July 22, 1971

RULE AGAINST PERPETUITIES

APPENDIX A

POWERS OF MAINTENANCE AND ADVANCEMENT:
TRUSTEE ACT ss. 32 AND 33

Early in our examination of perpetuities, we noted the existence of ss. 32 and 33 of The Trustee Act. More recently we made a detailed study of their scope in comparison to ss. 31 and 32 of the English Trustee Act. We decided it necessary to consider whether they should be replaced by provisions more in line with England's. In July, 1971, Professor Donovan Waters of the Faculty of Law, McGill University, who sometime ago prepared at our request a research paper on the Rule in Saunders v. Vautier, and whom we consulted informally in connection with the present problem, referred us to a published working paper he prepared in 1970 for the Ontario Law Reform Commission. This working paper deals exhaustively with the subject of powers of maintenance and advancement. It is an excellent examination of the rules of equity and of statutory additions to the equitable power and makes the most careful and helpful recommendations for an improved 31 and 32 of England's Trustee Act. The following discussion and recommendations are based almost entirely on Professor Waters working paper.

[N.B. I have written Allan Leal for permission to make use of the paper. If his Commission gives it we can proceed. If not I think we must hold up our formal recommendation though there is no reason we cannot make a final decision as to what we want.]

The power of a trustee to pay from income sums needed for the maintenance of a beneficiary is clearly related to the beneficiary's right to the income. Frequently the testator

specifically provides for maintenance but very often does not. Often he makes a gift which may be vested but deferred or vested but defeasible, or contingent, and does not specify any disposition of the income in the meantime. Elaborate rules have been built up as to when the beneficiary is entitled to the income. Historically there were separate rules for real property, personal property and mixed property and specific rules for specific and general legacies on the one hand and residuary gifts on the other. Dealing first with residuary gifts, there is no problem where the gift is indefeasible and vested in possession. However if possession is deferred, there is an inference that the testator did not intend the beneficiary to have the income in the meantime so there is an intestacy as to the income. In the case of a contingent residuary gift, the gift does carry the income, though this may seem odd. In the case of a gift that is vested but defeasible the trend in England has been to say that the intermediate income does not go with the corpus but Canada has not followed these decisions. The leading case is Re Watson, 35 D.L.R. (2d) 532, aff'd 37 D.L.R. (2d) 370, aff'd 1964 S.C.R. 312.

In the case of specific or general legacies, a contingent gift does not carry income prior to vesting; likewise a vested gift where possession is postponed though there seems to be an exception where the testator has directed that the subject matter of the gift be set apart from the rest of the estate.

In England s. 75 of the Law of Property Act, 1925, changed the law to provide that a contingent or future devise or bequest carries the intermediate income; likewise a contingent residuary devise and a specific or residuary devise where the interest is contingent.

It will be noted that England's s. 31, which permits a contingent beneficiary to receive maintenance and if an adult to receive the income, is premised on the right of the beneficiary to the income.

Alberta's s. 32 is really a mere addition to s. 31 by way of permitting the sale of the property itself for an infant's maintenance. It is not in any sense an advancement provision, like England's s. 32. Professor Waters survey of Canadian statutes shows that several other provinces have the same two provisions Alberta has. On the other hand Manitoba in 1968 enacted England's 31 and 32 with minor changes (Trustee Act R.S.M. 1970, c. T160, ss. 31 and 32). Prince Edward Island in 1956 had also enacted the English provisions with only minor changes (Trustee Amendment Act 1956, c. 44, s. 1). Most of the Australian States have legislation based on England's 31 and 32, but New South Wales and South Australia have made important changes. Professor Waters recommendation is based on 31 but makes use of some of the Australian changes and is clearly designed to be an improvement on 31.

I shall now set out his draft and shall insert his comments in square brackets in the appropriate place.

s. 1(1) Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, and whether absolute or liable to be divested, then, subject to any prior interests or charges affecting that property

[The opening words of the section follow the English language of section 31 because the only departure from this wording, that of the South Australia section, is inadequate, as explained in this paper.]

(i) during the infancy of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian or the person having custody or control of the infant, or otherwise apply for his maintenance, education, advancement, or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is

(a) any other fund applicable to the same purpose; or

(b) any person bound by law to provide for his maintenance or education; and

[Paragraph (i) of subsection (1) follows the English section, except that the purposes of the section are widened to include advancement.]

