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VARIATION OF TRUSTS IN ENGLAND AND CANADA

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If the trust is to be a useful method of disposing of property it must in some way or other be enabled to keep pace with economic and social change. An inflexible trust caught flat-footed in a period of inflation or depression, confronted with a variable stock-market or changing government taxation policies, or even merely faced with the necessity of making some more or less minor family re-arrangement may cause the name beneficiary to appear something of a misnomer. Theoretically the most satisfactory way of dealing with such varying conditions is to insert appropriate provisions in the trust instrument itself. But to cover in detail every conceivable future circumstance is beyond the power of the best of draftsmen and generally the best that can be done is to grant fairly wide discretionary powers to the trustees in the hope that those, supplemented by whatever statutory powers may exist, will cover most contingencies. Yet situations will still arise in which the accumulated powers of the trustees are of no avail and it will be necessary to turn to the rules relating to variation of trusts. It is proposed here to consider the nature and operation of these rules in England and Canada. This will involve a discussion of: I. The inherent jurisdiction of the courts; II. The various pieces of

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rather fragmentary legislation passed prior to 1958, and III. The effect of the more comprehensive legislation passed in England in that year and since adopted in some of the provinces in Canada.

As a preliminary a few words must be said on two matters of terminology. In seeking the assistance of the courts beneficiaries may be asking for one of two things. They may wish to have approved a proposal whereby one particular departure is made from the terms of the trust, leaving the trust provisions intact; for example the court may be asked to sanction one specific non-trustee investment or to allow a "once and for all" payment of capital to a life beneficiary. On the other hand, the beneficiaries may be attempting to re-write some of the trust provisions, perhaps to discard an old investment clause and replace it with a newer and wider one or to insert a clause giving a life tenant a continuing right to payments from capital. Although on occasions it is necessary to distinguish these two types of application, the courts have not adopted any appropriate language. It is here proposed to use the terms "vary" and "variation" to cover both sets of circumstances, the terms "deviate" or "deviation" to cover a single departure from the terms of the trust and the terms "re-write" or "re-writing" to cover any permanent changes in the trust provisions.

The second matter of terminology which needs clarification flows from the necessity to distinguish "administrative" and "beneficial" terms of a trust. By "administrative" provision is meant a term of the trust which relates to the trustees' powers of management and control of the trust property; by "beneficial" provision is meant a term of the trust which governs the nature of the interest or the financial return granted to the beneficiaries. It is readily acknowledged that these definitions are by no means complete but it is to be hoped that they will serve for our present purposes.¹

I. *The Inherent Jurisdiction.*

In England the extent of the inherent jurisdiction of the courts to authorize a variation of the terms of a trust was finally settled by the decision of the House of Lords in *Chapman v. Chapman*² in 1954, and it appears that the principles laid down in that case represent Canadian law.³ The facts of the *Chapman* case may be

¹ It should perhaps be noted that neither of these sets of terminology have been adopted by the courts or the legislatures.

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

³ *Crocker & Croquip Ltd. v. Tornoos*, [1957] S.C.R. 151, (1957), 7 D.L.R. (2d) 104. In delivering the judgment of the Supreme Court of

shortly stated. Two settlements each contained clauses providing that until the youngest of certain infant beneficiaries, the grandchildren of the settlors, should reach the age of twenty-five, or until twenty-one years after the death of the survivor of the settlors, whichever should happen first, the trustees should apply the trust income at their discretion for the maintenance and education of the infants, accumulating any surplus income. Owing to the presence of these clauses liability for estate duty would have arisen on the death of the settlors. To avoid this result, it was proposed that the trustees should be authorized to transfer the trust fund to new trustees, to be held on like trusts, but deleting the provision for common maintenance and education. All the beneficiaries who were *sui juris* had agreed to this arrangement and the court was asked to approve it on behalf of the infant beneficiaries.

In the House of Lords counsel arguing in favour of the court having the necessary authority approached the problem from the standpoint of the court's jurisdiction over infants rather than its jurisdiction in respect of trusts. It was assumed that if all the beneficiaries under a trust were *sui juris* and absolutely entitled they could by agreement vary the terms of their trust at will. The court, it was contended, acting as the protector of infants, could give its consent on behalf of the infant beneficiaries if it was shown that the proposed variation would be of benefit to them. Specific examples of the court so acting were to be found in the "maintenance", "conversion", "salvage" and "compromise" cases.⁴ No objection could be taken to this jurisdiction on the ground that its exercise might vary the terms of a trust; this result would be merely incidental to the court's intervening to protect the infants and *no power to vary trusts as such was claimed*.⁵ The Attorney General appearing as *amicus curiae*, emphasized the necessity of distinguishing two completely separate jurisdictions. Dealing with the court's power over infants he denied any general rule that the court could dispose of an infant's property merely because this would be for its benefit. With respect to the law of trusts he based

Canada, Kellock J. did not discuss the matter as extensively as did the House of Lords in *Chapman v. Chapman*, *ibid.*, but it may be legitimately inferred that the principles of the latter case were regarded as authoritative. See also: *Re Blivass*, [1944] O.W.N. 497 (H.C.); *Re Wright*, [1954] O.R. 755, [1955] 1 D.L.R. 213 (H.C.); *contra: Re Southam Trust*, [1954] O.W.N. 923 (H.C.).

⁴ These four groups of cases will be considered in detail later.

⁵ The fact that the jurisdiction over infants rather than that over trusts was invoked appears more clearly in the argument for the respondents, *supra*, footnote 2, at pp. 429, 436-439 (A.C.), than in the argument for the appellants, *ibid.*, at pp. 429, 433-436 (A.C.).

his argument on the axiomatic principle that the intent of the settlor, as found in the terms of the trust, must be scrupulously observed. The four groups of cases referred to by the appellants and respondents were examples of exceptions to this principle rather than illustrations of any general rule which might lead to contrary results.

Unfortunately, the House of Lords ignored the distinction drawn between the law relating to infants and the law relating to trusts. It was apparently understood that the House was being asked to approve *a jurisdiction to vary trusts* operative (i) if all the beneficiaries *sui juris* consented and (ii) if the proposed variation would benefit infants or other beneficiaries incapable of assenting in person.⁶ As an aspect of the law of trusts this proposition was unanimously rejected. The House adhered to the general rule of the inviolability of the terms of the trust instrument and would recognize only four exceptions to this rule; these were the "conversion", "compromise", "emergency", and "maintenance" jurisdictions.⁷ It is suggested that, of these four jurisdictions, only the "emergency" and "maintenance" jurisdictions are truly to be classified as exceptions to the general rule that a trust will not be varied merely for the benefit of the beneficiaries. The "conversion" and "compromise" jurisdictions do not really form part of the law of trusts at all. They do, however, have some incidental bearing on the question of variation and it is convenient to consider them before turning to the other two "exceptional" jurisdictions.

A. *Conversion.*

(i) *The scope of the jurisdiction.*

Two aspects of the conversion jurisdiction must be dealt with, its scope (that is the circumstances in which it may be exercised) and its basic nature (that is whether it is a part of the law of infants or the law of trusts).

Lord Morton, delivering the principal speech in *Chapman v. Chapman*,⁸ apparently accepted the contention that the court could exercise the conversion jurisdiction to change an infant's

⁶ This conception appears to have originated with Denning L.J. in his dissenting judgment in the Court of Appeal: [1953] Ch. 218, at p. 269 *et seq.*, [1953] 1 All E.R. 103, at p. 132 *et seq.*

⁷ The "emergency" jurisdiction is of much the same nature as the "salvage" jurisdiction to which reference was made in argument. It is rather curious that the four jurisdictions which in argument were put forward as illustrations of a general rule in the law of infants become in the judgments exceptions to a rule in the law of trusts.

⁸ *Supra*, footnote 2, at pp. 451 *et seq.* (A.C.), 807, 780 *et seq.* (All E. R.).

property from realty to personalty or personalty to realty if it was shown that this would be for the benefit of the infant. It is not at all clear that the authorities, including, it is to be noted, those on which the learned judge relied, necessarily support this proposition. The earlier cases,⁹ while acknowledging that the court is generally reluctant to alter the nature of an infant's property,¹⁰ take the view that a sale and conversion will be ordered if this be for the benefit of the infant and whether or not realty or personalty is involved. On the other hand some of the cases, and particularly those of the nineteenth century, would confine such a jurisdiction to dealings with personalty and would deny any power to deal with realty, save in the most exceptional circumstances.¹¹ If, therefore, the cases are to be reconciled, a distinction, however illogical it may seem, must be drawn between dealings with realty and personalty. The court may direct the conversion of an infant's personalty if this be shown to be for his benefit, but may only deal with his realty in circumstances of dire necessity.¹²

(ii) *The nature of the jurisdiction.*

Accepting this as the proper scope of the conversion jurisdiction, we must now consider its basic nature. There are at least two possible situations in which this is a question of some importance. In the first place what may be sought from a court is authority to sell an infant's beneficial interest under a trust. This was so in

⁹ *Earl of Winchelsea v. Norcliffe* (1686), 1 Vern. 435 (Lord Jeffrey L.C.); *Inwood v. Twynne* (1762), 2 Eden 148 (Lord Northington L.C.); *Ashburton v. Ashburton* (1801), 6 Ves. 6 (Lord Eldon L.C.); *Ex Parte Phillips* (1812), 19 Ves. 19 (Lord Eldon L.C.).

¹⁰ For the following reasons: (1) to permit a change from personalty to realty deprived an infant of his right to make a will at seventeen; (2) To change realty into personalty ran contrary to the judicial reluctance to dispose of land; (3) Whatever form the conversion took it would interfere with descent on intestacy. If the court did order a conversion it was the custom to provide in the order for the retention of "the infant's right to make a will during infancy in the case of personalty, and the rights of his heir to take the realty if he dies under the age of 21"; Lord Morton, *Chapman v. Chapman*, *supra*, footnote 2, at pp. 452 (A.C.), 808 (All E.R.). The above reasons would appear to have little weight today.

¹¹ *Taylor v. Phillips* (1750), 2 Ves. Sen. 23 (Lord Hardwicke L.C.); *Calvert v. Godfrey* (1842), 6 Beav. 95 (Lord Langdale M.R.); *Field v. Moore* (1855), 7 de G.M. & G. 691; *In Re Staines* (1886), 33 Ch.D. 172 (Ch.D.); *In Re De Teisser's Settled Estates*, [1893] 1 Ch. 153 (Ch.D.); *In Re Heyworth's Contingent Reversionary Interest*, [1956] Ch. 364, [1956] 2 All E.R. 21 (Ch.D.). See also the salvage cases, *infra*, footnote 50; and on the question of advancement out of realty: *Re Swanson* (1887), 31 Sol. J. 427 (C.A.).

¹² For specific judicial support for such a distinction see: *Taylor v. Phillips*, *ibid.*; *Nunn v. Hancock* (1871), L.R. 6 Ch. App. Cas. 850, at p. 851 (James L.J.); see also *In Re Heyworth's Contingent Reversionary Interest*, *ibid.*, at pp. 371 (Ch.), 24 (All E.R.).

*Nunn v. Hancock*¹³ where the court authorized the sale of an infant's reversionary interest: but in a more recent case, *Re Heyworth's Contingent Reversionary Interest*¹⁴, Upjohn J. refused to permit such a sale. The learned judge was not all enthusiastic about *Nunn v. Hancock*¹⁵ but thought that, in any event, consideration of that and other authorities was "unnecessary because all the speeches in the House of Lords in *Chapman v. Chapman* make it perfectly clear that there is no inherent jurisdiction to deal with an infant's interest and to alter trusts merely because it is for the benefit of the infant".¹⁶ It is suggested, however, that the speeches in *Chapman v. Chapman*¹⁷ were not at all relevant to the type of situation confronting the court in the *Heyworth* case. To authorize the sale of an infant's beneficial interest is not to condone an alteration in the terms of a trust, either in respect of its administrative or its beneficial provisions. If a court authorizes such a sale the terms of the trust are unchanged and consequently the law relating to variation of trusts, with which the speeches in *Chapman v. Chapman* were concerned, is irrelevant. The court would be exercising the conversion jurisdiction, a jurisdiction which in these circumstances merely raised the question of the extent of the court's power over infant's property, be that property legal or equitable.

The second situation where the conversion jurisdiction and that relating to trusts may come into contact is where it is in fact sought either to alter the beneficial provisions of a trust or to change the nature of trust property. The authorities do not countenance the use of this jurisdiction for the former purpose. In *Chapman v. Chapman*¹⁸ Lord Morton made it clear that he considered the conversion jurisdiction operated solely to effect a change in the nature of property; and later in his speech indicated that he thought the maintenance jurisdiction the *sole* exception to the rule against the alteration of beneficial interests.¹⁹ This conclusion is amply supported by all cases involving the conversion jurisdiction.²⁰

The remaining question is whether the jurisdiction may be used to change the nature of trust property. Where it is sought to effect a change from *realty to personalty*, it is, from the point of view of the ultimate results, immaterial whether the conversion

¹³ *Ibid.*

¹⁴ *Supra*, footnote 12.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, at pp. 371 (Ch.), 24 (All E.R.).

¹⁷ *Supra*, footnote 2.

¹⁸ *Ibid.*, at pp. 451 (A.C.), 808 (All E.R.).

¹⁹ *Ibid.*, at pp. 456 (A.C.), 810 (All E.R.).

²⁰ See footnotes 9 and 11, *supra*.

or the appropriate trust jurisdiction—in these circumstances the “emergency” power—is relied upon. If it is accepted that the proper scope of the conversion jurisdiction has been indicated above, in exercising both the conversion and emergency jurisdiction the court can act only in circumstances of obvious and demanding necessity.²¹ However if the trust corpus consists of personality (and, indeed if, contrary to our suggested position, we were to accept the proposition of Lord Morton that real property may also be converted if this will be beneficial to the infant, then even where it consists of realty) the use of the conversion jurisdiction would effect a variation on the ground of benefit to the beneficiaries, a result which could not be achieved by resort to the court’s power to deal with an emergency. If this be so, then the conversion jurisdiction becomes an exception to the already exceptional emergency jurisdiction by permitting trust personality to be changed into realty (and, accepting Lord Morton, realty into personality) on the ground of benefit and not solely on the ground of necessity.

This would be an anomalous situation and one which certainly does not appear to have occurred to the judges in *Chapman v. Chapman*.²² The confusion could be avoided if the conversion jurisdiction was classified, not as an aspect of the law of trusts, but as part of the law relating to infants. The jurisdiction should be confined to dealings with infant’s property, be this legal or equitable, absolute or less than absolute; it should not be used to effect any change in the nature of a trust corpus or any other variation of the terms of a trust. Thus if we have a situation where four adult beneficiaries and one infant beneficiary are interested in a trust of personality, the court may in pursuit of the conversion jurisdiction sell the infant’s beneficial interest, but may not, on the consent of the adults and benefit to the infant being shown, sell the trust corpus under the authority of exercising its conversion jurisdiction. To sell the corpus raises a problem in the law of trusts and to resort to the conversion jurisdiction, an aspect of the law of infants, is merely to confuse the issue. This the House of Lords did by classifying, erroneously it is submitted, conversion as an exception to a rule of trust law.

B. *Compromise.*

(i) *The nature of the jurisdiction.*

As with the conversion jurisdiction we are again interested in

²¹ See *supra* for the conversion jurisdiction and *infra* for the emergency jurisdiction.

²² *Supra*, footnote 2.

the nature of the compromise jurisdiction and in its scope. But for the decision in *Chapman v. Chapman*²³ no difficulty would have arisen in determining, in general terms at least, the nature of the court's powers. A compromise is a contract whereby the parties to a dispute agree to some mutually satisfactory settlement. Infant or other incompetent or unknown beneficiaries cannot of course consent in person, but any problems which this might have caused have in large part been met by the courts approving compromises on their behalf when to do so would be for their benefit.²⁴ *Prima facie* it would seem that such a jurisdiction ought not to be regarded solely as an aspect of the law of trusts. In one passage in his judgment in *Chapman v. Chapman*²⁵ Lord Simonds recognized the wider nature of the jurisdiction, but in the end he joined the rest of the House of Lords and the majority in the Court of Appeal in classifying it as an exception to the rule against variation of trusts.²⁶ While there are no decisions to the contrary, it is fairly clear that this is taking too narrow a view of the court's powers. In some instances the Rules of Court confer on the court an authority to approve compromises which extends beyond the field of trusts²⁷ and so far as judicial practice is concerned, compromises are continually being approved, particularly on behalf of infants, whether or not trusts are involved.²⁸ Thus, without it

²³ *Ibid.*

²⁴ In *Chapman v. Chapman*, *ibid.*, the court's powers were stated as applying to infants and unborn parties: Lord Simonds at p. 445 (A.C.); Lord Morton at pp. 451, 457 (A.C.); Lord Cohen at p. 471 (A.C.). One would assume the court has similar powers with respect to lunatics, see in England, R.S.C.: Ord. 80, r. 11, Annual Practice (1964). At the time of writing the Rules of Court of all the Canadian provinces were not available, but it would seem that some provinces have a rule similar to the English one: see Halsbury's Laws of England (3rd ed., 1959), Vol. 30, p. 404, para 760; Vol. 30A (Canadian Converter), p. 326.

²⁵ *Ibid.*, at pp. 445 (A.C.), 802 (All E.R.) where it was stated that the jurisdiction "is exercisable alike in the Queen's Bench and Chancery Division and whether or not the court is in the course of administering a trust".

²⁶ *Ibid.*, at pp. 445 (A.C.), 802 (All E.R.); Lord Cohen at pp. 471 (A.C.), 820 (All E.R.); Lord Asquith at pp. 469, 470 (A.C.), 818-819 (All E.R.) Lord Morton at pp. 451 (A.C.), 807 (All E.R.). In the Court of Appeal see *supra*, footnote 6, at pp. 239 (Ch.), 113 (All E.R.).

²⁷ The power to compromise on behalf of persons under disability is in quite wide terms: see the Rules of Court referred to footnote 24, *supra*. In some instances the court is given power to approve compromises of proceedings concerned with the administration of estates, trusts and the construction of a written instrument: England: R.S.C., O. 15, r. 13, Annual Practice (1964); B.C.: R.S.C., O. 16, r. 9A; N.B.: S.C. Rules, O. 16, r. 9A. It should be pointed out, however, that in some of the Canadian provinces what would appear to be the equivalent rule is confined to trusts: see, for example, Ont.: S.C. Rules, r. 79.

²⁸ The most common example is probably the settlement of personal injury claims; see e.g. England: *Rhones v. Swithenbank* (1889), 22 Q.B.D.

being necessary to decide what exactly the outer limits of the jurisdiction are, they are not limited to trusts or even the general field of equity. It would senselessly restrict the power of the court if the compromise jurisdiction was not operative in most if not all cases where the settlement of an action in equity or at law required approval on behalf of parties not capable of acting in person.

(ii) *The scope of the jurisdiction.*

Until *Chapman v. Chapman*²⁹ it was assumed that the compromise jurisdiction was only operative in cases involving a dispute, and the House adhered to this view. While this conclusion may, as we shall see, take too restricted a view of the matter, it is at least preferable to the two contrary arguments found in the case.

The first of these is an amalgam of the views of the majority judgment in the Court of Appeal and that of Lord Cohen in the House of Lords. In the Court of Appeal Lord Evershed stated, "It must also be taken in our judgment (at least since the decision in *In Re Trenchard* fifty years ago) that the court has a further power and jurisdiction . . . to approve on behalf of persons interested under a trust who are under a disability (particularly infants) and persons who may hereafter become interested, compromises proposed by or between persons beneficially interested under the trust . . . ; and the word compromise should not be construed so as to be confined to 'compromises' of disputed rights".³⁰ This view however, is unsatisfactory in that while pointing out what a compromise is not, it fails to state specifically what it is.³¹ Lord Cohen, adopting the same general position, attempted to remedy the defect by restricting this definition to arrangements made between various classes of beneficiaries; it was not, in his opinion, to be taken as extending to arrangements between beneficiaries

577 (C.A.); *Mattei v. Vautro* (1898), 78 L.T. 682 (Q.B.D.); *Walsh v. George Kemp*, [1938] 2 All E.R. 266 (C.A.); *Flack v. Whithers*, [1961] 1 W.L.R. 1284, [1961] 3 All E.R. 388 (H.L.). Canada: *Vano v. Canadian Coloured Cotton Mills* (1910), 21 O.L.R. 144 (K.B.D.); *Glynn v. Unwin* (1926), 30 O.W.N. 188 (H.C.); *Poulin v. Nadon*, [1950] O.R. 219, [1950] 2 D.L.R. 303 (C.A.); *Hurd v. Hurd*, [1955] O.W.N. 568 (H.C.); *Howe v. City of Vancouver* (1957), 9 D.L.R. (2d) 78, 22 W.W.R. 385 (B.C.S.C.). For other miscellaneous examples of the exercise of the jurisdiction see England: *Hargrave v. Hargrave* (1850), 12 Beav. 408 (Lord Langdale M.R.) (mortgage); *In Re Swain*, [1918] 1 Ch. 574 (C.A.) (will). Canada: *Boskovich v. Steen*, [1942] 1 D.L.R. 386, 1 W.W.R. 15, aff'd [1942] 2 D.L.R. 775, 1 W.W.R. 866 (Man. C.A.) (Fatal Accidents Act, R.S.M., 1940, c. 74, now R.S.M., 1954, c. 84); *Staicue v. Chatwin* (1955), 15 W.W.R. 222 (B.C.S.C.) (Families' Compensation Act, R.S.B.C., 1948, c. 116, now R.S.B.C., 1960, c. 138).

