference for early vesting have tended to add to that scope. This can be seen in the rule which distinguishes vested but defeasible interests from contingent interests. Where the condition as to attaining a certain age forms part of the actual devise of realty, the interest is contingent. But where the devise is made, and then the condition is contained in a separate direction, the devise is vested subject to divestment. A similar rule governs personalty. If the attainment of a certain age constitutes a quality or attribute which the donee must personally possess, the gift is contingent upon his acquiring that quality. But if the required age is not part of the gift, it does not constitute a quality which the donee must possess, and the

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1. (1963), 39 D.L.R. (2d) 743.

gift is vested. It may constitute a date for payment only, as we shall see, so that the gift is vested and indefeasible. But if there is a gift over on the beneficiary dying under the age, then the gift will be vested but defeasible.

It will be appreciated that, if an interest is construed to be vested but defeasible, the principal advantage of this construction to the beneficiary is that he can take the intermediate income which arises prior to the attainment of the required age. This was the issue in Bickersteth v. Shanu[1] where on attaining the required age the beneficiary sought for and obtained an account of all rents and profits which had arisen since the testator's death.[2] On the other hand this construction is of no value to the beneficiary if he wants to terminate the gift under Saunders v. Vautier. If the proper construction is that the gift to him, though vested, is defeasible on his dying under the required age, so that the capital of the gift will revert to the settlor or pass to a remainderman, it is clear by definition that the beneficiary has not an absolute interest, i.e., a vested and indefeasible interest. As we have seen, only if the beneficiary has an absolute interest may he (acting alone) terminate the trust.

It should be noted here that the rules as to the vesting of conditional gifts apply both to immediate interests (e.g., "to A on his attaining 25 my Bell Canada shares") and to remainder interests (e.g., "to X until A shall attain 30 years, and then to A absolutely"). However, since the remainderman cannot exercise the rule in Saunders v. Vautier

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1. [1936] A.C. 290.

2. Followed in Re Barton [1941] S.C.R. 426.

during the time of the preceding estate without combining with the preceding estate holder, in which case it does not matter whether the remainderman's interest is vested or contingent on the event, the writer does not intend to discuss here the rule in Boraston's Case,[1] or the application of that rule to personalty. See further, Halbury's Laws of England.[2]

The prime difficulty the draftsman faces is that if there is no gift over the court may apply the aforementioned rules of construction so that an intended conditional gift is construed to be a vested and indefeasible gift. This construction lets in Saunders v. Vautier. The situations in which a beneficiary, acting alone, can then terminate the trust are twofold; in a case of an immediate gift subject to the condition of a certain age, he can bring his claim on attaining his majority, and in the case of a remainder interest subject to a condition of certain age he can bring his claim on the falling in of the prior estate if that estate can and does fall in before the required age is attained by the beneficiary.

The key factors in determining whether a gift is vested indefeasibly as opposed to being contingent are the following: (1) whether the conditional gift is attached to residue, or (which may have the same effect) is attached to property which is set aside from the rest of the estate and vested in trustees for the benefit of the beneficiary; (2) whether the gift is made, and then a condition separately added about time of payment; (3) whether the beneficiary takes

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1. (1587) 3 Co. Rep. 19a.

2. 3rd ed., vol. 39, paras. 1659-1663.

the income arising from the property between the deed or will taking effect, and the required age being attained; (4) whether there is a prior interest or any charge in favour of another upon the property (if there is such an interest or charge, it may serve to arrest a Saunders v. Vautier claim until that interest or charge has fallen in).

(b) Different rules applying as between the vesting of conditional gifts of realty, and the vesting of similar gifts of personalty.

The old common law rules which determined vesting and contingency were originally applied to realty only. This is because they date back to the late mediaeval period. And common law rules continue to apply to devises until this day. When the old Chancery courts in England took over the administration and interpretation of wills from the ecclesiastical courts in the post-Restoration period, however, they took over several rules derived by the ecclesiastics from the civil law, and, since the ecclesiastical courts had been concerned with wills of personalty, these rules continued to be applied by Chancery to gifts of personalty, or realty taken as personalty, e.g. as a result of a trust for sale. The curious fact is that these civil law rules were only applied to personalty, or realty taken as personalty. Devises continued to be interpreted according to the common law rules. This has produced tiresome anomalies, e.g., in relation to the interpretation and effect of conditions precedent, both for English courts and for Canadian common law courts which, of course, adopted the English precedents.

A difficulty for the draftsman is that, there being no original reason for the difference in the rules other than slightly different judicial attitudes between the ecclesiastical and Chancery courts, since the merger of jurisdictions the two sets of rules have tended to become blurred with the other's notions. For instance, the favouring by the courts of early vesting is strictly of common law origin, but the ecclesiastical courts often interpreted the word "vest" as applicable to a gift taking effect in possession, which allowed vesting in interest to follow the common law rules applicable to realty.

The two sets of rules are discussed in Halsbury's Laws,[1] and Theobald on Wills.[2] It is interesting to observe from the practitioner's point of view that the respective learned authors clearly take a different view on the extent to which the two sets of rules are intertwined. The only thing which is paramountly clear is that the distinction between a gift and a direction as to payment is a rule applicable to personalty. Though even here it is probably the nature of the property which restricts the distinction to personalty (a devise of land cannot be treated as a bequest of a sum of money), and not any jurispurdential notion.

(c) The distinction between a gift and a direction to pay.

This is one of the key factors determining whether an interest is indefeasibly vested or is contingent. Where there is no direction in the will as to the vesting of the

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1. 3rd ed., vol. 39, paras. 1648 et seq.

2. 12th ed., ch. 42.

interest, the courts have to determine whether there is an implied direction. The problem is succinctly presented in Theobald:[1]

> "Where there is a clear gift, an additional direction to pay, when the legatee attains a given age, will not postpone the vesting, the gift being considered debitum in presenti, solvendum in futuro. Thus, a gift to A, payable at twenty-one, is vested, and it makes no difference whether the gift precedes or follows the direction for payment, provided a clear immediate gift can be found in the will. The difficulty in these cases is to decide whether there is a substantive gift and a direction to pay, or whether the only gift is in the direction to pay."

In a doubtful case the court can only look at all the provisions in the will, and draw a conclusion from the character of these provisions as to what was intended by the gift in question. In any event the distinction between the two situations Theobald describes can be very slight. E.g., "to A $20,000 payable at 25" is a substantive gift followed by a direction to pay; "to A at 25 $20,000" is a direction to pay containing a gift. In the first example, unless another key factor prevents vesting, A has an absolute interest, and can claim the $20,000 on coming to his majority. In the second example, A's interest is contingent, unless some other key factor or factors are persuasive to the contrary.

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1. para. 1434.

Where a gift is postponed so that a prior interest may run its course, or some administrative task may be carried out (e.g., payment of testator's debts out of the fund), the remainder will vest at the testator's death. But if the remainder is conditional upon an event which is in some way associated with the remainder itself (e.g., "my residue on trust for X for life, remainder to A when he shall attain 25"), Theobald's difficulty remains of determining whether the remainder is vested or contingent. Some courts, e.g., Re McCallum,[1] express this distinction in terms of whether the age requirement is personal to the beneficiary, as an attribute which he must have.

Where there are several named beneficiaries who are required to attain a certain age, the difficulty of the task remains about the same, but when the gift is to a class of persons the problem of determining whether there is a distinction between gift and implied direction to pay, is yet more subtle. On the whole, a class being a diverse group, the courts are more inclined to find a contingent gift in these circumstances.

Josselyn v. Josselyn[2] and Saunders v. Vautier[3], are well-known examples where in the case of a single beneficiary the respective court was able to find a distinction between a substantive gift and a direction to pay. The difference of view which the terms of a will may create is well brought out by the majority and dissenting judgments of a fairly recent case in the Manitoba Court of Appeal;

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1. [1956] O.W.N. 321.

2. (1837) 9 Sim. 63 per Shadwell V.-C.

3. (1841) 4 Beav. 115, per Lord Langdale, M.R.

Fast v. Van Fliet.[1]

(d) The significance of the form in which interim income is available to the beneficiary of a conditional gift.

Another of the key factors in determining whether a gift is vested indefeasibly or is contingent concerns interim or intermediate income. If the testator or inter vivos settlor has given this income to the beneficiary, that is a very strong pointer to the fact that not only a vested, but an indefeasibly vested interest was intended. E.g., "to A $50,000 when he attains 25, the interim income to be paid to him annually as it arises". If it be supposed that A is 18 years of age when the settlor creates his gift (normally by will, it is true, though Saunders v. Vautier is not restricted to the testamentary gift), there is strong evidence here overcoming the equivocality of the word, 'when', that the settlor intended to postpone the payment date of a fully vested gift.

However, the significance of this factor is less marked when the testator does not necessarily give all the interim income to the beneficiary. A very common provision is that the trustees are to maintain and educate the beneficiary out of that income, accumulating the surplus income. Now it has been held that a direction to accumulate does not necessarily point in either direction when the question is as to whether a gift is vested or contingent. Other factors are likely to determine the matter.[2] What, then, can be the significance of a power to maintain the beneficiary

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1. (1965), 51 W.W.R. 65.

2. See Halsbury's Laws, op. cit., para. 1669, footnote (q).

out of the interim income? Theobald[1] says categorically that the gift is vested if the income is given for maintenance; but this may not be the view which the court will take if maintenance is only to be provided for a period of time before the required age is attained. It is then a matter of looking to all the indications in the will. In Fast v. Van Fliet, e.g., where the gift was to A "upon his attaining the age of 25", the trustee was given power to maintain and educate A out of the income or capital of the property while A was under 21. A majority of the Court nevertheless held that the gift was contingent. And this, it should be noted, was a case where capital as well as income could be called upon.

When it is a matter of the maintenance of several named beneficiaries, and in particular of a class of beneficiaries, the draftsman must make it clear whether maintenance is to be financed out of the mass of interim income, or for each individual out of the share of such income assigned to his share of the capital fund. Maintenance out of the mass of interim income will not cause any class member's share of the capital to vest prior to the occurrence of the required age.

The testator may permit interim income to be paid to the beneficiary, but impose charges or annuities upon that income in favour of third parties. Such an express gift of the surplus income has been held to cause the gift at a required age to vest at the testator's death, but, of course, such a beneficiary would not be able to claim the capital under Saunders v. Vautier during the subsistence of

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1. parag. 1440.

the charges or lifetime of the annuitants. This point was confirmed in Re Burns Estate.[1]

If the trustees are directed to pay the whole or such part of the interim income as is necessary for maintenance, the courts have held that that is enough to vest as of the testator's death a conditional gift which otherwise would have been contingent. And even if the trustees have a discretion as to the payment of income, Astbury J. in Re Ussher[2] considered that the conditional gift was thereby vested, and a claim under Saunders v. Vautier made possible.

As to the permissable nature of the trustees' discretion, the distinction is again a nice one. If the trustees are under a direction to maintain out of interim income, but have a discretion as to the amounts which they pay, the gift is vested.[3] But if the trustees have a mere discretionary power to maintain out of the income, that is insufficient to render vested an interest which would otherwise be contingent. The explanation seems to be that in the latter case there is not sufficient evidence that the testator intended to give to the beneficiary. However, it is likely that in drafting practice it is not easy to be certain that one has secured the desired result.

However, we are now at the point where the particular interim income provision may be ambiguous in meaning. If the trustees have a discretion whether to pay income or accumulate it, if they may pay up to a fixed amount each

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1. (1960) 32 W.W.R. 689, (1961) 25 D.L.R. (2d) 427 (Alta. C.A.)
2. [1922] 2 Ch. 321.
3. Re Barton [1941] S.C.R. 426.

year for maintenance out of the interim income, or if they may pay an equivalent sum to the interim income out of another fund (which is another distinct gift), then an otherwise contingent conditional gift does not become vested. Others of the key factors already discussed may effect the court's decision as to whether the particular gift is indefeasibly vested. In Re Squire[1], e.g., Schatz J. found the other factors sufficiently compelling that an indefeasibly vested interest was intended. Consequently, he refused to accept an argument based on a ceiling figure for annual maintenance and education. The testator in question authorised up to $700 per annum to be spent out of the annual rents and profits of the devised realty, and required surplus to be accumulated, and paid over at the age of 30 when the realty was to be conveyed to the beneficiary. The limitation itself was "to hold ... until A reaches the age of thirty years, and upon A my said grandson reaching the age of thirty years" to convey to him absolutely. As we have said, Schatz J. found that an indefeasibly vested interest was devised to A, and allowed his claim to wind up the trust on coming to his majority.

Attention was earlier drawn to the fact that in Fast v. Van Fliet[2] capital as well as income could be employed by the trustee for maintenance. This is a fairly common provision, and the courts seem to find it of more significance than the availability to the beneficiary of interim income alone. It enhances the idea that the testator was merely postponing the payment date of his gift. Needless

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1. (1962) 34 D.L.R. (2d) 481 (Ont.).

2. (1965), 51 W.W.R. 65.

to say, when the testator does not require a future event to occur before the gift vests or is payable, but instructs his trustees to pay so much per month or per annum to the beneficiary until specific assets are exhausted, there is little difficulty in establishing a vested and indefeasible interest on the testator's death.[1]

If the testator directs that interim income is to be accumulated, and added to the capital, no particular significance attaches to the fact when the question is whether the gift is indefeasibly vested or is contingent. The requirement of accumulation on its own, as we have said, is ambiguous. The testator may have had in mind a vested interest, and be concerned to declare his intentions as to the interim income while the postponed payment date is awaited. Or he may have intended a contingent interest, and therefore have attempted to tie both capital and the interim income at compound interest to the same contingent event. The significance lies not in the accumulation of the interim income, but in the fact that the testator has specifically attached the interim income to the gift of the capital. As Leach M.R. said in Vawdry v. Geddes[2], "where interim interest is given, it is presumed that the testator meant an immediate gift, because, for the purpose of interest, the particular legacy is to be immediately separated from the bulk of the property." This sentence was quoted with approval by Schatz J. in Re Squire[3]. Where interim income is given as well as the capital of the gift, two factors come into prominence. First, the testator has demonstrated

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1. See Re Dawson [1941] 1 W.W.R. 177 (Alta.), and Re Burger [1949] 1 W.W.R. 280 (Alta.).

2. (1830) 1 Russ. & M. 202, 208.

3. (1962), 34 D.L.R. (2d) 481 (Ont.).

that he is giving the entire asset to the beneficiary, and, secondly, he has demonstrated that he intends the fund of the legacy to be severed from the rest of his estate. These were the crucial factors in the locus classicus, Saunders v. Vautier, for they showed, when the testator gave a legacy to A on his attaining 25, and added the accumulated income to the gift, that the postponement of the enjoyment of the gift was not for the purpose of making the gift contingent. At this point the attempted postponement became nothing more than an unenforceable derogation from grant.

Summary comment on the rule

The previous discussion attempts to show that, while the principle behind the rule is clear, the rules of construction are sufficiently subtle and the distinctions so fine that only the accomplished draftsman can say with some assuredness that his client's will avoids any future Saunders v. Vautier claims by sole beneficiaries. And when it is remembered that all the rules of construction discussed raise only presumptions of intention, presumptions which can be rebutted by evidence drawn from the context of the will at large, it is clear what room there is for differing opinions on the question of a testator's intent. Mr. Terence Sheard has commented to an Ontario Bar Course audience that many wills find their way to litigation because of the carelessness of draftsmen. Other wills, one must add, give the impression of having emanated from draftsmen whose knowledge of the law of the construction of wills leaves something to be desired. The likelihood of error in such circumstances is clearly possible. A fortiori, the testator who draws his own will at the fireside, and is happily ignorant of

these rules, will slip with ease into creating an undesired Saunders v. Vautier situation.

2. THE SITUATIONS IN WHICH SAUNDERS v. VAUTIER WILL APPLY

In its broadest understanding the rule applies to all trusts where one or more beneficiaries, being entitled between them to the whole beneficial interest in the trust property, are adult and of a sound mind. As we saw on page one of this paper, this includes all trusts where there are concurrent or successive interests. However, when only one beneficiary seeks to take advantage of the rule, and is required for that purpose to have a vested and indefeasible interest in the whole trust property, it is clear that the rule will apply in only a limited number of circumstances. The following are these circumstances:

(1) Postponement to a certain age

A conditional gift, which, despite its prima facie contingent character, is found to be vested, embodies a condition that contemplates an event, and that event is one which must necessarily happen at a determinable time. The most familiar example of such an event is the attainment by the beneficiary of certain age. If, e.g., there is a gift to A "when he shall attain 25", it is clear when the testator dies at what moment the event will happen, if it is to happen. In the case of a gift to A "when he marries", on the other hand, it is equally clear that, though if he is ever to marry, A must marry within his own lifetime, the event will not necessarily happen even if A lives to be a centenarian. In all but the unusual situation, therefore, such a gift will be

held to be contingent. In Re Panter[1] the testatrix bequeathed certain paintings to A "when he is married and has a house of his own". In the meantime two other persons were to have the paintings. Swinfin Eady J. was able to find a vested gift with postponed possession, but his judgment is very short and it was probably the singularity of the facts which brought about this result.

Very few cases exist which domonstrate events satisfying the above test, but not involving the age of the beneficiary. A possible event other than age is the death of the beneficiary. A gift of property is made, and income is payable annually, but payment of capital is deferred until the beneficiary's death. For the gift to be vested and indefeasible the property would have to be isolated from the rest of the testator's estate, and the capital fall into the beneficiary's estate upon the latter's death.

(2) Postponement to a date

Among the few events other than age which are compatible with a vested and indefeasible interest is that of the fixed date. An event may be chosen which is personal to the beneficiary, as for example his apprenticeship. Six months after his apprenticeship is an event which has satisfied the test. But much more familiar is the close of a specific period after the testator's death, e.g., "to A $20,000 payable five years after my death." Another such event is a specific calendar date which the testator correctly assumes will occur after his death.

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1. (1906), 22 T.L.R. 431.

(3) Instalment gifts

In this type of gift the donor instructs his executors and trustees that fixed amounts are to be paid to the beneficiary at fixed periods until the capital and accumulated income are exhausted. There are various small variations on this basic theme, but the principle remains the same. The trustees may be given power to encroach on that part of the invested sum which is not yet due to be paid over, or there may be a direction to pay income annually with the trustees empowered to encroach on the capital as and when they think fit, but being required to pay over so much capital during, e.g., every five year period after the testator's death.

(4) Discretionary trusts and powers

The conferment upon trustees of discretion in the payments which they make to beneficiaries does not necessarily oust the rule in Saunders v. Vautier. If the trustees have a discretion as to whether they will make any payments to a sole beneficiary or among a class of beneficiaries, then the rule is ousted. But if the beneficiary or the class of beneficiaries are the only possible recipients of the trust fund, and the trustees have a discretion merely as to the method of payment (i.e., who among the class, when and how much), the rule in Saunders v. Vautier can be invoked by the beneficiary or beneficiaries. The distinction was clearly established in the English case of Re Smith [1] though in fact the principle was established long before.

This means that, provided the gift of property is vested indefeasibly in a sole beneficiary, he is not prevented

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1. [1928] Ch. 915.

from invoking the rule in Saunders v. Vautier whatever the mode in which the settlor has conferred a discretion upon his trustees. A power to maintain, educate, and benefit; a power to make advances of capital or excess income (over that annual sum the settlor has said may be paid the beneficiary) to set a young beneficiary up in life with a career or a matrimonial home; a power to encroach on capital and/or excess income for any purpose in the trustees' absolute discretion: all of these familiar powers can be by-passed by a Saunders v. Vautier claim.

It will also be evident that, if the settlor creates a discretionary trust in favour of two or more beneficiaries, and there is no gift over of moneys not expended upon the class members during their respective lifetimes, the chances are reasonably high that a court will be able to find a vested and indefeasible interest in the class of beneficiaries. This fact is often not appreciated by settlors, who give considerable thought to the exact nature of the discretion they wish to confer upon their trustees in relation to the method of payment, but do not consider that the intended class of beneficiaries, e.g., the children of a middle-aged testator, are either adult or within a few years of adulthood. The non-taxable capital gain is a real incentive to that class, when the youngest member has come of age, to terminate the trust. Any far-seeing family protection object which the settlor had in mind is thus frustrated.

(5) The Barford v. Street Principle

If a beneficiary has a life estate, and a general power of appointment exercisable by deed or will as to the capital

of the gift, it has been established at least since Barford v. Street[1] that the beneficiary may exercise the power in his own favour, or apply to the court for an order, thus acquire the capital, and so terminate the trust. Nor does it seem to make any difference if the trust terms are that the appointment is to take effect on the beneficiary's death, or that there is a gift over to third parties in default of the exercise of the power. In the view of the courts a general power is tantamount to ownership, and if the life tenant thus appoints himself to the remainder interest, or shows his intention to do so by applying to the court for an order vesting the corpus in himself, the life tenancy and the remainder interest merge so that the whole equitable interest is in the beneficiary.