(ii) in the case of any such person who has attained the age of twenty-one years and has not an interest vested in interest, the trustees may exercise the power conferred upon them under the previous paragraph, until he either attains an interest vested in interest or dies or until failure of his interest, save only that, subject to paragraph (iii) of this subsection, any payments shall be made to him instead of the parent or guardian or person having custody or control during infancy.

[Paragraph (ii) adopts the policy commended in this paper of continuing the power of maintenance, etc., into adulthood where the interest is not already vested in interest and does not vest in interest on the beneficiary attaining majority.]

(iii) When the person qualified for discretionary payments or applications under this subsection is married, the trustees may exercise their power under this subsection in favour of the husband or wife of such person, or his or her children or more remote issue, where in the sole discretion of the trustees they consider the circumstances appropriate and to the benefit of the person qualified as aforesaid under this subsection.

[Paragraph (iii) specifically enables the trustees to do something which the English courts have already permitted by way of approving sub-trusts created by trustees in furtherance of their power to "benefit" the beneficiary. This paragraph goes further by

permitting direct payments to the spouse, children or more remote issue, where the trustees think this a more appropriate course of action. This is a valuable aspect of the protective trust contained in section 33 of the English Trustee Act, and it appears to the writer to be appropriate where so many settlors and testators delay vesting in interest or in possession because they feel the beneficiary will not be ready until a later date to take the gift and make good use of it.]

[Provided that where trustees have notice that the income of more than one fund is applicable for the purposes aforesaid, then, so far as practicable, unless the entire income of the funds is paid or applied as aforesaid or the court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.]

[The proviso clarifies a point that, as explained in this paper, is not clear in Ontario, and it may therefore be useful to include this provision. On the other hand, the proviso ties the hands of the trustees for a prupose that they will normally consider in any event in the exercise of their power. Should the trustees be different persons from the trustees of the other funds, they may also experience difficulties and delays. The proviso is therefore put in square brackets, because in the writer's view the balance of considerations seems to be against its inclusion.]

[Subsection (2) makes provision for the employment and payment of the accumulated surplus income which may arise both during infancy and pending the vesting in interest (or in possession) of the beneficiary's interest.]

(2) (i) Notwithstanding any rule of law, during the infancy of any such person, if his interest so long continues, and during the period trustees are otherwise empowered by the foregoing subsection to pay or apply income for the purposes aforesaid, the trustees shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time in authorized investments, and shall pay those accumulations to the person whose interest qualifies him for discretionary payments or applications under subsection (1), payment being made only when such person attains the age of twenty-one years or marries under that age, the receipt of that person after marriage and though still an infant being a good discharge, or, if he shall not at the age of twenty-one years have or acquire an interest vested in interest, when he does so acquire such an interest.

[Paragraph (i) authorises the trustees to accumulate, and in its opening words makes the rule against accumulations inapplicable. The writer strongly recommends this approach to the rule against accumulations, not only because he cannot see the force

of the retention of this rule in the Ontario Act, but because he believes it would introduce complexities as to surplus income arising after the permitted accumulation period and prior to vesting in interest. Berry v. Geen is evidence enough, it is thought, of the problems that can arise. Not only could there be tax implications in the reversion of such surplus income to the settlor of an inter vivos trust, but where such income passes to the residuary legatee or as on intestacy it produces a result which seems to violate the testator's scheme of things merely for the purpose of doing so.

The paragraph authorises payment of accumulations only upon the infant with a vested interest attaining his majority, or at the later date when such vesting does take place.]

(ii) If such person has an interest which is vested in interest, and prior to any defeasance occurring he dies, whether or not death causes defeasance, the accumulations to that date shall pass to his personal representatives, provided that under no circumstances shall a person who has a vested interest be entitled to call for the capital or the accumulations during his lifetime other than at the close of his infancy or when his interest vests in possession, whichever last occurs; and where before any contingency occurs such person dies or the interest fails, the accumulations shall be

held as an accretion to the capital of the property, and as one fund with such capital for all purposes.

