

*A CASE OF MISTAKEN IDENTITY:  
THE RULE IN SAUNDERS V. VAUTIER AND SECTION 61 OF  
THE TRUSTEE ACT OF MANITOBA*

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The article in the December, 1984, issue of the Canadian Bar Review, by Jane Matthews Glenn, entitled, "Perpetuities to Purefoy; Reform by Abolition in Manitoba" ends with a paragraph that reads:

In short, the arguments for abolishing the rule against perpetuities and the rule in *Saunders v. Vautier*, rules that are quietly and effectively performing their tasks, and substituting therefor a combination of social factors, taxing statutes and judicial discretion, are not persuasive, at least to this writer.<sup>1</sup>

It is obvious that this expression of the author's concern is founded on the premise that the Rule in *Saunders v. Vautier* has in fact been abolished by statute in Manitoba, and it is apparent from earlier passages in her article that the statute to which this effect is attributed is the new section 61 of *The Trustee Act*,<sup>2</sup> enacted in 1983.<sup>3</sup>

I believe this to be a false premise, and that the Rule in *Saunders v. Vautier* is still alive and well and living in Manitoba, notwithstanding section 61 of *The Trustee Act*.<sup>4</sup> To demonstrate this, it is necessary first to ascertain exactly what the Rule is, and then to examine section 61 to see exactly what it does.

On page 627 of her article, Glenn quotes two different statements of the Rule from Report Number Eighteen of the Manitoba Law Reform Commission.<sup>5</sup> The first of them, which is taken from *Underhill on Trusts*, is:

If there is only one beneficiary, or if there are several (whether entitled concurrently or successively), and they are 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.<sup>6</sup>

The second statement (which is to be found in the article at footnote 68 on the same page) is taken from *Theobald on Wills* and reads:

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.<sup>7</sup>

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1. J.M. Glenn, "Perpetuities to Purefoy; Reform by Abolition in Manitoba" (1984), 62 Can. B. Rev. 618 at 637.

2. *The Trustee Act*, R.S.M. 1970, c. T160.

3. *An Act to Amend The Trustee Act*, S.M. 1982-83-84, c. 38, s. 4, as am. by S.M. 1984-85, c. 17, s. 32(2).

4. *The Trustee Act*, R.S.M. 1970, c. T160.

5. Manitoba Law Reform Commission, *Report on the Rule in Saunders v. Vautier*, Report No. 18 (Winnipeg: The Commission, 1975).

6. *Underhill's Law Relating to Trusts and Trustees* (11th ed. C.M. White and M.M. Wells 1959) 443 (article 68). This is the edition cited in the *Report* and Glenn's article. For the latest edition see *Underhill's Law Relating to Trusts and Trustees* (13th ed. D.J. Hayton 1979) 601 (article 72). (Hereinafter referred to as *Underhill*.)

7. *Theobald on Wills* (13th ed. S. Cretney and G. Dworkin 1971) 568 (paragraph 1554). This is the edition cited in the *Report* and Glenn's article. For the latest edition see *Theobald on Wills* (14th ed. J.B. Clark 1982) 619. (Hereinafter referred to as *Theobald*.)

There is a significant difference between these two statements. *Underhill* expresses the Rule in terms of a change in the trust made by the beneficiaries: some action by them to modify or extinguish it is required, or else it will continue to operate as before. But *Theobald* expresses the Rule in terms of a particular provision in the will or trust deed not being enforced by the court. The unenforceability of this provision is not dependent on any action taken by a beneficiary. It is inherent in it from the beginning.

In fact this quotation from *Theobald* is only one of two statements of the Rule to be found therein. The other reads:

So too, when vested interests have once been given, restrictions postponing the enjoyment of the property beyond the age of majority are void, unless the property is otherwise disposed of in the meantime.<sup>8</sup>

Here the contrast between the view of *Theobald* and that of *Underhill* is even clearer. If the provision concerned is void, then no question of modification arises: it is void *ab initio*, and the will or deed must be read as if it was not there and never had been there.

In this conflict of opinion between these two texts, it is appropriate to refer to the book which has now, for something like 150 years, been recognized as the leading authority on the construction of wills, and that of course is *Jarman*.<sup>9</sup> It deals with the Rule as follows:

*Provisions wholly Void for Repugnancy.* Before dealing with the question of ascertaining the intention of a testator where the dispositions of the will appear to be contradictory, it should be premised that a provision in a will may be void for repugnancy apart from the question of intention. Thus where property is given to an adult person absolutely, coupled with a direction that the income shall be applied for his benefit in a certain way, or accumulated, this direction is generally void, being inconsistent with the right of enjoyment which flows from ownership. So, where a testator bequeathed the residue of his personal estate to his son absolutely, with a direction that it should not be delivered to him till the completion of his twenty-fifth year, it was held that the son was entitled to payment on attaining twenty-one, the direction being rejected as repugnant to the enjoyment of a vested interest. And where an absolute vested interest is given to a person, an attempt to create a protected interest in the income by directing it to be paid to him by weekly instalments until he attains the age of thirty-five is nugatory.<sup>10</sup>

This passage does not actually state a rule. It is a warning that a restriction may be void for repugnancy, followed by some illustrations of the point. However, in resting the Rule on the invalidity of the restriction, it clearly supports the second quotation from *Theobald*. Indeed, it is so far removed from *Underhill* that the two passages do not at first sight appear to be treating of the same topic. The only reason we know that they both relate to the Rule in *Saunders v. Vautier* is that they both include that case and others that followed it in their citations. *Theobald* and *Jarman* both state the Rule in terms of a single beneficiary: an adult beneficiary is entitled to enjoy his property as he pleases, and any attempt by the testator or settlor to restrict his right to do so is simply void. Thus, the will, or deed, takes effect as if the restriction was not there. *Underhill* states it in terms of either

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8. *Ibid.*, 13th ed. at 580, 14th ed. at 631.

9. T. Jarman, *A Treatise On Wills* (8th ed. R. Jennings and J.C. Harper 1951) (Hereinafter referred to as *Jarman*).

10. *Ibid.*, at 572.

a single beneficiary or a group of beneficiaries acting together: provided he or they are *sui juris* and entitled to the entire beneficial interest, he, or they together, may override the testator's, or settlor's, directions and do as they choose and not as the testator or settlor had chosen. There is no suggestion in *Underhill* that the donor's directions are void; rather, they are treated as valid until changed. Which of these two statements of the Rule is correct?

Obviously, the answer to this question will be found in the reported cases in which the Rule has been expounded. The paragraph in *Jarman* has three footnotes which cite a total of 15 cases, and I will examine these in turn.

1. *Gurney v. Goggs*.<sup>11</sup> The issue in this case was whether an initial absolute gift had been cut down to a life interest by a subsequent restriction. It was held to be absolute. It is not easy to see why this case is cited as it appears to be completely irrelevant.

2. *Saunders v. Vautier* itself. The decision at first instance is not helpful.<sup>12</sup> Lord Langdale M.R. held that the question was *res judicata* by reason of an earlier decree in the suit and merely gave leave to appeal out of time against that decree. It was on the appeal, heard by Lord Cottenham L.C., that the issue was decided.<sup>13</sup> The will directed that the income from the fund should be accumulated until the legatee attained twenty-five. The legatee, having attained twenty-one, was now claiming the fund. Most of Lord Cottenham's judgment is devoted to showing that the legacy was vested and not contingent. The consequence that flowed from that is dealt with very shortly as follows:

The order for the transfer of the funds, upon the regular evidence of the legatee having attained twenty-one, will follow this decision on the construction of the will.<sup>14</sup>

This is elliptical, to say the least, but it certainly suggests that the question is purely one of construction, and that no action by the beneficiary, or by the court, to change the impact of the will is needed.

3. *Gosling v. Gosling*.<sup>15</sup> Under the will and codicil, the plaintiff, having attained twenty-one and having accepted the offer made to him to succeed the testator as a partner in a bank, became entitled to an estate for life in a house and lands owned by the testator, determinable however either if he quit the partnership within four years, or upon his bankruptcy at any time, with remainder after his death to his sons successively in tail. The plaintiff was also entitled to a similar interest in the testator's residuary personal estate. If the plaintiff's life interest determined the income would, during the rest of his life, be applied for the benefit of his wife and children, if any, and otherwise, as if he were dead. The codicil ended with the following clause:

It is my particular desire, that no one shall be put in possession of my estate, or shall enjoy the rent, dividends, and profits of any part thereof, or of any property left by my will or

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11. (1858), 25 Beav. 334, 53 E.R. 664.

12. (1841), 4 Beav. 115, 49 E.R. 282.

13. (1841), Cr. & Ph. 240, [1835-42] All E.R. Rep. 58, 41 E.R. 482.

14. *Ibid.*, Cr. & Ph. at 249.

15. (1859), Johns. 265, 70 E.R. 423.

codicil, until he shall attain the age of twenty-five years; and in the meantime the rent, dividends and profits to accumulate.

Two questions were asked of the court. The first related to the interests to be taken by the as yet unborn tenants in tail. The second was whether the above-quoted clause was operative. Page Wood V.-C. declined to answer the first question as it had not yet arisen. Before examining his answer to the second, let us consider what the answer ought to be, first, if the explanation of the Rule given by *Underhill* is correct, and secondly, if the explanation given by *Theobald* and *Jarman* is correct.

*Underhill's* explanation is that "if there is only one beneficiary, or if there are several . . . and they are of one mind", he or they may modify the trust.<sup>16</sup> The beneficiary we are looking for is the beneficiary of the accumulated income: the person (or persons) who will ultimately receive the income if it is accumulated. In order to apply the Rule, we must first identify that beneficiary. If it is the plaintiff, then the Rule applies and the plaintiff can stop the accumulations. If it is someone else, then the plaintiff cannot stop the accumulations. In theory, that other person could, but as the result would be to give to the plaintiff the income that would otherwise ultimately come to himself, he obviously would not.

The sentence in the codicil directing the accumulation is disarmingly simple until you try to apply it. It says that the income is to be accumulated, but it fails to say explicitly what is to be done with the accumulations. Who is to receive the accumulated income? In most cases, an intention to add it to the capital can easily be implied because the beneficiary will then receive it when he reaches the stipulated age and receives the capital. But here the plaintiff has only a life interest. If you accumulate the income and add it to the capital, you take it away from the plaintiff, to whom it had originally been given, and give it to others. Those others will be his sons, if he has any, but if he is childless or has only daughters, it will go to the persons next entitled under the limitations in the will, presumably his younger brothers and their issue. There is no justification for implying from a mere direction to accumulate, such a drastic change in the destination of four years' income.

But if the accumulations are not to be added to capital, where do they go? The simple answer, of course, is to give them to the plaintiff when he attains twenty-five. But this assumes that the plaintiff will live to that age. He may not. What is intended to happen then? The only answer is to say that they are to go to the plaintiff or his successors in title. Then, if he dies, they fall into his estate and pass under his will. That is not very sensible, because it means that the testator is not prepared to trust the plaintiff to handle the income bit by bit as it comes in, but is prepared to trust him to make a prudent disposition of it *en masse* by his will. But there is worse to come. What if the plaintiff's life interest terminates before he is twenty-five, not because of his death, but because of his bankruptcy? Now his successor in title is his trustee in bankruptcy, with the result that the accu-

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16. *Supra* n. 6.

mulations will go to his creditors. But that would frustrate the whole purpose of the direction to accumulate, for the plaintiff would then be able to borrow against the income as it accrued, since his creditors would know that it would be bound to become available to them one way or another.

There is no destination for the accumulated income that can safely be implied. One can only throw up one's hands in despair and conclude that the testator has made no disposition of the income to be received before the plaintiff's twenty-fifth birthday, and that it therefore passes on intestacy. That will give it to his nearest relatives, of whom the plaintiff, being one of his nephews, was probably one. So the plaintiff will get some of the income as it comes in (which the testator was trying to prevent), and the rest will go to other persons (whom the testator did not wish to benefit). If *Underhill* is correct, the court must resolve this question before it can try to apply the Rule.

Now let us turn to *Theobald* and *Jarman*, and in particular to the second quotation from *Theobald*, which is as follows:

So too, when vested interests have once been given, restrictions postponing the enjoyment of the property beyond the age of majority are void, unless the property is otherwise disposed of in the meantime.<sup>17</sup>

Here, a vested life interest has been given by the will, so that this requirement is satisfied. The income from the testator's estate is property, and the direction to accumulate postpones the plaintiff's enjoyment of this income beyond the age of majority. The direction is therefore void unless the income being accumulated is 'otherwise disposed of', that is to say, given to someone other than the plaintiff.

So the practical difference in this instance between the two approaches is this: because there is no alternative disposition, either explicit or implied, of the accumulated income, *Underhill's* principle results in an intestacy as to that income, whereas, for the very same reason, *Theobald's* and *Jarman's* principle results in the direction to accumulate being void.

Now let us see what Page Wood V.-C. decided. Here is his answer:

There is to be no alteration in the limitations made by the will as regards the persons who are to take, or as regards the time at which their interests are to be vested. But, having said by his will that they should enjoy the property at twenty-one, it occurs to him in the codicil that a young man of twenty-one is not competent to manage his affairs, and, therefore, he desires 'that no one shall be put in possession of his estate, or shall enjoy the rents' until he shall attain twenty-five: every word in the codicil pointing to the enjoyment and user of a gift which is taken under the will, and nothing pointing to a revocation of that gift for any purpose, still less for the mere purpose of creating an intestacy.

It seems to me clear, both upon principle and upon the authorities which were cited, that the clause in the codicil was simply an attempt to put a fetter upon the enjoyment of the property given by the will after the period when the law says the owner of property shall enjoy it.