However, the logic of this position has not been so compelling if the power of appointment is exercisable by will only. Though there is some doubt as to what the cases establish, it is thought to be the law that the donee of a power limited to such exercise is not entitled to call for the corpus in his own lifetime. A note to Bull v. Vardy[2], gives the following explanation:

> "When, therefore, a gift is made to anyone expressly for life, with a power of appointment, by will only, superadded, that power must be exercised in the manner prescribed; for the property not being absolute in the first taker, the objects of the power cannot take without a formal appointment; but, where the gift is made indefinitely,

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1. (1809), 16 Ves. Jr. 135.

2. (1791), I Ves. Jr. 270; the note can be found in I Ves. Jr. Supp. 116, note 3.

> with a superadded power to dispose by will or deed, the property vests absolutely. The distinction is, perhaps, slight, but it has been judicially declared to be perfectly established."

Jarman on Wills[1], suggests that subsequent authorities since the Vesey Junior Supplement have left the matter less "perfectly established". The difficulty, of course, is that the courts are both concerned with discovery of the particular testator's intention, and yet with the legal concept of absolute vesting.

It now appears to be established that, if the general power to appoint by will only is coupled with a gift in default of appointment to the estate of the donee of the power (the life tenant), the court will make an order for transfer without requiring an appointment or a release of the power.

The connection between the Barford v. Street principle and the rule in Saunders v. Vautier is apparent. They are united by the fact that once the entire equitable (or beneficial) interest in property is concentrated, or is capable of concentration, in a beneficiary who is vested indefeasibly, or in two or more beneficiaries together entitled to the whole, he or they can call for the corpus and terminate the trust. For this reason several courts have described the Barford v. Street principle as a facet of the rule in Saunders v. Vautier.

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1. 8th ed., 1951, pp. 1174-1179.

(6) Charities

It was established in Wharton v. Masterman[1] that the rule in Saunders v. Vautier applies to unincorporated associations as it applies to natural persons. This was one leg of the charities' successful argument for transfer of the excess income (after certain annuities had been met) in Wharton v. Masterman.

However, the rule can only apply if the charity or charities have a vested and indefeasible interest. If an annuity is charged upon a natural person's interest, even if it is a vested and indefeasible interest, the natural person does not own the entire beneficial interest in the property, and therefore cannot, acting alone, exercise the rule in Saunders v. Vautier. The same reasoning would deny the benefit of that rule to a charity in a similar position. This was made clear in Wharton v. Masterman, and more forcibly so in Berry v. Geen.[2]

Moreover, it was made clear in Re Jefferies[3] that the rule cannot be invoked where there is a gift to 'charity'. Charity, as such, though a concept for the purpose of establishing that trust objects are certain, is not enough to establish a vested and indefeasible interest. In Re Jefferies the trustees were required to select such London hospitals as they chose to be the beneficiaries of the remainder interest (the division of the corpus), but the selection was to be made upon the occasion of the life tenant's death. Until then, the court held, the gift to those institutions was contingent.

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1. [1895] A.C. 186.

2. [1938] A.C. 575.

3. [1936] 2 All E.R. 626.

Yet another qualification must be made before it can be said that Saunders v. Vautier applies. It seems now to be decided that, if a testator makes a gift to a charitable institution in the terms that the income of the designated property is payable to the institution in perpetuity, the institution cannot call for the corpus of the fund unless it is otherwise clear from the language of the will that the testator nevertheless intended the charity to have the corpus. At first sight it might appear that such an intention is incompatible with a gift of income in perpetuity, but if the gift is made to a natural person it is obvious that the testator may well have intended the corpus to be payable on demand. A natural person can only fully enjoy the property if within his lifetime he can bring it totally within his own control, and a testator must be taken to have known this. Therefore, if the testator separates property from his estate, requiring his trustee to administer it as a separate fund, and he lays down that the income of the fund is to be paid in perpetuity to the beneficiary, he has created something of a contradiction. As a matter of law the beneficiary is the only person who has or can ever have any interest in the fund, but as a matter of construction there is a conflict between an income in perpetuity and the length of human life. The courts are not altogether clear whether their response to this situation constitutes a rule of law or a rule of construction, but they have decided that such a gift is only intelligible on the basis that the beneficiary (the natural person) can call for the corpus as soon as his gift is vested. This will normally be on the testator's death.[1]

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1. See Re Levy [1960] 1 All E.R. 42.

In the case of a gift of income in perpetuity from a separated fund when the beneficiary is a charitable institution, the same contradiction does not arise. An institution can exist in perpetuity, and therefore a testator will in all probability mean what he says when he lays down that income is to be paid in perpetuity. If the institution is non-charitable, and does not come within the limited list of valid non-charitable purposes, the give will fail because it offends the rule against inalienability. If the institution is charitable, it is exempt from the application of the rule against inalienability, and therefore the testator's intent can take effect.

Factors which confirm that the testator did indeed intend to keep the charity from acquiring the corpus of the fund are, e.g., these: the designation of the income for the general purposes of the charity; and the requirement that the fund be held by trustees other than the trustees of the will, the fund trustees being charged with the duty of paying the annual income to the charitable institution (or institutions).

The matter will be referred to later, but it should be mentioned at this point that, if the testator requires a sum to be invested and the accumulated income plus the original capital to be paid to the charitable institution at the close of a certain period of accumulation, the court is faced with the familiar question; is the gift vested or contingent upon the close of the accumulation period? If on a proper construction of the will it is established that the testator was creating an endowment fund, then effectively he was making a gift of accumulations. Such a fund is clearly contingent, and the charity cannot call for the capital plus existing accumulated income until the required period has run.

(7) The Wharton v. Masterman principle

If the testator or inter vivos settlor has required that income shall be accumulated for a period which is in fact longer than that permitted under the Accumulations Act, the question arises as to income arising after the close of the permitted period. E.g., "an annuity of $5000 p.a. to my widow charged on my residue, excess income to be accumulated during my widow's lifetime and paid to my son, George [or the XYZ Animal Hospital], on my widow's death." The widow is still alive 21 years after the testator's death. Who takes the income arising after the 21 year period ?

The Act lays down that, when an accumulation is invalid under the Act, the income arising during the excess portion of the chosen period shall "go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed." While Wharton v. Masterman was in the Court of Appeal,[1] and again while it was in the House of Lords,[2] efforts were made by the judges, notably Lindley L.J. and Lord Davey, to secure an interpretation of this phrase which would permit the beneficiary of the accumulations to take. It was suggested that an accumulation is the mode only in which the income is paid to the beneficiary. If that mode is invalid, then the income as it arises each year after the permitted period is payable to the person intended by the testator to take it, i.e., the beneficiary. In the above example that person would be George (or the XYZ Animal Hospital).

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1. [1894] 2 CH. 184.

2. [1895] A.C. 186.

However, these comments in Wharton v. Masterman have not been taken up by the subsequent authorities, and indeed have been ignored in the treatises. The view already then familiar was confirmed in later cases that the Act causes the excess income to pass as undisposed of property. Unless the beneficiary, e.g., George, is to take undisposed of property, excess income passes to the residuary estate donee, or, as would occur in the above example, to the next-of-kin. In Berry v. Geen[1] this interpretation of the Act was not even questioned. Moreover, Berry v. Geen made it clear that if the beneficiary is to take the accumulations "on the death of the annuitant", he cannot have been intended to take property which by reason of the Act becomes undisposed of prior to that time. Not even the rule of construction that a testator must be presumed not to have intended an intestacy, has prevented this interpretation.

So confirmed is the Berry v. Geen interpretation that that and later courts have refused to make an order under the inherent jurisdiction in favour of the accumulated income beneficiary, giving him the excess income, because, it is said, that would prejudice the interests of persons entitled to the undisposed of property.

In Wharton v. Masterman, however, it was established that if the accumulated income beneficiary has a vested and indefeasible interest in the whole equitable estate, he can assert a present right to the corpus and accumulations, and by calling for them under the rule in Saunders v. Vautier, avoid the occurrence of any excess accumulation period. The difficulty the beneficiary confronts in attempting to get the

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1. [1938] A.C. 575.

benefit of Saunders v. Vautier is that if an annuity or annuities are charged on the income arising, the beneficiary has a right not to the whole equitable interest in the property, but to the accumulations of excess income. The only reason this did not bring down the charitable beneficiary of Wharton v. Masterman was that that was the unusual case where the testator had laid down that, if there should be insufficient income in any year to meet the annuities, those annuities should abate proportionately. This meant that excess income in any year could not be called upon by the annuitants to make up the deficiencies in their annuities of other years. Consequently the charitable beneficiary had not only a vested and indefeasible right to the excess income accumulations, but that right was absolute.

It is rare that an excess income beneficiary is in the happy position both that his interest is vested on the testator's death, and that no other person's interest, or any purpose is charged upon that accumulating property. The complexity of most wills, which incorporate charged interests and accumulations, are such that the excess income beneficiary most often has only a contingent interest. However, this is another area where a Saunders v. Vautier claim may be successful.

3. THE APPLICATION OF SAUNDERS v. VAUTIER IN CANADA

An analysis of the reported cases shows that trust drafting and gifting in Canada has been such that all seven of the Saunders v. Vautier situations discussed in the previous section have occurred in this country. Several of the cases

have occurred in Alberta, including the most complex limitation that has come to light in Canada, namely, Re Burns Estate.[1] Moreover, the pattern of the cases from across Canada are such that any of them could have arisen in Alberta. That is to say, there is no evidence that will drafting practice in this respect differs at all in any part of the country. The authorities come evenly from the various common law provinces.

(1) Postponement to a certain age

In this bracket fall a large number of cases, relative to all six other brackets. The ages most popular with donors range between 23 and 30 years of age, and all the cases concern testamentary gifts. A noticeable fact, however, is that of eleven cases falling into this bracket only three resulted in a successful Saunders v. Vautier claim. Simplicity was the keynote in each of those cases. They were as follows:-

(a) Legacy in trustees to pay the income to A till he attained 25, and then to pay him the principal.

Re Townshend [1941] 3 D.L.R. 609 (N.B.)

(b) Specific realty to trustees to hold for A until he reaches the age of 30 years, and upon his reaching the age of 30 years to convey the realty to him, together with accumulated income. Trustees empowered to pay up to $700 p.a. for A's maintenance and higher education, and to sell the realty, if necessary, to produce that sum in any year.

Re Squire (1962), 34 D.L.R.(2d) 481 (Ont.)

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1. (1960) 32 W.W.R. 689; (1961) 25 D.L.R. (2d) 427.

(c) Residue to wife for life with power in trustees to encroach on capital for her, from and after the death of the wife income to A until he attains 25 with power in trustees to encroach on capital for him. Upon A attaining 25, capital to be transferred to A.

Re Mallory [1951] O.W.N. 661.

The remaining cases concern gifts which were either contingent or vested but defeasible, either construction being fatal to a Saunders v. Vautier claim.

In four cases the interest of the beneficiary was found to be contingent on his attaining the required age. The factors discussed in section 1 of this paper produced these results. In Re Waines Estate[1] an unanimous Alberta Court of Appeal considered crucial that interim maintenance was to be made out of a fund distinct from that under consideration, and that no intestacy would occur in any event. A comment of O'Connor J.A. demonstrates the tightrope the testator walks when he crosses the canyon named, 'vested and indefeasible'.

> "While one is sceptical as to a layman's knowledge of testamentary law, here we have a barrister testator. If he knew the law, as he probably did, he certainly chose the right words of gift to defer vesting and deftly avoided the pitfall of bequeathing the income in the meantime. This cannot have been purely accidental."[2]

In Fast v. Van Fliet[3] in the Manitoba Court of Appeal on the other hand, the testator's design avoided a Saunders v. Vautier claim by the narrow judicial margin of 2:1.

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1. [1947] 1 W.W.R. 880.
2. Ibid., at p. 886.
3. (1965), 51 W.W.R. 65.

In Re McCallum[1] the will was home-drawn, and the testatrix had used a printed form will. She had the good fortune to use the words, "after he is 30 years old", which suggested to the court that age was a desired personal attribute, and she omitted to say anything about maintenance or education out of the gift prior to that age being attained. Again, in Re Down[2] the Ontario Court of Appeal clearly found it crucial that there was a lack of provision out of the devised asset before A reached the desired age. But in this case it was almost by the very nature of the asset that this occurred. A was to have a joint interest in a farm when he attained 30. Prior to that time he was given $200 p.a. out of the income of the farm, to have a home on the farm, and his needs met in terms of eggs, butter, and milk.

One of the safest modes for preventing a successful Saunders v. Vautier claim is for the testator to provide a gift over on death under the required age.[3] This technique has a double advantage; it prevents A while he is under the age from being able to show that the entire beneficial interest is in himself, whether or not he can show that his own interest is vested rather than contingent, and it enables the court to find that the first gift (the gift to A) is vested,[4] thus entitling A to take the interim income as from the testator's death (as the cessation of a prior life interest). This means

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1. [1956] O.W.N. 321.

2. [1968] 2 O.R. 16.

3. Without a gift over the limitation in Re Johnstone Estate (No. 2) [1945] 2 W.W.R. 324 (Man.) would not only have been vested (as it was found to be), but surely indefeasible. $4000 to A "to be paid to him when he reaches the age of 25". The trustees had a discretion to apply A's "presumptive share" for the advancement or benefit. Giftover on death under 25.

4. Phipps v. Ackers (1842), 3 Cl. & Fin. 583.

that, if the testator has made no provision for A till the age is reached, the rule of construction (the rule in Phipps v. Ackers) will likely supply him with such provision. In the three Canadian cases where the court found A's interest to be vested but defeasible because of the gift over, the testator had in fact in each case provided for interim maintenance by way of a power in the trustees to make needed payments. But the vesting assisted A in each case to acquire the full interim income. To this extent, it is true, the testator's intention may not be implemented, but at least the gift over will prevent A from frustrating the testator's whole design. And in Re Barton Estate[1] the whole design was saved. The Supreme Court decided that though A's interest was vested as at the testator's death, and he was therefore entitled to the interim income, yet he could not have that income until he attained the required age. The distinction between a vested and contingent interest, the Court thought, was that the beneficiary of a contingent interest was only entitled to the interim income if a rule of law gave it to him; the beneficiare of a vested interest took by reason of the vesting. But in the Court's view, for reasons which are not entirely clear, A had to await the required age so that in effect he took capital and interim income at the same time. This curious outcome was avoided by Ford J. in Re Stedman.[2] Having decided that the beneficiary had a vested but defeasible interest, Ford J. held that she could take the interim income as from her 21st birthday rather than await the required age of 30. But Ford J.'s reasoning is not convincing. He distinguished Re Barton Estate on the grounds that in the instant case, unlike Barton, the provision for maintenance was charged on the corpus. This enabled him to say that the interim

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1. [1941] S.C.R. 426.

2. [1948] 2 W.W.R. 687.

income should therefore be paid into a separate account, and paid to the beneficiary at 21.

The writer would suggest that distinctions of this kind are too fine for the average testamentary intention and language which are of a cruder hue. The gift over enables the testator to avoid Saunders v. Vautier, but even if he is knowledgeable and addresses his mind to the matter, he cannot be sure of the time at which interim income will be paid, unless he specifically states his intention on that matter. Yet, if he requires as in Re Barton Estate and Re Stedman that the trustees are to have a power to make payments for maintenance, etc., during that time before the beneficiary reaches the stated age, he is not likely to have addressed his mind to when the full annual income should be paid. Indeed, he seems to have declared his mind to the effect that the full income is not to be paid at any time, except perhaps in the form of the accumulated excess income at the time when the corpus is paid.

(2) Postponement to a date

The few Canadian authorities on this technique are ambiguous as to whether it is sufficient to overcome the prima facie assumption that the gift is contingent. In Browne v. Moody,[1] on appeal from the Supreme Court of Canada, the Privy Council said of a gift that took place on the death of a life tenant that this date was a certain day, and the condition was not personal to the beneficiaries. Therefore the remainder interest vested on the testatrix's death. Browne v. Moody is now regarded as a leading authority. However, it has long been established in common law jurisdictions that, if the only reason for the

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1. [1936] A.C. 635.

gap in time between the testator's death and the gift taking effect is in order that a limited prior interest may be inserted, or that administration of the testator's estate may take place, e.g., the paying of debts charged on the gift property, then the gift vests at the testator's death. Browne v. Moody may only be an example of this rule.

Certainly in National Trust Co. v. Fleury[1] Ritchie J. suggested that, if a fund is to be taken at a certain date, this may actually aid the court in finding that the gift is contingent. In the two Canadian cases right on the point there was in fact a gift over on death before the date arrived, so that each gift could not be indefeasible, even if vested. But whereas in Re Boudreau Estate[2] the gift was held to be vested, in Re Winn[3] it was held that the gift was contingent. In Re Boudreau Estate the gift was of capital to be divided among the testator's children five years after the widow's death, the widow having a life interest in the property. In Re Winn the gift was in part of capital to be divided among the testator's children on January 1, 1971. The testator died in 1962, and his widow, who had a life interest in the property, dies in 1966. The children thereupon sought to have the capital transferred to them, all of them being of age and a sound mind.

In neither case was there a key factor other than the gift over, and it is significant, as we shall later note, that each trial judge seized on this factor. This prevented each testator's scheme from being upset. As the children in each case were seeking a Saunders v. Vautier termination, it therefore was of no particular significance whether the gift was vested or contingent.

1. (1966), 53 D.L.R. (2d) 700, 712.
2. (1965), 47 D.L.R. (2d) 584 (N.B.).
3. (1968), 66 D.L.R. (2d) 182 (Ont.).

(3) Instalment gifts

These gifts are an invitation to a successful Saunders v. Vautier claim, unless the testator has taken the care to make the vesting of each instalment contingent on the donee living to such time. The writer was able to find no Canadian authority where such contingency had even been attempted by the testator, but it is clear that such a requirement would have to be exceedingly explicit if the court is not to find that, the whole beneficial interest nevertheless being in the donee, he can wind up the trust or claim immediately upon the executors.

However the testator varies the basic scheme, if income and capital are eventually to go to the donee, and he alone, the Canadian cases demonstrate that the chances of a premature termination are extremely high. It will be realised that the testator could have secured his basic object by other limitation techniques, and the conclusion is irresistable that the testator's scheme is frustrated either by careless drafting or because the testator made his will at home without advice. As the chances of that frustration are so high, it may be valuable to set out the limitations of the Canadian authorities which met this end.

(a) One quarter of residue to trustees on trust to pay A $60 per month. Should A predecease the testator or die before all the capital is paid to him, the property to pass to A's estate.

Re Dawson [1941] 1 W.W.R. 177 (Alta.)

(b) One third of testator's estate on trust for A for her "sole use and benefit", to be paid in the form of $200 per month, except that in case of her illness or other emergency such payment may be increased in any month in the sole discretion of the trustees.

Re Burger Estate [1949] 1 W.W.R. 280 (Alta.)

(c) Proceeds of insurance policies on testator's life on trust to trustees to hold the proceeds as a spearate trust fund, and to pay $15,000 per year to A out of capital or accumulated revenue of the fund until the entire capital and income are used up.

Montreal Trust Co. v. Krisman (1960), 24 D.L.R. (2d) 220 (B.C.) S.C.C.

(d) Testator's estate divided into four parts. One half to A, and one sixth each to B, C, and D. A to receive $1000 p.a. until the capital and income of his share is exhausted. B, C, and D to receive $500 p.a. until the exhaustion of their shares.

Re Price Estate (1966), 55 W.W.R. 26 (Sask.).

It is also interesting to observe the courts' various comments in these cases. In Re Dawson Ewing J. pointed out that, if the testator gives a life interest to A, and requires the capital to pass to A's estate (discussed in section 2(1) of this paper), or makes a gift by instalments of corpus, remaining corpus to pass to A's estate, Saunders v. Vautier must apply. Either is an absolute gift. In Re Burger Estate Boyd McBride J.[1] noted that the will did not cut down, control, or modify the bequest. "No one else has any interest in it or derives any benefit from it. There is no definite future date when any balance on hand of the third [share of the estate] becomes payable to [A] in her lifetime, nor is there any gift over or provision as to any unpaid balance in the event of her death." Indeed, he said, this case was stronger than Re Dawson where there was a provision as to unpaid balance.

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1. [1949] 1 W.W.R. 280, 282.

The Montreal Trust Co. case is a striking example of poor drafting. The testator had even made other property available to feed the trust, and keep the income at $15,000 p.a. when the corpus was too depleted to accomplish that sum on its own. Cartwright J. pointed out that the testator could have provided that the beneficiary (his wife) should have $15,000 on his death if she were then living, and $15,000 on each anniversary of his death on which she was living, and on her death any balance should go as a gift over, or result to the testator's estate. On the words used, however, the learned judge could not avoid finding an absolute gift with subsequent directions as to payment.