[Paragraph (ii) changes the English section by giving the accumulations to the beneficiary with a vested interest who dies in infancy. It also gives the accumulations to the adult with a vested interest who dies prior to a vesting in possession. This result would follow under the general (or common) law, but it is thought better to spell out what is to happen rather than leave the practitioner to deduce what is the general law in these circumstances. The proviso to the first part of paragraph (ii) is intended to reverse the rule in Saunders v. Vautier. If a gift is vested in interest, but possession is deferred until the age of 35, for example, the beneficiary could argue that on attaining his majority he can call for the capital and wind up the trust of his interest since he is the only person interested in the capital, the income, and the accumulations. This is a technical rule which defeats the settlor's or testator's intention, and, given the introduction of a statutory power of this kind, it seems to the writer that the technical rule should give way to the policy of the statutory power. The remaining part of the paragraph causes accumulations to accrue to capital for all purposes when a contingency is prevented from taking place or does not take place. This result is inevitable given the distinction between vested and contingent interests; it is true that the narrowest line of construction may separate the vested, but defeasible,

from the contingent, but the section must recognize this distinction. Whether the concepts and rules concerning the construction of wills need simplification is another issue; any necessary reform cannot be introduced piecemeal in the contemplated statutory power of maintenance.]

(iii) The entitlement of any person to call for the accumulations under this section shall be without prejudice to any provisions with respect thereto contained in any settlement made by him at an earlier time, and subsisting when the aforesaid entitlement occurs.

[Paragraph (iii) is a self-explanatory provision following the provision of section 31(2)(i) of the Trustee Act, 1925 (Eng.).]

(iv) At any time during the infancy of any such person, if his interest so long continues, and during the period trustees are otherwise empowered by subsection (1) to pay or apply income for the purposes aforesaid, the trustees may pay or apply those accumulations, or any part thereof, for those purposes, as if the accumulations were income arising in the then current year.

[Paragraph (iv) follows the English section in permitting past accumulations to be drawn upon for maintenance, etc., in future years--a wise provision, for needs increase as the beneficiary grows older--paragraph (v) puts at rest the doubts associated with the

general law as to whether persons other than the beneficiary can later be compensated for benefits they have paid for and conferred upon the beneficiary at an earlier time.]

(v) Trustees acting under subsections (1) or (2) of this section may pay or apply income or accumulations for past maintenance, education, advancement, or benefit accruing to the beneficiary of the interest.

(3) Subject to subsection (4) of this section, all contingent interests, whether arising by will or otherwise, and whatever the nature of the property subject to them, shall carry the intermediate income from the date the interest arises, except so far as such income, or any part thereof, may be otherwise expressly disposed of; and where the property in which there is the contingent interest is not immediately ascertained or segregated the rate of interest until such ascertainment or segregation occurs shall (if the income available is sufficient, and subject to any rules of court to the contrary) be five per cent per annum.

[Subsection (3) follows the New South Wales and South Australia sections in that it lays down that contingent interests shall carry the intermediate income unless that income is otherwise <u>expressly</u> disposed of. This puts to rest all the nice distinctions of the general law, for the section applies regardless of the property concerned and the instrument or oral declaration creating the contingent interest. It thereby rectifies the confusion that

flows from section 175 of the Law of Property Act, 1925, (England). The proposed section departs from the N.S.W. section and the S.A. version of the N.S.W. section in one important respect; the proposed section omits a certain passage in the N.S.W. section, i.e., after the words, "and the [intermediate income] is not expressly or specifically disposed of", there follows these words:

> . . . but would pass to some other person in virtue only of an interest to which he is entitled under a residuary or a general gift in the instrument, if any, creating the trust, or in the absence of such a gift then as upon intestacy or as upon a resulting trust . . . and the interest of such person shall not be deemed to be a prior interest within the meaning of this subsection.

These words appear to do no more than list the situations that might occur if there were no express intent, and stress that such an implied intent or absence of intent does not constitute a prior interest or charge within the section. There is some value in words which ex cautela repeat in another form what has already been said, but the writer is persuaded that "expressly disposed of" is specific enough, and that a section such as this becomes more difficult as its length is increased.

The N.S.W. section refers to "future or contingent" interests, and the S.A. section to the interest which "is not vested". The proposed section avoids the future interest and the simple phrase, which 'is not vested', because of the English cases which since

1947 have distinguished between interests which are immediate and those which are subject to deferred possession. The words, 'contingent interests', includes all the limitations which have otherwise caused difficulties in the general law.

The latter part of subsection (3) speaks for itself.]

(4) A vested or contingent interest with deferred vesting in possession shall not carry the intermediate income; provided that if contrary intent is proved, for the purpose of such an interest the words, "vested in interest", in subsections (1)(ii) and 2(i) shall read, "vested in possession"; and the words, "until he attains an interest vested in interest or dies", in subsection (1)(ii) shall read, "until he attains an interest vested in possession, or, his interest being contingent, he dies".