The result is that there will be no answer to the first question, the case not being yet ripe for its decision. The answer to the second question will be that the desire of the testator expressed

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17. *Supra* n. 8.

in the codicil with respect to the accumulations of the rent, dividends and profits of his estate and property is inoperative.<sup>18</sup>

That answer vindicates the explanation of the Rule given by *Theobald* and *Jarman*, and flatly contradicts the one given by *Underhill*.

4. *Re Thompson; Griffith v. Thompson*<sup>19</sup>. In this case the Rule is stated by Chitty J. thus:

If a testator gives a share so that it vests in possession on his death, and afterwards directs that it should be paid at some future period, that direction is void, within the principle of *Saunders v. Vautier*.<sup>20</sup>

This summarizes in one sentence the Rule as propounded by *Jarman* and *Theobald*. It bears no resemblance to *Underhill*'s explanation.

5. *Re Johnston; Mills v. Johnston*.<sup>21</sup> Here the testator had directed a sum of money to be "invested for the benefit and advantage" of each of his sons on attaining twenty-one, "such sum to be applied to his professional or other advancement at the discretion or judgment" of his executor. This is an attempt to create a hybrid between an outright gift and a discretionary trust. That is, a specified sum has to be applied for the benefit of the donee, but someone else is to decide how it is to be spent.

Stirling J. posed the question to be answered thus: "The question is, does the law permit the testator to vest such a discretion in his trustee or executor?"<sup>22</sup> He answered the question in the negative, and held that the sons were entitled to have the money paid to them. However, it is the form of the question that is significant. If Stirling J. had thought that *Underhill*'s version of the Rule was the correct one, the question would surely have been: "Is the beneficiary entitled to put an end to the trustee's discretion?"

6. *Harbin v. Masterman*<sup>23</sup> (appealed to the House of Lords as *Wharton v. Masterman*<sup>24</sup>). The testator here gave his residuary estate to his executors on trust to pay annuities to certain individuals out of the income. If the income in any year was insufficient, the annuities were to abate rateably; but if in any year the income was more than sufficient, the surplus income was to be accumulated. The combined effect of these two provisions was to direct the accumulation of surplus income without thereby benefitting the annuitants in any way. As it was put by Stirling J. at first instance: "The annuitants have no right, as I read the will, to resort to the income of those accumulations in any shape or form to make good any deficiency in their annuities."<sup>25</sup> This conclusion was upheld in the Court of Appeal and in the House of Lords. On the death of the last surviving annuitant, the executors were directed by the will to divide the trust property and the accumulations

18. *Supra* n. 15, Johns. at 274.

19. (1896), 44 W.R. 582, 40 Sol. Jo. 544 (Ch. D.).

20. *Ibid.*

21. [1894] 3 Ch. 204, 63 L.J. Ch. 753, 71 L.T. 392.

22. *Ibid.*, Ch. at 208.

23. [1894] 2 Ch. 134, 63 L.J. Ch. 388, 70 L.T. 353.

24. [1895] A.C. 186, [1895-9] All E.R. Rep. 687, 64 L.J. Ch. 369 (H.L.).

25. *Supra* n. 23, Ch. at 188.

between five named charities. The executors accumulated the surplus income for the twenty-one years following the testator's death; further accumulation then became unlawful under the *Thellusson Act*. Some of the annuitants were still living at this time.

The testator's next-of-kin claimed that the surplus income, which could not be accumulated, was undisposed of and therefore belonged to them. The charities, on the other hand, claimed that all the surplus income was effectively given to them, and that the direction to accumulate was void and could be disregarded. The oddity in the disposition is that the gift is contained in the direction to accumulate. There is not an initial gift of the income followed by a direction to accumulate it for a stated period. Instead there is an initial direction to accumulate for a stated period, and then to hand over the accumulations to the charities. In effect, all the courts concerned held that this made no difference. They also held that the fact that the donees were charities and not individuals also made no difference. In the result, it was held not only that the charities were entitled to the future income, but that they had been entitled to receive all surplus income from the time of the testator's death, and that it should never have been accumulated.

However, what we are chiefly concerned with is how the Rule was stated, and this is to be found in the judgment of Lindley L.J. in the Court of Appeal:

Now, notwithstanding the general principle that a donee or legatee can only take what is given him on the terms on which it is given, yet by our law there is a remarkable exception to the general principle. Conditions which are repugnant to the estate to which they are annexed are absolutely void, and may consequently be disregarded. This doctrine, I apprehend, underlies the rule laid down in *Saunders v. Vautier*, and enunciated with great clarity by Vice-Chancellor Wood in *Gosling v. Gosling*.<sup>26</sup>

In the House of Lords, Lord Herschell L.C., after quoting from the judgment in *Gosling v. Gosling*,<sup>27</sup> expressed himself as follows:

The point seems, in the first instance, to have been rather assumed than decided. It was apparently regarded as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming *sui juris*, and could not be postponed until a later date unless the testator had made some other destination of the income during the intervening period.

It is needless to inquire whether the Courts might have given effect to the intention of the testator in such cases to postpone the enjoyment of his bounty to a time fixed by himself subsequent to the attainment by the objects of his bounty of their majority. The doctrine has been so long settled and so often recognized that it would not be proper now to question it.<sup>28</sup>

It is only in the speech of Lord Davey that some support for *Underhill's* position appears to be found, where he says that:

the Court will not enforce the trust for accumulation in which no person has any interest but the legatee, or (in other words) the Court holds that a legatee may put an end to an accumulation that is exclusively for his benefit.<sup>29</sup>

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26. *Ibid.*, at 196-197.

27. *Supra* n. 15.

28. *Supra* n. 24, A.C. at 192-193.

29. *Ibid.*, at 198.

But he then immediately goes on to say that:

The principle is stated, as well as elsewhere, by Lord Hatherley in the passage from his judgment in *Gosling v. Gosling* which was read by Lindley L.J. in the Court of Appeal.<sup>30</sup>

Clearly, therefore, Lord Davey was not conscious of ascribing to the Rule a meaning or effect that differed in any way from that expressed by Page Wood V.-C. and Lindley L.J..

7. *Billing v. Billing*.<sup>31</sup> This is another case of questionable relevance. The only legatee named in the will was the testator's nephew who was deaf and dumb, and the whole purpose of the will was to make a suitable provision for him. He died at the age of nineteen, and the question to be decided was whether he had been given an absolute interest or a life interest.

8. *Rocke v. Rocke*.<sup>32</sup> The relevant part of the testator's will in this case read as follows:

I appoint my son Richard . . . my residuary legatee to have and to hold the residue of my property . . . ; but it is my especial desire that the residue of my property be not delivered over to him until the completion of his twenty-fifth year, and that, in the meantime, he be subject to the guardianship of his mother.

Richard, having attained twenty-one, petitioned for immediate payment. At the conclusion of the argument, Lord Langdale M.R. said:

I will look at the terms of the will and see if the order can be made. If I can be satisfied that there is an absolute gift, with a direction to pay at twenty-five, then, as he has an absolute right at twenty-one, and can sell and mortgage his interest, I shall order payment.<sup>33</sup>

Two days later, he made an order for immediate payment.

9. *Re Young's Settlement*<sup>34</sup> (Decided by Romilly M.R.). The headnote reads:

A testator bequeathed one-third of his residue to his daughter, her executors, etc., to be vested at twenty-one, but not to be payable until twenty-five. He declared it should not be subject to the control of any husband, but should devolve and be settled by deed upon her as a *feme sole*, and that the income should not be anticipated, and that until her marriage, she should only be entitled to receive the dividends, and retain the power to bequeath the capital by will. The daughter, being unmarried: Held, that she took absolutely, and was entitled to payment of the fund out of Court on attaining twenty-one.<sup>35</sup>

If this fearsome litany of restrictions had been valid, the daughter would have had, until her marriage, only a life interest in the income with a general power of appointment by will only. So, if she were to fail to exercise that power, this one-third of the residue would not be disposed of by the testator's will after her death and would pass to the testator's next-of-kin. Therefore, according to *Underhill's* statement of the Rule, the concurrence of the next-of-kin would have been necessary to terminate the trust and give the daughter an absolute interest. Quite clearly, Romilly M.R. did not require it, so this is another decision which is not in accord with *Underhill's* version.

30. *Ibid.* 'Lord Hatherley' was the title subsequently conferred on Page Wood V.-C.

31. (1832), 5 Sim. 232, 58 E.R. 324.

32. (1845), 9 Beav. 66, 50 E.R. 267.

33. *Ibid.*

34. (1853), 18 Beav. 199, 52 E.R. 79.

35. *Ibid.*, Beav. at 199.



10. *Re Jacob's Will*.<sup>36</sup> In this case, also decided by Romilly M.R., there was an initial absolute gift of residue to the testator's four sons equally, followed by restriction on their enjoyment of it. These were held to be inoperative. But they were also so vague and so confusingly worded that this conclusion could equally be explained as resting on the ground that they were void for uncertainty.

11. *Re Couturier; Couturier v. Shea*.<sup>37</sup> The testatrix here directed her executors to set apart £200 for one grandson and £150 for each of two others, to be paid as to £50 on attaining twenty-one, another £50 on attaining twenty-five, and the balance on attaining thirty. The first grandson attained twenty-one, whereon he was paid £50. When he subsequently died shortly before attaining twenty-five, his personal representative claimed payment of the other £150 of his legacy with interest. He got it, but the judgment of Joyce J. sheds no light on which version of the Rule is correct.

12. *Hodson v. Micklethwaite*.<sup>38</sup>

13. *Berry v. Briant*.<sup>39</sup>

14. *Hughes v. Hughes*.<sup>40</sup>

These three cases are cited to illustrate a statement made in the footnote itself, and not in the text. Neither the statement nor the cases are in any way material to the proper expression of the Rule.

15. *Re Williams; Williams v. Williams*.<sup>41</sup> The headnote to this case reads as follows:

A testator gave all his residuary estate to trustees upon trust as to one-third part thereof to pay the income, or such part thereof as his trustees should think fit, to his son W for his advancement, preferment, or benefit by equal weekly instalments until he should attain thirty-five, and then to pay him the corpus:-

*Held*, that the son took a vested interest at the testator's death and was entitled to immediate payment.

The rule laid down by Jessel M.R. in *In re Palmer*, (1880) 16 Ch. D. 44, followed.<sup>42</sup>

The whole of the argument, and of the judgment, is, in fact, directed to whether the son's interest vested at once or not until he attained thirty-five. His right to immediate payment as soon as it vested, notwithstanding the wording of the will, was clearly taken for granted.

Those are the cases cited by *Jarman. Theobald*, in the two passages quoted, naturally cites several of the same cases. It also cites two more. To preserve continuity, I will continue with the same sequence of numbers.

16. *Coventry v. Coventry*.<sup>43</sup> In this case, Kindersley V.-C. was called on to decide several issues arising out of a somewhat complex will. After making

36. (1861), 29 Beav. 402, 54 E.R. 683, 9 W.R. 474.

37. [1907] 1 Ch. 470, 76 L.J. Ch. 246, 96 L.T. 560.

38. (1854), 2 Drew 294, 61 E.R. 732, 23 L.J. Ch. 719.

39. (1862), 2 Drew & Sm. 1, 62 E.R. 521, 31 L.J. Ch. 327.

40. (1792), 3 Bro. C.C. 434, 29 E.R. 628.

41. [1907] 1 Ch. 180, 76 L.J. Ch. 41, 95 L.T. 759.

42. *Ibid.*, Ch. at 180.

43. (1865), 2 Drew & Sm. 470, 13 L.T. 83, 62 E.R. 699 (Ch. D.).

a special disposition of some of his real and leasehold property, the testator gave the residue of his estate to his son Samuel, his daughter-in-law Henrietta, and all his grandchildren in equal shares. The report does not disclose whether Samuel was his only child, so that the class of beneficiaries would consist of the father, mother and their children, or whether the testator had other children, so that the class would consist of one son, the wife of another, and the children of them all. Either way, it is an unusual class. *Kindersley V.-C.* held that the class closed at the testator's death, so that it consisted of the son, the daughter-in-law and the grandchildren then in existence, to the exclusion of any born afterwards.

As regards the real and leasehold property referred to above, the testator directed that the income of half of it should be paid to his widow during her life and that on her death that half should fall into residue. As to the other half, the income was to be accumulated until 1875 (which was within the period permitted by the *Thellusson Act*), whereupon it and the accumulations were also to fall into residue.

Although when a gift to a class follows a life interest, the class is normally ascertained at the death of the life tenant, *Kindersley V.-C.* held that both half shares in this property were clearly intended to go to the same persons as took under the original residuary gift. The result was that the second half share in the real and personal property was being held in trust to accumulate the income for about twelve years, and then to divide the principal and the accumulations equally between a number of ascertained persons, some of whom were infants, whose interests had vested at the testator's death. As to this, *Kindersley V.-C.* said:

On the question of accumulation, the class who are to take being determined, those of them who are adult may claim the immediate enjoyment of the capital which belongs to them respectively; and the fact of some of the class being infants does not affect the question.<sup>44</sup>

On the basis of *Theobald's* statement of the Rule, this decision is correct. Vested interests had been given, and the direction to accumulate simply postponed enjoyment of the property without giving the income to anyone else. It is therefore void. But *Underhill's* version begins with the words, "If there is only one beneficiary, or if there are several (whether entitled concurrently or successively), and they are of one mind, and he or they are not under any disability. . ."<sup>45</sup> Here there were several beneficiaries entitled concurrently, and some of them were under disability. If the Rule in *Saunders v. Vautier* was as *Underhill* states it, *Kindersley V.-C.* could not have concluded his judgment by saying, "and the fact of some of the class being infants does not affect the question".<sup>46</sup> It would have affected the question and prevented termination of the accumulation until they had come of age.