Only in one case which has come to light did the testator avoid Saunders v. Vautier. In Re Eves[1] he left "the sum of $130 per month" to his widow "until such time as she receives her old age pension and the amount of the pension must be deducted from the $130." There was no gift over. The question was whether this was a perpetual income, which would have entitled the widow to call for the capital. Bence C.J.Q.B. decided that it was not. This was a gift of an annuity payable during lifetime; it was not a gift of a lump sum to be paid over a period of time, nor had the widow been given an income for an unlimited time, i.e., without limit beyond her death.

The seeds lie in Re Eves for yet another way in which the testator in the Montreal Trust Co. case could have achieved his purpose.

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1. (1965), 50 D.L.R. (2d) 88 (Sask.).

(4) Discretionary trusts and powers

Canadian courts have felt no hesitation in following the English cases, notably Re Johnstone[1], and Re Smith[2]. The mere fact of the testator creating a discretionary trust or giving his trustees a power will not prevent premature termination of the gift by the beneficiaries unless the trustees have it within their discretion or power to withhold the designated property from the beneficiary or class of beneficiaries. In each of three Canadian cases this had not been done, and the court was left to remark that had the disposition been left entirely to the trustees' discretion, or there had been a gift over of property not transferred to the beneficiaries, the rule in Saunders v. Vautier would not have applied.

Again, the limitations may be of interest :

(a) To W an income for life, remainder as to one quarter of the residue to A on his attaining 21, with the proviso that, if the trustees do not think it desirable for any reason that the share should be paid, they shall defer payment of the whole or part until such time as they think best, in the meantime paying only the income to A.

Re Hamilton (1913), 27 O.L.R. 445

(b) The testator's estate was left to trustees; to use the fund to educate and support A.

Re McKeon (1913), 25 O.W.R. 146; 14 D.L.R. 370

(c) Residue on trust as to one half of the income to A for life, remaining one half to be accumulated for A, the trustee having a power of encroachment over capital and accumulations for A's benefit. On A's death the residue

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1. [1894] 3 Ch. 304.

2. [1928] Ch. 915. See Re Rispin (1923), 2 D.L.R. 644, 25 O.L.R. 633, 636, aff'd. 46 S.C.R. 649.

to pass as A should by will appoint.

Re Johnston (1965), 48 D.L.R.(2d) 573 (B.C.)

In the last case the trustee objected to the benficiary's claim on the ground that it (a trust company) had a discretion. Having noted that in any event there was a complete vesting, Nemetz J. went on to add another consideration which is unique. In this case, he said,[1] the "discretion can only be of a most limited kind when one considers that the amount of the estate is only about $30,000 and that the sole beneficiary is 36 years of age."

(5) The Barfoot v. Street principle

When a testator gives a life interest over certain property, and confers upon the same beneficiary as power of appointment over that property to take effect upon the beneficiary's death, the courts, as we saw in section 2(5) of this paper, are caught in a difficult position. Seen from the point of view of the testator's intent, it appears to have been intended that A should have an income interest during his lifetime, and be able to determine who should have the remainder interest upon his death. However, if the power enables A to appoint to whom he will, including himself, the testator seems nevertheless to have intended that A can, if he wishes, appoint to himself, and thus bring the entire beneficial interest into his own hands. If A were to exercise the power in favour of himself, there would then be the following limitation: to A for life, remainder to A absolutely. It is clear from our previous discussion that the entire beneficial interest is vested in A, and that by rule of law when such a situation occurs A is

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1. At p. 576.

is entitled to call for the corpus, and terminate the trust or terms of the gift. So there are two factors bringing about this result; the somewhat contradictory intention of the testator (the donor of the power), and the rule concerning vested and indefeasible interests.

There is another difficulty. A power is merely a means whereby a person can acquire the remainder interest, and so, having exercised it, bring the absolute interest in the property into his own hands. Until he has exercised the power, he has not got a vested and indefeasible interest. And, if he does not exercise it, and there is no gift in default of appointment, the property will not on A's death fall into A's estate. It will pass as under the will of the donor of the power. So it becomes important as to when A can exercise the power. If he can exercise it by deed or will, clearly he can exercise it in his lifetime, release the power of revocation, and thereupon claim successfully that he is entitled here and now to have the corpus of the property.

But, if the power is exercisable by will only, there is something of a conundrum. He can make a will exercising the power in favour of himself, but the will takes effect from his death, and therefore he can never say while in the flesh, 'I am entitled to the corpus here and now.' Yet when he is dead his estate will acquire the corpus beneficially! In this way we come back to the limitation which runs: to A for life, remainder to A absolutely. And such a limitation lets in, or should let in, the rule in Saunders v. Vautier.

However, as we saw, the English courts for a long time drew back from this conundrum. The crucial point, they thought, was when the power took effect. If it was exercisable by deed, and it were so exercised, expressly or impliedly (by an application to the court for the corpus), then A was entitled to the corpus and to terminate the trust. If it were only exercisable by will

then whatever the conundrum, A was not entitled to call for the corpus. Canadian courts went along with this line of thought. In Re Templeton[1], Re Mewburn[2], Re Jones[3] and Re Southam Trust it was held, albeit over dissents in two of these cases, that where A, as life tenant, could by deed or will appoint, he was entitled to call for the corpus, and terminate the trust.

The dissents, however, were not concerned so much with the doctrine that a life interest plus a power of appointment by deed or will constitutes an absolute inter vivos vesting. They were principally concerned with the fact in each case that the donor of the power had said the power should take effect "on the death of" A (Re Templeton) or become "operative on the death" of A (Re Jones). The dissenters were unsuccessful because they could not convince their colleagues that this was evidence that the vesting of the appointed property was intended to be contingent on A's death.

The conundrum of the power to appoint by will only was eventually tackled by the English courts from another angle. Would it make any difference, it was asked, if, in default of appointment by A, the donor of the power had made a gift of the property to A's estate? The consensus of the English cases is that in these circumstances the timing of the taking effect of the appointment is less important. A has a life estate, plus a vested but defeasible remainder interest absolute. Since the occurrence of defeasance turns on his own act of appointment in favour of another, something which he does not intend to do, it seemed logical to the courts to classify this situation with the power to appoint by deed.

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1. [1936] 3 D.L.R. 782 (Man. C.A.).

2. [1939] 1 D.L.R. 257 (S.C.C.).

3. [1955] 1 D.L.R. 438 (Ont.).

However, where there is a gift in default to third parties, or no gift in default so that the property would fall back into the donor's estate, English courts will not award the corpus to a life tenant with a power of appointment by will only.

The few Canadian decisions on this type of power leave the law in the common law provinces in some doubt.

Two early judgments from Middleton J. suggested that this was not to be. In Re Hooper[1] he was confronted with both a power to appoint by deed or will and another power to appoint by will only. A, the donee of the powers, claimed the entire corpus, and succeeded. The learned judge did not even distinguish the powers; perhaps because the testator had given the corpus to A's intestate heirs in default of appointment. Later, in Re Campbell Trusts[2] Middleton J. heard the argument that in the earlier case he had overlooked the distinction between the two powers. He brushed the criticism aside. There was no distinction, Page v. Soper[3] and Re Onslow[4] had confirmed that, and the law was "too clearly settled to admit of discussion."[5] It is noteworthy, however, that there was again in this case a default gift to A's personal representatives. If there had been a default gift to a third party, said Middleton J., that would have been different. For an appointment by will could not be made to take effect in the testator's lifetime, and a will cannot be irrevocable.

This, it will be seen, is the English position. But Middleton J.'s views of what was so clearly settled do not appear to have been presented to the Supreme Court when the question came before it some thirty years later.

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1. (1914), 7 O.W.N. 104.
2. (1919), 17 O.W.N. 23.
3. (1853), 11 Hare 321
4. (1888), 39 Ch.D. 622
5. (1919), 17 O.W.N. 23, 24.

In Berwick v. Canada Trust Co.[1] A was left the income of one half of the testatrix's estate for so long as he should survive the testatrix. At the end of 10 years from her death, he took the corpus. However, if he predeceased her or died within the 10 year period, the trustees were to distribute the corpus as A appointed by will. In default of appointment, the corpus was to pass as part of A's estate. The other half of the testatrix' estate was left to A absolutely on the testatrix's death, and when she died A claimed the corpus of the entire residue.

If the English authorities were followed, the answer was a short one. As A had a vested, if defeasible, interest in the first half of the testatrix's estate by reason of the default gift, he could claim the entire residue. It would not make any difference that the corpus came to him under the terms of the will after the passage of 10 years, rather than by his own act of appointment to take effect after his own life estate. Indeed, A's argument was stronger because of the terms of the will. If he did nothing, he acquired the corpus after 10 years or it passed to him on his death before that period had elapsed.

If the English authorities were not followed, his right to the corpus vested after 10 years. While living he could not acquire the corpus before that time had elapsed.

The Supreme Court in an unanimous judgment decided that the words, "at the expiration of 10 years", created a contingent gift. As to the power of appointment, the Court held that appointment was essential. If A died before the 10 years had elapsed, "those then entitled would take, not through devolution by law, but through the will of the testatrix."[2] This is a totally new avenue of thinking, and unfortunately it appears

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1. [1948] 3 D.L.R. 81 (S.C.C.)

2. Ibid., at p. 84, quoting Macdonald J.A. in the Saskatchewan Court of Appeal.

not to have been commented upon since that time by any other court. It is true that the testatrix had said that the corpus should "form part of [A's] estate at the time of his death whether testate or intestate and had he died without owing any debts", but this ousting of creditors does not seem to have been in the Court's mind. The Court's decision was framed in general terms, and actually quoted in support English authorities (which, incidentally, did not speak to the point at issue). In the writer's respectful opinion this decision on the power of appointment cannot be defended. A claims in such cases as this that the default gift gives him a vested but defeasible interest; he does not have to show that he already has a technically absolute interest (which alone by law would devolve upon his heirs). If he did have to show this, even a donee of a power which can be exercised by deed would be met by this Court's argument if the power had not actually been exercised. This would surely be preposterous, even for the law concerning the construction of wills.

In Re Johnston[1] Nemetz J. came to a conclusion which is as curious in the opposite direction.[2] A had a power of appointment by will only. It appears from the report of the case that there was no gift in default of exercise. Nemetz J. took the view, however, that A "had everything".[3] She had a life interest over one half of the estate, a power of encroachment in her favour over the accumulations of the other half, and the remainder. Citing Re Jones, where as it happens there was a power to appoint by deed or will, and ignoring Berwick v. Canada Trust Co., he made an order in A's favour for the handing over of the entire corpus. This, of course, goes much

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1. (1965), 48 D.L.R. (2d) 573 (B.C.)
2. See section 3(4)(c) of this paper for the full limitation.
3. Ibid, at p.576.

beyond the English cases, and equates the beneficiary who has a power to appoint by will alone with the beneficiary who has a power to appoint by deed or will.

There are two issues to be considered in relation to the Barford v. Street principle. First, ought the donee of a power to appoint by deed or will as to the remainder following his own life interest, to be denied his existing right to acquire the corpus in his own lifetime. Secondly, if this right is to be retained, what clarification should there be of the rights of the donee of a power who may appoint by will only.

(6) Charities

Canadian cases permit charities to terminate trusts under the rule in Saunders v. Vautier, and have followed the English precedents. The controversial case of Re Levy[1] was in fact preceded by Canadian authority to the same effect, though this does not appear to have been drawn to the attention of the English Court of Appeal.

A crucial factor for the charity applicant, however, is to show that the gift was for the general purposes of the charity, and so provide evidence of a general charitable intent on the donor's part. Such an intent shows a dedication of the donated property to charitable work, the particular mode of application being of more secondary importance. In those circumstances the court can more easily distinguish between the gift to charity and the direction as to the mode of enjoyment. In Re Beresford Estate[2] , e.g., the testatrix gave her residue to trustees to pay $200 p.a. to a certain parish church. After 21 years the capital and accumulated excess income was to be

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1. [1960] 1 All E.R. 42 (C.A.).

2. (1966), 56 W.W.R. 248 (B.C.).

paid to the same church authorities. The church authorities having claimed that they were entitled on the testatrix's death to the corpus, the question was whether there was "an effectual and absolute gift" or a gift for a particular charitable intent, and therefore an immediate unconditional gift to charity with a term of postponement and a condition attached to the particular mode of execution. The testatrix's next-of-kin were therefore excluded, and the parish church was entitled to the corpus at once.

As to gifts to charities of income in perpetuity, Re Levy should be read together with Halifax School for the Blind v. Chipman,[1] for the English court in apparent ignorance of the Supreme Court decision came to the same conclusions. It can therefore be regarded as well established in Canada that where a charitable institution is made a gift of income as it arises year by year, whether or not the capital is vested in the hands of separate trustees, the institution cannot wind up the trust and have the capital transferred to itself. The Supreme Court decided in this case that there was no specific gift of the capital, and, thereby supporting the English court's later determination, concluded that the rule to the effect that an unlimited and unrestricted gift of income carries the corpus, is a rule of construction subject to evidence of a contrary intent. There was no evidence of a contrary intent in this case, as there was none later in Re Levy, and therefore the applicants in both cases failed to secure the corpus in question. Wharton v. Masterman[2], the leading case on a successful Saunders v. Vautier claim by charities, could be distinguished in both Re Levy and Halifax School for the Blind on the ground

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1. [1937 3 D.L.R. 9 (S.C.C.).

2. [1895] A.C. 186.

that in Wharton's case there was a gift of corpus to the charities.

Another way in which the testator or inter vivos settlor can keep his trust from being short-circulated by a Saunders v. Vautier claim is by creating a capital endowment for the chosen charity or charities. There are two methods by which this can be done. Either, as in the Halifax School case, he can vest the capital by deed or will in his trustees, and require them to pay the income annually to the charity,[1] or he can transfer the capital by deed or will to the chosen charity, stipulating by appropriate wording that it be invested by the charity as a capital endowment. The first method was used in Re Burns Estate,[2] and the second was most recently approved in Re Levy. Success with the second method is probably the more difficult to obtain, because the donor's words must be sufficiently clear that the gift is not intended to go into the charity's funds, available for immediate and total consumption, which the cases suggest is the natural construction.

The settlor may also decide to build up the capital to a greater sum before making it available to his chosen charity. But again he has to employ great care. The way in which to build up the gift is to convey capital to trustees, and require them to invest and accumulate the annual income for a given period. Then at the end of the period the charity acquires the amassed fund. If the settlor, normally but not necessarily a testator, simply requires the amassed fund to be paid to the charity at the close of the period, he is likely to find his design brought to nought by a Saunders v. Vautier claim. He can try to avoid this result by making the vesting of the fund contingent on the completion of the given period, and the best way in which to do this is to make it clear that the accumulations come to the charity as a gift of accumulations quâ accumulations, with the original

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1. See the words of Davis J., [1937] 3 D.L.R. 9, 25.

2. (1960), 32 W.W.R. 689 (alta.C.A.).

capital merely added on. This was not done in Wharton v. Masterman, and consequently the requirement that income be accumulated was no more the testator's investment policy before capital payment date. The charities could, and did, successfully claim that they had a present vested and indefeasible interest.

It is therefore still safer for the settlor, who wishes to see his design carried through, to have the amassed sum held by separate trustees or by the charity itself as a capital endowment. This is what happened in both Berry v. Geen[1] and in Re Burns Estate. In this way he can ensure the building up of the gift over a period of time, and then the availability of his largesse to the charity over a further and indefinite period of time.

There is another way in which the settlor can keep the charity at bay until at least the selected period of accumulation has run its course. He can charge further gifts on the accumulating fund, and make the duration of those charges the period of accumulation. If, e.g., annuities are charged, the annuitants always have a right to make up in good income years for the deficiencies in their annuities in past bad years. Thus, no person or charity entitled to the accumulating excess income can claim it under Saunders v. Vautier until the last annuitant has died, his annuity entitlements met. This was another factor which aided the testator's design in both Berry v. Geen and Re Burns Estate.

This factor aided in keeping out a Saunders v. Vautier claim in Re Robertson[2]. But there another factor proved important. Unlike Wharton v. Masterman, the testator did not give all the excess income to the charity. He gave up to, but not more than, $10,000 p.a. This meant the charity had to wait till the last annuitant's death when, as the testator had planned, the capital and sundry accruings of interest became payable.

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1. [1938] A.C. 575

2. [1939] 4 D.L.R. 511 (Ont. C.A.).

In short, the grave danger the settlor runs when he simply leaves capital in his trustees hands, requires them to accumulate the income for a given period, and then at the close of that period pay over the fund to the charity, is this: he lets in the possible deduction that he intended the charity to have the whole beneficial interest, regardless it would seem of when the charity got it. Alternatively, one could put it this way that the whole beneficial interest is in the charity, and therefore by a rule of law the charity can call for the corpus, and wind up the trust.

In Re Birtwhistle[1] the donee seemed to have such an open and shut case for a Saunders v. Vautier termination. An inter vivos trust gave the settlor a life interest, and following his death income was to be accumulated for 21 years, after which time capital and accumulations were to be paid to the corporation of the town of Colne, England, for the benefit of the aged and deserving poor of the town. However, Rose C.J.H.C. refused to find that after the settlor's death the corporation could acquire the corpus at once. His reasons were threefold, and with respect none is impressive. His first was that Colne was not entitled to the securities in the trust fund; only to a fund of capital plus accumulations. It is true the securities were only to be sold by the trustee, a trust company, at the end of the 21 year period, but the form of the property cannot defeat the Saunders v. Vautier claimant. His second was that the trust company was entitled under the trust terms to a scheme of remuneration. But it is axiomatic that no claimant may be met by this argument of the trustee. His third was that the corporation of Colne was only to be a trustee for the true legatees, an unascertained class of aged and poor. This is patently incorrect; the corporation of Colne was as much the legatee as is a charity whose works is with the aged and

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1. [1935] 4 D.L.R. 137 (Ont.).

poor. One surely cannot distinguish Wharton v. Masterman in this way. Finally, Rose C.J. commented that here was one trustee (the corporation of Colne) asking the court to assist another trustee (the trust company) "to join in a breach of trust, or, at least, to join in disregarding the settlor's instructions."[1]

This, one feels, is the key remark to this judgment. The trial judge could find no moral merit in Colne's claim. It was a claim which took the benefactor's donation, but thumbed the nose at his declared intention and wishes. As we shall later see, this is not the only case where the judicial desire to preserve the settlor's design has resulted in bad law, or at least unfortunate law.

(7) The Wharton v. Masterman principle

Saunders v. Vautier can be invoked under this principle if A is entitled to capital at the falling in of the last annuitant's life, and to surplus income which has accumulated during the subsistence of the annuities. If the annuities (or charges, whatever form they take) cannot be kept up, when necessary, from surplus income in previous years, A can step in and take the surplus income as it arises each year. No one else has a claim to it, and he can stop any accumulation required by the settlor. In this way, should any annuitant be living 21 years from the settlor's death, assuming a testamentary trust, A can prevent any income from falling into the hands of the next-of-kin of the settlor.

The Lords in Berry v. Geen took the view that the next-of-kin have a right to income arising after the permitted time of accumulation unless A is entitled to all undisposed

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1. Ibid, at p. 143.

of property; and that their interest should be kept in mind, together with that of A and others, when the will is being construed. This curious, almost perverse, interpretation of wills which can result in the testator's property going to persons whom he had not included in his will, is the modern position in Canada as well as England. In 1939, only a year after Berry v. Geen, it was approved and followed in Re Robertson[1] . Further, in Re Hammond[2], the Supreme Court had already decided that the Accumulations Act gives surplus income beyond the permitted accumulation period to those entitled to the testator's undisposed of property, or to his next-of-kin. Therefore, when as in both these Canadian cases it is held that A has only an executory interest in capital and accumulated income, vesting on the surviving annuitant's death, he has no claim to capital or income before that time. The Supreme Court also said, Crocket J. speaking for the Court,[3] that even if A's interest vests, though defeasibly, on the testator's death, he cannot claim income arising after the permitted accumulation period in those circumstances where the testator has made it clear that the distribution of capital and accumulations shall take place on the surviving annuitant's death.

Judson J. in Re Tuckett[4], and Johnson J.A. in Re Burns Estate[5] , assumed without question that excess accumulations went as undisposed of property to the next-of-kin.

Either because the particular beneficiary's interest was contingent or he was not entitled to all the surplus and

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1. [1939] 4 D.L.R. 511 (Ont.).
2. [1935] S.C.R. 550.
3. Ibid, at p. 558.
4. [1954] O.R. 973.
5. (1960) 32 W.W.R. 689.

accumulating income, there appears to be no Canadian case where a Wharton v. Masterman claim has succeeded.