[Subsection (4) is a matter for regret. It would have been preferable to have said under subsection (3) that all vested and contingent interests shall by force of the statute carry the intermediate income unless it is otherwise expressly disposed of. And this course of action may still have greater appeal for the Law Commission, but what such a provision does is to obtain simplicity in this complex area of what gifts carry the intermediate income, at the expense of the settlor's or testator's intent. It would not be so forbidding a task to reform the rules of construction of wills if the rules could

be rationalised without primary regard to the intent of the testator. The subsection which covered all vested and contingent interests would eliminate any effect from the testator's expression of implied intent. The English courts have been concerned with the similar effect which, as we have seen, is produced in part by section 175 of the Law of Property Act, 1925 (Eng.). In Re McGeorge Cross J. observed that that section denied effect to what in his view was the obvious intent of the testator. If a devise vested in interest is expressly deferred in possession "until after the death of my wife", and the residue is given to the widow for life, his Lordship had no doubt the intermediate profits are intended for the widow.

The choice the Commission will have to make is between a simple provision which will override even this example of implied intent, but be easily intelligible, and a provision such as the draft subsection (3) which, at the price of less simplicity, attempts to meet the criticism of section 175 which Cross J. voiced in relation to gifts (or devises) deferred in possession.

The writer was persuaded to adopt the latter course because statutory powers of maintenance and of advancement are always subject to the contrary intent of the settlor or testator, and, if an adequate subsection (4) could be designed, it seemed to be inconsistent to make an arbitrary ruling within the statutory power of maintenance, and thus fly in the face of what eminent Chancery judges think to be clear evidence of contrary intent.

Subsection (4) therefore treats gifts or devises or grants subject to deferred possession on a different basis from those interests covered in subsection (3).]

(5) This section extends to a vested annuity in like manner as if the annuity were the income of property held by a trustee in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the infancy of the annuitant shall be held in trust for the annuitant absolutely.

[Subsection (5) follows England's 31(4).]

(6) Excepting only subsection (3), this section shall have effect if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to the provisions therein contained.

[Professor Waters says (p. 133) that subsection (6) "follows the English section". I cannot find such a provision though s. 69 (2) covers the same ground.]

(7) This section does not apply where the instrument, if any, under which the interest arises, came into operation before this section took effect.

[Subsection (7) is explained by the fact that subsection (3), not to mention subsection (1), makes substantial changes in the general law, and it is thought that, if the section is made applicable to trusts existing when the section takes effect, it could affect both

the pattern of distribution of the assets intended by the settlor or testator, and interfere with administration. For example, if a testator has given $20,000 to A on his attaining 30, and made no express provision as to the intermediate income, the income arising will probably remain part of the residue, that being the implied intent. The proposed section will require the trustees to have that income available for possible maintenance payments till A is 30, and pay the accumulations to him at that age.]

BOARD'S TENTATIVE VIEWS IN MINUTES OF 22ND JUNE AND 13TH JULY

On June 22nd there was agreement on extending the scope of Alberta's s. 32 beyond majority but none as to the proper age limit. There was long discussion as to whether the trustee "may" or "shall" pay the income to an adult beneficiary. A motion favouring "shall" resulted in a favourable tentative decision. There was then long discussion as to adding "benefit" and decision was reserved.

As to s. 33 it was agreed to extend it to age 25 and not to add "benefit".

On 13 July Professor Waters was present with his Ontario working paper which the Board only learned of on the eve of the meeting. Professor Waters suggested two additions to his draft of the widened English 31:

(1) In subsection (1) "notwithstanding that the interest is liable to be defeated by the Rule against Perpetuities".

(2) A new subsection to meet Mr. Field's query, namely, "that the section apply whether the beneficiary be over or under the age of majority when the trust takes effect".

THE ADVANCEMENT PROVISION

Alberta has no counterpart of England's 32. True, our 33 permits disbursement out of capital for infants but nothing for advancement and nothing for adults and no use of "benefit".

To save retyping I am attaching Professor Waters' redraft of England's 32 and his comments thereon.

Assuming we recommend England's 31 or Professor Waters' version thereof, the Board should consider whether it should also enact England's s. 32 or Professor Waters' version thereof. Both Manitoba and Prince Edward Island have both 31 and 32.

After the meeting I phoned Professor Waters on another matter and he mentioned that we might want to consider, in connection with England's 32, whether to use the Manitoba version. It is based on England's 32 but requires intervention by the court. I shall not take the time to photostat Manitoba's provision. The citation is R.S.M. 1970, c. T160, s. 32 (this is a coincidence in numbering).