So this is another decision that is not consistent with *Underhill's* explanation.

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44. *Ibid.*, Drew & Sm. at 475.

45. *Supra* n. 6.

46. *Supra* n. 44.

17. *Re Trevanion; Trevanion v. Lennox*.<sup>47</sup> The testator in this case devised his real estate to the use of his wife for life and then to the use of the first and every other son of his son H successively in tail male, with remainders over. He then directed that, during a stated period (which would not exceed twenty-one years from his death), the rents and profits of the land should be accumulated upon trust for the person who at the expiration of the period should, under the trusts and limitations of his will, be entitled to possession and enjoyment of his real estate.

The testator died in 1901 and his widow in 1903. In 1905 the eldest son of H attained twenty-one. At this point, he was tenant in tail in possession. In 1906 he disentailed under the *Fines and Recoveries Act* and thus became absolutely entitled as tenant in fee simple in possession.

As of 1905, when the eldest son came of age, the trust for accumulation was unquestionably valid. The eldest son was tenant in tail in possession. But if he died without male issue before the accumulation period ended, his estate tail would thereon terminate, and his younger brother would in turn become tenant in tail. This meant that it was impossible to say in advance who would be the person entitled to possession of the land when the accumulation period ended. But by disentailing in 1906, the eldest son became absolutely entitled to the land and all subsequent interests in it were destroyed. Even if he died, the land would pass to his devisee or heir, not to the person next named in the testator's will. If that situation had existed at the testator's death, then, following *Gosling v. Gosling*,<sup>48</sup> the trust for accumulation would have been ineffectual as a fetter on the enjoyment of a person who was absolutely entitled. Joyce J. applied *Gosling v. Gosling*<sup>49</sup> and held that the eldest son was entitled to be let into possession at once.

So, here, a trust for accumulation that was initially valid was subsequently invalidated by the action of the beneficiary. It is important to examine how this happened. The eldest son, being tenant in tail in possession, had a vested interest. But because the income was to be accumulated for the benefit of a person whose identity would not be known until the accumulation period ended, the income during that period was being 'otherwise disposed of'. When the eldest son disentailed and became the absolute owner in fee simple, he thereby established himself as the person who was bound to become entitled to the accumulated income. It followed that this income was no longer 'otherwise disposed of', and therefore the accumulation was no longer valid and had to cease. But this was not because he had elected to terminate it; it was because an event happened which caused the recipient of the accumulations to be identified before the accumulation period had expired. Thus, this statement is consistent with *Theobald's* statement of the Rule. As it is also consistent with *Underhill's*, it does not help in deciding which is right.

Reviewing the position, after examining the authorities cited by *Jarman* and *Theobald*, the result is as follows.

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47. [1910] 2 Ch. 538, 80 L.J. Ch. 93, 103 L.T. 212.

48. *Supra* n. 15.

49. *Ibid.*

First, every decision is consistent with the Rule as stated by *Theobald*.

Second, there are three decisions which are inconsistent with the Rule as stated by *Underhill*, namely *Gosling v. Gosling*,<sup>50</sup> *Re Young's Settlement*<sup>51</sup> and *Coventry v. Coventry*.<sup>52</sup> If *Underhill* is right, these three cases were wrongly decided.

Third, there are three statements of the Rule by judges in other cases in terms that agree with *Theobald*. These are by Chitty J. in *Re Thompson*,<sup>53</sup> by Lindley L.J. in *Harbin v. Masterman*<sup>54</sup> and by Lord Herschell L.C. in *Wharton v. Masterman*.<sup>55</sup>

Finally, there is only one statement of the Rule in terms that support *Underhill*. This is by Lord Davey in *Wharton v. Masterman*.<sup>56</sup> But as he goes on to approve statements by Lindley L.J. and Page Wood V.-C. to the contrary effect, his observations as a whole are in fact self-contradictory on this point.

We now come to the authorities cited by *Underhill*. First, I will repeat the text of the article:

If there is only one beneficiary, or if there are several (whether entitled concurrently or successively), and they are 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.<sup>57</sup>

Subject to one qualification which will be noticed later, I am not suggesting that this is not a correct statement of the law. My point is simply that the law it states is not the Rule in *Saunders v. Vautier*.

No cases at all are cited in the only footnote to the article itself. The citations appear in the illustrations which follow the article. The two footnotes which relate to the Rule are 6 and 7 on page 602 (in the thirteenth edition), and therefore it is the cases cited in those two footnotes that must be examined.

Footnote 6 relates to the following passage in the text:

Thus in one case:

a testator gave his residuary personal estate to an infant, and directed his executors to place it out at interest to accumulate, and to pay the principal and accumulations to the infant on his attaining twenty-four, and in the meantime to allow £60 a year for his maintenance. In the event of the infant's dying under twenty-one the testator gave the estate to third persons.

The court held that, on the true construction of the will, the infant took an absolute vested and transmissible interest on attaining twenty-one; and that, consequently, being the only

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50. *Ibid.*

51. *Supra* n. 34.

52. *Supra* n. 43.

53. *Supra* n. 19.

54. *Supra* n. 23.

55. *Supra* n. 24.

56. *Supra* n. 24.

57. *Supra* n. 6.

person beneficially interested, he could put an end to the trust, and was entitled to have the residue and accumulations at once transferred to him.<sup>58</sup>

The first case named in the footnote is *Josselyn v. Josselyn*,<sup>59</sup> and it is obviously the case intended to be summarized in the above passage. However, it is not correctly summarized, for the words, "he could put an end to the trust" in *Underhill*'s text find no place or parallel in the report.<sup>60</sup> According to the report, the plaintiff's petition stated that he had attained twenty-one and that being advised that he was now entitled under the will to a vested interest in the testator's residuary estate, he was asking that it be transferred to him. Shadwell V.-C. disposed of the application in two sentences as follows:

The residue is actually given to the plaintiff; and the words which follow the gift are merely directory as to the future management of what is before given. I shall, therefore, make an order according to the prayer of the petition.<sup>61</sup>

Incredible as it may seem, *Underhill* appears to have distorted the report of this case in order to make it accord with Article 72.

The above-quoted passage in the text is followed immediately by a reference to *Gosling v. Gosling*<sup>62</sup> and an extract from the judgment of Page Wood V.-C. therein. Footnote 7 refers to this.

There are eleven more cases cited in footnote 6 and two more in footnote 7, making thirteen in all. However, they include three which are cited in *Jarman* and have already been examined. These three are *Saunders v. Vautier* itself,<sup>63</sup> *Wharton v. Masterman*<sup>64</sup> and *Re Johnston*.<sup>65</sup> This means that we have ten new cases. They are as follows.

1. *Bubb v. Padwick*.<sup>66</sup>

2. *Re Chaston; Chaston v. Seago*.<sup>67</sup> These are the two cases in footnote 7. In the first of them, the question was whether the interests given to the testator's children vested in them individually as they attained twenty-one, or remained contingent until they all attained twenty-one. They were held to vest individually in each child at twenty-one. In the other case, the question was substantially the same, but the decision went the other way. Neither case sheds any light on the meaning of the Rule.

3. *Re Smith; Public Trustee v. Aspinall*.<sup>68</sup>

58. *Ibid.*, at 602.

59. (1837), 9 Sim. 63, 59 E.R. 281.

60. *Supra* n. 59.

61. *Supra* n. 59, Sim. at 66.

62. *Supra* n. 15.

63. *Supra* n. 13.

64. *Supra* n. 24.

65. *Supra* n. 21.

66. (1880), 13 Ch. 517, 49 L.J. Ch. 178, 42 L.T. 116.

67. (1880-81), 18 Ch. 218, 50 L.J. Ch. 716, 45 L.T. 20.

68. [1928] 1 Ch. 915, [1928] All E.R. 520, 97 L.J. Ch. 441.

4. *Re Nelson; Norris v. Nelson*.<sup>69</sup>

5. *Thorn v. Inland Revenue Commissioners*.<sup>70</sup> These three cases form a group and provide the authority for the proposition embodied in Article 72, namely, if all the beneficiaries of a trust are ascertained and are *sui juris*, they can put an end to the trust. In both of the first two cases, all the objects of a discretionary trust had joined together to terminate the trust and mortgage the trust property. In both cases the court held that they could do this and that the mortgage was valid. *Re Nelson*<sup>71</sup> was a decision of the Court of Appeal which was not reported at the time of *Re Smith*,<sup>72</sup> but a transcript of the shorthand note of the judgments was produced to Romer J. in the latter case and he followed it. *Thorn v. Inland Revenue Commissioners*<sup>73</sup> is a case on stamp duty of no direct relevance but which cites *Re Nelson*<sup>74</sup> in its judgment.

Not one of these three cases purports to apply the Rule in *Saunders v. Vautier*. Neither *Saunders v. Vautier* itself,<sup>75</sup> nor any of the other cases I have examined are cited, either in the arguments of counsel or in the judgments. There is simply no visible connection between these three cases and the Rule.

6. *Re Lord Nunburnholme; Wilson v. Nunburnholme*.<sup>76</sup> The issue here was whether a bequest to the testator's son was vested or was contingent on his attaining twenty-five. If it had been vested, the Rule would clearly have applied. However, the Court of Appeal decided it was contingent.

7. *Re Travis; Frost v. Greatorex*.<sup>77</sup> In this case, during the life of the testator's niece, the income of a fund was to be applied in paying her an annuity, and the surplus accumulated. After her death, the fund was to be given to her children, if any, or, if there were none, to other persons. After twenty-one years the accumulation had to stop. The niece was then fifty-four and childless. The court was asked to presume, as a matter of law, that a woman of that age could no longer bear a child, so that the alternative gift would vest and the Rule would apply to the future surplus income. The Court of Appeal refused, with the result that the surplus income passed on intestacy.

8. *Talbot v. Jevers*.<sup>78</sup> The testator here gave his residuary estate on trust to pay some annuities and with the direction to accumulate the surplus income during such part of the lives of the annuitants, as the law would permit. On the death of the last annuitant, the capital and the accumulations were to be applied in buying real estate for the testator's nephew. As one of the

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69. Reported as a note to *Re Smith*, *supra* n. 68, Ch. at 920 (C.A.).

70. [1976] 1 W.L.R. 915, [1976] 2 All E.R. 622, 120 Sol. Jo. 216 (Ch. D.).

71. *Supra* n. 69.

72. *Supra* n. 68.

73. *Supra* n. 70.

74. *Supra* n. 69.

75. *Supra* n. 13.

76. [1912] 1 Ch. 489, 81 L.J. Ch. 347, 106 L.T. 361 (C.A.).

77. [1900] 2 Ch. 541, 69 L.J. Ch. 663, 83 L.T. 241 (C.A.).

78. (1875), L.R. 20 Eq. 225, 44 L.J. Ch. 646, 23 W.R. 741.

annuitants was an infant, it was almost certain that the *Thellusson Act* would stop the accumulations at the end of twenty-one years. The will did not attempt to make any provision for the disposition of the subsequent surplus income if the accumulation was thus stopped, so the nephew could not claim that the testator had tried to give him all the surplus income. The income after twenty-one years was 'otherwise disposed of' by deliberately leaving it to pass on intestacy. To add a further complication, the nephew had been convicted of a felony with the result, as the law then stood, that any property that vested in him while in prison would be forfeited to the Crown. Bacon V.-C. made no order except to continue the accumulation as only nine years had elapsed since the testator's death.

9. *Berry v. Geen*.<sup>79</sup> The facts here bear a close resemblance to *Wharton v. Masterman*.<sup>80</sup> There was a direction to pay numerous annuities and accumulate the surplus income, followed by a gift of the capital to charities on the death of the last annuitant. But the annuities would not abate in the event of a shortage of income; the annuitants would be entitled to have the shortage made up out of the accumulated surplus income of prior years, and possibly out of capital. Consequently, whereas in *Wharton v. Masterman*<sup>81</sup> the charities could assert that the income being accumulated was bound to come to them, in this case they could not. Their claim that this income should be paid out to them at once, therefore, failed.

But although the point decided in this case is not relevant, there are two incidental matters that are. The first is the reason why the charities were trying to stop the accumulation. It was stated by their counsel in opening their argument that:

The appellants being a charitable organization and as such entitled to relief from income tax under s. 37 of the Income Tax Act, 1918, have brought this action to obtain now the accumulated income to which they are ultimately entitled, so as to obtain exemption from income tax.<sup>82</sup>

The point here is that income which is validly accumulated pursuant to a provision of the trust instrument is income of the trust, not of any beneficiary. When the gift to the beneficiary of the capital and the accumulations ultimately takes effect, he receives the accumulations as an accretion to capital, not as income. (This statement, of course, relates to the revenue law of the United Kingdom at that time.) This point recurs in the remaining case to be examined, where it is of considerable significance.

The second important incidental matter is a statement in the speech of the Lord Chancellor, Lord Maugham, which reads:

My Lords, upon this construction of the will it is not now in dispute that the rule in *Saunders v. Vautier* does not apply, the reason being that the rule has no operation unless all the persons who have any present or contingent interest in the property are *sui juris* and consent.<sup>83</sup>

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79. [1938] A.C. 575 (H.L.).

80. *Supra* n. 24.

81. *Ibid.*

82. *Supra* n. 79, at 577.

83. *Supra* n. 79, at 582.

Here is a statement by an eminent Lord Chancellor that treats the Rule as being exactly what *Underhill* says it is. It is, however, a statement about a matter that was not in issue in the case, for as it was nowhere in dispute that the Rule did not apply, counsel obviously must have conceded this point. It is thus clearly an *obiter dictum*, spoken without hearing any argument on the point. And, apart from the equivocal comment of Lord Davey in *Wharton v. Masterman*,<sup>84</sup> it so far stands alone as against the several decisions and statements that support *Theobald*.