²⁹ *Supra*, footnote 2.

³⁰ *Supra*, footnote 6, at pp. 239 (Ch.), 113 (All E.R.).

³¹ Cf. Lord Morton, *supra*, footnote 2, at pp. 459 (A.C.), 812 (All E.R.).

within one particular class.³² In reaching their conclusions both Lord Evershed M.R. and Lord Cohen relied on the case of *In Re Trenchard*.³³ That case is not of any great assistance for, while stated by Buckley J. to be an exercise of the "compromise" jurisdiction, the exact nature and scope of the jurisdiction was not argued or defined and it gives no solid support to the Court of Appeal or Lord Cohen. Considered on their merits the conclusions of the Court of Appeal are defective for uncertainty and those of Lord Cohen are without logical foundation. The latter would have provided a ground for rationalizing previous decisions but for reasons which certainly do not appear in the decisions themselves.³⁴ The distinction does not rest on any recognizable principle and is highly artificial—it smacks of distinguishing for the sake of distinguishing. Fundamentally each of the arrangements varies undisputed rights. The fact that in one case these are rights of classes and in the other rights of members of a particular class appears beside the point.

The second alternative to that adopted by the House of Lords was propounded by Denning L.J. in the Court of Appeal. He defined compromises as "arrangements between beneficiaries about their beneficial interests whereby these interests are changed and distributed between them differently from the directions of the settlor or the testator".³⁵ To support this conclusion Denning L.J. relied on three cases. From two of these cases, *Inwood v. Twynne*³⁶ and *Brooke v. Lord Mostyn*³⁷ he cited dicta which do

³² *Ibid.*, at pp. 473-474 (A.C.), 821 (All E.R.). Lord Cohen's position may be illustrated as follows. Suppose there is a trust the income of which is to be divided equally among the settlor's children, with remainder over to his grandchildren. Any arrangements about their interests between the income beneficiaries, as a class, and the remaindermen, as a class, would constitute a compromise. However an arrangement made by either group *inter se* would not be so regarded.

³³ [1902] 1 Ch. 378, [1900-3] All E.R. Rep. 289 (Ch.D.). In this case a widow had the use of a house for life, the estate to pay all expenses. It was proposed that she release this right in return for an annual payment of £275. Buckley J. approved this as a compromise of her rights.

³⁴ The following cases involved the re-arrangement of rights between various classes of beneficiaries: *In Re Trenchard*, *ibid.*; *In Re Duke of Leeds*, [1947] Ch. 525, [1947] 2 All E.R. 200 (Ch.D.); *In Re Lucas*, [1947] Ch. 558, [1947] 2 All E.R. 213 N. (Ch.D.); *In Re Downshire's Settled Estates*, [1953] Ch. 218, [1953] 1 All E.R. 103 (C.A.); *In Re Blackwell's Settlement Trusts*, [1953] Ch. 218, [1953] 1 All E.R. 103 (C.A.); *Chapman v. Chapman*, *supra*, footnote 2, involved the re-arrangement of the rights of a particular class. Prior to Lord Cohen's judgment the cases had made nothing of the suggested distinction.

³⁵ *Supra*, footnote 6, at pp. 273 (Ch.), 134 (All E.R.).

³⁶ [1762] Amb. 417, at p. 418 (Lord Hardwicke L.C.). "It was said that the nature of an infant's estate cannot be changed . . . ; the court has often changed it for the convenience of the infant . . . when it is manifestly

³⁷ See following page.

not appear to be in point and the third case was, once again, *In Re Trenchard*.³⁸ But as we have observed, this case could be of assistance only insofar as the actual result was concerned, and in it no attempt was made in the arguments or in the judgment to assess the exact nature of the jurisdiction.

So far as opposing authority was concerned, there was, therefore, little which could be of service in disputing the conclusion of the majority in the House of Lords. On the other hand, apart perhaps from the case of *In Re Wells*³⁹ in which Farwell J. in a judgment considering the issue in some detail, arrived at a conclusion as to the applicability of the compromise jurisdiction which was in conflict with the result in *In Re Trenchard*,⁴⁰ there was no authority which specifically supported the proposition that a dispute was a prerequisite to the exercise of the jurisdiction.⁴¹ In the end it would seem that the main consideration which induced the House to reject the wide conception of compromise was that not to do so would result in this "exception" extinguishing the general rule (against variation on the ground of benefit to the beneficiaries) that they had previously laid down. This reason-

for the advantage or convenience of the infant. The court has done it in many cases, in making compositions, and often contrary to the direction of the donor or testator" Denning L.J. quoted only the *last* sentence of this passage: see *ibid.*, at pp. 273 (Ch.), 134 (All E.R.). In its context it is easily seen that the dictum refers to conversion.

³⁷ (1864), 2 De G.J. & S. 373 (L.J.J.). "That this court has the power to compromise rights and claims of infants and persons under disabilities when these rights are merely equitable has not and cannot be disputed. It is a power which has been continually exercised by the court and results almost necessarily from the jurisdiction which the court exercises over trustees. In the exercise of that jurisdiction the court may in general order the trustees to deal with the trust property in whatever mode it may consider to be for the benefit of the cestui que trust" At best this indicates that in the exercise of the compromise jurisdiction the courts act for the benefit of the infant; but it still leaves unanswered the question of whether a dispute is also a necessary prerequisite.

It should be noted that *Brooke v. Lord Mostyn* was reversed on appeal but on grounds irrelevant in the present context: (1866), L.R. 4 H.L. 304.

³⁸ *Supra*, footnote 33.

³⁹ [1903] 1 Ch. 848 (Ch.D.). The majority of the Court of Appeal attempted to explain *In Re Wells*, but in a rather unsatisfactory way: *supra* footnote 6, at pp. 242-243 (Ch.), 114-116 (All E.R.).

⁴⁰ *Supra*, footnote 33.

⁴¹ It was generally accepted that over a period of about fifty years the wide compromise jurisdiction had been exercised in Chambers; only Lord Simonds was inclined to question the matter: *supra*, footnote 2, at pp. 447 (A.C.), 803 (All E.R.). Lord Morton, ignoring the thesis that long established bad law should be accepted as law, took the view that the courts could not establish a jurisdiction by merely asserting and exercising it and, in any event, there being no reports of the Chamber proceedings, it was impossible to determine either the exact circumstances of the cases or the reasons for the court's decision: *Ibid.*, at pp. 464 (A.C.) 815-816 (All E.R.).

ing is fallacious owing to the misclassification of the "compromise" power as an exception to a rule of trust law. As we have seen it is an entirely separate jurisdiction, and it is erroneous to restrict its operation in this manner. If authority had shown the wide concept of compromise to be valid the fact that this achieved the same result as the rejected equitable jurisdiction was of itself no reason for rejecting it. An argument in the alternative must be met on more substantial grounds.

Thus the House of Lords had no strong authority for restricting the exercise of the compromise jurisdiction to circumstances where a dispute exists, nor were the reasons advanced to support the principle totally convincing. Two matters ignored by the House might have strengthened their case. Firstly, it is significant that in every case where a compromise has been approved it has represented the settlement of a dispute.⁴² The precise point at issue in the *Chapman* case was not, of course, argued, but nonetheless such a line of cases is of some persuasive authority. Secondly, the concept of compromise in other fields might have been referred to; for example, a reference to company law would have shown that there "compromise" and "dispute" went together.⁴³

There is no doubt therefore that the rule laid down by the House of Lords is correct; a compromise must be based on a dispute. "Dispute" should not however be used in too restricted a sense, for there are two situations in which it will be proper to exercise the jurisdiction, although there is no positive disagreement as to rights. The first is where there is some area of doubt which is a potential source of disagreement and the parties agree to an amicable solution without "battle lines" ever being drawn. There does not appear to be a case in point, but it is suggested that the settlement in such a manner of a doubt, which carries with it the germ of a dispute, would at least fall within the spirit if not the language of *Chapman v. Chapman*.⁴⁴

The second analogous situation is where there is no dispute or

⁴² See the cases cited footnote 28 *supra*.

⁴³ *Follit v. Eddystone Granite Quarries*, [1892] 3 Ch. 75 (Ch.D.); *Mercantile & General Trust Co. v. International Co. of Mexico*, [1893] 1 Ch. 484 (C.A.); *Mercantile Investment Co. v. River Plate Co.*, [1894] 1 Ch. 578 (Ch.D.); *Sneath v. Valley Gold*, [1893] 1 Ch. 477 (C.A.); *In Re Stocks Ltd.* (1909), [1912] 2 Ch. 134 N. (Ch.D.); *Northern Assurance Co. v. Farnham Ltd.*, [1912] 2 Ch. 125 (Ch.D.); *Re Guardian Assurance Co.*, [1917] 1 Ch. 431 (C.A.).

⁴⁴ *Supra*, footnote 2. Some of the passages in *In re Powell Cotton's Settlement*, [1956] 1 W.L.R. 23, [1956] 1 All E.R. 60 (C.A.) might be read as refuting this suggestion; but if the court in that case refused to exercise the compromise jurisdiction in the case of a doubt, it was because the doubt was not genuine: see *infra*.

even a doubt as to rights but there is some difficulty in enforcing them. *Brooke v. Lord Mostyn*⁴⁵ dealt with such a set of circumstances. In that case there were trusts of real estate for a term of 500 years to raise such monies as would, *inter alia*, pay a legacy of £20,000 to A. When the testator died his estates were so heavily encumbered that it was uncertain when, if at all, payment would be made. On her marriage A settled the legacy on herself, her husband and children, and subsequently an action was commenced, an infant child being one of the plaintiffs, seeking payment of the legacy. The defendant offered to secure £20,000 for the settlement in another way in return for a release of the claim against the trust estate. The plaintiffs were advised that in view of the nature and extent of the liabilities affecting the estate of the testator, the suit could not be prosecuted without very great delay and expense and that even then probably no part of the legacy would ultimately be recovered. The legal rights of the parties were not really in dispute, but the problem was whether in the end there would be anything left to satisfy them. Accepting the advice that there probably would not, the petitioners, instead of embarking on the difficult if not impossible task of asserting their legal rights to the full, agreed instead to the settlement proposed by the defendant. This settlement was approved by the court on behalf of the infants, and, although no dispute as to rights was involved, the case may be taken as representing a valid exercise of the compromise jurisdiction.

It is important to note however that although the courts are prepared to approve on behalf of infant and other incompetent beneficiaries agreements which settle disputes and what we may call difficulties or doubts, even though this may incidentally vary a trust, this jurisdiction is necessarily limited to approving *bona fide* compromises arising out of *bona fide* disputes, doubts or difficulties. This requirement of *bona fides* prevents the compromise jurisdiction being misused to achieve an otherwise impossible variation of a trust. Beneficiaries may attempt to arrange a "sham" dispute⁴⁶ and on this basis arrive at a compromise which achieves their desired end; or, given a genuine or "sham" dispute, the compromise may hardly be *bona fide* in that it travels well beyond what was necessary to settle the dispute. The attitude of the courts to both these situations is illustrated by *In Re Powell Cotton's Settlement*.⁴⁷

⁴⁵ *Supra*, footnote 37.

⁴⁶ Using that word to cover all the situations just referred to.

⁴⁷ *Supra*, footnote 44.

In that case it was alleged there was a doubt as to the interpretation of the investment clause of a trust, and the beneficiaries who included infants, compromised an action for its construction by substituting a "modern" clause for one which had been rather outdated and restrictive in character. The Court of Appeal upheld Danckwerts J. in refusing to grant his approval. In the first place they were agreed that what was before the court was really a "dressed-up" dispute. That being so they considered that the case did not fall within the spirit of *Chapman v. Chapman*⁴⁸ which they took as requiring an actual as opposed to a fake dispute to be shown. But even if the dispute had been genuine the court still would have withheld its approval, for the substitution of the new investment did not constitute a *bona fide* compromise of the doubt concerning the old. Lord Evershed M.R. thought this an extremely strong point. "I, for my part, prefer to base my own conclusion in rejecting this appeal on the second ground; namely that if it could be said that there was a question being compromised nevertheless I would feel unjustified in interfering with the view which the judge took in his discretion that to substitute an entirely modern investment clause for that which was found in the settlement was not the right way of treating the matter."⁴⁹

In conclusion therefore, it is submitted that the compromise jurisdiction is not to be regarded only as an aspect of the law of trusts. It is of some importance in the latter context in that its exercise may incidentally vary the terms of a trust. It cannot however be used or misused for the sole purpose of achieving that end. The court will only act if a genuine dispute, doubt or difficulty is settled by a genuine compromise and this compromise is shown to be for the benefit of those on whose behalf approval is being given. The variation of a trust will be an incidental result.

C. Emergency.

(i) *Nature of the jurisdiction.*

The emergency jurisdiction is quite clearly an exception to the rule that the courts will not vary the terms of a trust.⁵⁰ The leading

⁴⁸ *Supra*, footnote 2.

⁴⁹ *Supra*, footnote 44, at pp. 27 (W.L.R.), 62 (All E.R.).

⁵⁰ The courts also recognize a "salvage" jurisdiction where realty is concerned: *Glover v. Barlow* (1831), 21 Ch.D. 788 N. (Shadwell V.C.); *Dunne v. Dunne* (1855), 3 Sm. & Giff. 22 (Stuart V.C.); *Dent v. Dent* (1862), 30 Beav. 363 (Romilly M.R.); *Frith v. Cameron* (1871), L.R. 12 Eq. 169 (Malins V.C.); *In Re Jackson* (1882), 21 Ch.D. 786 (Ch.D.); *Conway v. Fenton* (1888), 40 Ch.D. 512 (Ch.D.); *In Re De Teisser's Settled Estates*, *supra*, footnote 11; *In Re Montagu*, [1897] 2 Ch. 8 (C.A.); *In Re Willis*, [1902] 1 Ch. 15 (C.A.). This is essentially the same as the emergency

formulation of the doctrine is to be found in a passage in the judgment of Romer L.J. in *In Re New*.⁵¹ Having stated the basic rule he continued:

But in the management of a trust estate and especially when that estate consists of a business or shares in a mercantile company, it not infrequently happens that some peculiar state of circumstances arises for which provision is not expressly made by the trust instrument and which renders it most desirable, and it may be even essential, for the benefit of the trust estate and in the interests of all the cestuis que trust that certain acts should be done by the trustees which in ordinary circumstances they would have no power to do. In a case of this kind, which may reasonably be supposed to be one not foreseen or anticipated by the author of the trust where the trustees are embarrassed by the emergency that has arisen and the duty cast upon them to do what is best for the estate, and the consent of all the beneficiaries cannot be obtained, by reason of some of them not being *sui juris* or in existence then it may be right for the Court, and the Court would in proper cases have jurisdiction, to sanction on behalf of all concerned such acts in behalf of the trustees as we have above referred to.

In the United States, where the same doctrine exists,⁵² some of the cases attempt to rationalize it on the basis of the settlor's intent.⁵³ In England the courts have been content to rely on the mere fact of necessity as sufficient justification for the jurisdiction. This is the more tenable position for to talk in terms of intention is to indulge in blatant fiction. The emergency confronting the trust was probably not foreseen by the settlor.⁵⁴ At best the courts meet it by doing what he might have done; more often they are authorizing what they feel he ought to have done. Any lapse into the language of intent is something in the nature of a salve for the judicial conscience and, more importantly, may lead to the situation where an originally fictional intent may come to be regarded by some as real. It is safer and more realistic to accept the fact that necessity calls for immediate action.

jurisdiction. Some of the cases might be interpreted as resting on the courts' powers over infants; cf. the leading case *Re Jackson*, *supra*. While this is a moot point, it is clear that emergency is the sole ground for the exercise of the jurisdiction.

⁵¹ [1901] 2 Ch. 534, at pp. 544-545, [1900-3] All E.R. Rep. 763, at pp. 768-769 (C.A.) This passage was cited with approval by Lord Morton in *Chapman v. Chapman*, *supra*, footnote 2, at pp. 453 (A.C.), 808-809 (All E.R.).

⁵² The leading case is *Curtis v. Brown* (1862), 29 Ill. 201. See Scott on Trusts (2nd ed., 1956), Vol. II, Sec. 167.

⁵³ Cf. *Curtis v. Brown*, *ibid.*; *Pennington v. Metropolitan Museum of Art* (1903), 65 N.H. Eq. 11, at p. 22, 55 Atl. 468, at p. 472.

⁵⁴ Indeed that the settlor should not have foreseen the emergency is probably one of the elements of the jurisdiction: see *infra*, *et seq.*

(ii) *The scope of the jurisdiction.*

Altogether there are five matters to be taken into account in a discussion of the scope of the emergency jurisdiction. Two of these are well established limitations on its operation, the importance of two more has not yet been precisely determined, and as for the fifth, although the contrary can be argued, it is suggested that it should not be regarded as affecting the exercise of the jurisdiction.

In the first place, as its name implies, before the court may act it must be shown that an emergency exists. No "test" of emergency has been formulated, but it is clear that only in a compelling case will the court be prepared to intervene. In England the question used to arise where on the organization of a partnership into a company or on a company reconstruction, trustees were faced with the alternative of disposing of valuable assets or of accepting shares which were not trustee investments. In some instances despite the obvious advantages of permitting the trustees to accept such investments, the court refused to sanction this, even on a temporary basis.⁵⁵ In the leading case *In Re New*⁵⁶ the court did however conditionally approve such a course of action. In that case on a company reconstruction for every £100 share they held shareholders were to be given ten £10 preference shares, ten £10 ordinary shares and one £100 debenture. The trustees of the settlement were not authorized to invest in any of these securities and applied to the court for permission to accept and retain them. The Court of Appeal authorized them to do so, but subject, in the first place, to further evidence being produced of "the difficulties that will arise if the trustees are obliged to stand aloof and taking no part in any reconstruction",⁵⁷ and in the second place, to their applying for further power to retain if the securities were not disposed of within a year. The court therefore would only deviate from the terms of the trust if a "difficulty" was clearly shown to exist and even then the deviation was to be as short-lived as possible. The judicial attitude was thus one of extreme caution and yet in a later case *In Re New*⁵⁸ was stated to be the "high-water mark"⁵⁹ of the emergency jurisdiction.⁶⁰

⁵⁵ *In Re Crawshaw* (1888), 60 L.T. 357 (Ch.D.); *In Re Morrison*, [1901] 1 Ch. 701 (Ch.D.).

⁵⁶ *Supra*, footnote 51.

⁵⁷ *Ibid.*, at pp. 546 (Ch.), 769 (All E.R. Rep.).

⁵⁸ *Supra*, footnote 51.

⁵⁹ Per Cozens-Hardy M.R. in *In Re Tollemache*, [1903] 1 Ch. 955, at p. 956 (C.A.).

⁶⁰ The specific problem of company reconstruction has been dealt with in some jurisdictions by statute: *infra*, Part II.

Even more restrictive has been the attitude of the English courts in the "salvage" cases.⁶¹ These usually involved applications by trustees to use capital moneys for the erection, rebuilding or repair of trust realty. In the leading case of *In Re Jackson*,⁶² Kay J. stressed that the court would grant such authority only where it was shown to be absolutely necessary for the preservation of the trust property that some action should be taken. In effect the jurisdiction has been confined to the use of capital for the purpose of repair⁶³ and then only in the most exceptional case. *In Re De Teisser's Settled Estates*⁶⁴ well illustrates the rigidity of the position. There a house forming part of a trust estate was admittedly uninhabitable and no provision for repair had been made in the trust instrument. The court however felt there was no danger of any permanent damage to the inheritance and therefore no justification for resorting to the salvage principle.⁶⁵

The second limitation on the emergency jurisdiction is that it may be used only for the purpose of authorizing deviations from the *administrative* provisions of a trust. Although the point did not come up for decision in *In Re New*⁶⁶ this is the implication to be drawn from the language in which Romer L.J. there stated the nature of the jurisdiction and eventually this was the position adopted by the Court of Appeal in *In Re Downshire Settled Estates*.⁶⁷ In that case, and in its two companion cases,⁶⁸ it was argued that the court could in pursuance of the emergency jurisdiction authorize a re-writing of the beneficial interests under the three trusts involved. The majority of the Court of Appeal rejected this contention. The emergency jurisdiction, Lord Evershed M.R. stated, enabled the court to "confer upon trustees, quoad items of trust property vested in them, administrative powers . . . where a situa-

⁶¹ See cases cited footnote 50, *supra*.

⁶² *Supra*, footnote 50. This, a decision at first instance, was approved by the Court of Appeal in *In Re Montagu*, *supra*, footnote 50.