W. F. Bowker

~~Subsections (5) and (6) follow the English section.~~ Subsection (7) is explained by the fact that subsection (3), not to mention subsection (1), makes substantial changes in the general law, and it is thought that, if the section is made applicable to trusts existing when the section takes effect, it could affect both the pattern of distribution of the assets intended by the settlor or testator, and interfere with administration. For example, if a testator has given $20,000 to A on his attaining 30, and made no express provision as to the intermediate income, the income arising will probably remain part of the residue, that being the implied intent. The proposed section will require the trustees to have that income available for possible maintenance payments ~~till A is 30, and pay the accumulations to him at that age.~~

(b) Advancement

Section 32 of the Trustee Act, 1925, (Eng.), does not provide the same number of problems as section 31. There are changes which this paper has recommended for its improvement, and the proposed section attempts to meet these recommendations. Aside from these matters, there is only the question of arrangement of the section. New Zealand, New South Wales, and South Australia have made substantial changes of this kind to their own versions of section 32, and in the writer's view made it easier to read and, therefore, to apply.

The recommended text of the proposed section is as follows:

S.1(1) Where under a trust a person is entitled to the capital of the trust property or any share thereof, the trustees may from time to time —

(a) pay or apply any capital money subject to the trust; or

(b) with a view to such payment or application, sell, mortgage, or charge any other capital asset; or

(c) transfer any such capital asset

for the maintenance, education (including past maintenance or education), advancement or benefit of such person as the trustees in their absolute discretion think fit :

Provided that —

(i) trustees may pay, transfer or apply to or for such person an amount not exceeding altogether one-half of the value of the trust capital, whatever form it shall take, or of the share of such capital to which the person is entitled, if the value of such capital or the share thereof exceeds ten thousand dollars, [but if the value is that sum or less the amount may not exceed five thousand dollars.]

(ii) in paying, transferring or applying any further amount the trustees shall require the consent of the Court.

(2) The power conferred by this section may be exercised whether the person is entitled absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and notwithstanding that the interest of the person so entitled is liable to be defeated by the exercise of a power of appointment or revocation, or by the operation of the rule against perpetuities, or to be diminished by the increase of the class to which he belongs.

(3) The power conferred by this section may be exercised whether the person is so entitled in possession or in remainder or reversion.

(4) Where such person or any other person is or becomes absolutely and indefeasibly entitled to the share in the

trust capital, in which such person had a vested or contingent interest when the money or asset was so paid, transferred, or applied, that money or asset shall be brought into account as part of that share of the trust capital.

(5) No such payment, transfer, or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money or asset paid, transferred, or applied, unless that person is in existence and of full age and consents in writing to the payment, transfer, or application, or unless the court, on the application of the trustees, so orders.

(6) (i) Where a power to pay, transfer or apply any property for the purposes set out in subsection (1), or for any one or more of those purposes, is vested in trustees, the trustees when exercising the power shall have, and be deemed always to have had, authority to impose on the person receiving such property any condition, whether as to repayment, payment of interest, giving security, or otherwise; and at any time after imposing any such condition, the trustee may, either wholly or in part, waive the condition or release any obligation undertaken or any security given by reason of the condition.

(ii) In determining the amount or value of the property which trustees who have imposed such a condition may pay, transfer or apply in exercise of the power, any money or asset repaid or re-transferred to the trustees or recovered by them shall be deemed not to have been so paid, transferred or applied by the trustees.

(iii) Nothing in this subsection shall impose upon trustees any obligation to impose such a condition; and trustees, when imposing any condition as to security as aforesaid, shall not be affected by any restrictions upon the investment of trust funds, whether imposed by this Act or by any rule of law or by the trust instrument (if any).

(iv) Trustees shall not be liable for any loss which may be incurred in respect of any money or asset that is paid, transferred or applied as aforesaid, whether the loss arises through failure to take security, or through the security being insufficient, or through failure to take action for its protection, or through the release or abandonment of the security without payment, or from any other cause: provided that this paragraph shall not detract from the liability of the trustees to act honestly and to employ reasonable care as under the general law.

(7) Where any trust is a settlement within the Settled Estates Act, this section shall only apply by order of the Court, and the Court may thereupon specify to what extent the section shall apply.

(8) This section applies whether the instrument, if any, creating the trust comes into operation before or after this section takes effect: Provided that this section shall take effect only if and so far as a contrary intention is not existent in the said instrument, if any.