10. *Commissioners of Inland Revenue v. Executors of Hamilton-Russell*.<sup>85</sup> This is a remarkable case in two respects. First, it is the only reported case in which the two opposing statements of the Rule were actually pitted against each other so that the issue turned on which of them was chosen. Secondly, in view of the eventual outcome, it is remarkable that the case is cited in *Underhill*, but not in either *Theobald* or *Jarman*. In view of its importance, it requires to be examined in some detail.

By a settlement made in 1918, Lord Boyne gave a sum of £15,000 to trustees upon trust to accumulate the income during his lifetime, and after his death to stand possessed of the capital and accumulations upon trust for such one of his sons by his then wife as, being tenant in tail male of certain estates, should first attain the age of 21 years. It is worth pausing here to make two points. The first is that the trust for accumulation was for the life of the settlor, which is one of the periods permitted by the *Thellusson Act*. Therefore, we do not have any problems caused by excessive accumulations in this case. The second point is that the estate tail is in the family estates, not in the fund. In order to become entitled to the fund, the son had to be both tenant in tail of the estates and attain twenty-one. On doing both, he took an absolute interest in the fund. There is nothing about disentailing in this case as there was in *Re Trevanion*.<sup>86</sup>

Lord Boyne's son, G. L. Hamilton-Russell, became tenant in tail male of the estates, and attained twenty-one on the seventeenth of October, 1928. The trustees continued to accumulate the income until the eighteenth of January, 1939. On that day, G. L. Hamilton-Russell gave the trustees a written direction to hand over the fund including, of course, the accumulations, to himself, and they complied with it. At this time Lord Boyne, the settlor, was still living, and indeed he outlived his son who was killed in action in June, 1940. It follows, of course, that on the eighteenth of January, 1939, the period of accumulation directed by the trust instrument had not yet come to an end.

After the son's death, the Commissioners of Inland Revenue raised an assessment of surtax against the estate for the fiscal year 1938/9 on the full amount of the accumulated income thus paid over to the son. (The U.K. fiscal year runs from the fifth of April.) In those days, the U.K. income tax itself was at a flat rate, but individuals in the higher income brackets

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84. *Supra* n. 29.

85. [1943] 1 All E.R. 166 (High Ct.); rev'd [1943] 1 All E.R. 474 (C.A.).

86. *Supra* n. 47.



paid an additional graduated tax, called sur-tax, on the upper slices of their income. The accumulated income had borne income tax when received by the trustees but, since a trust is not an individual, no sur-tax was then paid on it; it was only when the income became income of a beneficiary that sur-tax could be payable. The executors filed an objection to the assessment on the ground that the son had received the accumulations as capital.

The matter came first, as is usual, before the Commissioners for the Special Purposes of the Income Tax Acts, (which is merely a long-winded way of saying 'Tax Appeal Court'). They upheld the assessment. The executors appealed to the Court and, bearing in mind the extract from the argument in *Berry v. Geen*<sup>87</sup> quoted above, their appeal obviously had a good prospect of success.

At this point, the Crown changed the basis and the amount of its claim. Hitherto, it had claimed that the whole of the accumulated income had become the son's income in January, 1939, when he demanded and received payment. Now the Crown abandoned that position and claimed instead that the trust for accumulation had been void ever since the son attained twenty-one in 1928, with the result that all income received by the trustees thereafter had been the son's income right from the moment the trustees received it, and ought, therefore, to be taxed as such. This meant that the claim for surtax for some of the earlier years was statute barred. It also meant that the claim for 1938/9, which was the only one actually before the Court, was sharply reduced to a claim for tax on the income received by the trustees during the ten months from April, 1938, to January, 1939. Thus, it became, in effect, a test case for all the previous years as well.

This change in the Crown's position quite obviously accords with *Theobald's* statement of the Rule in *Saunders v. Vautier*, and must be correct if *Theobald* is correct. The change in thinking occurred between the time of the decision of the Special Commissioners and the hearing of the appeal by the Court. That is precisely when the matter would have been referred by the Crown's own salaried legal staff to the counsel retained to take the appeal. The leading counsel for the Crown on the appeal was in fact the Solicitor-General. (This may seem remarkable to Canadians, but it is not unusual in England.) I mean no disrespect to the Law Officers of the Crown in England, however, when I say that in this situation they are essentially mouthpieces, and that the real driving force behind their presentation is the junior counsel whom they are leading. In this case, the first of the two junior counsel for the Crown was Mr. J. H. Stamp of the Chancery Bar, subsequently first a judge of the Chancery Division and then of the Court of Appeal. It is a fair inference that he was the author of the change. The executors continued to claim that the son had received the accumulated income for the first time in January, 1939, when he put an end to the accumulation, and that he received it as capital. This position is obviously tenable only if *Underhill* is right and the trust for accumulation is valid until terminated. Thus, battle was fairly joined between the two rival expositions of the Rule.

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87. *Supra* n. 82.

According to the then practice, this appeal, being a Revenue appeal, was assigned to the King's Bench Division of the High Court and it was heard by Macnaghten J. of that Division. It will not have escaped the reader's notice that every other case that has been examined has been a decision either of the old Court of Chancery, or of the Chancery Division of the High Court, or else of the Court of Appeal or House of Lords on appeal from that Division. That is not a coincidence; the Rule in *Saunders v. Vautier* is a rule of Equity. This appeal was now being heard by a judge from the Common Law side of the Court, who was thus called on to adjudicate in a field that was wholly unfamiliar to him.

Macnaghten J. decided in favour of the executors. The penultimate paragraph of his judgment reads:

The rule that a man is entitled to take forthwith the fruit which must sooner or later inevitably fall into his hands affords, in my opinion, no ground for the contention that he must take it willy-nilly before it is ripe. No support for that contention is to be found in any of the cases cited to me. It seems unreasonable that a beneficiary should be compelled against his will to frustrate the wishes of his benefactor; and none the less so when they stand in the relation of father and son and the father is still alive. It would, I think, be — to say the very least — rather odd if a court of equity, charged with the duty of protecting and enforcing lawful trusts, held itself bound to put an end to such a trust, although all concerned desired its continuance; for it cannot be suggested that the Inland Revenue has any 'equity' in the matter.<sup>88</sup>

This is precisely the position taken by *Underhill*, namely, that the trust continues in force until modified or extinguished by the beneficiary.

Now the Crown appealed to the Court of Appeal. The appeal was of course heard by a panel of three judges, and, in accordance with the usual practice, since it was an appeal from the King's Bench Division, the panel consisted of two former judges of that Division and one former judge of the Chancery Division. The Chancery judge was Luxmoore L.J., and he delivered the unanimous judgment of the Court, which reversed the decision of Macnaghten J. and decided the issue in favour of the Crown. As it happens, the important paragraph is again the penultimate one, and it reads as follows:

The settlement is indistinguishable in its material features from the will of the testator in *Wharton v. Masterman*. In that case there was a direction to accumulate the income of a trust fund during a period which continued until the death of the last survivor of a number of annuitants with a direction on the happening of that event to divide the trust fund and the accumulations between certain named charities. The court held that the trust for accumulation was unenforceable and, therefore, ineffective before the expiration of the period fixed by the will because there was an antecedent absolute vested gift of the fund and its accumulations although payment was postponed to a future date. Obviously, in the present case, neither G. L. Hamilton-Russell nor the trustees of the settlement could, after G. L. Hamilton-Russell attained his majority, have insisted on the continuation of the trusts. The trustees could at any time after the happening of that event, even though G. L. Hamilton-Russell had requested them to continue the accumulations, have refused to do so and, if he had refused to accept a transfer of the trust funds, could have paid them into court just in the same way as G. L. Hamilton-Russell could, contrary to the wishes of the trustees, have insisted on a transfer to himself of the whole of the trust funds. The reason why the trusts then became unenforceable and ineffective is because the funds were at home and belonged

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88. *Supra* n. 85, at 167 (High Ct.).

solely to the beneficiary for his own absolute use and benefit. The capital and income were his and no one else was interested in them: if the income was left in the hands of the trustees and they invested it they only did so by the sufferance of the beneficiary whose income it was. The trustees took the income as the income of G. L. Hamilton-Russell because neither the trustees nor G. L. Hamilton-Russell could enforce the trust for accumulation. As was pointed out in *Gosling v. Gosling*, the court does not hesitate to strike out of the will any direction that the devisee shall not enjoy the benefit in full until some future date beyond the attainment of majority unless the benefit is not to vest until the arrival of the future date. Once the question, whose is the income from the settlement between Apr. 5, 1938, and Jan. 18, 1939, is answered by stating that it is the property of G. L. Hamilton-Russell, there is an end of the case, for it is plain that that income is assessable to tax.<sup>89</sup>

This is precisely the position taken by *Jarman* and *Theobald*: an attempt to restrict the enjoyment of a vested interest is simply inoperative, without the need for any action by the beneficiary. Leave was given by the Court of Appeal to appeal to the House of Lords, but there is no report of any such appeal being taken.

That, I submit, is game, set and match to *Theobald*, so that the conclusion has to be that *Theobald's* statement of the Rule is correct and that *Underhill's* is not. As has already been noticed, *Theobald* in fact contains two statements of the Rule. The first is:

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.<sup>90</sup>

The second reads:

So too, when vested interests have once been given, restrictions postponing the enjoyment of the property beyond the age of majority are void, unless the property is otherwise disposed of in the meantime.<sup>91</sup>

Of these two quotations, it is the second one that states the principle that is to be deduced from the reported decisions. The first is simply a particular application of that principle in the case of a bare accumulation, which is not only the most common instance of its application, but also happened to be the instance involved in *Saunders v. Vautier* itself.<sup>92</sup>

*Underhill*, *Theobald* and *Jarman* are not, of course, the only textbooks that expound the Rule in *Saunders v. Vautier*. I have concentrated on *Underhill* and *Theobald* because they are the two texts referred to in the report of the Manitoba Law Reform Commission and in Ms. Glenn's article. I have referred, also, to *Jarman* because of its pre-eminence as an authority on wills. And this latter observation points to the essential difference between these three works. *Underhill* is a book on trusts; *Theobald* and *Jarman* are books on wills. The statement of the Rule found in *Underhill* will also be found in other textbooks on trusts. That, I suggest, is because an author writing about trusts tends to view the trust from the perspective of the trustees and beneficiaries; the trust is to him an existing institution that has been established by a settlor or testator, and he is concerned with the rights

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89. *Supra* n. 85, at 477 (C.A.).

90. *Supra* n. 7.

91. *Supra* n. 8.

92. *Supra* n. 13.

and duties of the persons interested in it. From this perspective there is no practical difference between a provision which cannot be enforced against the beneficiary or beneficiaries and one which can be overridden by him or them. Consequently, there is a tendency to treat all such provisions as different manifestations of one rule, thus obscuring the fact that the former are unenforceable because they are void, while the latter are valid until actually overridden. By contrast, an author writing about wills tends to view the will from the perspective of the testator. Thus, although the will creates a trust, his focus is not on the trust thus created, but on the document that creates it, the will; and he is concerned with whether the provisions contained in it are valid or void. The possibility that a valid provision may subsequently be changed by the action of the beneficiaries does not concern him. It is over his horizon. Consequently, textbooks on wills differentiate sharply between provisions that are intrinsically void and those that are valid, and have to explain why it is that the former are void. And the reason they give, in our context, is that they constitute restrictions on enjoyment that are repugnant to the gift.

The purpose of this part of this article has been to demonstrate that the latter viewpoint is the correct one, and that there are indeed two separate rules founded on quite different principles, although hitherto it has only rarely been necessary to distinguish between them. The *Hamilton-Russell* case<sup>93</sup> is the only such case reported in more than a century.

There has recently been a decision of the Court of Appeal of Manitoba in which the Rule in *Saunders v. Vautier* was referred to. The case is *Brown v. The National Victoria & Grey Trust Company*.<sup>94</sup> Under the testator's will, the residue was to be invested and \$1,000 a month paid to his widow for life. On her death, the residue was to be divided into three equal parts, one to be delivered to The Winnipeg Foundation, one to be held and invested as a perpetual trust in favour of The Manitoba Heart Foundation, and one to be held and invested as a perpetual trust in favour of The Manitoba Law School. The beneficiaries agreed among themselves upon a scheme for immediate distribution of the trust property. This involved two distinct changes in the trust. The first change was that the widow's life annuity was to be terminated in exchange for a lump sum out of the trust capital. The second change was that the perpetual trusts in favour of the Heart Foundation and the Law School would be terminated, so that they would each receive one third of the remaining capital outright, in the same way as The Winnipeg Foundation. The purpose of the application was to obtain the court's approval to these changes under section 61. This approval had already been given but, unusually, the trustee appealed. It is clear from the judgment of the Court of Appeal, delivered by Huband J.A., that the trustee's real objection was to the second change. The appeal was dismissed. The Court of Appeal thus approved both changes under section 61. That is all the case actually decides.

In the course of his judgment, however, Huband J.A. observed that:

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93. *Supra* n. 85.