⁶³ And in two instances the completion of buildings in the course of execution at the time of the testator's death: *Hibbert v. Cooke* (1824), 1 Sim. & St. 552 (Leach V.C.); *Dent v. Dent*, *supra*, footnote 50. On the other hand applications to use capital to erect buildings contemplated by the testator, or to totally reconstruct existing buildings have generally been refused: *Dent v. Dent*, *supra*; *In Re Montagu*, *supra*, footnote 50.

⁶⁴ *Supra*, footnote 11.

⁶⁵ Again in some jurisdictions statute law has alleviated this particular problem, see *infra*, Part II.

⁶⁶ *Supra*, footnote 51, at pp. 544-545 (Ch.), 768 (All E.R. Rep.). His remarks were prefaced by the phrase: "In the management of a trust estate . . ."

⁶⁷ *Supra*, footnote 34, at p. 235 (Ch.), 110-111 (All E.R.).

⁶⁸ *In Re Chapman's Settlement Trusts*; *In Re Blackwell's Settlement Trusts*, *supra*, footnote 6.

tion has arisen in regard to the property . . . creating what may be fairly called an 'emergency' The power or jurisdiction does not, in our view, extend to changes or re-arrangements of the beneficial interests *inter se* under the trust, as distinct from re-arrangements or reconstructions of the trust property itself".⁶⁹

We now turn to the two factors whose existence as limitations on the jurisdiction has not yet been specifically recognized by the courts. Firstly, it may be that in so far as the courts may act to vary administrative provisions of a trust, they are confined to authorizing a specific deviation as opposed to any re-writing of the trust instrument. The judgment of Romer, L.J. in *In Re New*⁷⁰ can be taken as an indication that this was how he regarded the jurisdiction and the nature of the order made by the court supports this conclusion; for, it will be remembered, while the trustees were permitted to take the unauthorized investments, their holding them was to be reviewed at the end of a year. It may be implied then that the jurisdiction is envisaged as being limited to permitting a specific deviation to combat a specific emergency. If this be so it affords no assistance to the beneficiary who is searching to procure an actual re-writing of his trust instrument, and this result would be quite consistent with the conception of the jurisdiction as a reluctantly granted exception to the general rule against variation. On the other hand it may well be that the only legitimate inference from *In Re New* is that the courts will not travel further outside the terms of the trust instrument than dealing with the emergency requires. Given a situation which could only be remedied by a re-writing of some of the administrative terms, perhaps the courts would not hesitate to do so; but it is significant that this has not yet been done.

It probably also is the case that if the settlor, having foreseen the possibility of the situation which created the emergency developing, either made no or inadequate provision for it, then the emergency jurisdiction may not be invoked. Again there is no direct authority, but Romer L.J. in *In Re New*⁷¹ and Evershed M.R.

⁶⁹ *Ibid.*, at pp. 235 (Ch.), 111 (All E.R.). When the *Chapman* case was appealed to the House of Lords, this point was not specifically dealt with, but it may be implied that the view expressed by the Court of Appeal was taken as correct: see Lord Simonds, *supra*, footnote 2, at pp. 445 (A.C.), 802 (All E.R.); Lord Morton, *ibid.*, at pp. 456 (A.C.), 810 (All E.R.), where he described the maintenance jurisdiction as the only exception to the rule against re-writing beneficial interests.

⁷⁰ *Supra*, footnote 51.

⁷¹ *Ibid.*, at pp. 545 (Ch.), 768 (All E.R. Rep.). Romer L.J. there stated that the situation creating the emergency "may reasonably be supposed to be one not foreseen or anticipated by the author of the trust".

in *In Re Downshire Settled Estates*⁷² both stated that generally it was to be expected that the settlor would not have foreseen the emergency which had developed; though neither judge specifically made this a necessary element in the exercise of the jurisdiction. But remembering again the extraordinary nature of the jurisdiction and the premise that the expressed intent of the settlor inimical though it may be to the interests of the beneficiaries, must prevail, it is a logical conclusion and one which, it is suggested, the courts would probably accept.⁷³ It would then follow that although the facts of the case clearly disclosed an emergency, the court could not act to help the beneficiaries.

If the courts should in fact adopt this position one possible "loophole" is in the finding of fact that the settlor did foresee the circumstances in which the court is asked to act. If the trust instrument clearly indicates that the effect of the specific situation was foreseen and appreciated in full by the settlor and provision made to deal with it the court is probably powerless. But it would be unusual for a trust instrument to be so specific. If the court does in fact find that the settlor did foresee the emergency or the type of emergency which has arisen, and that he has not, in its opinion, made adequate provision for it, it could be found as a further fact that he did not really foresee the full consequences or danger of the emergency and this then might open the door for judicial intervention. If the trust instrument discloses no attempt to deal with the emergency, it is easy to draw the conclusion that the settlor did not foresee it. It may be, therefore, that even if the courts do apply this "foresight" rule it will not really represent too great a restriction on the jurisdiction.

We now come to the fifth point requiring discussion and the one which, it is suggested, ought to be discounted. It may often happen that the course of action which the court is asked to sanction has been expressly or impliedly prohibited in the trust instrument. If the prohibition be implied this appears to impose no restriction on the court. Thus in *In Re New*,⁷⁴ where the terms of the investment clause impliedly ruled out the investments the court was asked to authorize, this was not considered as being of any importance once it was established an emergency existed. On the other hand if there be an express prohibition, the courts might be

⁷² *Supra*, footnote 34, at pp. 234 (Ch.), 110 (All E.R.). Lord Evershed M.R. said the court could act in an emergency "particularly [in] a situation not originally foreseen".

⁷³ This rule is in fact clearly recognized in the United States: see e.g. *Pennington v. Metropolitan Museum of Art*, *supra*, footnote 53.

⁷⁴ *Supra*, footnote 51.

more reluctant to act. There is no English or Canadian authority in point, but in the United States, where on the whole the courts are much more attentive to the intent of the settlor, such an express prohibition has not prevented an exercise of the jurisdiction.⁷⁵ One United States court has put the matter as follows: "Although the settlor has expressly forbidden the course of action to be pursued, the judicial theory is that he would not have forbidden it but on the contrary would have authorized it, had he envisioned the eventual circumstances."⁷⁶ It will be noticed that this dictum assumes that the settlor has not foreseen the emergency. Given this assumption, this approach appears sound. If in an emergency the court is going to take it upon itself to deviate from the terms of a trust, *ipso facto* any prohibition, express or implied, being merely another term of the trust, is liable to be ignored.

To summarize the position, the emergency jurisdiction will only operate in a situation which demands action to preserve the trust intact. It is further restricted to dealings with the administrative provisions of a trust and cannot be used to change beneficial interests. Moreover probably only a specific deviation as opposed to any re-writing of the trust terms can be authorized by the courts, though a better way of expressing this may be to say that the courts will not go further than is necessary to meet the emergency and generally this merely involves a single deviation. A further limitation is that if the settlor has foreseen the difficulty with which the court is asked to deal and he has ignored or inadequately provided for it, then the court is powerless to act. On the other hand a general prohibition in the trust instrument against the specific course of action the court is asked to approve will not prevent the court from acting, provided the other prerequisites for the exercise of the jurisdiction are satisfied. It is, then, a much restricted jurisdiction, operating within a narrow sphere. So far as is possible it retains inviolate the intent of the settlor and certainly affords no assistance to the beneficiary who is seeking what would be for him a more advantageous application of the trust property.

D. Maintenance.

(i) Nature of the jurisdiction.

⁷⁵ See the leading New York decision *In Re Pulitzer's Estate* (1931), 249 N.Y.S. 87, aff'd (1932), 237 App. Div. 260, 260 N.Y. 975.

⁷⁶ *Lambertville National Bank v. Bumster* (1948), 141 N.J. Eq. 396, at p. 399, 57 A. 2d 525, at p. 527. Among the authorities referred to in this case are *In Re New*, *supra*, footnote 51 and *In Re Tollemache*, *supra*, footnote 59.

In *Chapman v. Chapman*⁷⁷ Lord Morton stated that the "maintenance jurisdiction" was the "only real exception" to the rule that the court could not alter the beneficial interests under a trust. In the exercise of this jurisdiction the courts may appropriate income, directed by the settlor to be accumulated or used to pay debts, for the benefit of beneficiaries whose interests may range from a life tenancy to that of a vested but defeasible absolute interest.⁷⁸ The result is to give to a beneficiary property to which he should either never be, or at least is not immediately, entitled. To apply for the benefit of a life tenant income which was to be accumulated is to take it from the ultimate absolute owner and give it to someone who by the terms of the trust could never get it; to pay such income to the owner of a contingent absolute interest is to permit him to enjoy property to which he is only rightly entitled if the contingency is satisfied.

The generally accepted rationale of this extraordinary doctrine is that the court is carrying out a presumed intent on the part of the settlor that the beneficiaries should not only not starve, but that they should also be properly maintained while awaiting the bounty he has provided for them. *Havelock v. Havelock*,⁷⁹ the leading English case, is a good illustration of the judicial approach. The testator there gave property to trustees, directing that the income should be accumulated for a period of twenty one years, and that the property should then be held for H for life, for his eldest son for life and on his death to his first and every son in tail male, with similar trusts for the second son and further limitations over. The two sons sought payment out of the income in order that they might educate themselves for the position to which their interests under the trust would eventually entitle them. Their father, it was alleged, had not the means to provide such an education. The court granted the application, Malins V. C. stating: "I believe it would have been the intention of the testator if his attention was called to the facts to have done what I am about to do."⁸⁰ This

⁷⁷ *Supra*, footnote 2, at pp. 456 (A.C.), 810 (All E.R.).

⁷⁸ England: *Revel v. Watkinson* (1748), 1 Ves. Sen. 93 (Lord Hardwicke L.C.); *Greenwell v. Greenwell* (1800), 5 Ves. 194 (Lord Loughborough L.C.); *Havelock v. Havelock* (1800), 17 Ch.D. 807 (Ch.D.); *In Re Collins* (1886), 32 Ch.D. 229 (Ch.D.); *In Re Walker*, [1901] 1 Ch. 879 (Ch.D.). Canada: *Re Wright*, *supra*, footnote 3. *Re McCallum* (1956), 2 D.L.R. (2d) 618 (Ont. H.C.) was decided on the basis of the maintenance jurisdiction. There was, however, no trust in the case and perhaps it is rather an example of the analogous jurisdiction to award maintenance out of a direct gift. *Contra: Re Waddell* (1902), 34 N.S.R. 435 (S.C.).

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*, at p. 813. (Emphasis supplied).

case was followed in *In Re Collins*⁸¹ and the latter case was specifically approved in *Chapman v. Chapman*.⁸²

A second explanation of the basis of the jurisdiction is to be found in *In Re Walker*.⁸³ There Farwell J., having affirmed the basic proposition that the court will not alter the terms of a will, continued: "But in considering the true construction of the will it is open to the court to ascertain if there be a paramount intent in the will and if so to consider whether particular directions are properly to be read as subordinate to such paramount intention or are to be treated as imperative positive provisions."⁸⁴ In the case before him Farwell J. was able to find a paramount intention that the trust estate be adequately maintained and the infant tenant in tail appropriately educated. This intention overrode a direction for accumulation and so income was made available for those two purposes. The learned judge purported to explain two earlier cases on this "construction" basis, but it is suggested that they were in fact decided on the grounds of presumed intent.⁸⁵ It might be more palatable if it could be said that all that was being done in these cases was the carrying out of the intent of the settlor as found on the straightforward interpretation of the trust instrument. It is, however, more accurate to admit that the court is really doing what it thinks the settlor ought to have done.⁸⁶ Moreover Farwell's J. theory leads us unnecessarily into the realm of fiction and on the whole the explanation of the maintenance jurisdiction on the ground of presumed intent is the one to be preferred.

(ii) *The scope of the jurisdiction.*

The scope of the jurisdiction is limited in three ways. The first

⁸¹ *Supra*, footnote 78.

⁸² By Lord Morton: *supra*, footnote 2, at pp. 455-456 (A.C.), 810 (All E.R.). Lord Morton quoted a passage from the judgment of Pearson J. in *In Re Collins*, *ibid.*, in which that learned judge laid some emphasis on the fact that the testator was making provision for a family. This point was relied on in *Havelock v. Havelock*, *supra*, footnote 78. It is thought that the fact that provision is being made for a family makes it easier for the court to find the presumed intent. There is nothing in any of the cases which would suggest it is a necessary prerequisite to the exercise of the jurisdiction.

⁸³ *Supra*, footnote 78.

⁸⁴ *Ibid.*, at p. 885.

⁸⁵ The cases referred to were *Revel v. Watkinson*, and *In Re Collins*, *supra*, footnote 78. The latter case we have already referred to, *supra*; it is clear that *Revel v. Watkinson* was decided on the grounds of "presumed intent".

⁸⁶ Cf: (i) *Revel v. Watkinson*, *ibid.*, where Lord Hardwicke said: "The court will not in favour of a remainderman, suffer all the surplus profits to be exhausted to discharge the interest in exoneration of the estate and leave the daughter and heir at law to starve" (Emphasis added); (ii) *Havelock v. Havelock*, and *In Re Collins*, *supra*, footnote 78, where the court emphasized its dislike of accumulations, a factor which was of some importance.

of these may be referred to as the "content" of the intent imputed to the settlor. It is presumed that, pending the vesting in possession of the interests of the beneficiaries, he did not intend them to starve and further that he intended they should be maintained in a position appropriate to their expectations under the trust.⁸⁷ If a beneficiary seeks to invoke the jurisdiction on the ground of starvation, this should not cause too great difficulty from the standpoint of assessing the validity of his allegations; the judicial attitude to a plea of inappropriate maintenance, a more difficult matter to judge, can be best illustrated by a reference to *Havelock v. Havelock*⁸⁸ and the Canadian case of *Re Wright*.⁸⁹

In the first⁹⁰ of these cases the father of the two brothers, on whose behalf an application for maintenance out of accumulated income was made, was a Major-General and a Member of Parliament, a man of moderate but not unsubstantial means. There was certainly nothing in the nature of starvation or similar emergency facing his two sons. However, they were prospective life tenants of an estate worth ten thousand pounds a year and he could not maintain them to that level. The court had no hesitation in awarding them maintenance appropriate to their expectations; indeed, having been allowed two thousand seven hundred pounds per year they were left at liberty to apply for more.

In *In Re Wright*⁹¹ the testator left a net estate of \$4,000,000.00 to trustees to pay out of the income for a period of twenty-one years after his death \$150.00 per quarter to those of the "main beneficiaries" who should be under twenty-five and \$300.00 per quarter to those over that age, the surplus income to be accumulated. The main beneficiaries were the sister of the testator, three of her four children and all the lineal descendants of these children living at the testator's death or born before the final distribution of the estate. At the end of the twenty-one year period the income of the property was to be divided among the main beneficiaries during their respective lives, those over twenty-five taking double the income of those under that age. In addition each beneficiary was to receive out of capital the sum of \$10,000.00 on attaining

⁸⁷ "The authorities indicate that in the past maintenance has been decreed either on the basis of necessity in the literal sense [the starvation cases such as *Revel v. Watkinson*, *ibid.* and *Greenwell v. Greenwell*, *supra*, footnote 78] or to provide such maintenance and education for those who will probably benefit so as to enable these persons to assume properly and intelligently the position intended for them": *Re Wright*, *supra*, footnote 3, at pp. 762 (O.R.), 220 (D.L.R.).

⁸⁸ *Supra*, footnote 78.

⁸⁹ *Supra*, footnote 3.

⁹⁰ See *supra* for a complete statement of the facts.

⁹¹ *Supra*, footnote 3.

the ages of twenty-five, thirty, thirty-five and fifty and the sum of \$5,000.00 in attaining the ages of forty and forty-five. Twenty-one years after the death of the last survivor of the main beneficiaries born before the testator's death or if and when the last survivor of the main beneficiaries should have died, whichever should happen first, the capital was to be distributed equally among the main beneficiaries then living, with the remainder over to the Salvation Army, Toronto.

At the testator's death there were fifteen beneficiaries, whose ages then ranged from seventy-one to one approximately. An application was made on their behalf to have their income trebled during the twenty-one year period of accumulation. None of the beneficiaries could plead necessity and so they based their suit on the fact that they had not sufficient funds to maintain themselves in a manner appropriate to their expectations under the trust. Gale J. estimated that the ultimate distribution of the capital would not take place for about ninety years. Because of their ages at the death of the testator, the sister and her three children had no chance of sharing in this distribution.⁹² As for the income of the trust fund after the twenty-one year period of accumulation they would share it only for a very short period, if indeed they lived to receive any of it at all. It was thus extremely doubtful if they would receive any of these benefits from the trust and the court could not therefore grant them maintenance to prepare them for a financial status they would never attain. In any event, they were entitled to share immediately in the various interim capital payments⁹³ and after the twenty-one year period of accumulation would each receive for life an estimated annual income of \$16,500.00 each. The trust, therefore, did adequately provide for them, even if they did share in the distribution of the total income or of the capital. This latter reasoning applied also, Gale J. decided, to all other beneficiaries over twenty-five, and so there only remained those under that age. Having looked at their financial position,⁹⁴ the learned judge de-

⁹² At the time of the hearing two years after the death of the testator, the sister was aged seventy-five and her three children forty-nine, forty-six and forty-three. They were therefore approximately seventy-one, forty-seven, forty-four and forty-one respectively at his death.

⁹³ It should be stated that the will provided that each main beneficiary (with exception of the testator's sister) who survived the testator and was then over twenty-five, was to receive one lump sum representing all capital payments to which they would have been entitled if the testator had died just before their twenty-fifth birthday. At the date of the testator's death his sister was seventy-one. She was therefore *prima facie* entitled to \$50,000.00 but it was directed it should be held in trust to pay her the income for life. All these directions had been carried out.

⁹⁴ The beneficiaries under twenty-five could be divided into three groups,

cided they did need funds for maintenance and education and he increased their quarterly payments from \$150.00 to \$450.00; but added the proviso that his order was effective only until they reached the age of twenty-five when, as he had held, the trust itself would adequately provide for them.

Two aspects of the case are worthy of comment. In the first place it indicates that the courts are not going to award maintenance to beneficiaries who are no more than theoretical successors to benefits under the trust. To the extent that an application is based on the need for maintenance commensurate with future expectations, this approach is clearly sound; if the expectations are non-existent, so is the need. Secondly, the case provides something of a contrast with the English cases with respect to the amount of the award made. In the case of the beneficiaries under twenty-five at least, could it not have been argued that \$1,800.00 per annum allowed by the court was rather small for someone entitled to capital payments of \$50,000.00 between the ages of twenty-five and fifty, an estimated annual income of \$16,500.00 at the end of the twenty-one year period of accumulation and an ultimate share of an estate of approximately \$4,000,000.00. Certainly on a relative basis the beneficiaries in some of the English cases have done much better than this.⁹⁵ Perhaps the proper implication is that the Canadian courts are not going to be so generous in these matters as have been those in England.

The jurisdiction is probably further restricted by the fact that, as in the emergency cases, the court could not act if the settlor had foreseen the situation in which beneficiaries seek relief. The point arose indirectly in *Havelock v. Havelock*.⁹⁶ The court there thought the direction for accumulation strange and explained it on the ground that the settlor probably thought the father of the two boys would be able to maintain them adequately; this of course was not the case. This lack of foresight was not specifi-

each group representing all the children of one of the three children of the testator's sister. Group A: three children, family income over \$9,500.00; Group B: one child; family income \$17,400.00; Group C: seven children family income \$8,100.00. In making the award Gale J. drew no distinction between the differing financial conditions of the children. It might have been contended that the one child forming Group B really did not need any increase on what the testator had provided.

⁹⁵ In *Havelock v. Havelock*, *supra*, footnote 78, the two boys received £2,700 a year to maintain both of them; their prospective income if either became life tenant of the trust was £10,000 a year. In *In Re Walker*, *supra*, footnote 78 the prospective yearly income of the tenant in tail was £14,000. The court awarded altogether £4,000, £800 to be used for the upkeep of the mansion house and grounds, £3,100 for the benefit of the tenant in tail and £100 to enable him to subscribe to local charities!

⁹⁶ *Ibid.*

cally stated to be a necessary element of the jurisdiction, but was used to support the finding of "presumed intent". Conversely, if it could have been shown that the settlor did foresee the need for maintenance and still ordered an accumulation, it would have been impossible to raise this intent. It would thus appear that if the settlor foresees the need for maintenance and does nothing to meet it, the court may not act.

A variation on this problem presented itself in *Re Wright*.⁹⁷ In that case the settlor had specifically provided for payments to the beneficiaries during the period of the accumulation. Gale J. felt free to increase this sum if he considered it inadequate and cited two cases where this had been done; in neither of them however was the point argued or dealt with as a direct issue in the judgments.⁹⁸ In the analogous jurisdiction of allowing maintenance out of interest on contingent legacies given by a parent to a child, the rule is well established that maintenance will not be awarded if the testator has made other provision for it. If the maintenance so provided is thought inadequate, it is not settled whether the court may increase it, though the balance of authority is against this procedure.⁹⁹ At least it can be said that the point is not as clear as Gale J. took it to be. In *Re Wright*¹⁰⁰ the fact that the settlor had made some allowance to the beneficiaries suggests that he had considered their position and then had made such provisions as he thought appropriate. If the settlor has thus expressed his intention, it is difficult to see how the court can raise a presumed intent and on this basis alter what he has done.¹⁰¹ On this ground it can be strongly argued that maintenance should not have been awarded.