It only remains to be added that, if a charity is to take capital and accumulations on the surviving annuitant's death, and that death has no occurred when the permitted accumulation comes to a close, the intestate heirs will not take that income if the court can find a general charitable intent. In those circumstances the court will require a scheme to be drawn up, acting under the cy-pres doctrine.[1]

4. THE HISTORICAL BACKGROUND OF SAUNDERS v. VAUTIER

The rule goes back into the antiquity of the law of trusts. As early as the seventeenth century when the doctrine of the trust flourished after the Restoration of 1660 it was recognised that the right of enjoyment which rests in the trust beneficiary is the essence of the ownership, and that the rights of disposition and of management which remain in the trustee, though essential to the concept of ownership, are subsidiary. The trust was seen as a mode of disposition, and once the settlor had divided up the right of enjoyment among his chosen beneficiaries, he truly alienated the property when he conveyed or transferred it to the trustees. As an alienor he gave up all his rights over the property, and consigned them to the trustee and beneficiaries together. In a sense the settlor chose the trust as his mode of disposition, because rather than transfer his property out-and-out he preferred to transfer it to the complex of trustee and beneficiary. In the great majority of cases the beneficiary would be a donee, and the trust allowed the settlor not only to distribute his benefaction among a number of persons, but via the dispositive powers and discretions which he gave to the trustee to make gifts to all or some

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1. See Re Burns Estate.

his beneficiaries contingent or payable on the occurrence of future events. From 1660 onwards the ways became numerous in which the settlor might in his deed of settlement or his will determine who enjoyed his property in the future, and when that enjoyment should take place. Nevertheless, the trust remained a mode of alienation. If the settlor once transferred the property on trust terms, he did not even have an action against the trustee for breach unless he expressly reserved it. The settlor's rights ended on conveyance or transfer.

As between the trustee and the beneficiary (or beneficiaries) thereafter, while no beneficiary might challenge the trustee in his carrying out of his management and dispositive rights, except for failure to carry out the trustee duties, the beneficiaries alone possessed the right of enjoyment. If followed in the eyes of the post-Restoration Chancellors, the fathers of modern Equity, that a single beneficiary or all the actual and possible beneficiaries together might terminate the trust. In the case of a single beneficiary whether his gift was vested, the owner of that interest was entitled to say, like any other donee of an out-and-out transfer, that no one could dictate to him how he could enjoy what was his own.

It was for these reasons that Lord Chancellor King's judgment was affirmed by the House of Lords in Love v. L'Estrange[1]. The testator left his personalty to trustees on trust for A until he should attain the age of 24 years, and thereafter for A, his heirs and assigns. A attained 21, but died before attaining 24. It was held that A's interest vested on the testator's death, and therefore it passed as part of A's estate. The House decided that 24 years was

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1. (1727), 5 Bro.P.C. 59.

mentioned in the will not to prevent the right from vesting before that age, but in order to direct the trustees as to the time of payment. Since the testator had vested the right in A on the testator's own death, the gift was then complete. Clearly, had A claimed on the corpus on coming of age, he would have got it.

The decisions in Saunders v. Vautier[1], affirmed on appeal before Lord Cottenham, L.C.[2], and Gosling v. Gosling[3], were therefore in a line of precedent with its origin in the seventeenth century. Occasionally, as in Wharton v. Masterman, a member of the bench would say that the rule might usefully have been examined as to its consequences when in its formative stage, but its conceptual validity was accepted by all.

As such the rule has gone to common law jurisdictions everywhere, and it is currently in force in the states of Australia, in New Zealand, and in all the common law provinces of Canada, as well as in England.

5. THE AMERICAN VIEW

The rule emigrated to the colonies on the eastern seaboard, and it became firmly established in the States of the Union. Towards the close of the nineteenth century a totally new philosophy began to emerge, however. The trust is unique and somewhat conceptually contradictory in that, while a mode of transfer, it is the sole means whereby a man can transfer and yet at the same time impose close regulation on the administration of the property, and create present and future beneficial interests. In a sense the settlor is planning the role of the property over one, two, or three generations. This suggested

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1. (1841), 4 Beav. 115.

2. (41 E.R. 354).

3. (1859) John 265.

to American thinkers that prime emphasis should be put upon the settlor's intent. But this thinking was also part of a movement of social and economic theories, which was an expression of a laissez faire philosophy. As a result, caught up in such a movement, the idea rapidly spread among the States that the settlor's intent should prevail over the beneficiary's desire to acquire the corpus. Only in a few states today will a Saunders v. Vautier claim succeed.

The general recognition of the principle that the settlor's purpose should not be defeated first found expression in the growth and spread of the spendthrift trust throughout the U.S.A. Such a trust involved a total restraint on alienation by the beneficiary, and as such was a singularly effective means of providing for a person. Creditors could not move against the trust fund nor against the beneficiary's future expectation of income. That such a trust should have been tolerated when other jurisdictions were concerned with stamping out trusts whose object was to defraud creditors, is a monument to the strength of whole social and economic theory which prevailed in the U.S.A. in the second half of the nineteenth century.

From this beginning grew naturally the idea that, in the absence of a spendthrift clause, the courts should impose a restraint on anticipation where that would ensure the carrying out of the settlor's intent. In Chaflin v. Chaflin[1], the Supreme Judicial Court of Massachusetts decided that where income was payable to A as from the testator's death, and the capital in three instalments at the ages of 21, 25, and 30 years, A was not entitled to the capital on attaining 21.

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1. 149 Mass. 19, 20 N.E. 454 (1889).

The settlor's purpose would clearly be frustrated if A could acquire the capital other than at the ages which the settlor had chosen. This case is the leading authority for the 'material purpose' doctrine.

Under this doctrine no beneficiary (if it is a single beneficiary trust) or the sum total of beneficiaries may terminate the trust if any material purpose of the settlor remains to be carried out. What is a material purpose seems largely to be a question of fact, and the evidence needed for deciding that question may be drawn either from the trust instrument or the circumstances in which the settlor drew his trust.

The most obvious area in which the material purpose doctrine would apply is where the settlor has postponed the enjoyment of the donated property. This would cover the first three situations in which the rule in Saunders v. Vautier applies; i.e., postponement to a certain age, postponement to a date, and instalment gifts. In the view of the Chaflin cases, the settlor has foreseen and provided for the future, and to depart from his scheme by allowing termination would directly violate his obvious purpose and provision. It follows that it is of no significance whether A's interest is vested or contingent. He cannot terminate the trust. It will be observed that A could alienate his interest if it is not subject to a spendthrift provision; some courts have therefore gone to the length of binding A's transferee to the same restraint on anticipation, and by this means considerably restricted the number of persons who would be interested in acquiring A's interest. Other courts have not been prepared to go so far, and the difficulty of course is the reluctance to impose conditions on third party alienees. Such impositions

are perhaps justifiable when the third party appreciated what A was attempting to achieve, but the courts soon run into problems of notice. The inevitable outcome is the call for the registration of trust interests, after which the court could more easily deny the beneficiary the right to anticipate a contingency or a payment date.

The second area in which American courts will refuse premature termination is that of support trusts and discretionary trusts. A support trust is one of which the object is the maintenance of the beneficiary or beneficiaries over a given period of time. Usually this will involve discretionary powers being placed in the trustee. A support trust cannot be terminated because the settlor clearly did not intend that his beneficiary should be able to acquire the corpus. And whether the discretionary powers extend only to the timing of payments or involve the ability permanently to withhold the fund or part of it, the courts will not permit any termination which will destroy that discretion. If the trustee has a discretion as to when the trust is to be determined, the courts will not effectively take it away from him by an order for termination.

The third area concerns the Barford v. Street principle, as Canadian and English lawyers know it. If the evidence shows that the settlor had a purpose in giving a power of appointment to A to follow A's life interest, there is American precedent which demonstrates that the courts will not agree to an early termination. In the Will of Hamburger[1], for instance, A had a life interest, remainder as to capital as she should by will or otherwise appoint, and in default of appointment the capital went to her intestate heirs. A transferred all her interest

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1. 185 Wis. 270, 201 N.W. 267 (1924).

in the trust to her son, who thereupon sought to terminate the trust and acquire the corpus. The court refused on the ground that the settlor was shown to have intended that the particular form of the corpus should remain for the duration of A's life. That intention was secured by leaving the corpus in trust for that time. On the other hand, Scott on Trusts[1] states categorically that while a beneficiary with a life estate and power to appoint by will only cannot terminate the trust, even when there is a default gift to his heirs or next-of-kin, the courts make no such restriction when the beneficiary has a power to appoint by deed or will. In the latter case, it is said, the beneficiary can appoint to himself, and thus cut out any who are to take in default of appointment. One would comment that any such conceptual distinction is more compatible with the rule in Saunders v. Vautier. Should not evidence be adducible to show that a settlor had a material purpose in wording his power in this way ? A reading of American cases in this area suggests that the courts are more indecisive than Scott would lead one to think. The factual issue of what is a material purpose in a particular case masks the court's attitude as to whether this is, after all, an area of conceptualism. The precedents tend to swing between the Will of Hamburger approach and the conceptual approach.

The fourth area concerns gifts to charities, and under this head it will be convenient to take the Wharton v. Masterman principle. A trust in favour of a charity is also subject to the material purpose doctrine, and the courts will only interfere to stop an accumulation for a charity where the accumulation is unreasonable, unnecessary, and to the public injury. Incidentally, this is a criteria which American courts will apply to all trusts. Only if the trust is not in the

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1. (3rd ed., para. 340, p. 2708).

public interest (putting it at its broadest) or if it no longer serves the settlor's evident intention, will the courts permit premature termination. This principle was applied to a charitable gift in St. Paul's Church v. A.G.[1]. But an earlier case gives a genuine expression of the thinking behind the refusal to terminate, one which underlies the whole philosophy of these cases. In Bainbridge's Appeal[2], the court saw no reason to set aside the testator's directions where they were not in conflict with public policy, religion, or morality, and did not impinge upon any statute. The court reflected that the testator may have thought, as the good man of the house said to the labourer who complained of the inequality of the payment, 'Is it not lawful for me to do what I will with mine own ? '.

Material purpose is most commonly found, and therefore the rule against frustrating the settlor's intent most commonly applied, in spendthrift trusts. Such trusts are recognised in the majority of States. In some States they have been introduced by statute, and in others they are recognised by the common law. In a spendthrift trust, where beneficial interests or a particular interest will be subject to a total restraint on alienation, the beneficiary may make no voluntary assignment of his interest and his interest may not be proceeded against by any creditor of his. The likelihood of abuse of such a considerable advantage to the beneficiary is considerable, and as a result, while the undoubted policy of most American jurisdictions is to not to terminate spendthrift trusts, there is some movement in the other direction. Cases have occurred, even in Pennsylvania where the spendthrift

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1. 164 Mass. 188, 41 N.E. 231 (1895).

2. 97 P. 482 (1881).

trust was born, in which the court has refused to resist a winding-up action, giving as its justification the right of the absolutely entitled beneficiary, who is adult, to call for the corpus. Under the Pennsylvania Estates Act, 1947[1], the court may terminate a trust, regardless of a spendthrift provision, and make allowances out of capital to income beneficiaries, if it considers the trust terms impracticable or impossible to carry out, and that modification or termination would more nearly carry out the settlor's intent. This Act makes an interesting comparison with the variation of trusts Acts in other common law jurisdictions outside the U.S.A.[2].

Finally, some of the most difficult problems for American courts have occurred with trusts containing successive interests. In general the policy of American courts is not to award a terminating decree where the trust is active, (i.e., involving the trustees in dispositive duties or administrative duties other than routine matters like investment), and the trust purposes are not shown to be impossible of accomplishment, or there are contingent interests awaiting the happening of certain events. But, in applying this policy, trusts have been prematurely terminated where there was a simple scheme of successive interests. A settlor may have the intention to protect the life tenant, because of sex, age, inexperience, physical or mental incapacity, or a factor of that kind. The view has been taken that where no such evidence appears, there is no reason why consenting beneficiaries should not be able to wind up the trust. In other words, where the only apparent intention is to preserve the capital during the life tenant's lifetime, and make it available to

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1. Section 2.

2. The spendthrift trust is considered more fully at p. [illegible] of this paper.

remaindermen thereafter, the courts will not resist termination. On the other hand the court may find that the preservation of capital was an object in itself, and in that circumstance termination would not be permitted. As Scott on Trusts[1] points out, "the cases are not altogether in agreement." In fact, the cases show that the courts are unpredictable and have the utmost difficulty in determining such questions as these.

6. PROBLEMS ARISING FROM THE RULE IN SAUNDERS v. VAUTIER

There appear to be two main questions:

(1) Should the desire of the beneficiaries, or the settlor's intention be preferred? Should either be able to dictate to the other?

(2) What, if any, should be the role of the court in this matter? To ensure that the beneficiaries are all adult, capacitated, and consenting, or to ensure that no one frustrates the original owner's intentions? Should the court be asked to assume either of those roles?

7. POSSIBLE COURSES OF ACTION

(1) To leave the law as it is

For : (a) All the seven situations in which Saunders v. Vautier applies can be avoided by good drafting. Many cases which come before the courts involve negligent or ill-informed drafting. It should be the responsibility of the profession to ensure that uniformly high standards of will and settlement drafting are available to the public; it should

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1. 3rd ed., para. 337.1, page 2664.

not be incumbent upon the legislature to change the law in order to protect the public from poor professional practice. If a lay member of the public makes a home-drawn will, or inter vivos settlement, he knows or should know that he is drawing a document which will have far-reaching significance for others. He fails to take legal advice at his own cost.

In furtherance to this argument it can be added that any good drafting includes a gift over in default of an age being attained, a date being reached, the beneficiary being alive to receive payment on an anniversary, the whole of a discretionary trust fund being paid out, or a power of appointment being exercised. Moreover, the usual gift in default or gift over will be in favour of the children of the beneficiary, and in the great majority of cases this in itself introduces persons who are not sui juris and therefore cannot consent to a termination. To put it at its simplest, any draftsman should have a copy of Sheard and Hull on his desk, know how to use it, and realise when faced with a complex and novel situation that he needs expert advice.

(b) Whether Saunders v. Vautier is a rule of law or a rule of construction (and it seems to the writer clearly to be a rule of law), any change in it involves interference with property concepts. "Vested and indefeasible", e.g., would not any longer carry the connotation that the person with such an interest can do what he likes with it. Also, if Saunders v. Vautier is changed, the delicate structure of the law of construction would possibly be upset. If change is needed, much of the law of the construction of wills should be looked into with a view to reform.

(c) Far from changing the rule in Saunders v. Vautier, the English legislature extended its effect in 1958 by conferring upon the High Court the capacity to approve the modification or termination of trusts on behalf of minor, incapacitated, or unborn persons, and thus to supplement the consents of those beneficiaries who are adult and capacitated. Many common law jurisdictions have followed suit, including Alberta. The advantage of the rule, and its statutory extension, is that under it a trust can be terminated when that would lower the incidence of taxation falling upon the beneficiaries. When the settlor through conservatism or questionable advice has not inserted a power in his trust under which the trustees can terminate the trust when it is desirable, Saunders v. Vautier will come to the rescue provided the beneficiaries are able to invoke it. If the trust is of long standing, or was not well drawn, it may contain a number of serious limitations in its administrative powers, including the investment power. Rather than seek a number of court orders to put the matter right, the beneficiaries might be well advised to wind up the trust, and to re-settle. It is true that capacitated beneficiaries are not likely to wish to re-settle, as opposed to each taking capital, but the opportunity is there. Moreover, no application to the court is necessary for a Saunders v. Vautier termination. Since the beneficiaries together own the whole, they are the owners, and they merely call upon the trustees for conferment of full title. Most applications to court are made as a result of executors or trustees seeking judicial approval of intended termination, or trustees or beneficiaries disagreeing as to whether the rule applies.[1]

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1. E.g., is the gift vested or contingent?

(d) The rule reflects an attitude on the part of the common law which goes back to the days of the Norman kings. What he has transferred to the living can only be determined by a construction of his language of transfer. If he has transferred the whole interest, then his rights are exhausted. No man may rule from his grave. He cannot dictate how the property is to be enjoyed. Unlike the civil law, the common law has never been able to accept with equanimity restraints upon enjoyment. As early as 1934 the restraint on anticipation, which could be imposed upon the interests of married women, was abolished in England. The first World War and its aftermath destroyed the social and economic conditions which fostered the restraint on anticipation, and as soon as those conditions were gone the restraint was rushed to its demise. There is no reason why a tradition of preventing any man from tying up property should now be departed from.

Against : (a) It is a matter of concern that, when there is no gift over, or the persons entitled to the gift over are themselves adult and capacitated, the rules of construction and the substantive law of estates taken together can produce so much difference of interpretation on a given set of facts. The previous sections of this paper have attempted to document both the complexity of this subject, and the variation of judicial attitude towards slightly different groups of facts. Two cases will serve to highlight the effects of a subtle change of wording. In Montreal Trust Co. v. Krisman[1], it will be recalled, trustees were required to hold a capital fund, and to pay $15,000 p.a. to A out of that fund and its accumulations until it was exhausted. A scheme

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1. (1960), 24 D.L.R. (2d) 220.

to provide for a widow over a period of years came to nothing because it was held the widow could take all on her husband's death. Cartwright J. for the majority in the Supreme Court could find nothing in the language of the trust declaration which cut down the absolute gift made in the opening words. The exact words used were, "to commence upon the day of my death, and the said payments of $15,000 per year to continue until the entire capital and income of the said fund is used up." Had those words instead read, "$15,000 to be paid to my wife on the day of my death, and $15,000 on each anniversary of my death thereafter, should she be living when the anniversary occurs", the gift of income would have been annually contingent. A provision for a gift over or reversion to the testator's estate of any balance left at her death, would have reinforced the contingency construction.

This case is an example of how the testator's object can be achieved with an alternative form of wording, but where that alternative form would make all the difference between a vested, indefeasible gift and a contingent gift. It may well be true that it is standard practice to draft an annuity gift, payable on the anniversary should the beneficiary be then living, but if error can occur in a case like the one under discussion then the question must be put as to whether such dire results should follow as the outcome of what one practitioner has described to the writer as "lawyers' word games".

Fast v. Van Fliet[1] is probably the best example of how members of the same court can differently interpret the same instrument. It will be recalled that this case involved a gift at 25 with power in the trustees to maintain the beneficiary

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1. (1965), 51 W.W.R. 65 (Man. C.A.).

while an infant out of capital or income. But Re Stedman[1], another age postponement case, is yet another example of a court waivering as to whether a particular gift is vested or contingent, and the Manitoba Court of Appeal divided again on this issue in Re Jones[2], a Barford v. Street case.

If courst can experience these difficulties, then it is possible that the distinctions drawn between different kinds of interests are too fine for the average testamentary intention, even if the testator is professionally advised. The draftsman himself may make mistakes, even though he is aware of the nuances which language may bear when put under the microscope of the law of construction of deeds and wills. Evidence also suggests that a considerable number of persons will purchase will forms at stationary stores, or draft their own wills in what they conceive to be legal language. If we are aware of this fact, should we retain a rule which comes into effect as a result of very complex distinctions, and which defeats testamentary intentions not for policy, but for conceptual, reasons ?

(b) Courts have expressed their displeasure with the rule in Saunders v. Vautier when the result is to produce the very situation which the testator wanted to prevent. It did not trouble Lord Langdale M.R. in Saunders v. Vautier itself when the young beneficiary was able to acquire the whole corpus at 21, but it very much concerned Baxter C.J. in Re Townshend[3]. This was a case where income was payable to A until he attained 25, and then the capital was to be paid over.

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1. [1948] 2 W.W.R. 687 (Alta.)

2. [1949] 3 D.L.R. 604.

3. [1941] 3 D.L.R. 609 (N.B.).

Commenting on the rule which in this case produced termination, he said[1], "While a Court is supposed to exert its abilities in discovering and enforcing the will of a testator yet it is sometimes confronted by authorities which compel it to depart from common sense. This is such a case. I am not left in the least doubt as to what the testator intended.... But the law has never admitted a restraint on anticipation in the case of male persons." Bowing to an "unbroken line of cases", he ordered that the corpus be paid over to A since A had come of age.

In Re Townshend the court had little room for manoeuvre; there was a possibility of arguing that the gift of corpus was contingent, but the words used much more nearly suggested a gift followed by a direction as to payment. Re Boudreau Estate[2], it will be recalled, was a case of postponement to a date, and it was provided that should A not survive until that date there should be a gift over to his children or, failing children, to others. On the dropping of the prior life A (and his fellow class members) sought to acquire the corpus before the arrival of the fixed time. Bridges C.J.Q.B. found that whether the gift was contingent on the date, or vested subject to defeasance should A not survive to the date, Saunders v. Vautier would not apply. Referring with approval to Baxter C.J.'s earlier comment on the rule, he said[3], "This would, of course, completely defeat the intention of the testator as Baxter C.J.N.B. pointed out in Re Townshend. I want to avoid this if possible." And avoid it he did. What saved the day for the testator was the gift over, however. Without that, a

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1. Ibid., at p. 610.

2. (1965), 47 D.L.R. (2d) 584 (N.B.).