94. Unreported, Nov. 12, 1985 (Appeal No. 341/85).

What is proposed could have been demanded by the beneficiaries without the need of Court approval prior to October 1, 1983. Before that date, the ancient case of *Saunders v. Vautier* (1841) 4 Beav. 115, 49 E.R. 282 provided the necessary authority to allow beneficiaries to terminate the trust and distribute the trust res among them as they might agree.<sup>95</sup>

As regards the first change involved, the commuting of the annuity to a lump sum, the first of these two sentences would clearly seem to be a correct statement of the law. The effect of the second sentence is to attach the label 'Rule in *Saunders v. Vautier*' to the law thus stated. However, absolutely nothing in the case turned on whether the label thus selected was the right one or not. In regard to the second change, converting perpetual charitable gifts of income into gifts of capital, it is respectfully submitted that Huband J.A. was wrong, but for reasons that have nothing to do with the subject of this article. Those who are interested in this latter point can explore it in the decision of the English Court of Appeal in *In Re Levy*,<sup>96</sup> which would appear not to have been cited to the court.

Now that we have established what the Rule in *Saunders v. Vautier* actually is, we must examine what has happened in Manitoba to see whether or not it has indeed been abolished.

The starting point is of course the eighteenth Report of the Manitoba Law Reform Commission published in 1975 and entitled *Report on the Rule in Saunders v. Vautier*.<sup>97</sup> It begins with a statement of the facts and the decision in *Saunders v. Vautier*<sup>98</sup> itself, and then continues: "The rule in its narrowest form is expressed as follows in *Theobald on Wills*", and proceeds to quote the first of the above two passages from *Theobald*.<sup>99</sup> The Report then observes that: "This description is accurate insofar as the actual circumstances of *Saunders v. Vautier* are concerned, but it is only one expression of a principle that has since acquired a much wider scope."<sup>100</sup> This would serve admirably as a means of introducing the second quoted passage from *Theobald*, which is indeed a statement of that principle. Instead, the authors of the Report change horses in midstream, and give us, not the second quotation from *Theobald*, but the present Article 72 from *Underhill*. For ease of reference, I will reproduce the text of this article yet again, as follows:

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 trustees.<sup>101</sup>

Because of the importance of the point, I will attempt to give a further illustration, by means of two simple examples, of the difference between the Rule in *Saunders v. Vautier* and the law stated in Article 72.

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95. *Ibid.*, at 3.

96. [1960] 1 Ch. 346, [1960] 1 All E.R. 42, [1960] 2 W.L.R. 278 (C.A.).

97. *Supra* n. 5.

98. *Supra* n. 13.

99. *Supra* n. 5, at 5.

100. *Ibid.*

101. *Supra* n. 6.

A settlor gives a sum of money to trustees upon trust to accumulate the income during his own life and, on his death, to pay over the principal and the accumulations to his eldest son, who has already attained twenty-one. The gift to the son vests at once, and this is an attempt to postpone or control the enjoyment by the beneficiary of a vested interest. Such an attempt is nugatory. The direction to accumulate is void, the income from the property is the son's income, and he can be taxed on it, whether he actually claims it from the trustees or not. This is an instance of the Rule in *Saunders v. Vautier*.

A testator leaves his residuary estate in trust for A if and when he attains the age of thirty, but, if he dies without attaining that age, then in trust for B, and directs that until A either attains thirty or dies, the income shall be accumulated and added to the principal. A is twenty-three when the testator dies, so the trust for accumulation does not infringe the *Thellusson Act*. This trust for accumulation is perfectly valid, because the interests of both A and B are contingent; neither A nor B can claim the income until A either attains thirty or dies, when the gift to one or other of them will vest. But A and B agree to divide the fund between them immediately, and direct the trustee to hand it over to them for that purpose. Since the fund and the accumulations must go to either A or B, it follows that A and B acting together are absolutely entitled to them, and, therefore, they may in this way bring the trust to a premature end. That does not make the accumulation void *ex post facto*; it merely terminates a valid accumulation. This is the law as laid down in *Re Smith*<sup>102</sup> and *Re Nelson*<sup>103</sup> and stated in *Underhill's Article 72*;<sup>104</sup> it is not the Rule in *Saunders v. Vautier*. The principle involved is totally different.

Consequently, the result of this change of horses on the very first page of the Introduction is a confusion of the issues addressed in the *Report*, and most of it is in fact devoted to the question of the termination and variation of trusts. Some of the Manitoba cases examined in it do relate to the Rule in *Saunders v. Vautier*, while others do not.

The *Report* also questions whether *Underhill's Article 72* is indeed a totally correct statement of the law. The Article asserts that, by the concerted action of the beneficiaries, the trust may be "modified or extinguished"<sup>105</sup> without reference to the wishes of the trustees, and the question raised is, in effect, whether the inclusion here of "modified or" is correct. There is substance in this question. Consider again the last example; a trust for A if he attains thirty, but for B if he dies without attaining that age, and to accumulate the income in the interval. There is no doubt whatever that, before section 61, A and B together could terminate this trust and divide the principal between them. But could they say to the trustee, "Continue to hold the principal for one or other of us as directed by the will, but instead of accumulating the income, pay three-quarters of it to A

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102. *Supra* n. 68.

103. *Supra* n. 69.

104. *Supra* n. 6.

105. *Ibid.*

and a quarter to B"? Suppose the trustee were to reply, "I am the trustee of the settlement created by the settlor. That was the responsibility that I agreed with the settlor to accept. You may terminate the trust and thus relieve me of all responsibilities, but you cannot change it so as to force me to become the trustee of a different settlement created partly by yourselves. You are trying to impose on me new and different responsibilities, and I do not choose to accept them". Clearly the trustee would have a point.

The conclusion expressed on this point in the *Report* is as follows:

It is always, of course, open to the trustees to voluntarily accept the collective directions of the beneficiaries and to act upon them without requiring the trusts to be brought to an end, but they cannot be forced to act contrary to the directions of the settlor.<sup>106</sup>

On principle, this must surely be correct. But the *Report* fails to notice that this conclusion flatly contradicts *Underhill's* assertion that the trust "may be modified . . . without reference to the wishes of . . . the trustees".<sup>107</sup> If Article 72 is corrected in accordance with the *Report's* conclusion, so as to require the trustees' concurrence for a modification, then it moves, visibly, even further away from the Rule in *Saunders v. Vautier*, which takes effect regardless of what the trustees may wish to do.

The *Report* concludes with a recommendation<sup>108</sup> that the law should be changed by the enactment of a new section in place of the existing section 61 of *The Trustee Act*,<sup>109</sup> and a draft of the proposed new section is appended to the *Report*. Before examining this new legislation, it is worth considering briefly what would in fact be needed to abolish the Rule in *Saunders v. Vautier*. As already noted, that case itself dealt with the invalidity of a bare accumulation, and the first of the two passages in *Theobald*<sup>110</sup> explaining the Rule is limited to this application of it. Legislation which was confined to abolishing this aspect of the Rule only would have to read something like this:

A provision in a will or settlement directing that the income to be received from any property held in trust shall be accumulated for a stated period shall henceforth be valid and effective notwithstanding that a beneficiary has a vested interest therein, and the trustee shall accumulate the income in accordance with that direction.

On the other hand, if the purpose was to reverse the basic principle which is expressed in the second passage from *Theobald*,<sup>111</sup> the legislation would have to be to the following effect:

All restrictions imposed in a will or settlement postponing the enjoyment of property held in trust shall henceforth be valid and effective and shall be observed by the trustee, notwithstanding that the interest of the person entitled to that property is vested and that the income therefrom is not otherwise disposed of during the period of postponement.

This would obviously have some far reaching effects. Take, for example, the following provision: "I devise my farm to my executors in trust for my

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106. *Supra* n. 5, at 6.

107. *Supra* n. 6.

108. *Supra* n. 5, at 28.

109. *The Trustee Act*, R.S.M. 1970, c. T160.

110. *Supra* n. 7.

111. *Supra* n. 8.

son, but I direct that for the period of ten years following my death he is to use it for the purpose of raising cattle only." This postpones the son's right to enjoy the farm as he chooses until the end of the ten years. The propensity of testators to impose restrictions on their beneficiaries in this way is at present an unknown quantity, because hitherto any such suggestion by a testator could be effectively choked off by his lawyer telling him that he cannot do it. It is only if testators are told that they have a free hand that the full scope of their ingenuity is likely to reveal itself.

Legislation to the above effect would totally abolish the Rule. However, it is clear from the *Report* that this is not what the Commission had in mind; they wished to give the court a discretion. Let us see how a provision to that effect might read.

Notwithstanding that the interest of the person entitled to the property is vested, and that the income from the property is not otherwise disposed of during the period of postponement, a restriction imposed in a will or settlement postponing the enjoyment by the person entitled thereto of property held in trust shall henceforth be valid and effective and shall be observed by the trustee, unless the court in its absolute discretion decides otherwise.

One cannot but wonder whether any legislature would be willing to give to any judges such a power to adjust the law to their own whims.

However, the legislation recommended by the *Report* bears absolutely no resemblance to any of these models, but appears to be directed at something else altogether. In the first place, the recommendation is for a rewriting of section 61 of *The Trustee Act*.<sup>112</sup> At the date of the *Report*, this section consisted of three subsections and was headed "Jurisdiction of court to vary trusts". It empowered the court to approve, on behalf of persons under disability, unborn or unascertained, any arrangement varying or revoking a trust. The choice of this section as the one to be rewritten is a good indication that the new legislation was seen as relating to that topic. The Legislature adopted this recommendation, but made a few changes in the wording proposed in the *Report*. There is therefore little to be gained by examining that wording, and I will move directly to the new section 61 as thus enacted.<sup>113</sup> It consists of twelve subsections, but it will only be necessary to examine the first seven and the last of them. The first seven read as follows:

**Definitions for section.**

- (1) In this section, "person" includes charitable and non-charitable purposes.

**Restriction on variation etc. of trust.**

- (2) Subject to any trust terms reserving a power to any person to revoke, or in any way vary the trust, a trust arising before, on or after October 1, 1983, whatever the nature of the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the expiry of the period of its natural duration as determined by the terms of the trust except with the approval of the court.

112. *The Trustee Act*, R.S.M. 1970, c. T160.

113. *An Act to Amend The Trustee Act*, S.M. 1982-83-84, c. 38, s. 4, as am. by S.M. 1984-85, c. 17, s. 32(2).



**Application of section to particular problems.**

(3) Without limiting the generality of subsection (2), the prohibition contained in subsection (2) and the requirement for the approval of the court for the purposes of subsection (2), apply to

- (a) any provision of a trust under which the transfer or payment of the capital or of the income, including rents and profits,
  - (i) is required to be postponed until the attainment by a person of a stated age, or
  - (ii) is required to be postponed until a stated date or time or the passage of a stated period of time, or
  - (iii) is required to be made by instalments, or
  - (iv) is subject to a discretion to be exercised during any period by the trustee, as to the person to whom the capital or income, including rents and profits, may or shall be transferred or paid, or as to the time at which or the manner in which the payment or transfer of capital or income, including rents and profits, may or shall be made;

and

- (b) any variation or termination of the trust
  - (i) by merger, however occurring, with another trust, or
  - (ii) by consent of all persons who are beneficially interested, or
  - (iii) by renunciation of any person's beneficial interest by that person so as to cause an acceleration of remainder or reversionary interests.

**Manner of giving approval.**

(4) The approval of the court required under subsection (2) shall be given by means of an order approving a proposed arrangement for

- (a) the variation or termination of the whole or any part of the trust; or
- (b) the resettling of any interest under the trust; or
- (c) the merger of the trust with another trust; or
- (d) the enlargement of the powers of the trustee to manage or administer any of the property subject to the trust.

**Court may consent on behalf of beneficiary.**

(5) In approving any proposed arrangement in respect of a trust, the court may consent to the arrangement

- (a) on behalf of any person who has, directly or indirectly, an interest, whether vested or contingent, under the trust and who, by reason of minority or other incapacity, is incapable of consenting; or
- (b) on behalf of any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trust, as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons; or
- (c) on behalf of any person who is unborn; or
- (d) on behalf of any person who is missing and whose whereabouts are unknown to the trustee, to the other persons beneficially interested and to the settlor, if the settlor is alive and available; or
- (e) on behalf of any person in respect of an interest of that person which may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined; or
- (f) on behalf of a corporation or association where there is no person able or empowered to consent on behalf of the corporation or association; or

- (g) where the benefits under the trust are to be used, directly or indirectly, for a specified purpose, and there is no person who is able or empowered to consent on behalf of all those persons, whether born or unborn and whether ascertained or not, who might derive some benefit from benefits used for that purpose, on behalf of all those persons; or
- (h) where the benefits under the trust are directed to be administered under another specified trust, and there is no person who is able or empowered to consent on behalf of all those persons whether born or unborn and whether ascertained or not who have or might have a beneficial interest under that other trust, on behalf of all those persons.

**Consent of beneficiaries.**

(6) Before a proposed arrangement is approved by the court, it must have the consent in writing of all persons who are beneficially interested under the trust and who are capable of consenting thereto.

**Criteria for approval.**

- (7) The court shall not approve a proposed arrangement in respect of a trust unless it is satisfied
- (a) that the carrying out of the arrangement appears to be for the benefit of each person on whose behalf the court may consent under subsection (5); and
  - (b) that in all the circumstances at the time of the application to the court, the arrangement appears otherwise to be of a justifiable character.

The next four subsections are to the following effect. Subsection (8) says what "benefit" means in subsection (7). Subsection (9) prohibits the donee of a general power of appointment, exercisable by deed, from appointing to himself, unless the instrument creating the power shows an intention to permit this. (The wording used poses a question of construction. A power "exercisable by deed" must mean either a power exercisable by deed or will, or a power exercisable by deed alone. Which does it mean?) Subsection (11) stipulates when an arrangement is to take effect. Subsection (12) reads as follows:

**Effect on section 60.**

(12) Nothing in this section affects the powers and authority of the court under section 60.