So far, the matters we have considered have not represented any great restriction on the jurisdiction. Generally the presumed intent is easily found, and the courts have not been reluctant to find inappropriate maintenance and then provide against it. The really major limitation is that maintenance may be awarded only out of income directed to be accumulated or to be used to pay

⁹⁷ *Supra*, footnote 3.

⁹⁸ *Josselyn v. Josselyn* (1837), 9 Sim. 63 (Shadwell V.C.); *In Re Walker, supra*, footnote 78.

⁹⁹ Compare *May v. Potter* (1877), 25 W.R. 507 (Ch.D.) with *In Re Colgan* (1881), 19 Ch. D. 305 (Ch.D.).

¹⁰⁰ *Supra*, footnote 3.

¹⁰¹ It might be slightly, though not appreciably easier, if one was to proceed on the basis that the exercise of the jurisdiction was merely a matter of construction. It is interesting to note that *In Re Walker, supra*, footnote 78, on which Gale J. relied, was decided on this basis; but as we have said the point with which we are dealing was not considered.

debts. Theoretically it is only a short step from there to the use of income not specifically disposed of or earmarked for such uses as the improvement of trust realty, but it is doubtful if even this step may be taken. Lord Morton in *Chapman v. Chapman*¹⁰² was careful to state the doctrine in terms of income to be accumulated or used to pay debts and it is probably to be taken that there is no room for even the narrowest expansion by analogy.

The explanation of the rather anomalous nature of the jurisdiction lies to a large extent in the attitude of Lord Eldon. Before his Chancellorship the courts were prepared to award maintenance, particularly for infants, even though this involved re-arranging the terms of a trust or a will. There thus developed not only the maintenance jurisdiction we are considering, but also the practice of the courts in awarding maintenance out of interest on contingent legacies.¹⁰³ Lord Eldon was highly critical of these doctrines and the case of *Ex Parte Keeble*¹⁰⁴ is a good illustration of his stand. In that case the residue of an estate was left to five infants, payable at twenty-one with a right of survivorship among them if any should die under that age, and if none should reach twenty-one, then to their sister. Lord Eldon refused to allow maintenance out of income which had been ordered to be accumulated. His reason was that to give to the five children any of the income would be to give them property which might never belong to them. If maintenance was awarded and all the children died under twenty-one they would have had the benefit of property which rightly belonged to their sister. There was thus the possibility that awarding maintenance "would in effect give for the maintenance of one person the property of another".¹⁰⁵

This principle was completely at odds with the maintenance jurisdiction. In the course of the nineteenth century Lord Eldon's ideas became firmly established to the extent that the courts as a general rule adhered rigidly to the terms of a will or trust. The maintenance jurisdiction was one of the few doctrines to survive this hardening of attitude and it was preserved, or indeed res-

¹⁰² *Supra*, footnote 2, at pp. 451, 455 (A.C.), 810 (All E.R.).

¹⁰³ Normally contingent legacies do not carry interest. To this rule there are three exceptions and in these three cases the courts may allow interest for the maintenance of (mainly infant) legatees. There are a multitude of cases on this rather complicated subject. For a general summary, with particular reference to gifts by testators in *loco parentis* see *In Re Jones*, [1932] 1 Ch. 642 (Ch.D.).

¹⁰⁴ (1805), 11 Ves. 604. See also: *Lomax v. Lomax* (1805), 11 Ves. 48; *Errat v. Barlow* (1807), 14 Ves. 202; *Marshall v. Holloway* (1818), 2 Swans. 432.

¹⁰⁵ *Marshall v. Holloway*, *ibid*, at p. 436.

urrected largely by the decision in *Havelock v. Havelock*.¹⁰⁶ Even then it only operated within the narrow sphere of allowing income out of accumulated income or income which was to be used to pay debts.¹⁰⁷ It has no capacity for expansion.

E. *Conclusions.*

With respect to the inherent jurisdiction, the basic rule is that the courts have no power to authorize any variation of the terms of a trust, even though this be approved by all adult beneficiaries and would be clearly beneficial to infants and other beneficiaries not capable of assenting on their own behalf to any changes. To this rule there are two exceptions. Under the emergency jurisdiction, the courts may authorize a deviation from the administrative terms of a trust if it is shown that an emergency, unanticipated by the settlor, is threatening the very existence of the trust. In the exercise of the maintenance jurisdiction the court may, out of income directed to be accumulated or to be used to pay debts, direct payments to be made to beneficiaries who will eventually receive some benefit under the trust if they are in need of money to prevent them from starving or to maintain themselves in a manner appropriate to their expectations under the trust. The conversion and the compromise jurisdictions are not to be regarded as exceptions to the general rule, but are of importance in so far as their exercise might incidentally vary the terms of a trust.

The inherent jurisdiction does not, therefore, afford any assistance to beneficiaries who wish to re-arrange their trust so as to ensure themselves greater benefits from it. They are at the mercy of the settlor, and, given that the trust provisions are not illegal or impossible, the courts, but for the two rather narrow exceptions, will enforce them to the full, even though this does not afford maximum benefit to the beneficiaries and indeed even if it proves detrimental to them.

II. *Legislation Prior to 1958.*

Before 1958, the legislation on variation of trusts could be divided into two categories. Some statutes, or, to be more accurate, sections of statutes, dealt with specific problems which the courts, in

¹⁰⁶ *Supra*, footnote 78.

¹⁰⁷ In effect one could say the awarding of maintenance out of accumulations for the only case to allow it out of income directed to be used to pay debts was *Revel v. Watkinson*, *supra*, footnote 78. The jurisdiction is then to some extent understandable if it is looked upon as an attack on accumulations, something the courts traditionally dislike.

the exercise of the inherent jurisdiction, had not been able to resolve in a satisfactory fashion. Generally the effect of this legislation was to permit variation of the administrative provisions of a trust on the ground of benefit to the trust rather than emergency. Thus, many jurisdictions had legislation dealing with difficulties arising from company re-organizations¹⁰⁸, or allowing the use of capital for improvements on a basis not permitted by the salvage jurisdiction;¹⁰⁹ and in some Canadian provinces, the court was given powers to authorize the variation of trust investments.¹¹⁰ But in addition to this type of legislation¹¹¹ some attempts were made to deal on a more general level with the whole question of variation. This legislation can be dealt with under three headings: A. Section 57, Trustee Act, 1925 and the equivalent Canadian statutes; B. Section 64, Settled Land Act, 1925; C. Section 53, Trustee Act, 1925.

A. Section 57, Trustee Act, 1925 and its Canadian Counterparts.

Section 57 of the Trustee Act, 1925 reads as follows:

(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release or other disposition, or any purchase investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

(2) The court may, from time to time, rescind or vary any order made under this section, or may make any new or further order.

¹⁰⁸ England: Trustee Act, 1925, 15 & 16 Geo. 5, c. 19, s. 10(3) and (4); B.C.: Trustee Act, R.S.B.C., 1960, c. 390, s. 22; Man.: Trustee Act, R.S.M., 1954, c. 273, s. 63(6), (7) and (8); N.S.: Trustee Act, R.S.N.S., 1954, c. 301(as am. S.N.S., 1957, c. 54, s. 3), s. 7D. The English and Manitoba legislation also enables trustees to exercise any preferential right to subscribe for shares offered in respect of any investments held by them. Alberta has legislation to this effect also: Trustee Act, R.S.A., 1955, c. 346, s. 8.

¹⁰⁹ England: Settled Land Act, 1925, 15 & 16 Geo. 5, c. 18, ss. 83 and 84; B.C.: Settled Estates Act, R.S.B.C., 1960, c. 351, s. 16; Trustee Act *ibid.*, s. 11; Ont.: Settled Estates, R.S.O., 1960, c. 369, s. 13 *et seq.* See also Trustee Act, R.S.P.E.I., 1951, c. 167 (as am. S.P.E.I., 1963, c. 33, s. 1), s. 2A(1).

¹¹⁰ B.C.: Trustee Act, *ibid.*, s. 17; N.S.: Trustee Act, *supra*, footnote 108, s. 6; Ont.: Trustee Act, R.S.O., 1960, c. 408, s. 27.

¹¹¹ It should be noted that this is not intended as a complete listing of this type of legislation.

(3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

(4) This section does not apply to trustees of a settlement for the purposes of the Settled Land Act, 1925.

With only minor differences, which do not affect the substance of the legislation, section 17 (1), (2) and (3) of the Alberta Trustee Act¹¹² and section 47(1), (2) and (3) of the Nova Scotia Trustee Act¹¹³ reproduce section 57(1), (2) and (3). Until 1956 section 54(1), (2) and (3) of the Manitoba Trustee Act¹¹⁴ was precisely the same as the corresponding sub-sections of section 57, but in that year section 54 was amended.¹¹⁵ The effect of the change will be considered after the original scope of the jurisdiction has been dealt with.¹¹⁶ New Brunswick, in section 29 of the Trustee Act,¹¹⁷ adopted only sub-section (1) of section 57, but the omission of sub-sections (2) and (3) is not really of major importance.¹¹⁸ None of the four provinces have adopted sub-section (4) of section 57. This is explicable on the ground that the sub-section is related to English legislation of which there is no Canadian equivalent; the significance of the sub-section will be discussed below. However, apart from this, and with reservations for the moment about the effect of the Manitoba amendment, we can safely proceed upon the basis that the Canadian legislation is in substance identical to that in England. In what follows, a reference to section 57 can be taken as encompassing the various Canadian sections.

The effect of section 57 has been to expand the emergency jurisdiction into what may be called an "expediency" jurisdiction. Lord Evershed M.R., speaking for the majority of the Court of Appeal in *In Re Downshire Settled Estates*¹¹⁹ stated the general nature of the power given to the court in the following terms:

In our judgment, the object of S. 57 was to ensure that trust property should be managed as advantageously as possible in the interests of

¹¹² *Supra*, footnote 108.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ An Act to Amend the Trustee Act, S.M., 1956, c. 68, s. 1.

¹¹⁶ *Infra*.

¹¹⁷ R.S.N.B., 1952, c. 239.

¹¹⁸ Of the two sub-sections, sub-section (2) is the more important. However even under the provisions of sub-section (1) a court could justify the rescission or variation of an order made under the section.

¹¹⁹ *Supra*, footnote 34, at pp. 248 (Ch.), 119 (All E.R.). See also *Re D's Settled Estates*, [1952] 2 All E.R. 603, at p. 607 (Ch.D.); *Municipal and General Securities v. Lloyd's Bank*, [1950] Ch. 212, at p. 223, [1949] 2 All E.R. 937, at p. 944 (Ch.D.); *In Re Forster's Settlement*, [1954] 1 W.L.R. 1450, [1954] 3 All E.R. 714 (Ch.D.). Denning L.J. in his dissenting judgment in the *Downshire* case dealt only with the inherent jurisdiction, as did the House of Lords in *Chapman v. Chapman*, *supra*, footnote 2.

the beneficiaries, and, with that object in view, to authorize specific dealings with the property which the court might have been unable to sanction, either because no actual "emergency" had arisen or because of inability to show that the position which called for intervention was one which the creator of the trust could not have reasonably foreseen; but it was not part of the legislative aim to disturb the rule that the court will not re-write a trust, or to add to such exceptions to that rule as had already found their way into the inherent jurisdiction.

This dictum indicates two major differences between this statutory and the inherent jurisdiction: (a) section 57 operates on the basis of advantage to the beneficiaries and not emergency and (b) under section 57 the foresight of the settlor is immaterial. On the other hand the two jurisdictions are alike in that they are confined to matters affecting administrative provisions.

The two differences between the jurisdictions reflect the general purpose which Lord Evershed M.R. attributed to the section. The rendering of the foresight of the settlor immaterial perhaps removes a minor irritant rather than a major obstacle, for, as we have seen,¹²⁰ if a court wished to exercise the emergency jurisdiction generally its effect as a restricting factor could be avoided. Nonetheless the way is now open for the court to ignore a specific provision made by the settlor, and, in a situation he clearly foresaw, authorize a contrary course of action because it would bring greater benefit to the beneficiaries.

However, the key to the carrying out of the general purpose of the section is that the court may act on the basis of expediency rather than emergency. The first extensive consideration of the nature of expediency is to be found in *In Re Craven*.¹²¹ In that case a residuary estate was held in trust, as to one moiety to apply the income on protective trusts for the benefit of a son of the testator for life, remainder to the son's children who being male should reach the age of twenty-one, or being female should reach that age or marry under it, with remainders over. A clause in the will authorized advances out of capital to the son, but only for four specified purposes. It was held that an advance to enable him to establish himself as an underwriter at Lloyd's did not fall within the terms of the clause and it was sought to obtain an advance for that purpose under section 57. Farwell J. refused to empower the trustees to make it. In determining the expediency of the proposed transaction the interests of all the beneficiaries had to be considered.

The word "expedient" there quite clearly means expedient for the

¹²⁰ *Supra*.

¹²¹ [1937] Ch. 431 (Ch.D.).

trust as a whole. It cannot mean that however expedient it may be for one beneficiary, if it is inexpedient from the point of view of the other beneficiaries, the court ought to sanction the transaction. In order that the matter may be one which is in the opinion of the court expedient, it must be expedient for the trust as a whole.¹²²

In the instant case the advance would have been expedient for the life tenant, and perhaps also for his family, but could not have been considered to be in the interests of the ultimate remaindermen. Although the courts have not been over articulate on the matter subsequent cases have generally followed the line of approach adopted by Farwell J.¹²³

None of the cases dealing with section 57 have attempted to formulate any general test of expediency; and this is perhaps inevitable for what is and what is not expedient is very much a matter of individual circumstance. Nonetheless one case, *Municipal and General Securities Co. Ltd. v. Lloyds Bank Ltd.*,¹²⁴ may be questioned on the general ground that it regarded expediency solely in a negative light and did not pay sufficient regard to its positive aspects. In that case companies whose shares formed part of the trust corpus were nationalized and the trust received stocks in the nationalized concerns in substitution for the original trust securities. A summons under section 57 asked the court to empower the trustees to sell these stocks. Wynn-Parry J. refused this application, pointing out that:

... the compensation stock has become part of the portfolio of the trust deed and is to be regarded substantially speaking as being for all purposes part of the unit, and that there is no real difficulty or inconvenience likely to be encountered in giving effect to that policy. In these circumstances a case is not made out to my satisfaction that it is expedient that any of the stocks should be sold.¹²⁵

To some extent this decision is based on "emergency" principles, for it would confine section 57 to rescuing the trust if it ran into difficulties, but would not enable it to be administered on a more advantageous basis; yet surely expediency encompasses both these

¹²² *Ibid.*, at p. 436.

¹²³ Two cases, *In Re Mair*, [1935] Ch. 562, [1935] All E.R. Rep. 736 (Ch.D.) and *In Re Salting*, [1932] 2 Ch. 57, [1932] All E.R. Rep. 857 (Ch.D.), are to be regarded with some suspicion. In both cases life tenants were permitted use of part of the corpus. Provision was made by way of insurance for repayment of the money advanced and apparently Lord Evershed M.R. would have been satisfied with the decisions had protection also been accorded to beneficiaries under a possible discretionary trust: *supra*, footnote 34, at pp. 250 (Ch.), 120 (All E.R.). But should the advances have been made in the first place? Surely the answer is no for they were expedient only for the life tenant and not for the trust as a whole.

¹²⁴ *Supra*, footnote 119.

¹²⁵ *Ibid.*, at pp. 225 (Ch.), 945-946 (All E.R.).

objects. In exercising its jurisdiction under the section, the court should not only consider if the circumstances of the case are causing "difficulty or inconvenience", but also whether to allow the proposed course of action would positively enhance the benefits flowing to the beneficiaries.

There are two further differences between the emergency jurisdiction and that under section 57 to which Lord Evershed M.R. did not have occasion to refer. The first concerns the "types" of trust to which section 57 is applicable—does it apply to trusts of both realty and personalty and to both private and charitable trusts? In England a most important contrast is that section 57 covers only trusts of personalty. Subsection 4 provides that the section does not apply to the trustees of a settlement for the purposes of the Settled Land Act, 1925. This contrast does not however extend to Canada. As we have seen, the Canadian provinces have omitted this sub-section from their legislation. In New Brunswick¹²⁶ and Nova Scotia¹²⁷ the Trustee Acts define property as including realty and personalty, the Manitoba Act is made applicable to all trusts,¹²⁸ and while there are no like aids to interpretation of section 17 of the Alberta Act there would be no reason for confining it to trusts of personalty. The matter therefore is beyond question.

Charitable trusts are not, of course, within the ambit of the emergency jurisdiction,¹²⁹ but they ought, it is suggested, to fall within the statutory powers of the court. In *In Re Harvey*,¹³⁰ it was in fact assumed that this was so. However in *In Re Royal Society's Charitable Trusts*,¹³¹ Vaisey J., on an application to consolidate several charitable funds of which the Royal Society was trustee, held that he could not proceed under section 57, presumably on the ground that charities were involved.¹³² But only three years later Danckwerts J. in *In Re Shipwrecked Fishermen and Mariners Royal Benevolent Society*¹³³ took a different view of the matter. It was conceded that section 1 (the investment section) of the Trustee Act, 1925, applied to charity and the court saw no reason why section 57 should not also apply. *In Re Royal Society's Charitable*

¹²⁶ *Supra*, footnote 117, s. 1 (j).

¹²⁷ *Supra*, footnote 108, s. 1(k).

¹²⁸ *Ibid.*, s. 3.

¹²⁹ The cy-pres doctrine would apply to them.

¹³⁰ [1941] 3 All E.R. 284 (Ch.D.).

¹³¹ [1956] Ch. 87, [1955] 3 All E.R. 14 (Ch.D.).

¹³² At least this was the explanation of the decision which the learned judge offered during the course of argument in *In Re Byng's Will Trusts*, [1959] 1 W.L.R. 379, at p. 381 (Ch.D.).

¹³³ [1959] Ch. 220, [1958] 3 All E.R. 465 (Ch.D.).

*Trusts*¹³⁴ was explained on the ground that it had not fully considered the question. The *Shipwrecked Fishermen* case was followed in *In Re Kolb's Will Trusts*¹³⁵ where the court simply stated that there was "no doubt" that the section covered charities. Thus the balance of authority favours the view that the jurisdiction is exercisable in the case of charitable, as well as private trusts, and this, it is submitted, is a sound conclusion. The wording of section 57 is certainly wide enough to cover charitable trusts¹³⁶ and from a policy standpoint there is every reason to accord them and, it would seem, little reason to deny them the benefits of the section.

The second further, though in this instance perhaps only slight, difference between the emergency and statutory jurisdictions is that the latter may not be exercised if adequate powers are already vested in the trustees. The court may authorize a transaction only where "the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, . . .".¹³⁷ The operation of this proviso is neatly illustrated by *In Re Pratt's Will Trusts*.¹³⁸ In that case an application was made to have a power of sale granted to the trustees, but as they already had such a power by virtue of section 1(i) of the Trustee Act, 1925, no order could be made under section 57. One English and one Canadian case appear to have overlooked this aspect of the jurisdiction. In *In Re Hope's Will Trusts*¹³⁹ Eve J. authorized a sale under section 57, but, as the point had been argued, said he was also prepared to consider if the power was already vested in the trustees under section 130 of the Law Of Property Act, 1925. In the Alberta case of *Re De Foras Estate*¹⁴⁰ an executrix¹⁴¹ sought the advice and direction of the court in compromising proceedings she had instituted on behalf of the estate. Section 23 of the Alberta Trustee Act conferred a power to compromise on an executor, but the court said that the

¹³⁴ *Supra*, footnote 131.

¹³⁵ [1962] Ch. 531, at p. 539, [1961] 3 All E.R. 811, at p. 815 (Ch.D.).

¹³⁶ In Manitoba further support may be again gained from the fact that the Trustee Act is expressed to apply to "all trusts", *supra*, footnote 108, s. 3.

¹³⁷ See s. 57, Trustee Act, 1925, *supra*, footnote 108.

¹³⁸ [1943] Ch. 326, [1943] 2 All E.R. 375 (Ch.D.); foll'd in *Municipal and General Securities Co. Ltd. v. Lloyds Bank*, *supra*, footnote 119, at pp. 224 (Ch.), 945 (All E.R.). See also *In Re Thomas*, [1930] 1 Ch. 194, at p. 198 (Ch.D.).

¹³⁹ [1929] 2 Ch. 136, [1929] All E.R. Rep. 561 (Ch.D.).

¹⁴⁰ (1958), 26 W.W.R. 131 (Alta S.C. App. Div.).