Comment on this draft

Subsection (1) extends section 32 of the Trustee Act, 1925, (Eng.), to realty and enables the trustees to raise money by

dealing with the trust assets, or to transfer any asset. It also extends the purposes of the power to maintenance and education, as well as past maintenance and education. The writer considers that enabling trustees to pay, transfer or apply capital for past 'benefit' conferred upon the beneficiary, other than past maintenance and education, is not commendable. Capital advancement is a serious matter, and the trustees should be in a position that they must be consulted before moneys are made available, for example, by a father to a son to facilitate entry into a profession or into commerce. It can be awkward for trustees who are faced with a request that they reimburse out of the capital a father who needs the money, and assumed their agreement to what is now a fait accompli. If the testator or settlor wants such an extension of the power, it is considered that he should insert it. The proviso retains the English limitation of the power of advancement to one-half of the capital, or the beneficiary's share, because on balance it is probably wiser in terms of obtaining the profession's support of these proposals to introduce this restriction, and to leave the Court to consent to the advance of any greater amount. However, it is thought a commendable idea, following Australasian legislation, to allow up to $5000 to be advanced without the court's consent even if the capital, or share thereof, is less than $10,000. As we earlier noted, capital is more likely to be genuinely needed in such circumstances, and the expense of an application to the court is unwarranted both in the light of that fact and the size of the capital expectation.

Subsections (2) and (3) follow the English section in setting out the situations in which a beneficiary can be said to have an interest in capital, except that the perpetuity rule is also provided for. in (2) Year End.

Subsection (4) follows the hotchpot provision of the English section, and subsection (5) also follows that section,

except that the court can consent where the person with a prior interest is unborn, unascertained, or incapacitated.

Subsection (6) follows and adopts section 41a of the New Zealand Trustee Act.[1] The only exception is that, as discussed in connection with the New Zealand section, the proviso makes it clear that trustees are not thereby released from their basic obligations of good faith and reasonable care. It is a nice point as to whether trustees do have to show reasonable care in the discharge of their responsibilities; section 33 of the Ontario Trustee Act, in its use of the term 'wilful default', may be construed as section 30(1) of the Trustee Act, 1925, (Eng.) has been construed.[2] If in fact 'wilful default' in the Ontario Act may be construed as the honest moron's charter (as a ribald student once put it), then in the writer's view the words should be changed to 'negligence". This would bring the Act into line with the general law prevailing before that Act, which still prevails in areas of trust law which section 33 does not touch. In any event in the writer's view the proposed Proviso should not be brought into line with the honest moron standard of trustee liability.

Subsection (7) seems inevitable in the light of the Settled Land Act's definition of "settlement". If a trust does come under that Act, however, it could be said that the Act is merely concerned to provide a machinery by which the estate management powers of the trustees or the tenant for life may be adequately enlarged. The power of advancement is not of that character, and is similarly concerned to enhance the enjoyment of the trust property. This argument does not seem convincing. The Settled Estates Act empowers the court to confer powers of sale, leasing, mortgaging, etc., and, if this is so, the court should have the same power when the

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(1) See page 103 , supra.

(2) See Re Vickery [1931] 1 Ch. 572.

trustees are desirous of exercising the proposed statutory power of advancement, and thereby of selling, mortgaging, charging, or transferring land.

No changes are made to the general law which would prevent the proposed statutory power applying to existing trusts at the time of enactment, and therefore subsection (8) appears in the form it does.

One final thought is whether the proposed power of advancement should specifically deal with the situation where the beneficiary settles his interest in the capital prior to the occurrence of the contingency or vesting in possession, and then invites the trustees of the head trust to exercise their power of advancement in his favour. Effectively, what the beneficiary has done is change his mind about the trust, and now wishes the capital in order to act in breach of the sub-trust. The trustees may not know nor reasonably be expected to have known of the sub-trust, and, if they make an advance, the sub-trustees will have no case against them provided the trustees can show a reasonable case for having exercised the power. Should the proposed statutory power of advancing capital make the trustees strictly liable for exercising the power by paying or transferring capital to the beneficiary when an irrevocable sub-trust existed, of which they neither knew nor ought to have known ? This would force insurance on to the head trustees, no doubt at the cost of the head trust. But more substantial is the point that anything which inhibits a conservatively-inclined trustee from exercising his power renders the proposed power less valuable, and therefore on balance the writer would hope for astute trusteeship, and not make any special rule.

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