Clearly the important subsections are (2), (3) and (6). Subsection (3) is intended to clarify subsection (2), and could have the effect of extending its meaning. Subsection (6) is important because it explicitly requires the consent of all persons not under disability who are beneficially interested under the trust, not just those who are adversely affected by the proposed arrangement. The remaining subsections quoted are important to us only to the extent that they shed light on the meaning of (2), (3) and (6).

The substance of the old section 61 now appears in paragraphs (a), (b), (c) and (e) of subsection (5) and in paragraph (a) of subsection (7). The rest of the matter contained in the subsections quoted above is new. The result of this combination is most unusual. The purpose of the old section was to make the variation of trusts by agreement between the beneficiaries easier by empowering the court to assent on behalf of beneficiaries who were unable to do so. The purpose of the new matter that has been added is to make the variation of trusts by agreement between the beneficiaries more difficult by requiring the approval of the court in all cases. The new section as a whole, thus, has two distinct purposes which are not merely in

conflict but are diametrically opposed to each other. It is almost inevitable that a section with such a split personality will have results that are strange, or even bizarre.

Clearly, the scope of the section turns principally on subsection (2), and therefore we must start by examining carefully what subsection (2) does and what it does not do.

One thing subsection (2) very clearly does not do; it does not purport to validate any provision of a trust that would otherwise be void, and therefore, it does not change the Rule in *Saunders v. Vautier*. It may very well change the law as expounded in *Underhill's* Article 72, but that of course is not the same thing. There is another thing the subsection does not do. It does not say that a trust can be varied with the approval of the court; it says that it cannot be varied without it. The distinction is material to the question of whether the consent of the trustee is required to a variation, as opposed to a termination. If it is correct that his consent was needed before, it is still needed. In this respect, the legislation conspicuously fails to give effect to one of the Commission's recommendations, namely: "We would add that the court should be given a direct power of variation and not simply the authority to approve or disapprove of a proposed arrangement. . .".<sup>114</sup> The responsibility for this lapse does not lie with the Legislature but with the Commission itself, for in this respect the section as enacted follows faithfully the draft appended to the *Report*.

Turning to what the subsection does, it clearly provides for the variation of trusts. What, in this context, is a trust? As the section does not have its own definition, the definition in paragraph (v) of section 2 of the Act applies. It reads:

- (v) 'trust' does not mean the duties incident to an estate conveyed by way of mortgage; but, with this exception, includes implied and constructive trusts and cases where the trustee has some beneficial estate or interest in the subject of the trust, and extends to, and includes, the duties incident to the office of personal representative of a deceased person; and "trustee" has a corresponding meaning and includes a trustee, however appointed, and several joint trustees.<sup>115</sup>

However, the wording of subsection (2) is such that it can only apply to a trust "arising by will, deed or other disposition".<sup>116</sup> Does this use of "other" require that "disposition" be construed *ejusdem generis* with "will" or "deed"? If so, what is the genus? Since wills in Manitoba must now always be in writing,<sup>117</sup> and deeds must of necessity be written, one possible genus is writing. There does not seem to be any other. The requirement of the subsection is not that the trust be declared by the disposition, but only that it arise by it. The second species in the genus is not "settlement" but "deed", and any writing under seal is a deed, whatever its contents. It is, therefore, not possible to read "other disposition" as "other disposition declaring a trust". It can be read as "other disposition in writing", but no further

114. *Supra* n. 5, at 29.

115. *The Trustee Act*, R.S.M. 1970, c. T160.

116. *The Trustee Act*, R.S.M. 1970, c. T160, s. 61(2).

117. *The Wills Act*, S.M. 1982-83-84, c. 31 (W150) s. 3.

restriction seems permissible. A transfer of land is a disposition of it and is in writing; so is a transfer of shares. And today the usual way of making a disposition of large amounts of money is by cheque or telex; both are in writing. It follows that, for example, the resulting trust for the transferor that arises on a transfer of land without consideration is a trust to which subsection (2) applies.

Indeed, the scope of subsection (2) is even wider than that. It does not require that the trust be created by will, deed or other disposition, but only that it arise by one. *The Builders' Liens Act*<sup>118</sup> imposes a trust on the contract price as it is received by the contractor from the owner. This trust is created by the *Act*, but it arises upon the payment by the owner to the contractor. Surely that payment is a disposition by the owner of the money he pays. Money paid by an investor to a trust company to purchase a guaranteed investment certificate is received by the trust company in trust. This trust is created by *The Corporations Act*,<sup>119</sup> but it arises upon the payment by the investor to the company. Surely that payment too is a disposition of the money paid. And there are numerous instances of so-called 'deemed trusts' created by statute. In so far as these arise out of a disposition in writing of something by somebody, they too will fall within the subsection, unless, of course, they are not really trusts at all. Finally, there is the trust that arises when a client gives money to his solicitor to put in his trust account, for surely the transfer of the client's funds to the solicitor is a disposition of them. These are all instances where, by statute, a disposition of something, usually money, triggers the creation of a trust. But it has also become exceedingly common in Canada to import trusts into commercial transactions. For example, the standard form of assignment of book debts used by some banks provides that the assignor will hold any book debts he collects himself in trust for the bank. This is an express trust created by the assignment, which is clearly a disposition. It, therefore, cannot be varied or prematurely terminated without the approval of the court. This assumes, of course, that these various arrangements really do create true trusts, so that one party becomes a trustee and the other a beneficiary. There is, however, recent authority in England to the effect that some at least of them do not, but create equitable charges.<sup>120</sup> If this reasoning is adopted here, many of these problems may disappear.

In this connection, it is to be noticed that subsection (1) defines "person" to include "charitable and non-charitable purposes", which assumes that a trust for a purpose that is not charitable is a real trust and falls within the *Act*.<sup>121</sup> In this respect, the Legislature has departed from the Commission's recommendation, for the corresponding subsection in the appendix to the *Report* provides only that "person" includes "charitable purposes and charitable institutions".<sup>122</sup> The courts have never recognized attempts to create trusts for non-charitable purposes with no identifiable

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118. *The Builders' Liens Act*, S.M. 1980-81, c. 7 (B91).

119. *The Corporations Act*, S.M. 1976, c. 40 (C225), ss. 322(6).

120. See *In Re Bond Worth Ltd.* (1980), Ch. 228, [1979] 3 All E.R. 919, [1979] 3 W.L.R. 629.

121. *The Trustee Act*, R.S.M. 1970 c. T160, s. 61(1).

122. *Supra* n. 5, at 31.

beneficiaries as being effective to create enforceable trusts. Such 'trusts' have been held either to be void or to create powers only. To change this, the Legislature would have to expand the meaning of 'trust'. The definition has not been amended, nor is there anything in subsection (2) or elsewhere in section 61 to expand the meaning of 'trust' to include one for a non-charitable purpose. There is only a definition of 'person' which betrays an apparent but erroneous assumption that such purposes do give rise to trusts. However, "the rule is that Parliament does not alter the law merely by betraying an erroneous opinion of it".<sup>123</sup>

Returning to the text of subsection (2), it is important to note that it begins with a reservation making it "[s]ubject to any trust terms reserving a power to any person to revoke or in any way vary the trust".<sup>124</sup> The expression "trust terms" is unusual, but it must mean "terms of the trust", and that surely requires that they be found in some document that creates or gives rise to the trust. It follows that a power of revocation or variation derived from some other source, even another statute, must now be inoperative.

The substantive provision of subsection (2) is that "a trust . . . shall not be varied or terminated . . . except with the approval of the court".<sup>125</sup> This prohibition is total. The subsection does not say that a trust shall not be varied or terminated by the beneficiaries; it is not to be varied or terminated by anyone. The difficulty this causes is that there are, and were when the section was enacted, a number of federal and provincial statutes which empower the court itself to vary or terminate a trust. A federal statute will, of course, prevail in case of conflict, but any existing provincial statute which is inconsistent with the new section 61 will be repealed to the extent of the inconsistency. One such conflict is noticed and provided for, namely that with section 60 of the *Act* itself. That section was originally copied from section 57 of the English *Trustee Act, 1925*.<sup>126</sup> However, in 1956 it was amended in Manitoba<sup>127</sup> so as to negate the decision of the House of Lords in *Chapman v. Chapman*<sup>128</sup> which was to the effect that the English section was limited to authorizing dealings with the trust property and did not authorize any variation of beneficial interests. As a result of this amendment, it now provides, *inter alia*, that "[w]here . . . any modification or variation of the trust . . . is in the opinion of the court expedient . . . the court may by order confer upon the trustees . . . the necessary power for the purpose."<sup>129</sup> The importance of subsection (2) of section 61, which explicitly saves the court's powers under section 60 from the operation of section 61, is that it is a recognition by the Legislature that those powers might otherwise be destroyed.

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123. *Maxwell On The Interpretation of Statutes* (12th ed. P.S. Langan 1969) 271.

124. *The Trustee Act*, R.S.M. 1970, c. T160, s. 61(2).

125. *The Trustee Act*, R.S.M. 1970, c. T160, s. 61(2).

126. *Trustee Act, 1925*, 15 & 16 Geo. 5, c. 19 (U.K.).

127. *An Act to Amend The Trustee Act*, S.M. 1956, c. 68, s. 1.

128. [1954] A.C. 429, [1954] 1 All E.R. 798, [1954] 2 W.L.R. 723 (H.L.).

129. *The Trustee Act*, R.S.M. 1970, c. T160, s. 60.

This brings us to *The Testators Family Maintenance Act*<sup>130</sup> and *The Marital Property Act*.<sup>131</sup> The problem, of course, does not lie in subsection (2) itself, for a variation that is ordered by the court is necessarily approved by the court. The problem lies in subsections (6) and (7). The former requires that before the court can give its approval, the variation must have the written consent of all beneficiaries who are *sui juris*. The latter requires that the court must be satisfied that it is for the benefit of all beneficiaries who are not. The effect of an order under *The Testators Family Maintenance Act*<sup>132</sup> is to require the estate to be distributed in a manner different from that prescribed by the will, or, in the case of an intestacy, by *The Devolution of Estates Act*.<sup>133</sup> As already noted, the definition of "trust" in paragraph 2(v) of *The Trustee Act* includes "the duties incident to the office of personal representative of a deceased person",<sup>134</sup> and there can be no doubt that these are varied by an order under *The Testators Family Maintenance Act*.<sup>135</sup> Where the deceased left a will, these duties obviously arise out of it, and, therefore, the trust is one "arising by will, deed or other disposition", so that a variation of it is caught by subsection (2).<sup>136</sup> The mere act of dying intestate can hardly be said to constitute a disposition, and, therefore, a variation of the statutory scheme of distribution on intestacy will not be caught by it. But that is small comfort, for circumstances justifying a variation of the statutory distribution are fairly rare.

The majority of applications under *The Testators Family Maintenance Act*<sup>137</sup> involve a will and are attempts by one or more dependents to procure a variation of the distribution of the estate prescribed in the will. How can one avoid the conclusion that such a variation now requires approval by the court under subsection (2)? But the beneficiaries whose consent is required by subsection (6), or on whose behalf the court must consent under subsection (5) and (7), are the very persons who stand to lose by the variation. How can such consent possibly be forthcoming? Unless some solution to this problem can be found, it certainly looks as if *The Testators Family Maintenance Act*<sup>138</sup> has been substantially nullified.

The conflict with *The Marital Property Act*<sup>139</sup> is comparatively minor. Because of subsection 7(1) of that *Act*, the only interests under a trust to which it can apply are those which arise under a trust created by one of the spouses or which are intended by the settlor to benefit both spouses. And the only effect of the conflict will be to prevent the court from making an order which directly requires the transfer of all or part of a trust interest between the spouses; substantially the same result can be achieved indirectly by ordering a payment of money.

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130. *The Testators' Family Maintenance Act*, R.S.M. 1970, c. T50.

131. *The Marital Property Act*, S.M. 1978, c. 24 (M45).

132. *The Testators' Family Maintenance Act*, R.S.M. 1970, c. T50.

133. *The Devolution of Estates Act*, R.S.M. 1970, c. D70.

134. *The Trustee Act*, R.S.M. 1970, c. T160, s. 2(v).

135. *The Testators' Family Maintenance Act*, R.S.M. 1970, c. T50.

136. *The Trustee Act*, R.S.M. 1970, c. T160, s. 61(2).

137. *The Testators' Family Maintenance Act*, R.S.M. 1970, c. T50.

138. *The Testators' Family Maintenance Act*, R.S.M. 1970, c. T50.

139. *The Marital Property Act*, S.M. 1978, c. 24 (M45).

Just as the prohibition of variation imposed by subsection (2) is total, so the nature of the variations prohibited is all-embracing. It is not limited to variations of the beneficial interests, but extends to variations of the trustees' powers of management. Not only is that the natural meaning of subsection (2), but paragraph (4)(d) makes specific provision for a variation of this kind. Suppose, for example, that a testator leaves his residuary estate in trust for his wife for life and then to his two adult children absolutely. The estate contains rental properties that require renovation and the best way to raise the money needed is by mortgaging the properties, but there is no power to mortgage in the will. Previously this did not matter. As all three beneficiaries are *sui juris*, they could authorize the trustees to mortgage the properties. But now, their authorization alone is not enough as the trustees must also get the court's approval. It is impossible to conceive of this approval being refused in such a case, so that such an application is a mere formality. But it is a formality that costs money, and that cost falls upon the beneficiaries. They may well feel that it ought rather to be borne by the draftsman of the will who failed to include in it all the powers the trustees were likely to need. The moral of this is that even the simplest trust will must now contain all the powers of management and administration not already conferred by statute that the trustees can possibly need, because it will no longer be possible to make good a deficiency by an authorization from the beneficiaries.