¹⁴¹ Who is also covered by provisions of the Alberta Trustee Act: see *supra*, footnote 108, s. 2(a).

matter could be dealt with under that section or under section 17 of the Act (the equivalent of section 57 of the Trustee Act, 1925). In both the cases if by statute the trustees or the executrix had ample powers to effect the transaction neither they nor the courts had any alternative as to the course of action to be followed;¹⁴² all other powers must be exhausted before resort is made to section 57. No like rule has ever been expressly laid down with respect to the emergency jurisdiction, but it may probably be taken for granted that, as a matter of practice, a court would not exercise it if the powers of the trustees are already adequate. But, in theory at least, by relying on it, it is possible to avoid the (perhaps difficult) interpretation of the scope of the trustees' powers which must be undertaken in proceedings under section 57. It should be added however, that the court is not required to consider the possibility of exercising the inherent jurisdiction before turning to section 57. In the latter case jurisdiction is denied the courts only if there are appropriate powers "vested" in the trustees. At the date of the application the powers which may be conferred under the emergency jurisdiction are no more vested in the trustees than are the powers which are granted under the section itself.

Of the similarities between the emergency jurisdiction and that under section 57 the most significant is that both extend only to dealings with the administrative provisions of a trust. The cases all agree that the operative phrase in this respect is "management or administration of trust property",¹⁴³ but only one, *In Re Downshire Settled Estates*,¹⁴⁴ has discussed the matter in any detail. It was there sought to re-write the terms of the trusts involved so as to extinguish two life interests and a clause providing for the common maintenance of the beneficiaries at the discretion of the trustees. It was argued that "management" and "administration", being separated by the disjunctive "or", should be taken as having separate and individual meanings. Management, it was contended, covered the general care and control by trustees of property of which, so far as legal title goes, they are the legal owners; an act of management would therefore be referable to that ownership—for example, the purchase or sale of a trust investment. Adminis-

¹⁴² In effect, in *In Re Hope's Will Trusts*, *supra* footnote 139, the court decided the trustees had no power to carry the sale; in result, there was no violation of section 57. In *Re De Foras Estate*, *supra*, footnote 140, it appears the executrix did have a statutory power to compromise.

¹⁴³ *Re Craven*, *supra*, footnote 121, at p. 436; *Municipal and General Securities Co. Ltd. v. Lloyd's Bank*, *supra*, footnote 119, at pp. 223 (Ch.) 944, (All E.R.); *In Re Downshire Settled Estates*, *supra*, footnote 34, at pp. 251-252 (Ch.), 121 (All E.R.).

¹⁴⁴ *Ibid.*

tration, it was argued, covered all the activities of a trustee which derive from the fiduciary position he holds; for example the payment of income to beneficiaries or the execution of a discretionary trust. The court rejected this argument, for, it stated, if the context was considered it was seen that what was subject to "management or administration", was trust property, and "in our opinion 'trust property' cannot, by any legitimate stretch of the language, include equitable interests which a settlor has created in that property".¹⁴⁵ The principle was thus established that section 57 does not permit the variation of beneficial interests, and, generally speaking, the cases both before and after *In Re Downshire Settled Estates*¹⁴⁶ have respected this rule.¹⁴⁷

But if it is restricted to dealings with administrative provisions, the jurisdiction, should, it is submitted, permit them to be entirely or partially re-written as well as covering single specific deviations. It will be remembered that this matter was never really decided under the emergency jurisdiction¹⁴⁸ and it has been a matter of controversy under section 57. In England and in all the provinces which have legislation equivalent to section 57 the problem has been made less acute by the enactment of the new variation of trusts legislation¹⁴⁹ and in Manitoba it may also have been resolved by the amendment to section 54 of the Trustee Act.¹⁵⁰ The issue was first raised in *In Re Shipwrecked Fishermen and Mariners Benevolent Society*¹⁵¹ on an application to extend the investment powers of the Society. Danckwerts J. thought he had jurisdiction to authorize a new clause by way of scheme or under section 57 and in the end made an order under the latter provision. He had no doubts about the statutory jurisdiction.

The word "investment" is plainly there, so that there seems to be no doubt that the court can authorize the investment by the corporation in a particular fund on a particular occasion. I also find in the subsection that the court may confer upon the trustees the power generally

¹⁴⁵ *Ibid.*, at pp. 247 (Ch.), 118 (All E.R.).

¹⁴⁶ *Ibid.*

¹⁴⁷ There are, however, three instances where orders of dubious validity have been made. It is doubtful if the orders in *In Re Salting*, *supra*, footnote 123 and *In Re Mair*, *supra*, footnote 123 allowing the life tenants advances out of corpus, were justified: see the comments of Lord Evershed M.R. in *Re Downshire Settled Estate*, *ibid.*, at pp. 248 *et seq.* (Ch.), 119 *et seq.* (All E.R.). In *In Re Forster's Settlement*, *supra*, footnote 119, Harman J. had grave doubts as to whether he had the power in that case to act under section 57, but was more or less obliged to do so because earlier rather dubious orders made under the section contributed to the dilemma before the court.

¹⁴⁸ See *supra*.

¹⁵⁰ See *infra*.

¹⁴⁹ See *infra*.

¹⁵¹ *See supra*, footnote 133.

and therefore I cannot see why the court may not, under this power conferred upon the court by the Act, give a general power to invest.¹⁵²

In two subsequent cases, in both of which it was again sought to widen investment clauses, doubts were cast on this conclusion. In *In Re Coate's Will Trusts*¹⁵³ Harman J. expressed some uncertainty on the point and eventually avoided the difficulty by dealing with the case before him under the Variation of Trusts Act 1958. In *In Re Byng's Will Trusts*¹⁵⁴ counsel sought a direction as to whether they should proceed under section 57 or the 1958 Act. Vaisey J. thought either way would have been satisfactory, but decided it was probably safer to act under the 1958 Act, no doubt having in mind, though he did not make this explicit, the views expressed by Harman J. It is difficult to see on what grounds the views of Danckwerts J. may be refuted. They are consonant with a literal interpretation of the section and again there would appear to be good reason for allowing the widest scope to remedial legislation of this nature. Despite the doubts which have been expressed, it is to be hoped that where necessary the courts will use section 57 for a re-writing as well as single deviation from the terms of trusts.

However, even if all these detailed requirements which we have discussed are satisfied, the court may still refuse to approve a variation for the jurisdiction is discretionary in nature. Apart from merely stating this fact, the cases have not indicated at any length what factors they will take into account in exercising their discretion. In 1943 in *In Re Basden's Settlement Trusts*¹⁵⁵ Simonds J. stated that if a proposed variation had as its object tax avoidance, the court might refuse to act; but that view, if it was ever valid, has now been exploded.¹⁵⁶ More recently, in *In Re Kolb's Will Trusts*,¹⁵⁷ the court refused to vary an investment clause on the ground that Parliament, by passing the Trustee Investments Act, 1961, had established a *prima facie* adequate range of investments and that the court ought to go beyond that only in special circumstances. However that decision merely followed a similar exercise of judicial discretion in the application of the Variation of Trusts Act, 1958.¹⁵⁸ Indeed, in view of the paucity of

¹⁵² *Ibid.*, at pp. 228 (Ch.), 467-468 (All E.R.).

¹⁵³ [1959] 1 W.L.R. 375, [1959] 2 All E.R. 51 (Ch.D.).

¹⁵⁴ *Supra*, footnote 132.

¹⁵⁵ [1943] 2 All E.R. 11, at p. 14 (Ch.D.).

¹⁵⁶ For example under the Variation of Trusts Act, 1958, 6 & 7 Eliz 2, c. 53, numerous orders have been made approving arrangements which had as their main object the avoidance of tax: see *infra*.

¹⁵⁷ *Supra*, footnote 135.

¹⁵⁸ *Supra*, footnote 156.

discussion directed specifically towards section 57, it would seem that if the matter arises in an acute form in the future, guidance will have to be sought from various decisions under the 1958 Act where the discretionary nature of the jurisdiction has been of somewhat greater impact.¹⁵⁹ For the present therefore it will suffice to draw attention to the potential importance of judicial discretion in the application of section 57 and to note that decisions under the 1958 Act will be of strong authority in relation to it.

There is one further matter which is of some importance in the exercise of the jurisdiction. It will often happen that an order made under section 57 will conflict with an existing term of the trust. No provision is made for such a possibility, but the courts have reached the conclusion that the original terms of the trust are subordinate to an order made under the section, which must be regarded as being of an overriding nature. This doctrine was laid down by Farwell J. in *In Re Mair*¹⁶⁰ and was said by Lord Evershed M.R. in *In Re Downshire's Settled Estates* to have "been repeatedly followed and adopted in later cases".¹⁶¹ It should however be made clear that this interpretation of the effect of an order made under section 57 does not give a carte blanche to every ancillary matter connected with the powers conferred on the trustees. This may be deduced from *In Re Salting*.¹⁶² In that case a life tenant under a protective trust sought to invade capital and the court held purely as a matter of construction of the trust instrument that this did not result in a forfeiture. As part of the general scheme it was proposed that the interests of the remaindermen be safeguarded by the taking out of an assurance policy on the life of the life tenant, the proceeds being payable at his death to the trust. The premiums were to be paid by the life tenant and, if he defaulted, the trustees were directed to pay them directly out of trust income. The court rejected the argument that the mere insertion of a clause was in itself sufficient to create a forfeiture, but did go on to point out that if the life tenant did default in the payment of premiums, he would have "suffered—voluntarily or involuntarily—something by which the income will actually become payable to others, and in that event a forfeiture will, in my opinion, be incurred".¹⁶³ *In Re Mair*¹⁶⁴ endorsed that opinion. In the result therefore an order made under section 57 may override

¹⁵⁹ See *infra*.

¹⁶⁰ *Supra*, footnote 123.

¹⁶¹ *Supra*, footnote 34, at pp. 251 (Ch.), 120-121 (All E.R.).

¹⁶² *Supra*, footnote 123.

¹⁶³ *Ibid.*, at pp. 65 (Ch.), 860 (All E.R. Rep.).

¹⁶⁴ *Supra*, footnote 123.

the terms of the trust, but it is the order and the order alone, and not necessarily any connected transactions, which has this effect.

Finally, we must deal with a question to which reference was made at the outset—to what extent, if at all, has the amendment of section 54 of the Manitoba Trustee Act altered the nature of the jurisdiction in that province. The 1956 amendment provided for the insertion in section 54 after the word “transaction” of the words “or any modification or variation of the trusts or investments”.¹⁶⁵ To assess the effect of this addition, it is important to recall that the English cases at least have established that the words “management or administration of trust property” to a large extent govern the operation of the jurisdiction. Relating this phrase to the amendment, it would seem that “any modification or variation” which may be effected must be connected with management or administration. If this be so, the change has in fact added nothing to the section, except perhaps to make it a little clearer that it covers re-writing as well as specific deviations. The intent may well have been to allow for variation of the beneficial and the administrative terms of a trust. Some support for this view might be found in the use of the words “any modification or variation” and by analogy to the Variation of Trusts Act, 1958, it might be argued that the word “trusts” is intended to cover beneficial interests in contrast to the other transactions of an administrative nature which are listed in the section.¹⁶⁶ It is difficult however to escape the impact of the requirement that variation must be needed to facilitate “the management or administration of the trust property”. A court might be reluctant to deny any efficacy to the amendment¹⁶⁷ and on a generous interpretation might extend it to cover beneficial interests. However, it can be strongly argued that to alter its basic sense, the section required greater modification than it in fact received, and the fact that Manitoba enacted more comprehensive legislation in 1964^{167A} may perhaps be taken as indicating that, whatever the intention may originally have been, the 1956 amendment did not go far enough.

In conclusion therefore, section 57 and the corresponding Canadian legislation operate to permit any type of variation of the administrative provisions of either private or charitable trusts, provided this is expedient for the trust as a whole, and in England

¹⁶⁵ *Supra*, footnote 108, s. 54, as am., *supra*, footnote 115, s. 1.

¹⁶⁶ See *infra*.

¹⁶⁷ Though an amendment does not necessarily indicate a change in the law: Interpretation Act, R.S.M., 1954, c. 128, s. 27(2).

^{167A} See *infra*.

only, provided the trust corpus consists of personalty. In some ways, particularly in its being confined to dealings with administrative provisions, this represents no great advance on the inherent emergency jurisdiction; but in allowing variation to be effected on the basis of expediency rather than emergency the statutory jurisdiction goes well beyond the inherent power of the court. On this latter ground (and also in some rather minor respects) section 57 significantly shifted the law in favour of the beneficiaries and enabled the court on their behalf to more often remove the heavy hand of the settlor from the operation of the trust.

B. Section 64, Settled Land Act, 1925.

As we have just seen, section 57 of the English Trustee Act, 1925¹⁶⁸ does not apply to trusts of land; the appropriate legislation in this respect is section 64 of the Settled Land Act, 1925.¹⁶⁹ The Canadian equivalents of section 57 apply to trusts of both realty and personalty and so there was no need to adopt section 64 in Canada; what follows therefore applies only to England.

Section 64 reads:

(1) Any transaction affecting or concerning the settled land, or any part thereof, or any other land (not being a transaction otherwise authorized by this Act, or by the settlement) which in the opinion of the court would be for the benefit of the settled land, or any party thereof, or the persons interested under the settlement, may, under an order of the court, be effected by a tenant for life, if it is one which could have been validly effected by an absolute owner.

(2) In this section "transaction" includes any sale, extinguishment of manorial incidents, exchange, assurance, grant, lease, surrender, reconveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract, or option, and any application of capital money (except as hereinafter mentioned), and any compromise or other dealing, or arrangement; but does not include an application of capital money in payment for any improvement not authorised by this Act, or by the settlement; and "effected" has the meaning appropriate to the particular transaction; and the references to land include references to restrictions and burdens affecting land.

As section 57 and section 64 were both enacted to alleviate the harshness of the emergency and the salvage jurisdictions, they are similar in many respects. Although there are some differences in terminology, it would seem that section 64, in allowing a variation to be effected if this would "benefit the settled land, or any part thereof, or the persons interested under the settlement",

¹⁶⁸ *Supra*, footnote 108.

¹⁶⁹ *Supra*, footnote 109.

achieves substantially the same end as does section 57 in permitting variation when this would be "expedient" for the trust as a whole.¹⁷⁰ It is also probably the case that section 64 may, like section 57, operate even though the settlor saw and specifically provided for the circumstances in which the court is asked to act. The section also expressly provides, as does section 57, that the jurisdiction is dependant upon there not being vested in the trustees powers to carry out the desired transaction.¹⁷¹ Another similarity is that the effect of an order made under section 64 on the terms of the trust (other than that being varied) will probably be dealt with as it has been under section 57. Finally the significant limitation that the jurisdiction conferred in the courts is discretionary will apply to both sections. There has not been such extended judicial consideration of section 64 with respect to these matters as there has been of section 57, but in the light of their common purpose it is probably safe to assume that the conclusions arrived at under the latter section will be paralleled under section 64.

Of the differences between the two, one section, of course, applies only to realty and the other only to personalty. Between them, however, they are not comprehensive for, as Lord Evershed M.R. pointed out in *In Re Downshire Settled Estates*¹⁷² "in the case of a settlement the trustees of which are trustees for the purposes of the Settled Land Act, but which no longer comprises any unsold land", neither section applies. Despite a recommendation of the Law Reform Committee¹⁷³ nothing has been done to remedy this situation. Beyond this there are three matters to be considered. Two of these may be dealt with quite shortly. There was, it will be remembered, some dispute as to whether sec-

¹⁷⁰ Under section 64 orders have been made to (a) avoid death duties and so conserve the land for the beneficiaries: *In Re Downshire Settled Estates*, *supra*, footnote 34; *In Re Simmons*, [1956] Ch. 125, [1955] 3 All E.R. 818 (Ch.D.); (b) keep the mansion house in repair: *In Re Scarisbrick's Re-Settlement Trusts*, [1944] Ch. 279, [1944] 1 All E.R. 404 (Ch.D.); (c) "replace" a family heirloom: *In Re Mount Edgcumbe*, [1950] Ch. 815, [1950] 2 All E.R. 242 (Ch.D.). One case *In Re White Popham Settled Estates*, [1936] Ch. 728, [1936] 2 All E.R. 1486 (Ch.D.) is perhaps of dubious authority. The court authorized a mortgage to raise money to pay the debts of the life tenant. It could be forceably argued this benefited one beneficiary and not "the persons interested under the settlement" i.e., in terms of section 57, it was not for the benefit of the trust as a whole: see *supra*.

¹⁷¹ Section 64 is perhaps slightly narrower in this respect for it refers only to powers arising under the Settled Land Act, 1925, itself or under the settlement, presumably excluding any powers which the trustees may have as a matter of "ordinary" trust law.

¹⁷² *Supra*, footnote 34, at pp. 254 (Ch.), 123 (All E.R.).

¹⁷³ Law Reform Committee, Sixth Report (Court's Power to Sanction Variation of Trusts), Cmnd 310, paras. 12, 25 and 27(4).

tion 57 applied to charitable trusts. This is not an issue under section 64 for section 29 of the Settled Land Act, 1925, provides that land vested in trustees for charitable, ecclesiastical or public trusts shall be deemed to be settled land and the trustees have, with reference to the land, all the powers conferred by the Act on a life tenant and the trustees of a settlement. Thus the trustees of these types of trusts may be empowered to act under section 64.¹⁷⁴ It was also a matter of controversy whether section 57 applies to a rewriting of, as well as a single deviation from, the terms of a trust. The matter has not been specifically dealt with under section 64, but there is not perhaps as much in the language of the section as there is in section 57 to support the view that it relates to anything other than a specific transaction. However, without the question being at all canvassed, *In Re Downshire's Settled Estates*¹⁷⁵ authorized a rewriting of the beneficial terms of a trust and it may be therefore that on a liberal interpretation, (which would be desirable) the courts are going to use the section to effect all types of variation. Nonetheless if an argument can be made under section 57 to confine it to single transactions a stronger argument can be made under section 64 that that section is also so limited.

The final and most significant difference between section 64 and section 57 is that while the latter is confined to transactions of an administrative nature, the former covers variations of both beneficial and administrative provisions. That was decided in *In Re Downshire Settled Estates*.¹⁷⁶ In that case, in the events that happened, land was settled on trusts under which the plaintiff had a protected life interest, remainder to his first and other sons in tail male, remainder to the second defendant (the plaintiff's brother) for life, remainder to the use of his first and other sons in tail male. At the date of the action the plaintiff had no sons. The trust corpus consisted of land valued at £400,000 and capital monies to the extent of £700,000. To avoid the payment of estate duty at the death of a life tenant, it was proposed that the plaintiff and the second defendant should release their interests in the capital monies. The main obstacle to this scheme was the plaintiff's protective trusts. The court was therefore asked to authorize an arrangement under section 64, whereby (i) the release of the plain-

¹⁷⁴ See e.g. *In Re Cleveland Literary and Philosophical Society's Land*, [1931] 2 Ch. 247, [1931] All E.R. Rep. 741 (Ch.D.). It will have been noted section 29 covers a wider range of trusts than those legally charitable, a point which the above case illustrates.

¹⁷⁵ *Supra*, footnote 34.

¹⁷⁶ *Ibid*.

tiff's interest in the capital monies would not result in a forfeiture of his interest in the land, (ii) the trustees would be required to release the capital monies from the discretionary trusts which would have arisen if the life interest had been forfeited, and (iii) provision would be made for any son or wife of the plaintiff by the taking out of an insurance.

At first instance Upjohn J. refused to authorize this arrangement.¹⁷⁷ He took the view that sections 64 and 57 should be regarded as conferring on the courts more or less identical powers and that if section 57 was confined to dealings with administrative provisions so also should section 64. The Court of Appeal felt that even if the two sections were designed to serve the same purpose, there was such a difference in language between them that a court was justified, if not compelled, to give them different interpretations. On this approach the first key word in section 64 is "transaction". Upjohn J. had concluded that that word encompassed some practical administrative step, a view supported to some extent by section 64 (2) which lists a number of "transactions" of such a nature. Again the Court of Appeal thought differently. Transaction, they said, is a word of "the widest import, as is emphasized, in our judgment, by the terms of the second subsection which make the meaning of the word comprehend (*inter alia*) any application of capital money and any compromise or other dealing or arrangement".¹⁷⁸ These latter are, it is true, words of very general significance, but much might have been said for construing them *ejusdem generis* to the specific administrative transactions set out immediately before them. However, on the contrary line of reasoning, and relying also to some degree on implications drawn from section 71 of the Settled Land Act, 1925, the court held that "transaction" encompassed dealings with the beneficial as well as the administrative terms of a trust.

With "transaction" being virtually unlimited in scope, the requirement that what can be done under the section must "affect and concern" the land then became of first importance. The conclusion of the Court of Appeal as to the nature of the nexus was (perhaps inevitably) rather vague:

In our judgment, the test imparted by this last qualification is satisfied by transactions indirectly as well as directly operating upon the settled land (or other land) provided that in the former case the effect is real

¹⁷⁷ *Re D's Settled Estates*, *supra*, footnote 119.