3. Ibid., at p. 593.

decision that postponement to a date (for a five year period in Re Boudreau) gives rise to a contingent interest must have led to an appeal.

What gives rise to concern is that some constructions as to particular testamentary intent may have been influenced by the desire of the court in question to avoid a Saunders v. Vautier termination. We have had reason to notice the questionable reasoning which led to the result in Re Birtwhistle, where the town of Colne, England, was clearly by-passing the testator's intent in claiming the corpus of his gift upon his death. But the concern to avoid Saunders v. Vautier, if possible, which Bridges C.J.N.B. expressed in Re Boudreau Estate, was expressed again by Ford J. in the Alberta case of Re Stedman[1]. This was a case of a gift of capital on the attaining of 30, with trustees having a power to maintain and educate the beneficiary out of capital in the meantime. Fortunately for the testator there was a gift over to third persons if death should occur under the age of 30. Nevertheless, Ford J.'s comment is worth observing.

> "These provisions of the will were no doubt for the protection of the granddaughter herself as well as for the estate, and ought to be given effect to unless there is a clear rule of law so positive as to destroy the clearly expressed intention of the testatrix. Decisions were cited that would appear to go this length but, notwithstanding these, I adhere to the opinion that although a rule of construction, when applied, results in the vesting of property on the death of the testatrix, it ought not, if it can be avoided, to be held to give rise to a rule of law that defeats the intention of the testatrix, as here, that

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1. [1948] 2 W.W.R. 687, at p. 703.

> the enjoyment or use of the property bequeathed shall be postponed for the stated period, and in the meantime that the legatee be maintained and educated out of the property."

As the age of 30 was made contingent by the presence of a gift over to third persons, Ford J. was effectively free to find that the beneficiary's interest vested on the testatrix's death, so that he could rule that the granddaughter took the interim income from the age of 21.

One of the most unusual ways in which Saunders v. Vautier was avoided occurred in Re Hamilton[1]. This was a case, it will be recalled, in which the testator left one quarter of his residue to A on attaining 21, but gave the trustees a discretion to defer payment of the whole or part for such time as they thought desirable, in the meantime paying income to A. Boyd C. found there was a vested and indefeasible interest in A, and that therefore the rule applied. But he also considered the effect of these words, "I wish all my money that [A] ... may inherit from me should be settled upon herself so that in the event of her marriage [she was so married when the question arose] it will be impossible for her or her husband to encroach upon the same." At first blush one might imagine that this clause was ineffective if A indeed had a vested and indefeasible interest. But Boyd C. thought it compatible with such an interest that A should take the property on trust subject to a restraint to her sole separate use during coverture, and that the property be not encroached upon by her or her husband during coverture.

Restraints on anticipation are still legal in Canada[2], and presumably this device by court order is still available.

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1. (1913), 27 O.L.R. 445.

2. See. e.g., Married Women's Property Act, R.S.O. 1960, c. 229, s. 10.

It is disturbing to note that in Re Hooper[1], Middleton J. seemed to disagree with what could be done if the beneficiary's entitlement constituted the whole beneficial interest. In that case A took an interest for life, remainder as she should by deed or will appoint, and in default of appointment the property (realty) went to A's intestate heirs. Certain personalty was left on the same limitation, except that the power could be exercised by will only. Both interests in realty and personalty were to A's separate use, and there was a restraint on anticipation during coverture. A claimed the corpus of both realty and personalty. Middleton J. felt that the effect of the gifts in default was conclusive in A's favour, and he made the order sought. He said this,[2]

> "I cannot help feeling that this is but another case added to the long list in which the effect of Shelley's case is to disappoint the testator's intention. With every desire to give effect to the intention, I find myself unable to get away from the rule of law, which appears to me to be plain and conclusive."

The effect of Shelley's case is to entitle A to a fee simple or absolute interest. The matter in English law is arguable, but Middleton J. assumed the rule also applies to personalty. It therefore creates precisely the same result as gives rise to Saunders v. Vautier. How then are Re Hamilton and Re Hooper to be reconciled? An argument can be made, but it seems to the writer to be a very tenuous one.

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1. (1914), 7 O.W.N. 104.

2. Ibid., at p. 105.

Shelley's case was not raised in Re Templeton or Berwick v. Canada Trust Co., both cases on the Barford v. Street principle. A Saunders v. Vautier termination occurred in Re Templeton, so that Shelley's case was not necessary, but what difference might it have made in the Berwick case had it been argued?

Aside from the problems of Shelley's case, judicial hostility to the rule in Saunders v. Vautier, and the efforts here discussed to avoid it, lead only to increased uncertainties. They argue in favour of changing the law.

c) If the courts have power to consider the benefit of the beneficiary rather than being compelled to make a winding-up order, the result is that the particular needs of the beneficiary can be considered. For instance, in Re McCallum[1] Spence J. was able to find that a gift to A "after he is thirty years old" was contingent. This outsted the rule in Saunders v. Vautier, and allowed Spence J. to consider whether an order should be made out of interim imcome since the gift carried that income. A wanted "at least $5000 p.a.", but, having studied his circumstances and his needs, Spence J. made an order under the inherent jurisdiction to maintain whereby A acquired $2500 p.a. A was 24, a student, married with a child, and Spence J. thought this sum met the situation.

Of course, there would always be access to the courts should such an order prove inadequate.

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1 [1956] O.W.N. 321

(2) To adopt the American 'material purpose' doctrine

For : (a) If a settlor' s provisions are not illegal or contrary to public policy, he should be able to expect that the law will support his intentions. The settlor, is disposing of his own property, or of his own interest in property and it is a "well-established" principle that every man may do as he pleases with his own property, imposing what restrictions and limitations he pleases and are not repugnant to law or public policy.

(b) The whole law of the construction of wills is concerned with discovering the true intention of the testator. It is contrary to common sense, that, once an intention has been discovered, it should be thwarted by the application of a rule of law which has no better policy basis than that the whole beneficial interest is concentrated in the claimant beneficiary or beneficiaries.

Against : (a) It was recognised in Chaflin v. Chaflin[1] itself the testator's intentions which the Chaflin courts uphold, there is nothing to stop a beneficiary from alienating his interest to others, unless the settlor has also imposed a restraint upon alienation. The donee of an instalment gift, e.g., can take the price of the gift by selling it, or he can charge it. Not only has the settlor's intention been frustrated, but the beneficiary will not even take all that was marked out for him. A sale of an interest will be at a discount. Indeed, Field J. indirectly acknowledged this in Chaflin v. Chaflin but he thought this was no reason for the court not to further such testamentary intent as it discovered.

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1 20 N.E. 454 (1889).

But if beneficiaries are compelled to sell, especially those who have only future and possibly speculative interests, what is the point of forcing them to sell when this must lead to sale at a discount?

(b) If all the beneficiaries are ascertained, capacitated, and agree to wind up the trust, they can release the trustees, and acquire the capital for division among themselves. None of the beneficiaries is in a position to sue the trustees for breach. So there is an end of the matter; the legal and equitable estates are merged, and the trust is terminated. It is only when an application to the court is made that the effect of Chaflin's case will be felt. For, if the purposes of the trust are not accomplished, the court will refuse termination. It has therefore been said that only naive beneficiaries are caught this way. But, however, worldlywise the beneficiaries, the trustee m ay refuse to accept a release (or one of the trustees may refuse), and insist on seeking an opinion from the court. So the question arises, should the ability to terminate a trust depend upon the attitude of the trustee?

It is true that an institutional trustee is not likely to accept a release and hand over the capital if there is the slightest likelihood of allegations of bad trust practice. But such a trustee <u>might</u> be willing. Certainly he is not entitled to keep the trust going just in order to earn his fees. The non-institutional trustee is more likely to be willing to fall

in with the beneficiaries' plan but he may take the somewhat punctitious view of Rose C.J.H.C. in Re Birthwhistle[1] that he is being asked "to join in a breach of trust, or, at least, to join in disregarding the settlor's instructions."

The doctrine of merger may operate in another way. The beneficiary or beneficiaries, being adult and capacitated, may release their interests to the trustees, so that the legal and equitable interests merge in the trustee's hands. Once the trustee has the merged estates in his own hands, however, that merger will also terminate the trust. The consideration for this release of their interests on the part of the beneficiaries may take the form of capital payments or annuity payments by the trustee, or by a third party through contract with the trustee, but again, though the material purpose doctrine can be avoided in this way, it requires the compliance of the trustee. A trustee faced with this request may be very aware of his dangers in acquiring the beneficial interests from the beneficiaries, i.e., because of his fiduciary obligations. Nevertheless, as with merger in the beneficiaries' hands, the trustee can be placed in an embarrassing positonn, being reminded that no one can sue him for breach.

I t therefore seems that the material purpose doctrine should be wed to a new law making a trustee liable who acts in breach of the testator's intent, relying upon his protection from suit.

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1 [1935] 4 D.L.R. 137, 143.

(c) In the light of paras. (a) and (b), above, it is arguable that a material purpose doctrine is of limited value, unless it is also supported by legislation imposing a restraint on alienation. American jurisdictions have not been prepared to go this far. Assuming that there were a law to the effect that a trustee might not act in breach of the testator's intent, even were the trustee immune from suit, a restraint on anticipation or a denial to consenting beneficiaries of the right to terminate prematurely, does not, as we have seen, prevent a sale or mortgage of the beneficiaries' interests.

A third party, i.e., a creditor, purchaser, or donee, is required under the Chaflin doctrine to take the interest subject to the material purpose. This means that, though the third party can claim the interest on the beneficiary's death even if the death occurs before, e.g., a postponed payment date or certain age has occurred, no third party can demand payment, while the beneficiary lives, until the required date or age occurs. Such a policy on the part of the courts prevents the beneficiary from avoiding the settlor's intent through disposition or mortgage, but it has an illogical side. A material purpose can certainly be no longer achieved once the beneficiary is dead, but neither can it be achieved if the beneficiary alienates or even mortgages his interest prior to the occurrence of the desired event. If there were a restraint on alienation until the material purpose has been accomplished, or the beneficiary dies prior to that event, the testator's intent would truly be carried through to fruition.

However, such a restraint in common law jurisdictions can only be imposed by the settlor. Outside the United States it can only be done by means of the protective trust, and within the United States by the spendthrift trust. The spendthrift trust itself has always been controversial within the United States, and statute in most jurisdictions is now moving in the direction of limiting its employment to the provisions of a guaranteed maintenance for the spendthrift and his immediate family, which of course is the thinking behind the protective trust. In fact, therefore, not only do American jurisdictions resile from imposing a statutory restraint on alienation, the movement is away from allowing the settlor himself to have a free hand in imposing such a restraint. The policy thinking behind this is clear; supporting the intent of the settlor is one thing, but enabling the avoidance of bona fide creditors and alienees is quite another.

(d) The material purpose doctrine has led to a good deal of litigation, arising primarily out of the question of fact as to whether there is a material purpose in the particular case. It is difficult to see why American courts find no material purpose in the creation of successive interests, but evidence is often available showing what intention the settlor had in creatint those interests. If he was concerned to protect the capital of the trust fund for remaindermen, or to provide for one generation and then for the next, that may

be enough to constitute a material purpose. It is evident that in the areas of less obvious intent there will be a good deal of room for difference of opinion as to what purpose the settlor had in mind. It is doubtful whether the volume of usage of the trust in Alberta, and the size of the estates involved, would justify the introduction of a doctrine known to be the cause of contested litigation.

Possible legislative enactment adopting the American material purpose doctrine and meeting the above criticisms, paras. (a), (b), and (c).

Clause 1 (1) Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, no trust arising after the coming into force of this section, whatever the nature of the property involved, and whether arising by will, deed, or other disposition, shall be terminated by the beneficiary or beneficiaries or by the court, except the termination be with the consent of the settlor, if any material purpose of the trust remains to be accomplished.

(2) Subsection (1) of this section shall also apply to testamentary gifts other than those which take the form of a trust.

(3) Material purpose may be established by evidence drawn from the instrument of creation or words of creation, or the circumstances under which the trust or gift was created.

(4) If any material purpose remains to be accomplished;

(a) the beneficiary or beneficiaries, or donee or donees, shall hold his or their interest interests subject to a restraint on alienation; and

(b) no executor or trustee may release the corpus of the trust property or of the gift to the beneficiary or beneficiaries, or donee or donees, or accept a release in relation to the gift or trust in question.

(5) A beneficiary under subsection (1) of this section, and a donee under subsection (2) of this section, shall include charitable purposes and charitable institutions.

(6) Nothing in this section shall detract from the statutory and inherent powers of the court, including the power of the court to order a scheme cy-prés, and the ability of the court to declare a trust void or voidable because of mistake, fraud, duress or undue influence, or other such ground, or because its objects are illegal or contrary to public policy. Nor shall this section alter or amend the law of the validity or construction of wills, or otherwise alter or amend the law concerning charity.

Comment

Clause 1(1) sets out the basic proposition adopted by the Chaflin jurisdictions. No mention is made of the inherent jurisdiction of the court to make maintence orders, salvage or emergency orders, or to agree to compromises. If this proposal commends itself to the Institute, consideration should be given as to whether the inherent jurisdiction should be expressly excepted from clause 1(1). Chaflin jurisdictions in the U.S.A. retain the inherent jurisdictions, because Chaflin is a case development.

Clause 1(2) is designed to prevent any possibility of the argument that a gift, e.g., an instalment gift, merely comes within the normal duties of an executor to distribute the estate, and does not constitute a trust. If, e.g., a home-drawn will contained an instalment gift to a child of 21 years, residue to the widow, with the widow named as executrix, it could be argued that the testator never thought in terms of a trust. Then the question arises as to whether the act of appointing an executrix and creating an instalment gift is implied intention to create a trust. Every executor occupies a fiduciary role, as does the trustee, and it is sometimes said that an executor is a trustee even if his only task is to collect the assets, discharge the deceased's obligations, and distribute the estate. But this subsection would head off any such argument.

Clause 1(3) follows American practice on this matter. The subsection does not go on to define 'material purpose'. This is because it seems wiser to take advantage of existing American case law than adopt a new definition which, like a definition of charity, would have to be interpreted by the courts.

Clause 1(4) attempts to meet the problem raised in para. (b), above. Clause 1(5) is self-explanatory, and 1(6) is the saving provision.

(3) To adopt a prohibition on termination for statutorily enumerated situations

For : (a) This approach attempts to meet the criticism that 'material purpose' involves litigation both as to what constitutes such a purpose, and as to whether such a purpose exists on a given set of facts. The rule in Saunders v. Vautier has earned criticism in Canada when a single beneficiary has invoked the rule in order to avoid a clear testamentary intent that enjoyment should be postponed in some way. These are undoubtedly cases of material purpose, and would come within the previously suggested legislative language, but this approach both avoids litigation as to the other situations in which material purpose might apply, and deals with the area of Canadian concern. In fact, it makes no mention of 'material purpose'.

(b) The American material purpose doctrine does not include the power of appointment problem, known here as the Barford v. Street principle. In the United States a life tenant with a power of appointment exercisable by deed or will may exercise the power in favour of himself, and acquire the corpus of the property, or he may apply for a court order entitling him to call for the corpus.

The Institute may decide to prevent this happening in Alberta, and, should it do so, legislation enumerating material purpose situations may be considered also an occasion for referring to and correcting the above problem, including the uncertainty that appears in Canada to hang over the power to appoint by deed only.

Against : (a) This solution does not deal with the objections which necessitate a restraint on alienation, and a prohibition on executors or trustees accepting a release of their duties, after transferring the corpus to the beneficiaries. In view of the consistent hostility of both law and equity in England and Canada to restraints on alienation (the so-called "restraint on anticipation" in favour of married women during coverture being alone excepted, other than the restraint of the protective trust), this objection remains one which is not lightly to be put aside.

Possible legislative enactment adopting a prohibition of termination in specific situations, including the exercise or release of a power of appointment so as to terminate a trust.

Clause 1(1) Prior to the occurrence of the events or the cessation of the periods hereinafter enumerated in this subsection, no trust or testamentary gift arising after the coming into force of this section, whatever the nature of the property involved, and whether the trust arises by will, deed or other disposition, shall be terminated by the beneficiary or beneficiaries, donee or donees, or by the court, except the termination be with the consent of the settlor, if the trust or gift in question shall include or constitute a gift, whether immediate or in remainder, whereunder the transfer or payment of the corpus or of income, including rents and profits,

(a) is postponed to the attainment by the beneficiary or beneficiaries, donee or donees, of a stated age or of stated ages; or

(b) is postponed to the occurrence of a stated date or the passage of a stated period of time; or

(c) is to be made by instalments; or

(d) is subject to a discretion to be exercised during any period by executors or trustees as to the person or persons who may be paid or receive the corpus or income, including the rents and profits, or as to the time or times at which payments or transfers of corpus or income may be made.

1(2) Prior to the occurrence of the events or the cessation of the periods enumerated in subsection (1) of section 1,

(a) a beneficiary or donee who comes within its provisions shall hold his interest subject to a restraint on alienation; and

(b) no executor or trustee may release the corpus of the trust property or of the gift to any person within the provisions or subsection one of section one, or accept a release from his duties as executor or trustee in relation to the gift or trust in question.

1(3) The foregoing subsections of this section shall be subject to any trust terms reserving to any person or persons a power to revoke or in any way vary the trust or trusts.

1(4) Where by whatever act of creation a life interest is conferred upon any person together with a general power of appointment in that person exercisable by deed or will, or by will alone, with a gift in default of appointment to that person, or to that person and his heirs, or to the heirs, testate or intestate, of that person, or to third persons, the power of appointment shall not take effect, whether exercised inter vivos or by will or disclaimed, so as to entitle that person to call for the corpus of the property in his own lifetime.

1(5) The words, 'beneficiary', 'donee', and 'person', in subsections (1), (2), and (3) of this section shall include charitable purposes and charitable institutions.

1(6) Nothing in this section shall detract from the statutory and inherent powers of the court, including the power of the court to order a scheme cy-près, and the ability of the court to declare a trust void or voidable because of mistake, fraud, duress or undue influence, or other such ground, or because its objects are illegal or contrary to public policy. Nor shall this section alter or amend the law of the validity or construction of wills, or otherwise alter or amend the law concerning charity.

Comment

Clause 1(1) permits termination with the consent of the settlor, as with the previous legislative proposal on page 80 of this paper. This is American doctrine as part of the material purpose doctrine, and highlights the fact that the legislation is aimed at supporting the settlor's intent. If the trust is inter vivos, and the settlor consents to the termination (in the U.S.A. he is also required to join in the application to the court for termination), American jurisdictions see no point in perpetuating the trust. It follows that, if the settlor himself is the sole beneficiary, he can apply to the court for termination. If he is one of a number of adult, capacitated, and consenting beneficiaries, and together they own the whole beneficial interest in the trust property, they can apply for termination. The American courts are also prepared to consent on behalf of unborn, unascertained, or incapacitated beneficiaries, if the settlor consents to termination. In other common law jurisdictions, including the Canadian common law provinces, the settlor who is a beneficiary, alone or with others, would apply under Saunders v. Vautier. However, because of Chapman v. Chapman[1] which has been followed in Canada, the court in many cases will only be able to consent on behalf of the unborn, unascertained, or incapacitated, under the variation of trusts Act provisions[2].

In the U.S.A., as we have noted, the Barford v. Street principle is followed. But, while a life tenant with a general power of appointment by deed or will can appoint to himself by deed and thus acquire the corpus from the trustee, U.S. jurisdictions do not allow this when there is a general power to appoint by will only.[3] Nevertheless, when the life tenant is the settlor, and the gift in default of appointment is to his

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1. [1954] A.C. 429.

2. Trustee Act, R.S.A. 1955, as amended, s. 31a.

3. See Scott on Trusts, 3rd ed., para. 340, p. 2708.

heirs or next-of-kin, he may terminate the trust and acquire the corpus. Therefore, approaching from different starting points, the U.S. jurisdictions and the other common law jurisdictions agree in permitting the settlor/beneficiary to terminate.[1] Because the legislative proposals on page 80 and page 84 of this paper do not seek to prevent the settlor from consenting to a termination, a case like Re McCrossan would remain good law.

Clause 1(1) also seeks to include in paras. (a) - (d) all the situations which have caused difficulty or intent frustration in Canada, and Clause 1(3) and 1(4) complete that attempt to support the settlor's, or testator's, intent. Clause 1(4), it will be observed, includes both types of powers; by deed or will, and will alone.

If it is decided to adopt the American material purpose doctrine, and follow the proposals on pages 80 and 81 of this paper, Clause 1(4) on page 86 could be inserted in those proposals.

(4) To reject Saunders v. Vautier, the material purpose doctrine, and a prohibition on termination in specific situations, and to bring all premature termination of trusts and of testamentary gifts under the Trustee Act, R.S.A. 1955, as amended, s. 31a.