We are now left with the two fundamental questions posed by subsection (2). Exactly what is meant by "variation" when applied to beneficial interests, and what is the period of a trust's natural duration as determined by the terms of the trust? These questions are related in that the answer to one could prove to be inconsistent with some possible answers to the other. Let us start by considering the second question, the natural duration of a trust.

In the case of a will that states: "I devise Blackacre to my trustees in fee simple in trust for my son John absolutely", what is the natural duration of that trust? Both the legal estate of the trustees and the equitable interest of the beneficiary are of indefinite duration, which means that they are as close to being perpetual as any human institution can be. One possible answer to the question is, therefore, that the trust will last until the end of the world. But, unless the testator chooses to die partially intestate, every trust arising by will must have an ultimate remainder which is absolute. So, to adopt this answer would require a court order for the final distribution to the beneficiaries in practically every case. That surely cannot be what the Legislature intended.

The next possibility is that the trust terminates whenever the beneficiaries are entitled to call for a transfer of the trust property. They are entitled to do this at any time after they are all ascertained and *sui juris*. That is what *Re Smith*<sup>140</sup> decided and what *Underhill's* Article 72 says. But clearly this is one of the things that the authors of the section set out

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140. *Supra* n. 68.

to change. And equally clearly, they have done so, for subparagraph (b)(ii) of subsection (3) precisely covers this situation; it is a provision for termination by consent of all the beneficiaries, and this is specifically declared to fall within subsection (2).

However, if there is only one beneficiary, this problem does not arise. If a trust has only one beneficiary, then, obviously, he must be absolutely entitled. This is so whether the trust was set up with only one beneficiary, or whether there were several and the others have died off and their interests have expired. In this situation, to use the words of Luxmoore L.J., the trusts are unenforceable and ineffective, because the funds are at home and belong solely to the beneficiary for his own absolute use and benefit.<sup>141</sup> And, in consequence, not only may the beneficiary demand the trust property from the trustee, but the trustee may insist on handing it over to him whether the beneficiary wishes it or not. Surely it is this latter feature, the right of the trustee to hand over the trust property, that establishes the natural termination of the trust. It is only when the trustee has a *right* to do this that the termination is independent of the consent of the beneficiary or beneficiaries.

However, that does not completely resolve the problem. In the first place, not every trust ends with one person absolutely entitled. There may be two or more persons entitled concurrently, either as tenants in common or as joint tenants. A tenancy in common does not pose any difficulty. There may be a question as to whether the trustee's basic obligation is to transfer the whole property to all the beneficiaries in undivided shares, or to divide it up and give each his share. But that affects how the trust is terminated, not when. However, a joint tenancy is not completely worked out until all but one have died, so that the survivor is ascertained. Must the trustee wait till then, or can he transfer the property to the beneficiaries jointly?

This question has some importance in relation to the creation of an *inter vivos* trust. The usual practice is to transfer the trust property to the trustee first and have the settlor and the trustee execute a trust declaration afterwards. In the interval between the two, the trustee is holding on a resulting trust for the settlor. This resulting trust arises by the transfer, and as that is usually a written disposition, it is itself a trust to which subsection (2) applies. It is terminated by the execution of the trust declaration, and it is therefore imperative that this must not shorten its natural duration. If the natural duration of a trust is as has been suggested above, the declaration will not shorten the resulting trust in the case of a single settlor, because, until he signs the trust declaration, the trustee has the right to back out and transfer the property back to the settlor. Thus, the resulting trust is naturally terminable at any time at the will of the trustee. But there could be two or more settlors entitled jointly to the property being settled; indeed this is quite probable in the case of a husband and wife. In this case, since the property came from the settlors jointly, the trustee should surely have the right to hand it back to them jointly, so that this resulting trust,

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141. See text to n. 89.



too, is naturally terminable at the will of the trustee, and the execution of the trust declaration does not shorten its natural duration.

There remains one final question on the duration of a trust, and it is here that the meaning of "variation" becomes involved. Can an assignment by a beneficiary be a variation? Suppose that a fund is held on trust for A for life and then for B absolutely, and that A assigns his interest. He might assign it to a third person, or he might assign it to B. It is with an assignment to B that we are here concerned, because it will make B absolutely entitled to the fund. Is that a variation? If the answer to this question is yes, then such a transfer of A's interest cannot occur without the approval of the court, and, in giving its approval, the court will also approve the termination of the trust. But if the transfer of A's interest to B is not a variation, then B can, without the court's approval, become absolutely entitled, and the trustee then has the right to hand over the trust property to him. If we are right in concluding that this point marks the natural termination of the trust, then it follows that the natural duration of this trust has expired, despite the fact that A is still alive. If this is so, the new section will not have accomplished very much. Thus, we have reached the stage where it is imperative to decide what is a variation.

Let us stay with the simple example of a trust with a single life tenant, A, and a single remainderman, B. The question is whether the transfer of the interest of either one of them to someone else is a variation. If B predeceases A, B's rights will vest in his personal representative, but this is inherent in the nature of his interest; if it were not so, his interest would not be absolute but would be contingent on his surviving A. This example is a transmission, not a transfer. If A assigns his interest to X, A's interest has been transferred to X and the income during A's life is now payable to X. The same result follows if it is seized under an execution and sold to X. As has already been noticed, the prohibition on variation is total. That is, if a transfer of A's interest is a variation, then it is prohibited whether it is voluntary or involuntary. The same, of course, applies to B's interest. It follows that to hold that any assignment is a variation means also, as a necessary corollary, that equitable interests are now largely immune from execution. (Income actually in the trustee's hands could be garnisheed, but you could not garnishee future income because A has no right to it unless he is still living when it is received.) Theoretically, the court could approve the seizure, but the court's hands are tied by subsection (6); it cannot approve anything unless the beneficiaries consent, and, in the circumstances, that is hardly likely. It seems unlikely that this is what the Legislature had in mind, and we should not impute this intention to it unless we have to.

On the other hand, if interests under trusts remain assignable without the court's approval, what does the section really accomplish? The only reason for the beneficiaries to wish to terminate a trust is that one or more of them want cash now; either the life tenant wants an immediate lump sum in exchange for his future income, or the remainderman wants to receive now the present discounted value of his future right to the capital. It is not essential to terminate the trust to do this. If an interest can be assigned, it can be sold or mortgaged. The selling and mortgaging of life

and reversionary interests has been a well established practice in England for a long time. It has not been familiar here because there has been no demand for such a service. Create the demand and the service will appear; it always does. Thus, the court's refusal to approve a termination of the trust will not prevent the beneficiaries from anticipating the testator's bounty if they decide to do so.

There is one provision in subsection (3) which looks as if it might shed some light on this question. This is subparagraph (b)(iii). Put in its context, it reads as follows:

(3). Without limiting the generality of subsection (2), the prohibition contained in subsection (2) and the requirement for the approval of the court for the purposes of subsection (2), apply to . . .

(b) any variation or termination of the trust

(iii) by renunciation of any person's beneficial interest by that person so as to cause an acceleration of remainder or reversionary interests.<sup>142</sup>

There are three oddities in the wording of this subparagraph. The first is the use of "renunciation". This is a technical term of Scots law<sup>143</sup> and also, of course, of English probate law. This combination is to be expected, since both Scots law and English probate law (originally administered by Church courts) are derived from the Civil Law, whereas the rest of English law is not. The corresponding term in the rest of English law is "disclaimer". The second oddity is the use of "remainder" as an adjective qualifying "interests"; except in the compound word "remainderman", it is not an adjective, but only a noun. It is not needed anyway. The Common Law had to distinguish between reversions and remainders; the reversioner held the grantor's estate, and, therefore, he was the immediate feudal lord of the life tenant, whereas the remainderman held an estate created by the grantor at the same time that the life estate was, and thus, there could be no tenure between them. These feudal niceties had no relevance in Equity, which, therefore, classified all future interests as reversionary interests. As the whole *Act* deals exclusively with trusts, "reversionary interests" by itself is not only sufficient but correct, and "remainder and" is mere surplusage. The third oddity is the use of the plural "reversionary interests" after the repeated use of the singular in "any person's beneficial interest by that person". Throughout the rest of the section, the singular is normally used, and the plural is used only where it is appropriate. This suggests that the switch is deliberate, and that a disclaimer has to accelerate more than one reversionary interest in order to bring this subparagraph into operation. But the drafting of the subparagraph is so much inferior to that of the rest of the section that this may be an unsafe deduction. For the moment at least, therefore, let us correct all three of these oddities. The subparagraph will then read: "by disclaimer of any person's beneficial interest by that person so as to cause an acceleration of a reversionary interest".

A disclaimer is something of an oddity itself. It is thus described in *Williams on Wills*:

142. *The Trustee Act*, R.S.M. 1970, c. T160, s. 61(3)(b)(iii).

143. *See Great Northern Railway v. Inland Revenue Commissioners* (1899), 2 Q.B. 652 at 655.

The disclaimer does not strictly speaking operate as a disposition of property. As was said in an old case, a man 'cannot have an estate put into him in spite of his teeth'. Thus a disclaimer will not divest a gift in favour of the disclaiming beneficiary, but will prevent it from vesting in him.<sup>144</sup>

The treatment of the subject in the title "Wills" in *Halsbury*<sup>145</sup> is even more interesting. It is in one of a group of paragraphs under the heading "Effect of failure and lapse" and reads as follows:

The effect of failure of a prior life interest or other particular interest through the donee of that interest being dead or prevented by law from taking the gift, for example owing to the attestation of the will by him or his spouse, or through revocation by codicil, disclaimer, forfeiture, or lapse, is ordinarily to accelerate the subsequent interests. . . .<sup>146</sup>

It is also instructive to read the judgment of Walton J. in *Re Scott*.<sup>147</sup> The two life tenants of the residue had both disclaimed, and the first question to be decided was whether this caused an acceleration or a partial intestacy. In examining this question, Walton J. refers not only to cases where the legatee had disclaimed, but also to cases where the gift could not take effect because the legatee or his spouse had witnessed the will, quite clearly treating the two situations as being on all fours with each other.

In short, the result of a disclaimer is that the gift to the disclaiming legatee fails to take effect, so that the will operates just as if he were already dead, or the gift to him had been revoked. No doubt this varies the effect of the will. But that is not what section 61 is seeking to regulate. It regulates variations of the trust that arises by the will. And because the disclaimer wipes the disclaiming donee out *ab initio*, just as if he were dead or barred by law from taking the gift, the trust that arises by the will is one of which he never is a beneficiary. The elimination of his interest cannot be a variation of that trust, since he never had one. This is just as well. Any other conclusion would mean that anyone who has been named in a will requires the approval of the court before he can predecease the testator.

This raises another conundrum. The actual wording of subparagraph (3)(b)(iii) is not that the provisions of subsection (2) apply to a disclaimer, but that they apply to "any variation or termination of the trust by renunciation. . . ."<sup>148</sup> In fact no variation occurs in that way. Does that mean that the subparagraph has no effect because it has nothing to operate on? Or are we to read into subsection (2) something that is not there in order to give some effect to subparagraph (3)(b)(iii)? If so, what are we to read in?

It will be recalled that our purpose in examining this subparagraph was to see whether its treatment of disclaimers shed any light on the intended treatment of assignments. The result of the examination has been to lead us to question whether the subparagraph has any effect at all. But that does not prevent us from using it for the original intended purpose. The subpar-

144. *Williams on Wills* (5th ed. W. Williams 1980) 1323.

145. 50 *Halsbury's* (4th ed.) para. 366.

146. *Ibid.*

147. [1975] 2 All E.R. 1033.

148. *The Trustee Act*, R.S.M. 1970, c. T160, s. 61(3)(b)(iii).

agraph does, after all, at least show how the Legislature would deal with a disclaimer if it were capable of being a variation.

The most obvious point is that it is prohibiting only one type of disclaimer, one that results in an acceleration. If A makes an *inter vivos* settlement of a sum of money on B absolutely, and B disclaims, there is no subsequent interest to be accelerated. There is just a trust with no beneficiary, and, therefore, a resulting trust for A. The subparagraph does not apply, and the court's approval is not required. Now assume a testator gives numerous pecuniary legacies and gives the residue to X. A legacy of \$1,000 is disclaimed by the legatee. Again there is no acceleration. The \$1,000 falls into residue, and X gets \$1,000 more than he otherwise would have done, but he does not get it any faster. The prohibition in the subparagraph falls only on the disclaimer of one of two or more successive interests, and even then it does not fall on a disclaimer of the last of those interests. If the gift is to A for life and then to B absolutely, and B disclaims, nothing is accelerated and the subparagraph does not apply. Furthermore, even if A disclaims, the result is not always an acceleration of B's interest. It would be the result in the very simply worded example just given, but testators rarely make such simply worded dispositions. When, as in *Re Scott*,<sup>149</sup> a life tenant of residue disclaims, it is often far from easy to decide whether the correct result is an acceleration or a partial intestacy.<sup>150</sup> If the purpose is to restrain disclaimers, there is no sense in making the application of the prohibition turn on such a fine point. The only sensible purpose for the subparagraph is to prevent acceleration without the approval of the court. But why? The reason, I suggest, is to plug what would otherwise be a hole in the intended operation of subsection (2). If the life tenant A disclaims, and the interest of the remainderman B is accelerated, B will have become absolutely entitled and the trust terminates. But the same result follows if A assigns to B, or indeed if B assigns to A. The enactment of subparagraph (3)(b)(iii) is totally pointless unless such assignments are prohibited by subsection (2). And the same holds good where the limitations are more complex, for example, to A for life, then to B for life and then to C absolutely. Obviously, if C acquires B's interest, the termination of the trust is likely to be advanced. But it might be advanced if C acquires A's interest, because B may predecease A. The result of C's acquisition is that only one death is needed to terminate the trust instead of two.