¹⁷⁸ *Supra*, footnote 34, at pp. 252 (Ch.), 122 (All E.R.).

and substantial by ordinary common sense standards as distinct from that which is oblique or remote and merely incidental.¹⁷⁹

On the facts of the *Downshire* case itself it was decided that the settled land was affected or concerned because the carrying into effect of the transaction would prevent the land being broken up, and it would appear that the other decisions under the section meet the test laid down by the court.¹⁸⁰ However, the court appeared to doubt whether the re-arrangement of beneficial interests could in itself be said to affect or concern the land.¹⁸¹ It may be therefore, that, although covering all types of administrative variations (which will probably as a matter of course satisfy the requirement) the section does not necessarily give a carte blanche to the variation of beneficial interests, albeit that this would be for the benefit of the beneficiaries. But the effect of this possible limitation should not be over-emphasized. It will often, if indeed not generally, be the case (as it was in the *Downshire* case) that there will be some other element in the transaction, which either separately or when combined with the variation of beneficial interests, will satisfy the requirement that the land be affected or concerned.

Thus section 64 permits variations of both administrative and beneficial provisions of trusts of realty, provided the change would be of benefit to either the beneficiaries or the land and that the land be affected or concerned by the transaction. In this respect it of course differs widely from section 57 of the Trustee Act, 1925 for the latter covers only dealings with administrative terms. Thus, prior to 1958 in England, there was an unfortunate and ridiculous distinction between the court's powers of variation of trusts of realty, in respect of which their powers extended to both beneficial and administrative provisions, and trusts of personalty, of which only the administrative provisions could be altered.

C. Section 53, Trustee Act, 1925.

To complete the survey of English legislation some reference must be made to section 53 of the Trustee Act, 1925.¹⁸² The section reads:

Where an infant is beneficially entitled to any property the court may, with a view to the application of the capital or income thereof for the maintenance, education, or benefit of the infant, make an order—

(a) appointing a person to convey such property; or

¹⁷⁹ *Ibid.*, at pp. 253 (Ch.), 122 (All. E.R.).

¹⁸⁰ See cases cited footnote 170, *supra*.

¹⁸¹ *Supra*, footnote 34, at pp. 259 (Ch.), 126 (All E.R.).

¹⁸² *Supra*, footnote 108.

- (b) in the case of stock, or a thing in action, vesting in any person the right to transfer or call for a transfer of such stock, or to receive dividends or income thereof, or to sue for and recover such thing in action, upon such terms as the court may think fit.

It appears that section 53 was enacted to overcome the problem arising out of the decision in *In Re Hamilton*.¹⁸³ In *In Re Gower's Settlement*¹⁸⁴ (the first case to come before the courts after 1925) Clauson J. propounded the issue in the following terms. "A.B. an infant tenant in tail in remainder of Blackacre with divers remainders over: can the court by virtue of S. 53 authorize a mortgage of Blackacre (subject to the interests having priority over the infant's tenancy in tail) so framed as to vest in the mortgagee a security which would be good at law against A.B.'s issue who take under the entail and subsequent remaindermen as if the infant were of full age and had executed the conveyance in accordance with the Fines and Recoveries Act, 1833?" Under the doctrine laid down in *In Re Hamilton*¹⁸⁵ this would have been impossible, but, relying on section 53, Clauson J. decided he could authorize on behalf of the infant the conveyance of the interest which he, if an adult, could have conveyed. At first glance, this conclusion on the operation of section 53 had no immediate connection with variation of trusts, and for the first suggestion that they might be related we were indebted to Professor Marshall.¹⁸⁶ Commenting on *Chapman v. Chapman*,¹⁸⁷ he speculated that owing to the omission to refer to section 53 that case might have been decided per incuriam; though, as he himself noted, section 53 not being applicable where there are unknown or unborn beneficiaries, it probably would not have been of any assistance in the particular circumstances of that case. However one subsequent case has confirmed that the section is of some relevance to the question of variation.

In that case, *In Re Meux*¹⁸⁸, a residuary estate was settled on trust for the plaintiff for life, remainder to his first and other sons in tail male, with remainders over. An application was made under section 53 for the appointment of a person to convey to the plain-

¹⁸³ (1885), 31 Ch. D. 291 (C.A.), followed *Cadman v. Cadman* (1886), 33 Ch.D. 397 (C.A.); *In Re Humbrough's Estate*, [1909] 2 Ch. 620 (Ch.D.); *In Re Badger*, [1913] 1 Ch. 385 (C.A.).

¹⁸⁴ [1934] Ch. 365, at p. 369, [1934] All E.R. Rep. 796, at p. 797 (Ch.D.).
¹⁸⁵ *Supra*, footnote 183.

¹⁸⁶ Deviations from the Terms of a Trust (1954), 17 Mod. L. Rev. 420, at pp. 432-433. See also by the same author: The Scope of Section 53 of the Trustee Act, 1925 (1957), 21 Conv. (N.S.) 448.

¹⁸⁷ *Supra*, footnote 2.

¹⁸⁸ [1958] Ch. 154, [1957] 2 All E.R. 630 (Ch.D.).

tiff the interest of the infant tenant in tail in remainder (with the consent of the plaintiff as protector) in consideration of a proper purchase price, the price to be paid to trustees for the benefit of the infant and, except for the omission of the plaintiff, the other beneficiaries of the original trusts. Wynn-Parry J. held that this transaction fell within section 53, being a conveyance of the infant's interest with a view to the application of the capital for his benefit. He was able to distinguish a previous case, *In Re Heyworth's Contingent Reversionary Interest*,¹⁸⁹ where Upjohn J. had decided section 53 was inapplicable. In that case an application was made for the sale and conveyance to a life tenant of an infant's remainder interest, the purchase price to be paid to the infant absolutely. Upjohn J. held that while what was proposed was for the benefit of the infant, it was not an "application" of anything for her benefit. In the *Meux* case any objection along such lines was met, Wynn-Parry J. thought, by the fact that the purchase price was to be re-settled, this being sufficient to meet the requirement of "application".¹⁹⁰ Another objection to the operation of the section was based on the contention that the sale and conveyance to the life tenant and the resettlement of the proceeds were to be regarded as two distinct transactions. The sale alone, it was argued, produced the benefit to the infant by avoiding the heavy estate duty which would otherwise have been payable on the death of the life tenant; the settlement of the purchase price did nothing to enhance the benefit already conferred by the sale. Wynn-Parry J. decided that he was really confronted with one transaction, a conclusion which "inevitably" flowed from the fact that in the light of the testator's will a court would not have approved only the barring of the entail and the extinguishment of the subsequent interests, and so the settlement was a necessary element in the whole transaction.

In effect, therefore, in the *Meux* case, a variation of the beneficial interests was brought about by the "termination" of the original trust and the subsequent settlement of the purchase price of the remainder interest; and presumably, if a variation of the administrative provisions had also been desired, this, provided it was for the benefit of the infant and did not prejudice the interests which followed his, could also have been done. There are however

¹⁸⁹ *Supra*, footnote 11.

¹⁹⁰ Professor Marshall expresses the hope that the restriction imported by this interpretation of "application" will eventually disappear. The Scope of Section 53 of the Trustee Act, 1925, *loc. cit.*, footnote 186, at p. 454.

significant limitations on this apparently wide scope for varying trusts under section 53. If there are unascertained or unknown beneficiaries whose interests precede that of the infant remainderman their consent cannot be obtained in person and the court has no power under the section to act on their behalf. If the interest of the infant is anything less than absolute or a fee tail (in which case an absolute conveyance may be made with the consent of the protector) then the interests of subsequent beneficiaries have to be taken into account and once again there may be unascertained or unborn beneficiaries whose consent cannot be obtained. In many cases, therefore, variation will be impossible under section 53 alone and this, it is suggested, is not a totally unfortunate result for the section was not intended to serve this purpose.

III. Legislation Since 1958.

A. The Law Reform Committee Report.

After the decision in *Chapman v. Chapman*,¹⁹¹ the Law Reform Committee was asked to consider the question of variation of trusts and it reported in November, 1957.¹⁹² The law in England as of that date could be summarized as follows. Under the inherent jurisdiction, the courts had no power to vary trusts, even when this was for the benefit of beneficiaries. The emergency jurisdiction¹⁹³ and the extremely narrow maintenance jurisdiction¹⁹⁴ were exceptions to this general rule.¹⁹⁵ Section 57 of the Trustee Act, 1925, permitted deviation from, and probably a re-writing of the administrative provisions of a trust of personalty when this was expedient for the trust as a whole; this represented a significant extension of the emergency jurisdiction.¹⁹⁶ Under section 64(1) of the Settled Land Act, 1925, the court could approve transactions varying either the administrative or beneficial terms of a trust of realty, provided the transactions affected or concerned the settled (or other) land and were for the benefit of the land or the beneficiaries.¹⁹⁷ In addition section 53 gave the courts power to authorize on behalf of infants variations of both administrative and beneficial provision of all types of trusts, if the variation could be considered an application of the property for the infants' benefit; this jurisdiction was much limited by the fact that often it could

¹⁹¹ *Supra*, footnote 2.

¹⁹² *Supra*, footnote 173.

¹⁹³ See *supra*.

¹⁹⁴ *Ibid*.

¹⁹⁵ In addition there were the conversion and compromise jurisdictions. These might incidentally affect the question of variation, but were not part of the inherent jurisdiction to vary.

¹⁹⁶ *Supra*.

¹⁹⁷ *Ibid*.

not operate where there were unknown or unborn beneficiaries.¹⁹⁸ In Canada there was a like inherent jurisdiction. A few provinces had legislation equivalent to section 57 of the Trustee Act, 1925,¹⁹⁹ and there was also the miscellaneous legislation to which we have referred.²⁰⁰

The Law Reform Committee found the existing law anomalous and unsatisfactory. On the grounds of logic and justice they thought it ought to be changed to confer upon the courts greater powers to facilitate variation. Formerly, it was pointed out, the main purpose of the trust was the preservation of capital for future generations, and economic conditions favoured inflexible terms. Investment was therefore generally restricted to gilt-edge or other sound pedestrian securities; and the life tenant was restricted to the income, neither he, nor indeed any other beneficiary, being empowered to invade capital. Such limitations were well nigh disastrous in modern times. "If the capital can only be invested in trustee investments, heavy losses may be suffered in a period of inflation; if all the income is payable to one beneficiary it may be largely absorbed in tax; if capital cannot be paid to the beneficiaries but must be retained until the death of a life tenant, it may be largely swallowed up in death duties while some member of the family who has urgent need of capital for some reasonable purpose cannot be paid it."²⁰¹ Modern settlements, it was thought, are generally drawn with enough flexibility to avoid these disadvantages, but to many an older trust they could prove disastrous. And indeed the *Report* might have added that even a modern trust may in time disclose blemishes which a judicial power to vary could help to erase.

The Committee was thus satisfied that the powers of the courts to approve variations needed to be increased if beneficiaries were to enjoy the benefits of their trusts in full. The major obstacle to the courts exercising such a jurisdiction was their inability to consent on behalf of and bind infant, unborn and unascertained beneficiaries. As a matter of general principle the Committee saw no reason why the courts should not be empowered to approve arrangements on behalf of such beneficiaries, if this was for their benefit. To deny this power to the courts, not only prejudiced these beneficiaries but it also operated to the disadvantage of adult beneficiaries who were interested in the same trust, and who, but for the presence or lack of presence of the infants, the unborn

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.* The legislation extended to trusts of realty and personality.

²⁰⁰ *Ibid.*

²⁰¹ *Supra*, footnote 173, para. 5.

and the unascertained, could have altered the terms of the trust at will.

There were two main arguments against the courts being given such powers. In the first place it would violate the cardinal principle of the law of trusts that the expressed intention of the settlor must take precedence, even though this may not operate to the greatest benefit of the beneficiaries. In a few sentences and without analysing the issue the Committee overthrew this ancient rule and reversed the priorities. In their view the interests of the beneficiaries were of paramount importance and the only concession they made to the settlor was in the recommendation that he could be heard on an application to vary trusts under the legislation they proposed; and even then the court could overrule any objection he might make.²⁰²

The issues at stake in the proposal that the interest of the settlor should give way to that of the beneficiaries were more fully discussed in the parliamentary debates on the Variation of Trusts Bill.²⁰³ On one side it was thought that people today are only too ready to discover that the purposes and plans of a donor of property were not all that they might have been and to alter them, despite his clearly expressed wishes to the contrary. If donees accept a donor's bounty, it is not inequitable to insist that they should do so on his terms. Against this it was contended that it was incongruous that an (often dead) settlor could control the interests of beneficiaries to their decided disadvantage. Moreover the old, though at times rather suspect doctrine of "presumed intent" could be invoked. Surely, it was argued, a settlor in the creation of his trust has as his main aim the benefit of the beneficiaries. If they were adversely affected by changing conditions, would he not be the first to agree to a variation of the trusts to conserve and protect their interests? These latter arguments won the day and both Houses accepted the proposition that the interests of the beneficiaries must take precedence over the intent of the settlor, though this was made more palatable by the undertaking that arrangements would be made to implement the Committee's recommendation that the settlor, if living, could be heard on any application under the Bill.²⁰⁴

The second main contention against making easier the varia-

²⁰² *Ibid.*, paras. 21 and 27(3). See *infra*.

²⁰³ House of Commons: Hansard, Vol. 578, p. 394; Vol. 579, pp. 768-807; Vol. 586, pp. 496-506; Vol. 591, pp. 1643-1645; House of Lords: Hansard, Vol. 208, p. 851; Vol. 209, pp. 833-856; Vol. 210, pp. 372-383, 610, 674; Vol. 211, p. 6.

²⁰⁴ *Infra*.

tion of trusts was that this would be an encouragement, and indeed, an approval of tax avoidance. The Law Reform Committee and the supporters of the Bill in Parliament met this argument on two grounds. In the first place the object of the proposed variation need not necessarily be tax avoidance. As was pointed out in the House of Commons, the purpose of the change might be to achieve more flexible trust investments, to raise capital to build a house, educate children, or to meet the expenses of an illness or some other emergency.²⁰⁵ But even if it was admitted that very often the object of the proposed variation would be the avoidance of tax, it did not follow that *ipso facto* the wider power to approve variations should be denied the courts. Tax avoidance was not illegal, and it was perfectly in order for a man to arrange his affairs so as to be liable for the minimum taxation. To single out infant, unborn and unascertained beneficiaries, and prevent them making similar arrangements was to discriminate against them. The argument was put thus in the House of Commons: "If one wants to say that dispositions of capital should be illegal because they involve a loss to the revenue, we shall give careful consideration to that view, but let us do it generally and not in relation to that class."²⁰⁶ Again these arguments prevailed and England and soon afterwards some of the provinces in Canada proceeded to confer on the courts greater powers to facilitate variations.

B. The Legislation.

The English Variation of Trusts Act was passed in 1958.²⁰⁷ Nova Scotia, Ontario and Prince Edward Island followed the English expedient and passed similarly entitled Acts in 1964, 1959 and 1963 respectively.²⁰⁸ On the other hand, Alberta, Manitoba, and New Brunswick added new sections to their respective Trustee Acts.²⁰⁹ There is much to be said for this latter procedure for it is

²⁰⁵ Mr. F. P. Crowder, M.P., the sponsor of the Bill: House of Commons, Hansard, Vol. 579, p. 769.

²⁰⁶ Mr. F. P. Crowder, M.P., *op. cit.*, *ibid.*, p. 778, quoting the Attorney General (Sir Hartley Shawcross) speaking on the Married Women (Restraint on Anticipation) Bill, House of Commons: Hansard, Vol. 469, p. 910.

²⁰⁷ *Supra*, footnote 156.

²⁰⁸ The Variation of Trusts Act, S.N.S., 1962, c. 14; The Variation of Trusts Act, S.O., 1959, c. 104. See now R.S.O., 1960, c. 413, as am. by S.O., 1961-62, c. 141; The Variation of Trusts Act, S.P.E.I., 1963, c. 34.

²⁰⁹ The legislation will therefore be cited: Alta: Trustee Act, *supra*, footnote 108, as am. by S.A., 1964, c. 98, s. 31a; Man.: Trustee Act, *supra*, footnote 108, as am. by S.M., 1964, c. 56, s. 54 A; N.B.: Trustee Act, *supra*, footnote 117, as am. by S.N.B., 1959, c. 76, s. 29A. The Act has also

in many ways more convenient to have the legislation respecting variation incorporated with the other statutory rules relating to trusts.

The operative section of the English Act, section 1(1), reads as follows:

Where property, whether real or personal, is held on trusts arising, whether before or after the passing of this Act, under any will, settlement or other disposition, the court may if it thinks fit by order approve on behalf of—

- (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting, or
- (b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts 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, so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court, or
- (c) any person unborn, or
- (d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined.

any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts:

Provided that except by virtue of paragraph (d) of this subsection the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person.

The Canadian legislation is largely in identical terms, but there are some deviations of a substantial nature from paragraphs (b) and (d) of section 1(1) of the English Act, and in addition there are some differences of form. In all the Canadian provinces the words "so, however . . . to the court" have been omitted from paragraph (b). Of necessity paragraph (d) has been changed in Canada for the English version is tied in with section 33 of the Trustee Act, 1925,²¹⁰ of which there is no Canadian equivalent. The Canadian paragraph (d) reads:

been adopted in the Yukon Territory: Variation of Trusts Ordinance, 1962 (5th Sess.), c. 6.

²¹⁰ Section 33, Trustee Act, 1925, *supra*, footnote 108, deals with protective trusts. Section 1(2), Variation of Trusts Act 1958, *supra*, footnote 156, gives to "protective trust", "the principal beneficiary" and "discretionary interest" as they appear in section 1(1)(d) the same meaning as they have in section 33, Trustee Act 1925. See *infra*.

Any person in respect of any interest of his that 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.

Of the differences in form, the short title of the Prince Edward Island Act is contained in section 1 so that the equivalent of section 1(1) of the English Act is section 2. In all the provinces the proviso to section 1(1) of the English Act, that benefit must be shown to the beneficiaries in paragraphs (a), (b) and (c), has been reworded, but not, it is thought, so as to substantially alter its meaning. With the exception of Nova Scotia the proviso has also been converted into a separate sub-section of the appropriate sub-section of the Act; thus section 1(1) and (2) of the Ontario Act, section 2(1) and (2) of the Prince Edward Island Act and sub-sections (1) and (2) of sections 31a, 54A and 29A of the Alberta, Manitoba and New Brunswick Trustee Acts respectively cover the same ground as section 1(1) of the English Act. Nova Scotia follows a more individual pattern; section 1 of the Variation of Trusts Act contains the short title, section 2 the power to approve arrangements on behalf of the four groups of beneficiaries and section 3 the proviso regarding benefit. Finally, on two small matters of detail, the brackets, which appear around the words "by whomsoever . . . assenting thereto" have been replaced by commas in Canada, and in addition the comma after the word "proposed" has been omitted.

The effect of the legislation can be most conveniently discussed, and the differences between the English and Canadian legislation dealt with where appropriate, under three heads: (i) General nature of the jurisdiction; (ii) Detailed conditions of approval; (iii) Some points of procedure.²¹¹ During the discussion a reference to "the Act" can be taken as referring to both the English and Canadian legislation; where reference is being to a specific jurisdiction this will be made clear.

(i) *General nature of the jurisdiction.*

Two aspects of the general nature of the jurisdiction are worthy of note. First the precise extent of the power given to the courts has not yet been finally settled. In *In Re Joseph's Will Trusts*²¹² Vaisey J. thought it extended, though perhaps only in exceptional circumstances, to inserting in the order a direction to trustees to carry the arrangement into effect. In the case the court had ap-

²¹¹ It might seem more logical to deal first with procedure, but it is convenient to leave it to the end.

²¹² [1959] 1 W.L.R. 1019, [1959] 3 All E.R. 474 N. (Ch.D.).

proved an arrangement varying beneficial interests, the effect of which was in futuro in the sense that it changed only the limitations consequent on the death of the testator's widow, who was still alive at the date of the application. It was apparently felt that there was some danger of the matter being re-opened and the court was asked to insert the direction to trustees to forestall such a possibility. Vaisey J. acknowledged that the Act did not expressly authorize such an order, but felt that the power necessarily flowed from the general nature of the jurisdiction. He was fortified in this conclusion by the fact that Lord Jenkins had in *In Re Derby's Settlement Trusts*²¹³ made a similar order; though he did note that in a later unreported case, *In Re Savills's Will Trusts*,²¹⁴ the same judge had apparently refused a request that such a direction be inserted. In *In Re Hambleden's Will Trusts*²¹⁵ Wynn-Parry J. disagreed quite vigorously with the views expressed by Vaisey J. That case again involved the variation of beneficial interests, and the question arose as to what formalities were required to give effect to the changes. It had not been intended that any document embodying the variation would be executed, but in view of the decision in *Grey v. Inland Revenue Commissioners*,²¹⁶ which held that all dispositions of equitable interests had to be in writing to be enforceable,²¹⁷ counsel sought the advice of the court whether a document was now required or whether the order of the court *ipso facto* varied the trusts. Wynn-Parry J. had no doubt that all that was required was the court order. Moreover he thought he had no jurisdiction to insert in the order a direction to trustees to carry the arrangement into effect. Indeed on the view that he took such a direction was unnecessary; the trusts being validly altered, the trustees were, as a matter of ordinary law, obliged to carry them out in that form.