For : (a) The existence of legislation empowering the courts to consent on behalf of infants, incapacitated persons, unascertained persons, contingently interested persons, or unborn persons arose in all the common law jurisdictions, which have adopted it, as a response to the Chapman v. Chapman decision of the House of Lords. In that

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1. See Re McCrossan (1961), 28 D.L.R. (2d) 461 (B.C.).

case the House decided that it had no power under its inherent jurisdiction to consent to a scheme varying or revoking a trust when no element of salvage, emergency, maintenance or compromise arose. In England, unlike the U.S. jurisdictions, the compromise jurisdiction only includes an agreement between beneficiaries when there is a genuine dispute as to the property interests conferred by a trust, that dispute arising from the ambiguity of the instrument of creation and other admissible evidence. It does not include, it was held, an agreement as to the allocation of the trust property among the beneficiaries when the agreement arises from the desire to avoid or reduce the liability to taxes.

This decision meant that when all the beneficiaries of a trust were adult, capacitated, and ascertained, they could invoke the rule in Saunders v. Vautier and terminate the trust. But that when a trust included beneficiaries who were not adult, capacitated, or ascertained, the beneficiaries who were adult, of a sound mind, and in agreement as to the terms of the revocation they would like to see, could neither invoke the rule in Saunders v. Vautier, nor ask the court to consent on behalf of those who could not give their consent, if the only reason for termination was the avoidance or reduction of taxes. The Variation of Trusts Act, 1958, was the legislative response.

The object of that Act, and its Alberta counterpart[1], is to complement the rule in Saunders v. Vautier, and it enables the court to approve on behalf of all the persons mentioned at the beginning of this paragraph, any arrangement for the variation or revocation of the trust in question proposed by

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1. The Trustee Act, 1955, as amended, s. 31a.

any person, provided the arrangement is for the benefit of those on behalf of whom the court is consenting. In other words, there is to be no further question of the courts' capacity to consent to schemes or arrangements brought forward for terminating trusts. This is supported by the fact that the Act and section 31a refer to any trusts, whether inter vivos or testamentary, and whatever the nature of the property subject to the trust. The Act and section 31a also go beyond enabling the court to consent to arrangements "varying or revoking all or any of the trusts"; the language goes on to say, "or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts."[1]

This very extensive judicial power has been invoked by claimants in England to the extent that two-thirds of the work of the Chancery Division in recent years has been taken up with claims under the Act. The writer is informed that applications in Ontario since 1959 have also been of a considerable number, and this is confirmed by Sheard and Hull, Canadian Forms of Wills.[2] There is no reason to believe that this is not also true of Alberta. Moreover, from interviews which the writer has had in Ontario the English precedent on this legislation seems to have been followed consistently in that province. There have been variations as to procedure, but the substantive law created by the English cases is clearly very persuasive in Ontario.[3] Again, it is more than likely that the position is no different in Alberta.

The body of law which in consequence has built up around this legislation provides a useful fund of information as to what the courts consider to be beneficial to those on behalf of whom it is consenting.

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1. Trustee Act, 1955, as amended, s. 31a(1).

2. 3rd ed. 1970, p. 319.

3. See Sheard and Hull, ibid., to the same effect.

The legislation appears to have worked well in every jurisdiction in which it has been introduced, and it is now an appropriate time to consider whether the arbitrariness of Saunders v. Vautier ought to be replaced by making all trust termination subject to the legislation. Indeed, this may prove to be the direction of the future.

(b) Saunders v. Vautier puts all attention on the concentration of the beneficial interest in the sole beneficiary, or certain beneficiaries, whereas the material purpose concentrates attention on the original intention of the settlor. Either approach represents an extreme policy, neither reflects what are the legitimate wishes, often extremely sensible, of the other party, i.e., the settlor or the beneficiaries as the case may be. By introducing the note of 'benefit' the legislation allows the court to take over something of the role of the settlor, who in most cases is deceased when the beneficiary or beneficiaries come forward with their proposed arrangement. The experience of the courts in this area, going back into the days of the inherent jurisdiction, is long, and the court plays its traditional role of the objective, detached paterfamilias. It has not been easy for the judges to move away from what many see as an interpretation function to what is now under the variation of trust provisions more of an arbitrational function, but it is widely held that that shift has been accomplished with both wisdom and a respect for traditional Chancery doctrine. The settlor is unable to rule from the grave or, if living, to impose unreasonable attitudes upon the beneficiaries, nor are the beneficiaries given carte blanche to do what they will. The court considers the settlor's aims, and, if he is living,

asks him to give his views to the court. It also considers the situation of the beneficiaries on behalf of whom it is consenting, and agrees only to that arrangement which genuinely brings them benefit. In the early days of the English Variation of Trusts Act, 1958, Vaisey J. made it clear that the Act says the court may approve "if it thinks fit", and in his view the court was not required to consent to an arrangement which was not advantageous to all the beneficiaries.[1] Subsequent courts have sometimes noted that they are not concerned with the 'benefit' of beneficiaries who are able to consent, but Re Steed's Will Trusts[2], where an elderly life tenant of a protective trust was refused approval to her arrangement for termination, emphasises nevertheless that Vaisey J.'s early comments still reflect the judicial attitude.

(c) If the termination of all trusts came before the courts under an extension of the Trustee Act, R.S.A. 1955[3], there would be a disappearance of litigation as to whether the rule in Saunders v. Vautier applies. The courts would not be tempted, where they consider the termination unwise, to lean over backwards to find that interests are contingent. Fast v. Van Fliet[4], for instance, would be the type of case which would no longer trouble the courts. Nor would the courts need to find a gift to be vested, but defeasible, in order to keep the beneficiary away from the capital of the gift until the required event had occurred, but permit him to take the interim income as it arises.[5] The

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1. Re Oakes' Settlement Trusts, [1959] 1 W.L.R. 502.

2. [1960] Ch. 407 (C.A.).

3. c. 346, as amended, s. 31a.

4. (1965), 51 W.W.R. 65.

5. Compare Re Barton [1941] S.C.R. 426, and Re Stedman [1948] 2 W.W.R. 687 (Alta.).

writer is not saying that constructional problems would disappear; he is saying that the area in which constructional problems occur or, at least, are crucial, would be more limited if the rule in Saunders v. Vautier were abolished, and the courts' "paterfamilias jurisdiction" be extended to those cases. And it is submitted that a reform, which limits the area of constructional problems, has on that ground alone much to commend it.

In short, cases under Saunders v. Vautier often involve the parties and the courts in a kind of shadow-boxing. The apparent problem stems from the underlying fact that the executors or trustees do not feel termination is wise in the particular case, and/or the court is concerned on that ground. The real issue should come before the court as such, so that that issue can be dealt with on its merits, the necessary affidavits and oral evidence supporting or opposing that application to terminate.

Executors and trustees are often in a quandary as to whether they have a duty to tell a beneficiary under a will or trust of his rights under Saunders v. Vautier. It is a technical rule, and very few beneficiaries know of it. In particular, what does an executor or trustee say if he asked the bare question, 'Is there not any way in which I can get hold of the capital now? ' The testator's intention is paramountly clear, we will assume, and, having become acquainted with the beneficiary, the executor or trustee feels he understands exactly why the testator wanted payment of capital or income, or whatever it is, postponed. The executor or trustee has probably the duty to reveal the beneficiary's rights, and, if he bluffs the question off, he is in an embarrassing position if the beneficiary later comes to him having been informed elsewhere of the existence of the rule.

Even if the beneficiary merely expresses regret at the terms of the will or trust, or says nothing, the executor or trustee is confronted with the question of whether he ought to volunteer the information.

If there is the slightest ambiguity in the terms of the will or trust, a really concerned executor or trustee, confronted with an informed beneficiary, may well think in terms of asking the court for directions, or even suggesting to the beneficiary that he apply for a termination order under Saunders v. Vautier. The executor or trustee can then hope that the court will find some interpretation of the deceased's or settlor's intent which will obviate transfer of the entire property. It is difficult to tell how many cases never reach the court, but it is clear that the executor or trustee may decide merely to hand over a small fund, and hope for the best, rather than incur the costs of an application to the court.[1]

(d) The value of the variation of trust legislation can perhaps be demonstrated by Re T.'s Settlement Trusts.[2] The beneficiary was entitled absolutely to one quarter of the trust funds on coming of age, and took an absolute interest in another quarter on her mother's death. She would also take absolutely the remaining one half of the funds if her sister failed to attain a certain age or did not marry under that age. Prior to the beneficiary coming of age, the mother proposed an arrangement to the court under which the beneficiary's entire interest would be transferred to new trustees on protective trusts for the beneficiary (then 20 years of age) for life, remainder to her children or issue,

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1. See, further, Samuels, A., Must the Trustees tell the Beneficiary about Saunders v. Vautier? , (1970) 34 The Conveyancer and Property Lawyer 29.

2. [1964] Ch. 158.

and in default of such children or issue to her sister absolutely. Wilberforce J. refused to consent to this arrangement on the grounds that it constituted "a complete new resettlement" which, in his view, was beyond the jurisdiction of the court whose powers under the Act extended only to varying or revoking trusts. But, as the evidence showed that the beneficiary was irresponsible with money and a "strong case" to that effect had been made, he agreed to another proposed arrangement under which she would take a protected life interest until a certain (unreported) age, the capital to be paid at that age. Should she forfeit her life interest before that age was attained, the trustees were empowered to continue the protected life interest until they thought fit. The trustees were given power to advance capital at any time, and a fund was set aside out of which the beneficiary could purchase and equip a house.

Wilberforce J. added[1], and it seems worthy of reproduction here;

> "it appears to me to be a definite benefit for this infant for a period during which it is to be hoped that independence may bring her to maturity and responsibility to be protected against creditors (in fact to a greater extent than she would be protected if she were left to set up a similar trust herself at the age of 21 years) and this is the kind of benefit which seems to be within the spirit of the Act."

(e) Were all applications for termination to be brought within the variation of trusts legislation, the question arises as to whether criteria ought to be established by the legislation setting guidelines for what the legislature considers to constitute 'benefit'.

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1. Ibid., at p. 162.

In view of the body of law already built up in other jurisdictions, and the infinite ways in which benefit can accrue according to the facts of the case, it seems that the courts might be left to work this out as each case arises. A clause such as the following - "Benefit shall constitute the furtherance of the material, social, moral, or personal wellbeing of an individual" - would not seem to add anything to the existing case law.

(f) A beneficiary would continue to be able to alienate his interest, and as a result of merger call for the capital or corpus of the property, releasing the trustees from their duties. This might occur without any application to the court. However, the writer's discussions with practitioners suggest to him that, if the opportunity exists for an application to a court for termination, and in particular where the beneficiary knows himself to have a good case, the likelihood of alienation to third parties or to the trustees would be small. Purchase of the other beneficial interests by the beneficiary who wishes to terminate would not be enough to cause termination if the rule in Saunders v. Vautier were abolished and the beneficiary's interest was postponed, e.g., to an event which had not yet occurred. In any event when the beneficiary does not have a good case, the trustee or other beneficiaries can refuse to act according to the beneficiary's wishes, and instead advise him to bring an arrangement before the court for approval.

In this respect it is worth reminding one's self that the courts are already entertaining applications under the variation of trusts legislation when it is sought to prevent a vested and indefeasible interest falling into possession in that form.[1]

1 Re T's Settlement Trusts

Re T.'s Settlement Trusts.

Against : (a) Since the narrow ratio of Saunders v. Vautier can be avoided by the simple device of a gift over to unborn or unascertained persons, in which case there is presently a means of applying to the court for termination when it is thought desirable, opening up the whole field of Saunders v. Vautier termination (as set out by Underhill, Law of Trusts and Trustees on page 1 of this paper) to the necessity of judicial termination causes expense and delay without sufficient justification. The variation of trusts legislation was intended to complement Saunders v. Vautier; the proposal to abolish that rule and bring all premature terminations into court would drag into court every trust which has not run its natural course. If a life tenant has acquired from the remainderman the latter's interest, or the remainderman has acquired the life tenant's interest; if a group of beneficiaries together own a miscellany of concurrent, vested, and contingent interests making up the whole beneficial interest; if a life tenant simply agrees with the remainderman to divide the capital of the fund between them in some proportion: in all these cases, even if the parties are all adult and capacitated and agreed, they must propose to the court an arrangement and secure the court's approval ! If people who are adult and capacitated are agreed between themselves, and the intention of the settlor is not to be regarded as sacrosanct, why should the court have to approve their affairs ? In very many cases the object of the agreement between the parties is to avoid or reduce the burden of taxation, and since Re Pilkington's Will Trusts[1] there has been no doubt that a tax saving

1. [1964] A.C. 612.

constitutes benefit to all those beneficiaries who derive that sort of advantage from the arrangement. If this is so, the court is playing the role of a rubber stamp. And if a capacitated adult cannot look after himself when the advantages are being agreed upon, it is not the function of the court to 'mother' him. He is always free to withhold his consent.

(b) It seems clear from Wilberforce J.'s closing words in Re T.'s Settlement Trusts that no court would be likely to entertain an application for approval of an arrangement which alters an interest which is vested in interest and in possession. He said[1] that only because it was a strong case was he willing, "so close to the infant's majority, to interfere with the dispositions of the settlement". It may be that he had in mind that the infant in that case was entitled to an absolute interest on coming of age, but he did also say[2] that this case was unlike the "normal type of arrangement" where one or more beneficiaries ask the court on behalf of incapacitated or unborn persons to approve an arrangement recasting their respective interests in such a way as to improve the position of the incapacitated and unborn. This may mean that, if a life tenant of 19 is in possession and wasting his annual income by prodigality, the court will be most reluctant to approve an arrangement proposed by a third person, perhaps the parent, under which the life interest would be recast to a protected life interest. Wilberforce J. thought that an arrangement "dealing in a beneficial way with the special requirements of this infant"[3] would be permissable,

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1. [1964] Ch. 158, 163.

2. Ibid., at p. 160

3. Ibid., at p. 162.

but he also felt that, if the infant objected to the recasting of her interest, her 'benefit' allowed only a limited degree of recasting.

Other English courts in other circumstances have been less hesitant in their concern about the degree of 'benefit' needed, even being prepared to take risks that 'benefit' would accrue, but there remains some question as to how far under the proposed legislation the courts would agree to interfere with an interest that was vested and indefeasible though postponed to a future possession.[1]

(c) The courts have always been hostile to the request, direct or indirect, that they rewrite the will or redraft the trust, and under the variation of trusts legislation they have carefully drawn attention to the fact that the court approves of arrangements designed by others, it does not do any drafting on behalf of any beneficiary. If all premature terminations are now to come before the courts, the common law jurisdictions move yet further away from the idea that testators and settlors draw their own gifts and trusts. A trust will effectively become what is pleasing to the beneficiaries and the courts.

(d) The costs caused to beneficiaries arising out of applications to the court are not minimal. Courts in England have often asked that all points of view and of interest be argued before them, and in several cases under the 1958 Act more than eleven counsel were involved. It is no doubt too early to tell whether Alberta's experience under

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1. The writer would add that he does not find this argument persuasive. In the Saunders v. Vautier situations discussed in this paper the beneficiary is seeking to avoid the terms of the gift or trust. In Re T.'s Settlement Trusts the applicant was seeking to impose terms that were not in the trust. And substantially she succeeded.

section 31a will be similar, but there is little doubt that Alberta courts also require an exhaustive examination of the actual and possible effects of each proposed arrangement.

If all trusts can only be terminated by the courts, and added burden of trust expense is assumed by the beneficiaries. Nor is it very likely that any legal aid scheme will come to their relief, even in the case of small estates.

Possible legislative enactment bringing all premature termination of trusts and of testamentary gifts under Trustee Act, R.S.A. 1955, c. 346, as amended 1964, c. 98, s. 3la.

Clause 3lb. (1) Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, no trust arising after the coming into force of this section, whatever the nature of the property involved, and whether arising by will, deed, or other disposition, shall be terminated before the expiration of the period of its duration as determined by the terms of the trust, except by consent of the court.

(2) The court shall give its consent, where it sees fit so to do, by way of an order approving any arrangement by whomsoever proposed and to which all persons beneficially interested who are capable of assenting have given their assent.

(3) Where there are persons beneficially interested who fall within clauses (a), (b), (c), or (d) of subsection (1) of section 3la, that section shall apply, subject to the requirement in subsection (2) of this section that all persons beneficially interested who are capable of assenting must have given their assent.

(4) The court shall not approve an arrangement unless it is satisfied that the carrying out thereof appears to be for the benefit of each person who is beneficially interested and capable of assenting.

(5) Subsections (1), (2), (3), and (4) of this section shall also apply to testamentary gifts other than those which take the form of a trust.

(6) The words, 'persons beneficially interested', in subsections (2), (3), and (4) of this section shall include, and subsection (5) shall apply to gifts to, charitable purposes and charitable institutions.

(7) Nothing in the foregoing subsections shall detract from the statutory and inherent powers of the court, including the power of the court to order a scheme cy-prés, and the ability of the court to declare a trust void or voidable because of mistake, fraud, duress or undue influence, or other such ground, or because its objects are illegal or contrary to public policy. Nor shall this section alter or amend the law of the validity or construction of wills, or otherwise alter or amend the law concerning charity.

Comment

Clause 31b. (1) is intended to ensure that all terminations shall come before the court other than those where the trust has run its intended course, e.g., of successive interests, and the final absolutely interested remainderman requires the trustee to pay the corpus of the trust property to him. It is designed to bring situations of merger in the beneficiary's or beneficiaries' hands into court, thus encouraging the beneficiaries, where they are all adult and capa-itated, to come to the court with an arrangement before interests are bought or sold inter se. The settlor/beneficiary is also required to proceed under this legislation. It seems desirable to allow the abolition of Saunders v. Vautier to take effect from a certain time, and this has been provided for. Largely for this reason, but also because section 31a has already received extensive judicial interpretation and invocation, section 31a has been permitted to remain an independent provision.

Subsection (2) permits anyone to submit an arrangement including the settlor or a third party, but it requires all beneficiaries capable of assenting to assent. This is because the subsection is designed to bring a would-be Saunders v. Vautier termination before the court but at the stage when all the persons who would need to consent, have consented. It does not seem commendable that the court should be asked to consider an arrangement which has not been considered by one or more interested persons, or has not been accepted by each interested party. This does not mean that the court is in any obligated to accept the terms of the arrangement; it

merely seeks to avoid the court being involved in the early stages of bargaining between adult and capacitated beneficiaries. If the Institute desired to have a situation where applications to the court for approval could be made at an earlier stage, it would be possible to adopt the language of section 31a (1(, e.e., "and whether or not there is any other person beneficially interested who is capable of assenting thereto".

Where there are persons beneficially interested who are not capable of consenting, clause 31b. (3) adopts the provisions of section 31a. (1).

It is of course arguable that the court should never be concerned with the benefit of adult persons, especially when they have consented to the proposed arrangement, but clause 31b. (4) is also designed to deal with the six Saunders v. Vautier where a departure is being made from the intention of the testator or settlor. In other premature termination cases benefit should not provide too much of a problem for the court, but leaves the court with power to refuse its consent should it consider that the occassion calls for that.

Subsection (5) is a reproduction of a similar provision in previously suggested legislative provision. In Re Davies[1] Grant J. concluded that the Ontario Variation of Trusts Act does not apply when the will contains no trusts . His words

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1 [1968] 1 O.R. 349.
See also Griswold, E.N., Spendthrift Trusts, 2nd ed., 1947, p. 296.

in relation to the will in question were;[1]

> "The will contains no powers or trusts authorizing the executor to hold any proceeds of the estate other than as executor. In other words, it is a distributive will in which the executor is obliged to divide the assets of the estate among the persons entitled rather than hold any part thereof in trust to distribute at a later time or on the happening of some particular event."

The standard will names 'executor(s) and trustee(s)', and Grant J.'s language suggests that any postponement of a vested gift would constitute something more than distribution, but, as in the previous legislative drafts, the writer is anxious to head off any dispute as to whether there is a trust on the instant facts. In Re Davies the Canada Permanent Trust Co. was an administrator with the will annexed, but there may well be the home-drawn will which merely names an executor, as such,as well as the will which appoints no executor. One need not develop the point, but it seems particularly important to ensure that the legislation is fully comprehensive when the rule in Saunders v. Vautier is being abolished.

Subsection (6) is self-explanatory, and subsection (7) is designed to prevent any question arisig as to what else of the law has been changed. It seems particularly important that the confines of the abolition of Saunders v. Vautier and its replacement with a court consent procedure should be clearly established in an area such as trusts and wills where rules are so technical and interlinked.

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1 Ibid, at pp. 349, 350.

(5) To reject the material purpose doctrine, a prohibition on termination in specific situations, and an abolition of Saunders v. Vautier in its wider (Underhill) sense, but to adopt an abolition of Saunders v. Vautier in the specific situations discussed, and to bring those situations within a Trustee Act, R.S.A. 1955, as amended, s. 31a procedure.