It seems clear that, where there are successive beneficial interests, the transfer of an interest from one beneficiary to another is intended to be classified as a variation. Whether it is possible to give "variation" this highly specialized meaning when applying it to beneficial interests is another question. But if it is not, it seems that one of three results must follow. Either

- (1) any transfer, voluntary or involuntary, of any beneficial interest to anyone is prohibited; or

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149. *Supra* n. 147.

150. Compare *Re Scott*, *supra* n. 147 (intestacy) with *Re Davies*, [1957] 3 All E.R. 52 and *Re Taylor*, [1957] 3 All E.R. 56 (acceleration).

- (2) the meaning of "natural duration" of a trust suggested above is wrong; or
- (3) the section has accomplished practically nothing.

The recent decision of the Manitoba Court of Appeal in *Brown v. The National Victoria & Grey Trust Company*<sup>151</sup> unfortunately sheds no light on the meaning of either "natural duration" or "variation". The ultimate beneficial interests included two perpetual charitable trusts, so that this really was a trust that would endure for ever. Although the commuting of the widow's annuity would not in itself have terminated the trust, the conversion of these two charitable gifts into immediate gifts of capital obviously did, and the two changes were put forward together as parts of one single scheme. Thus, this arrangement clearly could not be anything other than the termination of a trust "before the expiry of the period of its natural duration", no matter what meaning we try giving to those words.<sup>152</sup>

An analysis of subsection (2) cannot be complete without an examination of the rest of subsection (3), because it contains a series of instances of the intended application of subsection (2), and may, therefore, be capable of affecting its construction. These instances are arranged in seven subparagraphs. Two of them have already been considered, namely (b)(ii) and (b)(iii). Since we have thus already begun at the end, we may as well continue that way and work backwards to the beginning.

Subparagraph (b)(i) provides that the prohibition in subsection (2) applies to a variation or termination "by merger, however occurring, with another trust". I must confess to being unable to understand the meaning of this. How can two trusts lawfully be merged unless the provisions of both are identical? And if they are identical, how would the merger vary or terminate either?

The four subparagraphs of paragraph (a) are of a different nature, and the opening words of the paragraph which introduce them are also quite different. Taking subparagraph (iv) first, its effect is that the prohibition in subsection (2) is to apply to "any provision of a trust under which the transfer or payment of the capital or of the income . . . is subject to a discretion to be exercised . . . by the trustee. . . ."<sup>153</sup> The object of this subparagraph is obvious: it is to make it clear that subsection (2) is intended to reverse the rule enunciated in *Re Smith*<sup>154</sup> and *Re Nelson*<sup>155</sup> that all the beneficiaries of a discretionary trust acting together can put an end to it and divide the trust property between themselves.

The remaining three subparagraphs of clause (a) form a related group and are best considered together. The prohibition against variation or termination in subsection (2) is to apply to

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151. *Supra* n. 94.

152. *The Trustee Act*, R.S.M. 1970, c. T160, s. 61(2).

153. *The Trustee Act*, R.S.M. 1970, c. T160, s 61(3)(a)(iv).

154. *Supra* n. 68.

155. *Supra* n. 69.

- (a) any provision of a trust under which the transfer or payment of the capital or of the income, including rents and profits,
  - (i) is required to be postponed until the attainment by a person of a stated age, or
  - (ii) is required to be postponed until a stated date or time or the passage of a stated period of time, or
  - (iii) is required to be made by instalments.<sup>156</sup>

All three of these subparagraphs carry audible echoes of the Rule in *Saunders v. Vautier*, in that they describe situations in which the Rule might apply. Does this mean that we are required to construe subsection (2) as abolishing that Rule? It must be emphasized that this is not a question of resolving an ambiguity in subsection (2); there is not, in this respect, any ambiguity whatsoever in it. The Rule makes provisions of a certain type void, and abolishing it therefore requires making such provisions valid. Subsection (2) does not attempt to do this, but merely prohibits variation and premature termination. The question is whether the presence of these three subparagraphs in subsection (3) requires us to read into subsection (2) words which are not there so as to give it the additional effect of validating such void provisions. Assuming, for the moment, that such a method of statutory construction is permissible at all, it obviously can be permissible only if the three subparagraphs are not otherwise capable of any operation whatever. It cannot be sufficient that so to construe subsection (2) would widen the operation of the three subparagraphs. Wherever one subsection is built on another, as (3) is on (2), expanding the scope of the first subsection will necessarily expand the scope of the second, and if courts were to be allowed to imply words which expand the scope of the first simply in order to expand the scope of the second, the operation of almost every statute could be expanded indefinitely and it would end up meaning whatever the court would like it to mean.

Accepting, therefore, that subsection (2) only forbids variation and premature termination, what effect will these three subparagraphs have? As just noted, they describe situations in which the Rule in *Saunders v. Vautier* might apply. The operative word here is "might" for it is by no means the case that it necessarily will. Let us take, as an example, a pecuniary legacy payable at a future time: "I bequeath the sum of \$10,000 to X to be paid to him when he attains the age of twenty-five". Since the definition of "trust" includes the duties incident to the office of personal representative, and paying legacies is one of those duties, this bequest is a provision of a trust. The legacy is capital, and payment of it is required to be postponed until the legatee attains the stated age. The case falls squarely within subparagraph (a)(i). Now let us assume that X is twenty when the testator dies. The law is clear that when he attains twenty-five he will be entitled to receive exactly \$10,000, without interest. As *Theobald* states: "A legacy payable at a future day, whether vested or not, carries interest only from the time fixed for its payment".<sup>157</sup> This, of course, means that, until that time, any income earned by the \$10,000 belongs to the residuary beneficiaries. Or, to put it another way, a pecuniary legacy payable in the

156. *The Trustee Act*, R.S.M. 1970, c. T160, s. 61(3)(a).

157. *Theobald on Wills* (14th ed. J.B. Clark 1982) 255.

future does not carry the intermediate income. The law reports may be searched in vain for an instance of the Rule in *Saunders v. Vautier* being applied to a legacy given in those terms so as to enable the legatee to obtain payment before the time specified. The reason is obvious. If payment of the legacy is advanced, the residuary beneficiaries will lose some of the income to which they are entitled. Or, to look at it the other way, to give X \$10,000 at the age of twenty is equivalent to giving him \$10,000 plus five years' interest at the age of twenty-five. And he is not entitled to that five years' interest. This is the point of the concluding clause in *Theobald's* statement: "unless the property is otherwise disposed of in the meantime".<sup>158</sup> The \$10,000 is otherwise disposed of in the meantime because its produce falls into residue.

There are some exceptions to the rule that a legacy payable at a future day does not carry interest in the interval. One of them is: "Where the legacy is directed to be set apart from the rest of the estate and invested, interest is payable from one year after the testator's death."<sup>159</sup> Here, the income is bound to come to the legatee sooner or later and no one else can have any claim to it. Therefore, the Rule in *Saunders v. Vautier* will be applied, as, for example, in *Re Couturier*.<sup>160</sup> where the first half of the judgment of Joyce J. is devoted to establishing that the legacy carried interest.

A future residuary bequest, of course, always carries the intermediate income, unless that income is specifically otherwise disposed of in the interval. Suppose that a testator bequeaths his residuary estate to his four children in equal shares, but directs that until the youngest attains twenty-five, the executors shall apply the income for the education and benefit of all four in such proportions as they see fit. Obviously, no one child can claim early payment under the Rule, because that would rob the other three of their right to have the whole income applied in that way. But suppose that, after the youngest has attained his majority, the four get together and agree that henceforth the income shall be divided equally. They have now created a situation in which each child is bound to get the income from the one quarter of the capital that is coming to him. That is a situation to which the Rule would apply and would entitle all of them to claim immediate payment. It is a situation created in part by the will, and in part by their variation of it. On the authority of *Re Trevanion*,<sup>161</sup> the Rule now applies and the children can claim immediate payment.

Thus it can be seen that these three subparagraphs describe situations to which the Rule may or may not apply, depending on whether or not the gift in question will carry the intermediate income with it. Furthermore, if the Rule does not apply, it is nevertheless open to the beneficiaries, provided all who will be affected are *sui juris* and agree, to vary the terms of the trust in a way that would bring the Rule into operation, as in the example

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158. *Supra* n. 8.

159. *Supra* n. 157.

160. *Supra* n. 37.

161. *Supra* n. 47.

suggested in the preceding paragraph. In that example, there is an advantage to them all to do so. There is no such clear advantage to a residuary legatee in accelerating the payment of a pecuniary legacy, but if it is the last legacy waiting to be paid, payment of it will complete the administration and the executors' right to remuneration will cease, and that will be to his benefit.

Thus it is not necessary to try to extend the clear meaning of subsection (2) in order to give a meaningful effect to the first three subparagraphs of paragraph (a) of subsection (3). It is always possible for a testator to postpone the enjoyment of a vested gift if he has some other use for the income in the interval; it is only postponement that has no other purpose that is struck down by the Rule. The prohibition on variation will prevent the beneficiaries from rearranging the beneficial interests in such a way that a valid postponement will be invalidated. This is a perfectly sensible object. In fact, some people may feel that it is more sensible than trying to abolish the Rule.

But even if this were not so, it would still not be permissible to do violence to the language used in subsection (2) in order to extend its operation. The argument for doing so depends entirely on the proposition that the Legislature set out to change the Rule in *Saunders v. Vautier*, whatever that Rule might be. That is obviously not so. It set out to do exactly what it did, to restrict the right of beneficiaries to vary the terms of the trust. It may have thought that their right to do so was derived from a principle known as the Rule in *Saunders v. Vautier*. But what if it did? What's in a name?

There is one further thing that subsection (2) does seem to have done; it seems to have abolished the right of the holder of an equitable estate in fee tail to bar the entail, and thereby enlarge his estate into a fee simple.<sup>162</sup> This is, in fact, the second legislative kick at this particular cat. The previous one was taken in 1285 by the statute *De Donis Conditionalibus*, sometimes known as the *Statute of Westminster the Second*.<sup>163</sup> The operative part of that statute, when translated into English, begins:

Wherefore our lord the King, perceiving how necessary and useful it is to appoint a remedy in the aforesaid case, has established that the will of the donor according to the form manifestly expressed in the charter shall henceforth be observed. . . .<sup>164</sup>

That is precisely the declared purpose of the Manitoba Law Reform Commission, expressed in its *Report* 690 years later. The problem this legislation gave rise to on that previous occasion was that it gradually resulted in more and more land being tied up in a way that made it substantially inalienable. Quite obviously, the same thing could happen again. Although now the title

162. This may be intentional. The abolition of the Rule in *Whitby v. Mitchell* (1890), 44 Ch. D. 85, makes it possible to create a close equivalent to an unbarred entail by creating an unending series of successive life estates. The judge-made procedure for barring entails and the judge-made Rule in *Whitby v. Mitchell* are two sides of the same coin, the preservation of the marketability of land.

163. 13 Edw. I, c. 1.

164. In the official language, the passage reads: "Propter quod dominus Rex, perpendens quod necessarium et utile est in praedictis casibus apponere remedium, statuit quod voluntas donatoris secundam formam in carta doni sui manifeste expressam de cetero observetur. . . ."



to the land will necessarily be vested in a trustee with a fee simple title, any sale by him will necessarily be a variation of the trust, because the purchase money, being personalty, cannot be entailed and will thus become the absolute property of the tenant in tail in possession at the time, which has the same practical result as disentailing. Theoretically, the court could sanction the sale by approving this variation. But in practice it would find it difficult to do so, because the wording of paragraph (5)(b) implies that it would have to consent on behalf of every potential subsequent tenant in tail.<sup>165</sup> By paragraph (7)(a), the court cannot do this unless it is satisfied that it would be for his or her benefit, and how can it be for anyone's benefit to be disinherited? The only solution would be for the court to require, as a condition of its approval, that the purchase money be reinvested in other land to be held upon the same trust. That frees one parcel, but only by tying up another of equal value.

On the last occasion, it took the courts the best part of two centuries to work out a way of re-establishing the marketability of land which was eventually done by making it possible to bar entails by the use of the fictitious action known as a common recovery. The origin of the trouble, then, was the desire expressed in the statute of 1285 to respect the wishes of donors. Although that sounds like a worthy object, it may, if pursued too zealously, end up allowing the dead to dictate to the living. And that is as true today as it was then. Every society has to set limits beyond which it will not allow the dead to exercise this power. The rules of law which define those limits are not mere legal technicalities; they are technical, but that is because they are precise. They are the concrete expression of ideas which are of deep social significance. The purpose of the amendments to section 61 is to move those limits. For the reasons I have endeavoured to explain, it has not moved them as far as some people seem to have thought it did, because it has not changed the Rule in *Saunders v. Vautier*. But it does seem to have moved those limits in some unexpected and unintended directions. Given the nature of the changes being attempted, that should not be thought surprising.

The new section 61 has now been in force for over two years. As yet, its implications do not seem to have been noticed by Manitoba practitioners. That too is not surprising. For one thing, one does not normally look closely at a section dealing with the variation of trusts until one is seeking to vary one, and that does not happen very often. And when one does look at it, its meaning turns out to be far from clear. This is, in fact, the writer's third attempt at an analysis of its effects. The first was shortly after it was enacted, and the second was a previous draft of this article. They are all different, and indeed some of the most important issues addressed here did not figure at all in the first attempt. Some of the conclusions I have arrived at may well prove to be wrong. I can only say that I believe they are more likely to be right than those I arrived at in the first two attempts.

165. Each successive tenant will take as the heir of the body of the original grantee, which surely is a "specified description."