Both these decisions may be subjected to some criticism. The Act does not expressly confer any power on the court to direct the trustees to carry the arrangement into effect; and once the trusts are varied the trustees have no option but to administer them as altered, so it seems that there is no need to imply that such a power exists. To that extent *In Re Hambleden's Will Trusts*²¹⁸ is to be preferred to *In Re Joseph's Will Trusts*.²¹⁹ But *In Re Hamble-*

²¹³ The Times, July 14th, 1959 (Ch.D.).

²¹⁴ July 24th, 1959; referred to by Vaisey J. in *Re Joseph's Will Trust*, *supra*, footnote 212, at pp. 1021 (W.L.R.), 474 N (All E.R.).

²¹⁵ [1960] 1 W.L.R. 82, [1960] 1 All E.R. 353 (Ch.D.).

²¹⁶ [1960] A.C. 1, [1959] 3 All E.R. 603 (H.L.).

²¹⁷ See s. 53, Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20.

²¹⁸ *Supra*, footnote 215.

²¹⁹ *Supra*, footnote 212.

*den's Will Trusts*²²⁰ is itself open to some objection with respect to the way in which Wynn-Parry J. thought the variation was brought about. From the language of the Act it would appear that all that the court is empowered to do is consent to an arrangement on behalf of groups of beneficiaries who cannot consent for themselves.²²¹ Surely an order covering only some of the beneficiaries under a trust cannot vary it. The consent of all the adult beneficiaries is required before any variation is possible and over them the court has no control. The theory behind the Act seems to be that, as a matter of ordinary trust law, all the beneficiaries may, by agreement *inter se*, vary their trust at will. The Act's sole function is to ensure that the consent of otherwise incompetent beneficiaries is obtained. Russell J. recognized this in *In Re Druce's Settlement Trusts*²²² when he said: "This jurisdiction in effect enables the court to *contract* on behalf of certain beneficiaries, or possible beneficiaries" The adults make their decision independently of the Act in pursuance of their ordinary rights, and, in so far as an arrangement varies beneficial interests, it seems that in a jurisdiction which requires dealings with such interests to be in writing, a document should be executed to ensure that the arrangement is in fact enforceable.²²³

If the Act operates in the way suggested two other difficulties arise. The first is perhaps a now rather theoretical problem. Before 1958 there was no support in the cases for the view that all the beneficiaries, if *sui juris* and absolutely entitled, could combine to vary their trust.²²⁴ The principle might have been supported by

²²⁰ *Supra*, footnote 215.

²²¹ The long title of both the English and the Ontario Acts could be used to support the view that the power to vary rests with the courts. The English long title reads: "An Act to extend the jurisdiction of the courts to vary trusts in the interests of the beneficiaries and sanction dealings with trust property". The Ontario long title is substantially the same. However the language of the Act overrules, it is submitted, any inference which, within the bounds of the rules of statutory interpretation, may be drawn from the long title.

²²² [1962] 1 W.L.R. 363, at p. 369, [1962] 1 All E.R. 563, at p. 567 (Ch.D.). (Emphasis supplied).

²²³ It should be noted that section 53 of the Law of Property Act 1925, *supra*, footnote 217 on which the decision in *Grey v. Inland Revenue Commissioners*, *supra*, footnote 216, is based is not identical with the comparable Canadian legislation.

²²⁴ *Chapman v. Chapman*, *supra*, footnote 2, assumed this was the law, but, as we have seen, the actual basis of the decision was the lack of jurisdiction to consent on behalf of infants, *etc.* The present question was left unanswered. The Attorney General, appearing as *amicus curiae*, argued that while beneficiaries *sui juris* could terminate a trust, they could not "give it a new face": at p. 441 (A.C.). In the Court of Appeal Denning L.J. suggested the consent of the trustees was necessary before a variation could be made: *supra*, footnote 6, at pp. 273 (Ch.), 134 (All E.R.).

analogy to the rule in *Saunders v. Vautier*;²²⁵ indeed when under that doctrine a trust could be terminated and the property resettled as desired, it would be rather ridiculous to deny to the beneficiaries a direct power of variation.²²⁶ Apart from authority, it could be said that in effect the beneficiaries are "owners" of the property and the law should not deny them the right to deal with it as they wish. On the other hand to permit variation in this way would run contrary to the basic rule that the intent of the settlor is paramount. The rule in *Saunders v. Vautier*²²⁷ is already exceptional and should not be made the basis of yet another exception. Thus it is possible to argue that the theoretical basis of the Act is open to some objections, and had the issue of the power of beneficiaries, *sui juris* and absolutely entitled, to vary their trust arisen before 1958, the matter was not clear cut. One would have hoped that the issue would have been resolved in their favour but in the light of the general attitude of the House of Lords in *Chapman v. Chapman*²²⁸ that was by no means inevitable. However no one is likely to challenge the validity of the Act on this basis and, if this did happen, it is highly improbable that a court would be induced to declare it invalid. Nonetheless, to avoid any such problem and more importantly to resolve the difficulties raised by *In Re Joseph's Will and Trusts*²²⁹ and *In Re Hambleden's Will Trusts*,²³⁰ it might perhaps be preferable for any other jurisdiction which adopts the Act to follow the pattern of the earlier legislation in the field and confer the power of variation directly on the courts;²³¹ the variation could (subject to what will be said in the next paragraph) be made contingent upon the adult beneficiaries consenting and the courts approving the arrangement on the terms already in the Act. This change might avoid some of the difficulties which the present form of the Act may entail.

The second difficulty is that, even if the legislation was so re-drafted, it would still in one respect be narrower in scope than any of the pre-1958 jurisdictions. Under them the power to vary rests with the court and it would seem that a variation can be authorized even though it is objected to by an adult beneficiary. No doubt

²²⁵ (1841), 4 Beav. 115, Cr. & Ph. 240 (Lord Langdale M.R.).

²²⁶ In *In re Brockbank*, [1948] Ch. 206, at p. 209, [1948], 1 All E.R. 287, at p. 288 (Ch.D.), Harman J. suggested the former procedure would attract stamp duty; *quaere* if this would only be so if beneficial interests were being changed: see Monroe, *Stamp Duties* (4th ed., 1964), p. 125; Lewin on Trusts (16th ed., 1964), p. 729. In Canada *prima facie* it would appear it matters little, from a tax viewpoint, which procedure is followed.

²²⁷ *Supra*, footnote 225.

²²⁸ *Supra*, footnote 2.

²²⁹ *Supra*, footnote 212.

²³⁰ *Supra*, footnote 215.

²³¹ See, for example, section 57, Trustee Act, 1925, *supra*, footnote 108.

great weight would be attached to any such objection and it would only be in the clearest case that a court would override it. The consent of all the beneficiaries being a prerequisite to a variation under the present Act the refusal of even one adult beneficiary (with possibly the minutest of interests) to co-operate would render the Act inoperative. This is another aspect of the legislation which may be worthy of re-consideration. There would be some well justified reluctance to acting in defiance of the wishes of an adult when in general the law leaves him to conduct his affairs as he sees fit. On the other hand much may be said for the argument that the courts should have a residual authority to overrule the recalcitrant adult when his objections are blocking a proposal obviously beneficial to the trust as a whole; in such a case his is not the only interest involved. One would imagine that the occasions on which such a power had to be exercised would be exceedingly rare, but it is not undesirable for it to be there before rather than after the need for its use arises. In any event, whatever the merits of such a proposal it seems clear the courts have no such power under the present Act. If the consent of all the adult beneficiaries cannot be obtained it will be necessary to turn to the pre-1958 jurisdictions and so they continue to be of some possible significance.

The second matter to be noted with respect to the general nature of the jurisdiction is that it is discretionary; even if all the particular conditions of the Act are satisfied the court still need only approve the arrangement "if it thinks fit".²³² So far the court's discretion has manifested itself in relation to (1) the settlor, (2) the trustees, (3) steps preparatory to and the purpose of the arrangement and (4) other relevant legislation.

Reference has already been made to the recommendation of the Law Reform Committee *Report* that the settlor should have a right to be heard on an application under the Act. The recommendation has been implemented in England,²³³ but not, as yet, in Canada. Apart from this, the English Court of Appeal has in *In Re Steed's Will Trusts*²³⁴ indicated that in the exercise of its

²³² England: Variation of Trusts Act, 1958, *supra*, footnote 156, s. 1(1). Canada: Alta: Trustee Act, *supra*, footnote 108, as am., *supra*, footnote 209, s. 31a(1); Man.: Trustee Act, *supra*, footnote 209, s. 54 A (1); N.B. Trustee Act, *supra*, footnote 117, as am., *supra*, footnote 209, s. 29A(1); N.S.: Variation of Trusts Act, *supra*, footnote 208, s. 2; Ont.: Variation of Trusts Act, *supra*, footnote 208, s. 1(1); P.E.I., Variation of Trusts Act *supra*, footnote 208, s. 2(1).

²³³ See *infra*.

²³⁴ [1960] Ch. 407, [1960] 1 All E.R. 487 (C.A.).

general discretion the court ought to give due weight to the intent of the settlor as it appears from the face of the trust and the circumstances of its creation. In that case, a testator left a farm upon trust for sale, giving to the trustees an absolute power of postponement. Before and after the sale the corpus was to be held upon protective trusts for the plaintiff for life, with remainder as she should appoint and in default of appointment as on her intestacy. At about the time the proceedings were instituted the plaintiff exercised her power and appointed irrevocably to herself. The will specifically stated that the main purpose of the trust was to ensure that the plaintiff was adequately provided for. At the testator's death the plaintiff's brother was the tenant of the farm. He had made certain improvements, but his general financial condition was unsound and it was uncertain that he had paid his rent. The trustees contracted to sell the farm at a most advantageous price, but the plaintiff sought an order restraining the sale. The writ was later amended and an application made under the Variation of Trusts Act seeking approval of an arrangement whereby the trustees should hold the farm for the plaintiff absolutely. The trustees opposed the arrangement.

In a comprehensive review of the proposal the Court of Appeal stated that an arrangement must be looked at in the light of the intention of the settlor. The Master of the Rolls referred to order 55, rule 14a (3A) of the Rules of the Supreme Court²³⁵ which was based on the premise, and this premise he was prepared to adopt, "that the court must, albeit that it is performing its duty on behalf of some person who cannot consent on his or her part, regard the proposal in the light of the purpose of the trust . . .".²³⁶ In the instant case the testator had specifically stated that he wished to provide adequate support for the plaintiff and had created the trust to safeguard her against influences which he regarded with justifiable apprehension. The Master of the Rolls agreed with what he took to be the basic ground of the decision of the court below: "that the arrangement was one which so cut at the root of the testator's wishes and intentions that it was not one which the court should approve."²³⁷

If an analogy be sought to explain this doctrine, it may be

²³⁵ Which was added to permit the settlor to be heard on an application under the Act. See *infra*.

²³⁶ *Supra*, footnote 234, at pp. 421 (Ch.), 493 (All E.R.).

²³⁷ *Ibid.*, at pp. 422 (Ch.), 494 (All E.R.). Compare *In re Baker's Will Trusts*, [1964] 1 W.L.R. 336, [1964] 1 All E.R. 482 (Ch.D.) where the court required evidence to be introduced to show to what extent a protective trust continued to serve any useful purpose.

found in the law relating to charities. There the court can only change a trust within the limits of the general charitable intention. The Court of Appeal would appear in this case to have put a like restriction on the operation of the Act. To be approved an arrangement must be in conformity with the general intent of the settlor. Thus the court could approve the variation of investment clauses because this would increase the material benefits to the beneficiaries, a thing presumably within the general intent; but in the instant case to have approved the arrangement would have defeated the general intent to safeguard the plaintiff against want and undue influences. It must, however, be pointed out that the court did not lay down any general rule that the general intent of the settlor must be respected; in certain circumstances it may probably be ignored.²³⁸ Nonetheless it is possible that in the exercise of its discretion the court may maintain the influence of the settlor to a considerable extent.

*In Re Steed's Will Trusts*²³⁹ also gave some indication of the extent to which the court will take into account the attitude of the trustees. At first instance Harman J. over-emphasized the importance to be attached to their views and indeed gave the impression that if they objected the court would not approve the arrangement.²⁴⁰ The Court of Appeal refused to accord such weight to their opinions, but agreed that "the court in exercising its general discretion will certainly pay regard to what the trustees say and their reason for saying it".²⁴¹ It is, however, to be expected that generally speaking such objections of the trustees that the courts will entertain will relate to the fulfillment of the general purpose of the trust or some like consideration, rather than to any personal predilections of the trustees themselves.²⁴²

The relevance to the court's general discretion of the events leading up to the arrangement and of its purpose has been dealt with in two cases. In *In Re Robertson's Will Trusts*²⁴³ the applicant had a protected life interest, with a power of appointment

²³⁸ If for example the court thought it undesirable, inexpedient or outmoded.

²³⁹ *Supra*, footnote 234.

²⁴⁰ [1959] Ch. 354, at p. 361, [1959] 1 All E.R. 609, at p. 612 (Ch.D.).

²⁴¹ *Supra*, footnote 234, at pp. 420 (Ch.), 492-493 (All E.R.).

²⁴² In *In Re Steed's Will Trusts*, *ibid.*, the trustees based their objections on the violation of the testator's intent. Trustees might also have more personal reasons for opposing an arrangement, e.g. if it considerably increased their duties under the trust. But if the arrangements clearly benefited the beneficiaries it is difficult to envisage a court accepting such a plea. Nevertheless see Underhill, *The Law of Trusts and Trustees* (11th ed., 1959), pp. 443, 450.

²⁴³ [1960] 1 W.L.R. 1050, [1960] 3 All E.R. 146 (Ch.D.).

over the remainder in favour of his issue. He wished to secure certain capital payments to his three children (all of whom were of age at the date of the application) and to reduce estate duty on his death. He therefore irrevocably appointed the remainder equally among the children and then made an application to the court to have approved an arrangement dividing the trust corpus between himself and them in agreed proportions. The children consented to the arrangement and so the court's consent was required only on behalf of the possible beneficiaries under the discretionary trust which would arise if the protected life interest failed or determined, and, as the Act dispenses with the showing of benefit to them²⁴⁴ the case was *prima facie* quite simple. However in the hearing of the summons Russell J. raised the question whether the appointment made by the applicant was a fraud on the power, presumably it being possible to argue that the appointment was made at least partly with the intent of benefiting himself, a non-object. On receiving additional information the judge was satisfied that the appointment was in fact valid. Nonetheless Russell J. indicated that if a fraud on a power had been involved he would have refused to approve the arrangement. The case makes it clear that quite rightly, indeed inevitably, the court is not going to approve schemes which are the outcome of a series of events of dubious legality; thus not only the arrangement itself, but also its general background is open to the court's scrutiny.

The significance of the purpose of the arrangement was dealt with by Vaisey J. in *In Re Falkner's Settlement*.²⁴⁵ There the settlor had settled £13,000 upon himself on protective trusts for life, with remainder as he should appoint, provided he could make no appointment in his own favour, and in default among his statutory next of kin. The court was asked to approve an arrangement whereby all but £500 of the capital was to be paid to the settlor absolutely, the sum retained to be paid to those entitled in default. Vaisey J. decided that this scheme was for the benefit of the latter group and so approved it on their behalf. He observed however that his jurisdiction was clearly discretionary and if the applicant had sought the money merely to misuse it, the application would have been refused.²⁴⁶ Thus the purpose behind the transaction is also a

²⁴⁴ Though the court will not disregard them entirely: see *infra*.

²⁴⁵ The Times, March 5th, 1959 (Ch.D.).

²⁴⁶ This might have been to the detriment of those entitled in default of appointment, for the applicant could have exercised his power and excluded them completely. Thus in its discretion it is possible the court may veto a scheme otherwise clearly beneficial to those on whose behalf it is asked to consent.

legitimate concern of the court. What a multitude of sins "mis-use" covers is yet to be seen. Tax avoidance however is not one of them; the courts have not refused to approve arrangements merely because that was the end in view, nor have they dallied with the suggestion of the Law Reform Committee that a distinction might be drawn between tax avoidance schemes that are of a "questionable character" and others which are "morally unquestionable".²⁴⁷ If the courts should decide to consider the "morality" of the purpose or of the events prior to the arrangement it would be opening a vague and uncertain field; they will probably be happy to confine themselves to the question of legality. In any event, it is clear that purpose and prior events must be borne in mind in the preparation of an arrangement.

Finally, the court may at its discretion take into account other relevant legislation. In England this has been illustrated by the attitude of the courts in dealing with applications for the variation of investment clauses made after the passing of the Trustee Investments Act, 1961. Prior to that Act the court had approved such arrangements quite freely. Now however such approval will not be so readily granted. Buckley J. put the matter as follows in *In Re Cooper's Settlement*:²⁴⁸

In enacting the Trustee Investments Act, 1961, Parliament, in my judgment, had indicated the extent to which in ordinary cases they think it right that trustees should be free to invest otherwise than in gilt edge investments. In my judgment, the enactment of that Act must have a direct and important bearing on the exercise by the court of its discretion in varying trusts under the Variation of Trusts Act, 1958 in relation to powers of investment. It seems to me that from this time this court will have to be satisfied, whenever applicants under the Variation of Trusts Act ask for the relaxation of the trustees' powers of investment, that there are special grounds which make it right that the trustees should have wider powers of investment than the legislature has indicated in the Trustee Investments Act, 1961 as the normally appropriate powers.

The gist of the matter appears to be that Parliament having established the norm, there must be a special reason for departing from it.

As a general proposition it is not unreasonable to suggest that the court should look at the arrangement it is asked to approve

²⁴⁷ *Supra*, footnote 173, para. 15.

²⁴⁸ [1962] Ch. 826, at pp. 829-830, [1961] 3 All E.R. 636, at p. 639 (Ch.D.). To the same effect see *In Re Clarke's Will Trusts*, [1961] 1 W.L.R. 1471, at p. 1475, [1961] 3 All E.R. 1133, at p. 1136 (Ch.D.); in this case the court found sufficient special circumstances to warrant it allowing the change.

in the light of other legislation and indeed of the general rules of the law of trusts. It would be unfortunate however if this resulted in a too restrictive approach. If the proposed arrangement is clearly for the benefit of the beneficiaries involved, the fact that the desired result could not be achieved under existing law does not seem a good reason for refusing approval; the very purpose of the Act is to enable things to be done which the general law would not permit. In the particular case of the effect of the Trustee Investments Act this argument may be further supported by reference to section 15 of that Act which expressly preserves the power of the court to otherwise widen investment powers. The present attitude to some extent puts the widening of investment clauses on an "emergency" basis. This is a return to the regime which the remedial legislation was designed to displace, and while admitting the validity of looking at any proposed arrangement in its overall "legal context" it would be most undesirable if this impaired the effectiveness of the new rules relating to variation.

(ii) *Detailed conditions of approval.*

The arrangement

The court is given the power of approving an "arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts".²⁴⁹

As yet, only three cases have had occasion to consider this passage of the Act. One *In Re Steed's Will Trusts*²⁵⁰ was concerned solely with the word "arrangement". In the case a proposal for variation was made by the one beneficiary capable of doing so, but was opposed by trustees. At first instance Harman J. was of the opinion that the proposed scheme did not constitute an arrangement, which, he thought, by its very nature envisaged an agreement *inter partes*. He acknowledged that the Act stated that there need be no other person capable of assenting to the arrangement, but he asked "does that mean that the arrangement can be

²⁴⁹ England: Variation of Trusts Act, 1958, *supra*, footnote 156, s. 1(1). Canada; Alta Trustee Act, *supra*, footnote 209, s. 31a(1); Man. Trustee Act, *supra*, footnote 108, as am., *supra*, footnote 209, s. 54A(1); N.B. Trustee Act, *supra*, footnote 117, as am., *supra*, footnote 209, s. 29A(1); N.S. Variation of Trusts Act, *supra*, footnote 208, s. 2; Ont. Variation of Trusts Act, *supra*, footnote 208, s. 1(1); P.E.I. Variation of Trusts Act, *supra*, footnote 208, s. 2(1).

²⁵⁰ *Supra*, footnote 234.

made by A alone in the face of the opposition of the trustees and that such a thing can be called an 'arrangement'? I do not think so".²⁵¹ On appeal Lord Evershed M.R., speaking for the Court of Appeal, took a different view of the matter. "I think the word 'arrangement' is deliberately used in the widest possible sense so as to cover any proposal which any person may put forward for varying or revoking trusts."²⁵² With respect, this is an eminently sensible conclusion. The draftsman appears to have had in mind the situation before the court in providing that it was immaterial "whether or not there is any other person beneficially interested who is capable of assenting" to the arrangement. This was, it is thought, sufficient to settle the issue. In any event, from a policy standpoint, it would be unfortunate if remedial legislation was hampered by an apparently pointless interpretation of one word in the Act.