For : (a) The objection to Saunders v. Vautier in Canada has been that it permits a violation of a testator's clear intentions in cases where a vested interest is postponed in enjoyment in some way, where discretionary powers of trustees can be overridden by a beneficiary with a vested interest, and where a power of appointment is exercised or disclaimed so as to entitle the beneficiary/donee of the power to acquire the corpus in his lifetime. Termination by merger, or by the beneficiaries, being all adult and capacitated, agreeing to wind up the trust when no objection arises on the grounds mentioned, does not seem to have invoked criticism, and consequently there is no reason to change the existing law in those circumstances. Moreover, since the rapidity of tax changes today calls for the utmost flexibility in trust machinery, something for which the settlor should have provided, the rule in Saunders v. Vautier provides in many cases a useful way in which beneficiaries can act so as to reduce their liabilities to tax. It can be assumed that the great majority of settlors and testators have no desire to impose avoidable tax levies upon their beneficiaries, and therefore the rule is able to meet what would no doubt have been the settlor's wishes had he foreseen developments after his death, or the taking effect of his trust.

(b) The advantages of a section 31a procedure over a straight denial of termination while a material purpose of the trust exists, or in the specific Saunders v. Vautier situations already discussed, have been set out hitherto.

(c) There will be costs involved in an application to the court for consent to arrangement, and these costs, it is understood, could be fairly sizeable. It is true that today many applications to the court are made in order to establish whether the rule in Saunders v. Vautier applies, or to provide court order authority for hesitant executors and trustees, but obviously in any change of the law the factor of costs should not be overlooked. Unless a court order is regarded as essential, it should not be necessary. Under the present proposal court orders would only be necessary in those cases where the settlor's or testator's intentions are being disregarded, and judicial and other criticism has suggested that a different outcome than that possible under Saunders v. Vautier would have been desirable. This is a particularly pertinant argument when the size of the trust fund or gift is small.

Against : (a) If a section 31a procedure is commendable, it should extend to all Saunders v. Vautier cases, including the cases of termination in the wider (Underhill) sense. As the Americans have stressed, in all cases where the trust is prematurely terminated some intention of the settlor or testator is being flouted, and it is not clear why only the more obvious flouting should be prevented while the less obvious flouting is allowed to continue. Moreover, if the court as a paterfamilias, as it were, is able to consider both the intentions of the creator of the trust or gift as well as the aspirations of the beneficiaries at the time of application to the

court, that is a justification of the court's proposed role quite apart from the degree of violence which is being done to the creator's intent.

(b) Costs can be reduced in a number of ways. It is not necessary as far as the parties are concerned for applications to be heard in open court. Hearings in chambers have proved entirely adequate in England, and it is now an established practice for English judges to adjourn into open court to give their judgments in cases where new principles are being established. In any event the reporting of variation of trusts cases is inadequate in all jurisdictions, it is submitted, and for the purposes of section 31a some thought has no doubt been given to the reporting of 'headnote' material and arrangements approved in all cases. These should be available to the profession.

No lower court than the Supreme Court has been given jurisdiction under the Variation of Trusts Act, 1958, in England, and this is probably explained by the importance of these cases, their complexity in many instances, and the need for the uniformity of practice which a small body of High Court judges can ensure. Only the Supreme Court currently has jurisdiction under section 31a of the Alberta Trustee Act. However, thought might be given to permitting applications for approval of arrangements, where the property involved is less than $1500 or $2000, to be made to district court judges further to the Trustee Act, R.S.A. 1955.[1] Since the proposed legislative proposal would extend to trusts arising inter vivos and by will, and to testamentary gifts other than in the form of trusts, the writer gathers that care would have to be taken that the district court had a comprehensive jurisdiction, i.e., not shared with the surrogate court.

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1. c. 346, s. 50(1), as amended 1969, c. 2, s. 76.

Possible legislative enactment bringing specific Saunders v. Vautier situations within a Trustee Act, R.S.A. 1955, as amended, s. 31a procedure.

Clause 31b. (1) Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, prior to the occurrence of the events or the cessation of the periods hereinafter enumerated in this subsection, no trust arising after the coming into force of this section, whatever the nature of the property involved, and whether the trust arises by will, deed or other disposition, shall be terminated by the beneficiary or beneficiaries, except with the consent of the court, if the trust shall include an interest, whether immediate or in remainder, whereunder the transfer or payment of the corpus or of income, including rents and profits;

(a) is postponed to the attainment by the beneficiary or beneficiaries of a stated age or stated ages; or

(b) is postponed to the occurrence of a stated date or the passage of a stated period of time; or

(c) is to be made by instalments; or

(d) is subject to a discretion to be exercised during any period by executors and trustees, or by trustees, as to the person or persons who may be paid or receive the corpus of income,

including rents and profits, or as to the time or times at which payments or transfers of corpus or income may be made.

(2) The court shall give its consent, where it sees fit so to do, by way of an order approving any arrangement by whomsoever proposed and to which all persons beneficially interested who are capable of assenting have given their assent.

(3) Where there are persons beneficially interested who fall within clauses (a), (b), (c), or (d) of subsection (1) of section 31a, that section shall apply, subject to the requirement in subsection (2) of this section that all persons beneficially interested who are capable of assenting must have given their assent.

(4) The court shall not approve an arrangement unless it is satisfied that the carrying out thereof appears to be for the benefit of each person who is beneficially interested and capable of assenting.

(5) The words, 'beneficiary or beneficiaries', 'person', and 'persons', in the foregoing subsections of this section shall include charitable purposes and charitable institutions.

(6) Where by whatever act of creation a life interest is conferred upon any person together with a general power of appointment

in that person exercisable [by deed or will, or] by will alone, with a gift in default of appointment to that person and his heirs, or to the testate or intestate heirs of that person, or to third persons, the power of appointment shall not take effect, whether exercised inter vivos or by will or disclaimed, so as to entitle that person to call for the corpus of the property in his own lifetime, [except with the consent of the court, and for the purpose of this consent subsections (2) and (4) of this section shall apply.]

(7) The foregoing subsections of this section shall also apply to testamentary gifts other than those which take the form of a trust.

(8) Nothing in the foregoing subsections shall detract from the statutory and inherent powers of the court, including the power of the court to order a scheme cy-près, and the ability of the court to declare a trust void or voidable because of mistake, fraud, duress or undue influence, or other such ground, or because its objects are illegal or contrary to public policy. Nor shall this section alter or amend the law of the validity or construction of wills, or otherwise alter or amend the law concerning charity.

Comment

Subsection (1), like its counterpart in the previous legislative proposal on page 101, applies to the settlor as it does to any beneficiary. Whether the settlor consents to an arrangement, or he is the sole beneficiary and either the trust has not run its natural course or one of the specific situations in the present subsection apply, the consent of the court must be obtained. The reason for this is that the object of bringing in a section 31a procedure is to avoid simply furthering the settlor's intent on the one hand, or assisting the beneficiaries to terminate the trust at their wish on the other. The procedure allows the court to ensure on application to it that the wisest course is taken. If a settlor consents to a proposed arrangement, and he is not a beneficiary or is one of a number of beneficiaries, the court would hear him if his evidence is available, but his views must then be weighed with others. Even if he is the sole beneficiary and the trust has not run its natural course, the court should have to approve his termination if he has not reserved to himself or his trustees a power to revoke or vary. After all, a trust is a disposition.

If this view of the writer's is not persuasive, it would be quite simple to introduce a phrase into subsection (1) on p. 101 and on p. 109 of this paper reading: "except with the consent of the settlor or the court".

Subsections (2), (3), (4), and (5) have already been commented upon. As with its use on page 101, it will be observed that subsection (3) states what is already the law, namely, that unborn, unascertained, and incapacitated persons must apply under section 31a. But it is inserted to ensure that all persons able to consent do in fact consent, and to clarify the necessary procedure of the proposed section 31b.

Subsection (6), which can also be employed in the suggested enactment on pages 101 and 102 of this paper, raises problems. Essentially the enactment should prohibit the donee of the power from being able to call for the corpus in his lifetime, or leave the law as it is. In the first two legislative proposals put forward in this paper (pp. 80, 81, 84, 85) prohibition was adopted. Once one introduces section 31a type procedure, however, one feels the force of this simple choice. If the settlor has given a power of appointment, the donee's arrangement will merely seek to exercise the power in his own favour. What then is the court to consider? The settlor probably thought of the donee having the income for life, and choosing among his children, his friends, his larger family, or charities, who should have the property and for what interests after the donee's death. But in fact he empowered the donee to get the corpus himself, especially if he gave a power to appoint by deed. On the other hand, perhaps the court should consider whether the moment of application is the right moment for the donee to have the corpus, whether the corpus should be paid in instalments, etc., as it would with any other proposed arrangement. It would be a Re T.'s Settlement Trusts type problem; whether to postpone on grounds of 'benefit' what the will enables the donee to take at once.

The words in square brackets at the close of the subsection add the consent procedure to the subsection previously discussed.

If it is decided to recommend that the power to appoint by will only shall be subject to subsection (6), with or without the consent procedure, but that the power to appoint by deed or will shall be subject to the existing law, the words in square brackets in line 4 of subsection (6) can be deleted.

The writer would suggest that, though this distinction between powers is made in the U.S.A., it is not to be commended. It is doubtful if testators would mean so much to flow from their omission or inclusion of the opportunity to appoint by deed, and such an enactment would not meet the objections to Re Mewburn[1]. On the other hand, if it is decided to retain the existing law for both powers, then some clarification should be made of the law in Alberta as to whether the donee of the power to appoint by will only can call for the corpus in his lifetime. A possible subsection might run as follows:

> Where by whatever act of creation a life interest is conferred upon any person together with a general power of appointment in that person exercisable by will alone, with a gift in default of appointment to that person, or to that person and his heirs, or to the testate or intestate heirs of that person, the donee of the power by disclaiming the power may call for the corpus of the property in his own lifetime, subject to any provision in the instrument of creation to the contrary.

This language would cover the situation where, as in Re McCrossan,[2] the life tenant is the settlor, and would therefore confirm the existing law.

The remainder of this report is concerned with subsidiary questions associated with the rule in Saunders v. Vautier, or flowing from its abolition.

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1. [1939] S.C.R. 75. See Mr. Field's paper.

2. (1961), 28 D.L.R (2d) 461 (B.C.).

8. SAUNDERS v. VAUTIER AND THE ACCUMULATIONS ACT, 1800

It was shown in the discussion of the Wharton v. Masterman principle, and of the history of that principle in Canada, that if a settlor requires the income of property to accumulate for a period that turns out to be longer than that permitted by the Accumulations Act, the question arises as to who is to have the income arising after the permitted period and prior to the intended end of accumulation. Saunders v. Vautier applies, as it did in Wharton v. Masterman, if the donee of the accumulations can show that under the instrument of creation, normally a will, he took a vested and indefeasible interest both in the capital sum and in the accumulations arising from it.

To do this, the donee has to clear two hurdles. He must establish, first, that the substance of the gift to him was the capital and that the testator directed the annual income to be accumulated merely as a mode of payment. In other words, he shows that the testator merely wrote in some sort of investment policy for the donee. Secondly, the donee must show that no other interest is charged on the accumulations.

To clear the first hurdle is more than most contenders can succeed in doing. There is indeed a presumption that the testator did not intend an intestacy, but it has also been established since Eyre v. Marsden[1], despite subsequent judicial efforts to the contrary, that the Act merely strikes out excess accumulation, it does not accelerate any interest or change any construction as to time of payment, substitution, or any contingencies. Very few contenders are able to show that the accumulation was not part of the substance of the gift.[2]

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1. (1838) 2 Keen 564.

2. See, e.g., Oddie v. Brown (1859), 4 De G. & J. 179.

Nearly all testators have a purpose in delaying the transfer of the capital for a period, and that purpose in itself may lead to a conclusion that the gift is contingent on that event.[1] Sometimes the payment is to be made on the death of the survivor of a class of persons,[2] and sometimes the donee is found to be a remainderman as to corpus and income.[3] A gift over to third persons will ensure, as we have seen, that even if the gift is vested as of the testator's death, it will be defeasible.[4] And, if the capital vests at the testator's death, the income and the accumulations may not, because the testator has dealt with the latter as a separate item.

If the first hurdle is cleared, then the second hurdle usually brings down the contender. Annuities are normally charged on the accumulations, as we have seen, and it is only on the last annuitant's death that the accumulation is planned to come to a close. This clearly prevents the contender from arguing that he has a vested, indefeasible, and absolute interest before that last life falls in.

It seems highly artificial that the person entitled to undisposed of property, or the testator's next-of-kin, should take income arising after the legal period and before the intended close of accumulation. The testator's intention to benefit the donee is frustrated by the Act, even if the gift is contingent or defeasible on the future event designed to terminate the accumulation. For the Act to operate in this way, there must be a policy gain behind its existence. Yet the present day purpose of striking down accumulation after a 21 year period (to take the period in the Act most familiar in practice) seems non-existant. Foreshadowed White Paper

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1. Berwick v. Canada Trust Co. [1948] S.C.R. 151; "at the expiration of 10 years". The Court found nothing to sway them from prima facie contingency.
2. Elborne v. Goode (1844), 14 Sim. 165.
3. Weatherall v. Thornburgh (1878), 8 Ch. D. 261 (C.A.).
4. McDonald v. Bryce (1838), 2 Keen 276.

taxation of accumulation trusts itself will be a major deterrant to long accumulations, but economic forces have been at work for years bringing about the ends which inter alia were in the English legislators' minds 180 years ago.

The rule in Saunders v. Vautier can relieve few beneficiaries of accumulating income from the side-tracking of those funds into the hands of the donors' next-of-kin. Wharton v. Masterman was the rare exception. And as far as reform is concerned, without an overhaul of the whole law of construction, nothing can be done to take away the unpredictability of what constructions will be placed upon wills. On the other hand cases like Re Parry[1] come close to absurdity. The fact itself of a required accumulation made the accumulations part of the substance of the gift. And the beneficiary could not take the capital because he was only entitled to legal accumulations. At the time when action was brought very little income had arisen from the capital in question, and none had been accumulated. So the beneficiary could not take the capital as legatee of that capital because those entitled to the testator's undisposed of property might thereby lose their rights to excess accumulations that one day might arise.

But, if the construction rules cannot be changed, the consequences of their application can be made more justifiable. If the Accumulations Act, 1800, were repealed in its applicability in Alberta, and replaced by the former common law rule, as has been done in the state of Victoria, Australia, by the Perpetuities and Accumulations Act, 1968, and earlier in Western Australia, there would be no problem of excess accumulations because provided the accumulating interest vested within the perpetuity period it would be valid for its intended

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1. (1889), 60 L.T. (N.S.).

duration. Experience demonstrates that the need to apply any rule against inalienability to such an accumulation would not arise. The maximum period of accumulation is likely to be a lifetime, the majority of periods will be shorter, there are likely to be powers of encroachment, and finally the beneficiary will ultimately be able to exercise the rule in Saunders v. Vautier or, if certain proposals in this paper are adopted, make an application to the court for approval of termination.

9. SPENDTHRIFT TRUSTS

The spendthrift trust arose in Pennsylvania, and it is now accepted in the majority of American jurisdictions, but it has remained an exclusively American phenomenon. A spendthrift trust, or to be more exact a spendthrift clause in a trust, ensures that the beneficiary of an interest subject to that clause shall not be able to alienate his interest. The effect of the clause is that any purported alienation or encumbering of the interest by the beneficiary is void. The attempted alienation or encumbering does not terminate the beneficiary's interest, however. The principal significance of such a clause is that creditors of the beneficiary may not reach the property to which the clause is attached. Normally the clause is attached to income, and sometimes it is attached to capital as well, where the beneficiary is entitled to capital at some stage. The jurisdictions differ quite considerably in the scope which they permit the spendthrift clause, and in many states there are conflicting authorities. Consequently, there is an immense body of authority and literature on the subject, reflecting both the importance and controversiality of the clause.[1]

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1. The leading work is still Griswold, E.N., Spendthrift Trusts, 2nd ed., 1947, Matthew Bender.

The spendthrift trust traces its origin into the nineteenth century, earlier than Chaflin v. Chaflin[1], and was one of the first products of the thinking that he who owns property can dispose of it in what way and upon what terms he pleases provided he does not contravene a rule of law. By imposing a restraint on alienation upon the equitable interest of the beneficiary, the settlor was able to secure for the beneficiary an income and capital expectation, sometimes of considerable proportions, beyond the creditors' reach. The trust was originally introduced by case law, but it spread both by this means and by statutory adoption, the incentive for the latter being the necessity of control. In its halcyon days this trust knew no limits, and the wealthy could thereby withhold remuneration from the merchants who had provided food and clothing. Since the First World War the necessity for control has become increasingly recognised throughout the jurisdictions that recognise the trust. Today it is seen in most jurisdictions, whether or not their existing law exactly reflects this, as a permissable means whereby a settlor can secure to the beneficiary and, through him, to his dependents a moderate income exempt from creditors' claims which can sustain the beneficiary and his family in bad times.

Jurisdictions outside the U.S.A. have not followed the American spendthrift doctrine. They have taken the view, which Lord Eldon reiterated in Brandon V. Robinson[2], that a restraint upon the alienability of an equitable interest, absolute or limited, takes away a major attribute of the interest. Thus the hostility is to restraints on alienation, not just as to whether they are imposed upon legal as opposed to equitable interest, absolute as opposed to limited interests. All that

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1. 20 N.E. 454 (1889).

2. (1811) 18 Ves. J. 429.

non-American jurisdictions have permitted is that an interest may commence provided the beneficiary is solvent, and terminate when he purports to alienate his interest. The act of alienation is therefore merely significant as an event which brings the interest to a close. The act will be ineffective as far as the creditor is concerned, however, because the beneficiary's interest terminates in the moment of the act.

Whether the spendthrift trust should be adopted by non-American jurisdictions is more a question of policy than of law. The policy will be discussed here in the context of this paper.

If it were decided to adopt the material purpose doctrine[1], or to prohibit termination of trusts in specific situations[2], the problem arises of the possible evasion of that legislation. As was said in the course of the earlier discussion, a beneficiary who is free to alienate or encumber his interest is in a position to destroy the purpose which the settlor had in making his gift. By way of reform, it is possible to prevent the trustee from giving a release to adult and capacitated beneficiaries who call for the capital, and it is possible to prevent the trustee from accepting an assignment to himself of all the beneficial interests and then a release from his duties. It is American practice to prevent the assignee of the donee's interest from obtaining the corpus of the trust property. But the American practice may well reveal the fundamental fact that nothing short of a restraint on alienation until the material purpose has been accomplished carries out the testator's intention or, if that intention also reflects the donee's best interest, what is desirable

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1. Para. 7(2) of this paper.

2. Para. 7(3) of this paper.

for the donee. It is somewhat ridiculous to burden the interest in the third party's hands for a purpose that was defeated at the moment when the donee assigned to the third party. The deterrent has not succeeded because no doubt the assignee was able to negotiate a discount to compensate him for the time during which he has to wait for possession of the property.

A restraint on alienation to meet this situation then becomes of real significance. It buttresses the material purpose of the gift. Clause 1(4)(a) on page 80 of this paper, and clause 1(2)(a) on page 84 of this paper, set out a restraint on alienation, but Griswold's text offers a comprehensive precedent:[1]

> No interest of any beneficiary under this trust either in income or in principal shall be subject to pledge, assignment, sale or transfer in any manner, nor shall any beneficiary have power in any manner to anticipate, charge or encumber his interest, either in income or in principal, nor shall such interest of any beneficiary be liable or subject in any manner while in the possession of the trustee for the debts, contracts, liabilities, engagements or torts of such beneficiary.

There are a number of variations which can be made to this precedent.

(1) It applies both to capital and income. It can be softened considerably, and thereby made to hold a better balance between the protection of the beneficiary and the interests of the creditor, by eliminating the references to principal. Griswold strongly supports such elimination.[2] Alternatively, the beneficiary may be better protected by

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1. Op. cit., p. 653.

2. Op. cit., paras. 102-106.

permitting him the protection of his capital interest, but freeing the annual income for the claims of creditors, alienees, etc.

(2) The precedent also has three parts; one concerned with transfer of the property, another concerned with burdening the interest, and the third concerned with the in personam claims of third parties. It is clearly a matter of policy as to whether all three of these protections, or less than the three, are necessary. It might be considered that it is assignment, sale, or transfer which principally defeats the settlor's material purpose. The interest could then be charged in favour of creditors. It is also questionable whether a restraint on alienation provision should extend to the beneficiary's tort liability. Omission of in personam claims from the restraint would meet this point. On the other hand, to take only the first part of the precedent could lead to some fine line-drawing as to what is within and not within the restraint, and the lines drawn may be more intellectually satisfying than reflective of the overall policy behind restraint.

(3) Another limitation might cut down the persons against whom spendthrift clause might be pleaded. The wife and children, elderly or incapacitated dependants, merchants supplying necessaries, doctors; these are the sort of people who because of their relationship with the beneficiary, or the importance of their goods and services, should not be bound by the clause.

(4) If capital and accumulated income are to be brought within the restraint, it could be made clear that, though the restraint must govern while the interest is contingent or merely vested in interest, it should not govern either capital or accumulated income which passes under the beneficiary's will or on his intestacy, unless the beneficiary leaves dependants.

(5) It is also possible to put a ceiling on the annual income or the amount of capital that may be protected behind a restraint clause. This would tie in the restraint to the ideas behind homestead legislation, and ensure that the wealthy do not have an advantage over the less well-to-do.

Once one introduces the analogy of homestead legislation, however, and the notion of the debtor's right to a subsistence income which the creditor cannot reach, the question arises as to whether the trust is the medium through which to introduce the right of the individual to a subsistence income exempt from the creditor's claim. Such a right will only be enjoyed by those who happen to own a trust interest, and, if the restraint is even further restricted to those trusts in which there is a material purpose yet to be accomplished, the possession of the right will be restricted to an even smaller number of people within the community. It is possibly for this reason among others that American jurisdictions have not by statute tied in a restraint on alienation with the material purpose doctrine[1]. The spendthrift trust has certainly been criticised on the grounds that it enables the wealthy and the middle income group to avoid their responsibilities to their creditors when those beneficiaries are by definition better able to meet their responsibilities than lower income groups. The latter, who are not likely to be the beneficiaries of trusts, are the persons who probably most need this protection. It is they who tend to be most heavily saddled with credit obligations.

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1. Griswold, op. cit., para. 88, shows that in those states where the spendthrift clause is valid it is possible for settlors to step up a Chaflin restraint on anticipation to a restraint on alienation, but many courts have confused the two types of restraint in any case, and in view of the wide variety of restraints on alienation, it is doubly difficult to discern any trend of testamentary or settlement practice.

If this argument is correct, protection from creditors should be the basis of a statutory provision which refers to the debtor's assets, not to his interests, if any, under trusts.

On the other hand, if the thrifty are the rock of society, or a buttress is needed for material purpose legislation, it may still be possible to balance the interests of donors anxious to protect their womenfold and their young adults from the results of folly, and the interests of creditors. There is nothing in the law of creditor and debtor which prohibits this protection, and if the protection is limited to income interests, to a ceiling figure in any one year, and to acts of transfer or encumbrance, while the class of persons mentioned in (3) above are excluded from its operation, a reasonable balance may have been struck.

It is tempting to add that the balance would be even more attractive if in any legislation permitting a restraint some account were taken of the age and sex of the beneficiary. A young man or woman will likely have acquired maturity by the age of 40 (the age taken by section 112(3)(a) of the Income Tax Act), and the widow's experience in handling affairs will grow with the passage of years. But there are so many factors affecting what might be called incapacity, that it seems unwise to limit the period of time during which a spendthrift clause may be imposed, or a statutory restraint is imposed, upon a beneficiary. It seems better that, as in American jurisdictions, the beneficiary should have to argue his case before a court, and convince the court that the factors which motivated the settlor, whatever they were, or the statutory restraint, should no longer restrain him from full ownership of his interest. The profligate, the drunkard, or the drug consumer, e.g., may have genuinely succeeded in changing his pattern of life.

Such a muted restraint on alienation as the writer puts forward would not meet all that clause 1(4)(a) on page 80 of this paper, and clause 1(2)(a) on page 84 of this paper, were intended to do, but it is arguably a more reasonable compromise between conflicting interests.

If the Institute decides to adopt a Trustee Act, R.S.A., 1955, as amended, section 31a procedure, either in all Saunders v. Vautier situations or in some, it is still possible to impose a statutory restraint on alienation which would have affect unless and until set aside by order of a court. The arguments for such a statutory restraint would be those already advanced in this paper. On the other hand, it is arguable that if a beneficiary can apply to the court for an order revoking the trust, the need for a restraint on alienation is nowhere so considerable. A beneficiary with a good case is more likely to seek a court order than suffer a loss by selling at a discount. It has already been attempted to bring merger within the proposals on pages 101 and 102 of this paper, and pages 109 and 110. This may be all that is necessary.

Another reason for having no statutory restraint on alienation when the court can terminate the trust by order is that the settlor can secure his intends, until the court determines to the contrary, by trust terms which are already possible in English and Canadian law. The discretionary trust secures that the beneficiary obtains payments of income and capital only when the trustee chooses, and in the typical support trust the trustee is required to exercise his discretion for the purposes only of maintenance and education. The creditor of the beneficiary cannot attack any moneys in the trustee's

hands; he must wait until those moneys have been paid over to the beneficiary, and in this way the unskilled widow or the wastrel youth is kept on as tight a rein as is necessary to protect the capital fund and accumulated income. In the United States several jurisdictions recognise the discretionary trust as a spendthrift trust, which may serve to underline the potentialities of this device in the would-be settlor's, or testator's, hands.

The other device which Lord Eldon's judgment in Brandon v. Robinson[1] foreshadowed is the protective trust. Under this well-known provision the life interest of the beneficiary is terminated by any act of attempted alienation or encumbrance of the life interest. If the life interest should be terminated, a discretionary trust immediately comes into effect. This trust is in favour of the former protected life tenant, his spouse, and the children of the marriage. If he is unmarried, the former life tenant and those persons who would be his next-of-kin form the discretionary trust class. This trust conforms to English and Canadian hostility to restraints on alienation, and was common conveyancing practice in England in the second half of the nineteenth century. In 1925 the English Trustee Act adopted it statutorily,[2] and today it is a familiar mode of providing for the young and hasty, as well as those of any age who are thought to need protection from themselves. Scott-Harston[3] gives a precedent for this trust which follows the English practice very closely. Whether the Institute should introduce legislation along the lines of section 33 of the Trustee Act, 1925, in England,

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1. (1811) 18 Ves. J. 429.

2. S. 33. See Also Griswold, op. cit., para. 429.

3. Tax Planned Will Precedents (Carswell), p. 211. See also Re Richardson's Will Trusts [1958] Ch. 504., (1958) 74 L.Q.R. 182.

is a question that need not here be pursued. It would merely clarify and perhaps simplify the existing law.

Adult beneficiaries must under existing law gain the consent of the court to terminate a protective trust because of the persons who would be possible beneficiaries if the life interest were to terminate during the tenant's lifetime. This requirement of a court order has worked well in England, and suggests that the testator and the court between them can indeed secure that the needful are protected.

If the rule in Saunders v. Vautier were not to be changed, a restraint on alienation introduced by statute seems pointless. The restraint would be rendered ineffective once the beneficiary was of age, and able to call for the capital. And the testator or settlor who really wishes to benefit another and impose a restraint has at hand the discretionary trust and the protective trust.

10. REFORM OF SAUNDERS v. VAUTIER AND THE CONFLICT OF LAWS

The law concerning trusts in the English and Canadian conflict of laws is still a largely undeveloped area. Even in the United States choice of law in trusts is still in a state of flux. A few basic rules can be set down with a fair degree of certainty, but beyond that point cases outside the United States seem to demonstrate what room there is for difference of opinion.

The possible reform proposals put forward by this paper are four in number; the introduction of a material purpose doctrine to cover all trusts, of a material purpose doctrine in selected trust situations, of court approval of the termination of all trusts, and of court approval of the termination of selected trusts.

It will have been seen that each of these proposals either takes away existing rights from beneficiaries, or restricts the availability of those rights by interposing court approval of their exercise. If the remaining common law provinces retain the rule in Saunders v. Vautier, trust beneficiaries in Alberta will have less rights than beneficiaries in the other provinces. In other words, Alberta will be the least popular province with beneficiaries wishing to terminate their trusts. For this reason there is in this case, as in so many others, a case for uniform legislation across common law Canada.

However, two questions need to be answered against this background. What actions would Alberta courts entertain under the suggested legislation in cases involving foreign elements? And what judgments of other jurisdictions terminating trusts under Saunders v. Vautier, or under variation of trusts legislation, should Alberta courts recognise?

The basic rules affecting trusts are these.

(1) The law governing the administration of deceaseds' assets is the lex situs of the administration, and this gives the courts of the situs jurisdiction to determine issues, including title, relating to moveables or immoveables out of the jurisdiction. Authority supports the last part of this proposition, but it is clear that regard has to be given to the attitude of the courts of the situs of immoveables towards the exercise of such a jurisdiction.

(2) Once estate administration is complete, the question of the validity of the testamentary trust arises. The essential validity of a testamentary trust, which will include its creation, the vesting of title, and the trustee's powers must be determined by the law governing the essential validity of the will. This means that the lex situs governs in the case of immoveables, and the lex domicilii of the testator at the time of his death governs in the case of moveables.

(3) The law governing the administration of a testamentary trust, however, is the lex situs of the administration, and on this matter Williams C.J.K.B. in Re Nanton Estate[1] adopted the words of Falconbridge[2]:

> "The valid creation of a testamentary trust being assumed, including the vesting of the title to or the control of the assets in the trustee, a different question is what law governs the administration of the trust. It would seem that whatever be the nature of the trust res and whatever be the law governing the creation of the trust, the law governing the administration should, as a general rule, be the lex rei sitae, including whatever effect that law gives to the expressed or implied intention of the testator. This law would also be the lex fori as regards the control which a court of the situs may exercise over the administration."

(4) As far as inter vivos trusts are concerned, there is more doubt. 'The proper law of the settlement' is a term which is widely employed, but there is no real agreement on what are the connecting factors. The proper law governs the validity, and therefore the creation of the trust. Falconbridge[3] says that "broadly speaking" both creation and administration "should be governed by the law of the situs of the trust res, in accordance with the general rule that the creation and transfer inter vivos of interests (legal or equitable) in things of all kinds is governed by the lex rei sitae, subject to whatever effect may be that law be given to the intention of the settlor."

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1. (1948), 56 Man. R. 71, [1948] 2 W.W.R. 113, 117, 118.
2. Conflict of Laws, 1947, pp. 558 et seq.
3. op. cit., 1954, at p. 640.

This view probable cannot be challenged as far as immoveables are concerned[1], but, if the trust property contains or constitutes moveables, American decisions suggest that nowadays many connecting factors or points of contact are considered in addition to the locus of the trust res. Two English cases under the Variation of Trusts Act, 1958, are to the same effect, though less inclined to be concerned with the settlor's intent. There is of course the domicile of the settlor at the time of the creation, and the place of the administration of the trust, but in Re Paget's Settlement[2], though without finding the actual proper law in that case, Cross J. referred to the place of execution of the settlement, and the nationality of the trustees at that time and at the time of the application to the court. These connecting factors he mentioned in addition to the location of the trust funds at those two times. In Re Ker's Settlement[3], the stress was on domicile. The settlement was executed in Northern Ireland, the trustees and the settlor then lived there. However, when action was brought in England to terminate the trust, the settlor and the trustees lived in England, and the property subject to the trust was also in England. Moreover, it was established that at the time of making the settlement the settlor and her husband intended to settle in England, and intended that the settlement should be governed by English law. The learned judge, who did not need to decide the point, inferred[4] that had it been clear that the settlor's husband was domiciled in Northern Ireland or England at the time of the execution of the settlement, that would have settled the matter. The settlor's domicile would have determined the proper law.

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1. Subject to the rule in Penn v. Baltimore (1750) 1 Ves. Sr.444.
2. [1965] 1 W.L.R. 1046.
3. [1963] Ch. 553.
4. Ibid., at. p. 555.

Falconbridge's view as to the connecting factor for essential validity may therefore be in part dated. It is interesting, however, that Falconbridge should say that the lex situs of the trust res should govern the administration of an inter vivos trust. But as far as moveables are concerned, the place where the trustees are administering the trust has for long been accepted as the connecting factor[1].

Classification of the prohibition, or court approval of, trust termination

The material purpose doctrine, whether applied to all trusts or some, is a restriction on the beneficiaries' powers of termination of the trust. Termination has associations both with administration and essential validity, the latter of these because it alters the nature of the property entitlement of the beneficiary. However, in Re Nanton Estate the trustees were seeking to determine whether they could apply for the maintenance and education of certain beneficiaries, and the court had no hesitation in treating this as a matter of administration, despite the fact that it altered the quantum of the entitlement of each beneficiary. This case suggests that, for example, should the trustees apply under the Variation of Trusts Act for the power to terminate the trusts, and at a time of their discretion, such a person would be granted or refused approval as a matter of the administration of the trust. But is this really a matter of administration, like enlarging an investment power?

Court approval under section 31a procedure raises similar doubts. One might expect to obtain some guidance from the Variation of Trusts legislation, but those Acts are silent

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1. Baker v. Archer-Shee [1927] A.C. 844. Archer-Shee v. Garland [1933] A.C. 212.

both on classification and on choice of law. Dr. Mann has suggested[1] that the limits of this statutory jurisdiction depend on the question whether this legislation "deals with title to property or with the terms, the context, and the substance of dispositions. In the former event the lex situs would apply, while in the latter event the variation would, at any rate where moveables are concerned, be subject to the law of the testator's domicile or to the proper law of the settlement or disposition, as the case may be." This means that Dr. Mann sees the process of court approval to arrangements as being a matter of essential validity.

In both Re Ker's Settlement and Re Paget's Settlement the court was concerned with the proper law of the settlement, and, since these were applications under the English Variation of Trusts Act, it must be assumed that each judge was classifying court approval to the variation or termination of dispositive trust terms as a matter of essential validity. But would such an 'arrangement' which terminates dispositive terms constitute something going to the heart of the trust, and therefore be a matter of essential validity, while an application for greater trustee powers would constitute administration? If so, different laws will apply according to the nature of the arrangement in question, as well as to whether the trust is testamentary or inter vivos.

The effect in Alberta of this paper's proposals

However, if it is correct that denial of trust termination, or court approval of a termination or variation are matters of essential validity, how far can beneficiaries avoid the more demanding Alberta law (as proposed)?

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1. (1964) 80 L.Q.R. 69.

Ex. 1 A is domiciled in Ontario, and the testamentary trust is being administered in Alberta where the trust fund is invested. A can invoke Saunders v. Vautier, or the Variation of Trusts Act, in Ontario, and terminate the trust.

Ex. 2 Similar facts, but the trust is inter vivos. The concentration of factors is in Alberta, including the trust res, and therefore the proper law is probably Alberta, but nevertheless, should it follow Re Paget's Settlement, an Ontario court might (1) assume jurisdiction, and (2) either order that the rule in Saunders v. Vautier is invocable, or approve, if it thought fit, the proposed arrangement under the Ontario Variation of Trusts Act.

N.B. An Ontario court "might" so decide because it may conclude that the preponderance of Alberta factors is such that it should refuse to accept jurisdiction, and refer the parties to the courts of Alberta.

As far as recognition of judgments of other jurisdictions is concerned, Alberta courts would seem to be in the position that they should recognise the courts of the domicile (moveables) or situs (immoveables) in the case of testamentary trusts, and, in finding the proper law of inter vivos trusts consider the same preponderance of non-Alberta factors.

The proposed Alberta legislation could at least specify (i) when the courts of Alberta can accept jurisdiction, and (ii) what law is to be applied.[1] This might well assist

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1. See Mann, op. cit.

the thinking of other jurisdictions in determining whether they ought to accept jurisdiction (i.e., whether to follow the English cases), and, if they do accept jurisdiction, what law or laws to apply.

11. REFORM OF THE RULE IN SAUNDERS v. VAUTIER AND TAXATION

Since 1958 in England it has been clear that the principal advantage of variation of trusts legislation is that it enables beneficiaries of trusts, who are unable to terminate their trusts under Saunders v. Vautier, to apply to the courts and by way of variation or termination introduce much needed flexibility into the financial handling of their trusts. The combination of inflation, the instability of the stock market, and high rates of taxation has brought about the result that trust terms should themselves contain the power enabling trustees (or others) to vary or terminate the trust terms as future circumstances should dictate. Settlors of older trusts were not accustomed to giving this degree of licence, and many modern Canadian settlors, the writer is informed, are unwilling to give such extensive power to the trustees or to the beneficiaries. Consequently there has been a volume of trust termination under Saunders v. Vautier, and a considerable number of applications under the new variation of trusts legislation. It has already been remarked that, since the introduction of this legislation in 1959, Ontario has experienced a volume of applications. The recent increase of gift taxes rates in 1968 has resulted in applications for the variation or termination of inter vivos trusts, and it is clear that existing accumulation trusts will need substantial revision or actual

termination if the White Paper proposals are adopted.[1] The introduction of a capital gains tax will also persuade many beneficiaries that they would be better placed if capital could be brought into their hands out of trusts. This has been the English experience. In the case of small trusts the size of accountancy fees can be an item out of line with the value of maintaining the trust. The problem of balancing the interests of life tenants and remaindermen is also greater, and more extensive powers of management are often necessary, when a capital gains tax is added to income tax and estate tax.

For these reasons the maintenance of the utmost flexibility in the trust may prove the most significant factor in providing for the beneficiaries. The introduction of a material purpose doctrine, or a prohibition of termination in certain circumstances, would introduce the opposite of flexibility. It would maintain the trust even though there would be clear tax advantages in terminating it. Some American decisions suggest that, if it can be demonstrated that the settlor would not have intended the result taxation has produced or threatens to produce, then the court will permit termination. But even to the extent to which American courts will accept such a doctrine or evidence in the particular case alleged to demonstrate it, for practical purposes this opens up the opportunity for considerable encroachment upon the material purpose doctrine. The necessity for court approval on the other hand may well provide the flexibility a trust needs, and prevent wholesale violation of the settlor's intention.

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1. Para. 5.58.

12. Summary of The Paper

The rule in Saunders v. Vautier is a rule of law having its origin in the conception that once all the beneficial interests are in one person, he has the whole right of enjoyment, and can call for the trust property. It applies in its narrow ration when a person has a vested and indefeasible interest but subject to a postponement of enjoyment. Due to the hostility of the common law, unlike the civil law of Quebec, to restraints on alienation, the postponement is struck out at the request of the beneficiary. However, it is often a fine point of construction as to whether a will (and sometimes a settlement inter vivos, for the rule in Saunders v. Vautier applies to both) creates a vested and indefeasible, a vested but defeasible, or a contingent interest. Mistakes in drafting are possible, and are commonly made, but the settlor who is anxious to avoid the rule has only to provide a gift over on the non-occurrence of the desired event to persons who are not adult or born, etc., and the rule is avoided.

Because of poor drafting and homedrawn wills, plus the great complexity of the rules of construction, there is a case for change. The American doctrine of Chaflin v. Chaflin applies in the majority of states, and under this doctrine no trust may be terminated, nor will any court terminate it, if any material purpose of the settlor's remains to be accomplished.

This would meet the objection of several Canadian courts to Saunders v. Vautier. An adoption of Chaflin would mean that no trust could be terminated in Alberta if the court found a material purpose not yet carried out. There are, however, several specific areas in which the rule in Saunders v. Vautier has been especially important, and it is possible to avoid a blanket material purpose doctrine by prohibiting termination in those specific areas. This would also ensure that the criticisms of Canadian judges would be met, because these criticisms have concerned Saunders v. Vautier in those areas.

Yet another approach is to avoid rigid prohibition, and to allow the courts to terminate within their discretion by way of approval of arrangements of the kind they now approve under the Trustee Act, R.S.A. 1955, as amended, s. 31a. Again a requirement of court approval in all cases of termination can be introduced,or a requirement only in the specific areas mentioned above. The greatest advantage of introducing court approval for all trusts is that it enables the court in all cases to consider what is best for all concerned in the circumstances as they have happened. The court looks at the matter with contemporary eyes, but is able to assess objectively the desires of both the settlor and the beneficiaries. The greatest advantage of a selective court approval requirement is that it leaves Saunders v. Vautier to deal with those cases where there has not been criticism, but regulates in the manner mentioned those cases where there has been criticism.

Spendthrift trusts are a feature of a great many American jurisdictions, and rather ~~anonymously~~ anomalously they can be produced under the civil law of Quebec, but the advantage of introducing them is that they restrict financial flexibility and deprive creditors. In any event the same result can largely be achieved by the protective trust.

Problems involving the conflict of laws chiefly arise out of the lack of agreement as to how termination of trusts should be classified. There is also disagreement as to the law which governs testamentary trusts and inter vivos settlements. There is a case for legislation clearing up these matters, both as to the jurisdiction of the court and the governing law.

Saunders v. Vautier has permitted rigidly drawn trusts to be terminated; the variation of trusts legislation has completed the picture by allowing the court to approve on behalf of infants, the unborn, and the incapacitated. The volume of work this legislation has brought to practitioners and courts demonstrates just how much modern tax law and its frequent changes call for flexibility in the trust machinery. This is the most important factor from the tax angle.

Submitted this 8th day of June, 1970.

Donovan W.M. Waters

Donovan W.M. Waters

THE RULE IN SAUNDERS v. VAUTIER

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