The other two cases drew attention to the fact that the Act authorizes a revocation as well as a variation of a trust, but raised some question as to whether a revocation and resettlement was also covered. Resettlement is not expressly mentioned in the Act, but nonetheless it was indirectly effected in *In Re Seale's Marriage Settlement*.²⁵³ In that case approval was sought for an arrangement transferring funds from the trustee of an English settlement to a Canadian trustee to be held, subject to changes required to comply with the law of Quebec, on terms as similar as possible to those of the English settlement. Buckley J. felt that this amounted to a revocation and a resettlement rather than a variation, and so he approved the arrangement as a revocation of the English trusts "in the event of the trust property becoming subject to the trusts of a settlement which would be recognized and enforced in some other jurisdiction".²⁵⁴ In effect therefore the court secured the resettlement by treating it as a condition of the approval of the revocation. Although no justification was offered for this procedure, it would seem that there is no reason why in the exercise of its general discretion the court should not so limit its approval of a revocation.²⁵⁵ Some doubt was thrown on this decision in *In Re T's Settlement Trusts*.²⁵⁶ In that case a mother made an application in June 1963 for the variation of a settlement under the ori-

²⁵¹ *Supra*, footnote 240, at pp. 361 (Ch.), 612 (All E.R.).

²⁵² *Supra*, footnote 234, at pp. 419 (Ch.), 492 (All E.R.).

²⁵³ [1961] Ch. 574, [1961] 3 All E.R. 136 (Ch.D.).

²⁵⁴ *Ibid.*, at pp. 579 (Ch.), 139 (All E.R.).

²⁵⁵ *Supra*.

²⁵⁶ [1963] 3 W.L.R. 987, [1963] 3 All E.R. 759 (Ch.D.).

ginal terms of which her infant daughter would, on reaching twenty-one or marrying before that age, have taken an absolute interest in one fourth of the trust fund and a vested remainder in another one fourth to fall into possession on the mother's death, with the possibility of the accrual of the other half of the fund should a second infant fail to obtain a vested interest. The daughter would reach twenty-one in November 1963 and to safeguard her against alleged immaturity and irresponsibility in handling money it was proposed that her share be transferred to trustees on protective trusts for her for life, with a remainder to her children or issue, with a remainder over in default to the second infant. Wilberforce J. was unhappy about this proposal for several reasons.²⁵⁷ One of these was that rather than being asked to vary a trust he was being asked to order a resettlement of the infant's own property. Admittedly the court had no inherent power to do this, nor was the 1958 Act intended to interfere with this well established rule, and, the learned judge reasoned, the general language of the Act ought not to be construed so as to bring about an incidental change in the law. However it would have been no undue stretching of the language of the Act to have dealt with the application on the basis of *In Re Seale's Marriage Settlement*.²⁵⁸ The withdrawal of the infant's share would have amounted to a (partial) revocation of the original settlement and the court could have made the resettlement a condition of the approval of the revocation. It would then have been a question of deciding if in its other respects the revocation ought to have been approved by the court. In the end Wilberforce J. approved a variation of the original settlement which in part achieved the effect sought by the proposal made by the mother, and, if it had been considered appropriate to do so, there seems to be no reason why all the proposal could not have been encompassed in the variation. This made the decision not to proceed by way of resettlement of less significance and one would suppose that in many cases a direct variation would bring about the same result as a revocation and resettlement and that the courts would be happier with such a procedure. Where this is not possible the courts should, it is suggested, be prepared to follow *In Re Seale's Marriage Settlement*²⁵⁹ and *In Re T's Settlement Trusts*²⁶⁰ should be considered either to be of doubtful authority or as decided on its own rather peculiar facts.

²⁵⁷ For a consideration of some of the other aspects of the case see *infra*.

²⁵⁸ *Supra*, footnote 253.

²⁵⁹ *Ibid.*

²⁶⁰ *Supra*, footnote 256.

Two other comments may be made on this portion of the Act. First, the proposed arrangement may vary or revoke "all or any of the trusts". By "trusts" the Act presumably means beneficial interests for it continues to deal with managerial or administrative powers. In this latter respect the arrangement may not vary or revoke but merely *enlarge* the powers of the trustees. Generally one would suppose that an arrangement would in fact seek an enlargement of these powers. On occasion, however, it might be sought to decrease them, but this the Act apparently does not allow. It is rather difficult to see why there should have been this change of language in dealing with administrative powers. There appears to be no good reason why, like beneficial interests, they should not be susceptible to being varied or revoked.²⁶¹ In a second respect this passage of the Act is not all-embracing or, at least, not totally satisfactory. It apparently envisages an arrangement which will have as its object the "re-writing" of some or all of the terms of the trust. Again, the beneficiaries may not want to go to that extent. One specific deviation—the sale of a particular piece of land or the invasion of corpus on a particular occasion for a particular purpose—may be all that is required. A liberal interpretation of the Act would allow this, but there is the possibility that such an arrangement may, on a narrow interpretation, be forestalled.²⁶² Both these defects may, to some extent be minimised by relying on the pre-1958 inherent and, where it exists the pre-1958 statutory jurisdiction; this would be possible in England, where the 1958 Act expressly preserves section 57 of the Trustee Act, 1925 and section 64 of the Settled Land Act, 1925 and in Manitoba where section 54A(3) of the Trustee Act preserves the powers of the court under section 54.²⁶³ Even then the pre-1958 legislation is far from comprehensive and, as the Law Reform Committee observed, it

²⁶¹ The Canadian Commissioners on Uniformity seem to have had this criticism in mind: see Proceedings Canadian Commissioners on Uniformity of Legislation 43rd Annual Meeting (1961), p. 140, comment 1. The draft Act, by error one would surmise, does not give effect to the views expressed on p. 140: see Appendix O, p. 142.

²⁶² Compare the difficulties which arise in the interpretation of s. 57 of the Trustee Act, 1925, *supra*, footnote 108.

²⁶³ The English Act follows the recommendation of the Law Reform Committee Report, *supra*, footnote 173, paras. 25 and 27(4). The Committee observed that there "will be some cases falling within section 57 of the Trustee Act, 1925 and section 64 of the Settled Land Act, 1925, to which the proposed new jurisdiction will not apply": para. 25. No instance was given of the type of case in mind. Perhaps the situations under discussion are examples.

Presumably, though they are not specifically saved, the inherent jurisdiction in England and Manitoba and, in the other Canadian provinces that adopted the 1958 English Act, the inherent and any earlier statutory jurisdictions still exist.

is desirable that there should be only one source for the authority to vary trusts.²⁶⁴ It is suggested therefore that the Act ought to have been drafted so as to permit the variation or revocation of managerial or administrative powers and so as to quite clearly allow single deviations.

In result the portion of the Act we are considering might be re-drafted to read as follows:

... any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying, either generally or in any specific instance, or revoking, either partially or completely;

This, it is thought, would at least be closer to being comprehensive than is the present form of the Act.²⁶⁵

The beneficiaries

The court is empowered to approve the arrangement on behalf of the four groups of beneficiaries described in paragraphs (a), (b), (c) and (d) of section 1(1) of the English Act, provided that, in the case of beneficiaries within the first three paragraphs, the proposed variation is for their benefit; for reasons which will appear later, the Act does not require that benefit be shown to beneficiaries within paragraph (d). Several questions as to the range of beneficiaries covered by the act need to be discussed.

One general question is whether the court has the power to approve an arrangement on behalf of a charity. Two cases have raised the issue. In *In Re Robert's Settlement Trusts*²⁶⁶ by an *inter vivos* deed a charitable trust²⁶⁷ was created for the employees of the settlor and of four companies. The settlor and any wife of his were potential members of these groups and, to avoid liability for income tax on the income of the trust fund, the settlor sought the addition of a clause excluding himself and any wife of his as beneficiaries. The settlor and his then wife agreed in person to the proposal and, to show benefit to any future wife the settlor undertook to pay her if she should ever exist £100 a year. The

²⁶⁴ *Ibid.*, para. 25; but thought such legislation should await the experience gained in the operation of the new Act.

²⁶⁵ (a) This omits any reference to a power of revocation and re-settlement; if it be thought that *In Re Seale's Marriage Settlement*, *supra*, footnote 253, is of doubtful validity express provision could also be made to cover this issue.

(b) The suggested redrafting still retains the word "revoking". "Terminating" might be considered more appropriate. "Revoke" is perhaps more appropriate to action taken by the settlor than to action taken by the beneficiaries.

²⁶⁶ The Times, February 27th, 1959.

²⁶⁷ It was assumed in the case that the trust was charitable. Having regard to the beneficiaries, *quaere* if this was correct?

court approved the arrangement on her behalf. The Attorney General supported the arrangement on behalf of charity, but made the point that charities did not fall within any of the groups of beneficiaries described in the Act. In *In Re Longman's Trusts*²⁶⁸ the Attorney General was again the "consenting" party for "charity". In that case the ultimate gift over of an otherwise private trust was to a charity, and the order eventually made recited, *inter alia*, that the Attorney General "not objecting" the court approved a variation of the investment clause in pursuance of the Act. The exact basis of these two decisions is not altogether clear. It may be accepted that the point made by the Attorney General in *In Re Robert's Settlement Trusts*²⁶⁹ is valid and that the language used in the Act to describe the beneficiaries is not such as to cover charity. On the other hand the implication from that case seems to be that individuals who may benefit from a charitable trust have the power to consent, either in person or through the medium of the court, to a variation of the trust, at least to the extent of excluding themselves from benefit under it. This would appear to be a rather novel doctrine. Nor does the fact that the assent or "non-objection" of the Attorney General is received help to resolve the difficulty. If it was true that he could consent to or acquiesce in changes in the terms of a charitable trust many, if not all, of the rules of equity and statute law relating to cy-pres would be obsolete; and this is hardly the case.

The Act should, it is suggested, have been more specific about its application to charity. There are two types of trusts, the wholly charitable and the partly charitable-partly private, which have to be borne in mind. It is clear that the Act does not cover the wholly charitable trust and obviously the variety of problems arising in connection with such trusts can best be dealt with in separate legislation; for the sake of certainty it might be advisable to expressly state that they are not intended to be covered by the present Act. However where private individuals and a charity are beneficiaries under the trust it would be unfortunate if a private beneficiary could not take advantage of the Act because the settlor had also wished to benefit charity. As the Act stands the court is again without jurisdiction and all that there is to fall back on are the rather dubious powers of the Attorney General and the equally dubious and in any event extremely narrow power of individuals to exclude themselves from the benefits of the charity.

²⁶⁸ [1962] 1 W.L.R. 455, [1962] 2 All E.R. 193 (Ch.D.).

²⁶⁹ *Supra*, footnote 266.

The Act could well provide that in a case involving this type of trust the court has power to approve the arrangement on behalf of a charity on the usual ground of benefit to it.

Looking more closely at each of the four paragraphs, (c) "any person unborn" has not been, nor does it seem likely that it will become, the source of any difficulty; the other three call for more extended comment. Paragraph (b) came under consideration in *In Re Suffret's Settlement*²⁷⁰ and inferentially the case also raised some question about (a). In the case, in the events that happened, property valued at £8,500 was held on protective trusts for the applicant for life, with various remainders over, and an ultimate remainder to those persons who would have succeeded to the property if the applicant had died possessed thereof, intestate and unmarried. The applicant proposed that £8,000 be held in trust for her absolutely and that the remaining £500 be held in protective trusts for her for life, then for her husband for life, with again an ultimate remainder as in the original settlement. At the date of application the applicant was sixty-one and had never married. If she had died at that date her next of kin would have been three adult cousins, only one of whom was party to the summons and who consented to the arrangement. Buckley J. held that the prospective next of kin fell within paragraph (b) and in Canada that would have decided the case. In England, however, the proviso to the paragraph (omitted it will be remembered from the Canadian legislation) still had to be taken into account. Applying it to the case, the applicant was to be presumed dead at the date of the application and the three cousins, who in that event would have truly fitted the description of next of kin, were excluded from the paragraph. The trustees were therefore advised that any order made by the court would not be binding on the two absent cousins.

It was suggested during the course of argument that various difficulties would arise if the court applied the proviso in the way in which it did. Only one of these difficulties seems to be of any substance.²⁷¹ This involves the question of what the position would

²⁷⁰ [1961] Ch. 1, [1960] 3 All E.R. 561 (Ch.D.).

²⁷¹ Two other problems were raised by counsel:

(a) It was suggested that "the court could not sanction a scheme on behalf of a future husband who might become interested under a discretionary trust already in operation. He would be a person within the exception to section 1(1)(b) and every living male would be a member of the class if an event (namely his marriage) had happened": *Ibid.*, at p. 4 (Ch.). But the event in question is not merely the marriage of the husband, but his marriage to the principal beneficiary. If at the date of an application that event is assumed to have happened, it still would not be possible to say of any male he was a person who fitted a specified description *i.e.* the husband of the principal beneficiary. On the other

have been if some of the next of kin who were excluded from paragraph (b) by the operation of the proviso had been infants. They could not have consented to the arrangement in person; could the court have consented for them? Obviously they would not have fallen within paragraphs (c) or (d); and as prospective next of kin, having only, according to the authorities, a mere *spes successionis*,²⁷² it could be argued they would not have fallen within paragraph (a), which encompasses infants having vested or contingent interests. There are several solutions to this problem. One is to say that the ability of the infants to qualify for admission to paragraphs (a), (c) and (d) is to be determined on the same presumed state of facts on which they were ousted from paragraph (d). They would then have a (presumed) vested interest and fall within paragraph (a). The other possible solutions involve changes in the legislation in itself. Paragraph (a) might be amended so as to include infants who are excluded from paragraph (b); the proviso to paragraph (b) might be changed so as not to exclude infants in the first place; or the proviso might be completely eliminated. This latter possibility leads to the question of the purpose, which the proviso was designed to serve. Its origin is in fact obscure. It does not appear to derive from anything in the *Report* of the Law Reform Committee, nor from anything said in the debates on the Variation of Trusts Act. Conversely the Canadian Commissioners on Uniformity offer no explanation for omitting it from their draft Act.²⁷³ Three main courses were open to the draftsmen in drafting paragraph (b). The proviso could have excluded at least all adults who were ascertained and have left them to consent in person to the arrangement. This would have posed a difficult, if not an insuperable problem of deciding on a criterion of ascertainability. Even if this had been established, the interests of many of those thus ascertained would probably have been so

hand if, as *In Re Suffret's Settlement*, *ibid.*, a life tenant is assumed to be dead, it is possible to identify the people who on that hypothesis would be the next of kin.

(b) Some doubt was also expressed about the position where the next of kin are by the terms of the settlement directed to be determined at an arbitrarily fixed date. It would seem however that if the death of the ancestor can be assumed at the date of the application there is also no reason why it cannot also be assumed at that date that the date fixed for determining the next of kin has been reached.

If, however, the courts could not under the Act deal with the difficulties, this would be another case when it would be necessary to turn to the pre-1958 law to see if it might be involved.

²⁷² See *In Re Parsons* (1890), 45 Ch.D. 51 (Ch.D.); *In Re Mudge*, [1914] 1 Ch. 115 (C.A.).

²⁷³ *Op cit.*, footnote 261, Appendix N, p. 140 *et seq.*

shadowy or tenuous as to raise some question of whether the time and trouble of ascertaining them was justified. Moreover it would have been unfortunate if, as could have happened, the refusal of even one of the holders of such interests to consent could have blocked a variation which all other beneficiaries and the court were prepared to approve. At the other extreme is the position adopted in Canada, the total elimination of the proviso. The difficulty with this is that it will often throw on the mercy of the court people who are easily ascertained and who, even if they have not technically an interest, have nonetheless such a substantial expectancy that it can be argued they should be permitted to consent in person. The English Act falls between these two extremes by allowing those who may be described as "legally closest" to an interest at the time of the application to consent in person while the court consents for everyone else. There is no necessary correlation between those granted the privilege of acting in person and those who have the greatest chance of actually obtaining an interest. Thus, if, in the type of situation which was before the court in *In Re Suffret's Settlement*,²⁷⁴ the next of kin were an aged father and three young and spritely adult cousins, the father would consent in person, but the court would act for the cousins. It may be argued therefore, that the compromise achieved by the English Act is of a rather arbitrary nature, with little regard being paid to the realities of the situation. There is perhaps much to be said for adopting the Canadian situation, particularly when it is borne in mind that in any event the court's consent is going to be withheld if the proposed arrangement is not for the benefit of those on whose behalf its approval is being sought.

Finally we turn to a consideration of paragraph (d). As was pointed out earlier the court may approve an arrangement on behalf of beneficiaries falling within this paragraph, even though the arrangement is not for their benefit. The origin of this rule can be traced to the *Report* of the Law Reform Committee. The *Report* took the view that where a discretionary trust is limited after the failure of a prior interest and "the trust has not yet become exercisable, the interests (if such they can be called) of potential objects of the trust may be of a nature too shadowy to deserve consideration; and that in those cases the court should be free to consider only the benefit to the other persons interested in the trust property and should have a discretion to disregard entirely the interests of those who would be the potential objects of the

²⁷⁴ *Supra*, footnote 270.

trust if and when it ever becomes exercisable".²⁷⁵ Three difficulties have arisen from the attempts to give effect to this recommendation.

In the first place it will be noted that the Committee did not say the interests of the potential beneficiaries under the future discretionary trust must be ignored, but merely that the court could disregard them if it saw fit. The Act does not in express terms confer such a discretion; indeed at first glance it could be read as compelling the courts to disregard the beneficiaries in paragraph (d). However, by holding that they may, in the exercise of their general discretion, require a showing of benefit if it is appropriate in the circumstances to do so, the courts have in effect implemented the substance of the Committee's recommendations.²⁷⁶ It would seem that this is a desirable exercise of the overall judicial discretion and the only comment which may be made is that the Act might have made the matter clear at the outset.

The second difficulty arises out of the drafting of paragraph (d) itself, drafting which, it will be remembered, is not the same in Canada as in England. In England the paragraph is drafted by reference to section 33 of the Trustee Act, 1925. The trust envisaged by this section is one in which property is held for a beneficiary (the principal beneficiary) for life or any lesser period until something happens which would, if he were absolutely entitled, deprive him of the income of the property; in such an event the trust for the principal beneficiary determines and during the rest of the period for which it might have continued the income is paid at the discretion of the trustees to (a) the principal beneficiary, his spouse, children or issue or (b) if no spouse children or issue are in existence the principal beneficiary and the persons who would be entitled to the income or the trust property if he was dead. Paragraph (d) in England covers the potential beneficiaries of the discretionary trust which would arise under a "Section 33" or any like trust during the period when the interest of the principal beneficiary has not been determined. The Canadian Acts are self-contained and so it is not necessary to travel outside them to ascertain their meaning. It would seem however that paragraph (d) in Canada covers a much wider range of beneficiaries than does the corresponding English provision and is drafted more widely than is necessary to meet the recommendation of the Law Reform Committee. Thus where property is held on trust for A

²⁷⁵ *Supra*, footnote 173, para. 19.

²⁷⁶ For a discussion of the courts' general discretion see *supra*.

for life, remainder to his children at the discretion of the trustees, it can be said that the interest of the children arises from a discretionary power exercisable on the determination of a prior interest. Some argument might be made that "determination" was meant to cover only "premature determination" of interest but there is nothing in the context to show that it need necessarily be so limited. Again if property is held for A during widowhood, with a similar remainder to her children, on the determination of her estate by re-marriage the interest of the children would appear to fall within paragraph (d). In both these examples, however, the interests of the children are quite different from the type of interest the Law Reform Committee had in mind and they are certainly not of a "shadowy nature". Consideration should perhaps be given to re-drafting the Canadian paragraph (d) in narrower terms than it presently stands.

The third difficulty arises from the fact that even if paragraph (d) be drafted in the narrow English form, the four paragraphs are not mutually exclusive. Thus an unborn person, covered by paragraph (c), may also fall within paragraph (b); and a beneficiary who comes within paragraph (d) may also fall within one or more of the other three paragraphs. Because benefit must be shown to the latter three groups of beneficiaries but not necessarily to those in paragraph (d) it is important to decide into which paragraph a beneficiary who *prima facie* is within paragraph (d) and also one of the other paragraphs is going to be placed. In *Re Turner's Will Trusts*²⁷⁷ decided such a beneficiary was to be taken as falling solely within paragraph (d). In the case the court was asked to approve an arrangement on behalf of the possible future husband of a life tenant, the husband being a potential beneficiary under a discretionary trust which would have arisen if the life interest was forfeited. Danckwerts J. took the view that the opening words of paragraph (d) — "Any person" — *prima facie* included the unascertained and the unborn and that the husband should not be excluded from that paragraph because there was reference to these two types of beneficiaries in paragraphs (b) and (c). Moreover as we have seen, paragraph (d) in England is to be more completely defined by reference to section 33 of the Trustee Act 1925 and that section clearly envisages the possibility of those interested under the discretionary trusts being unborn or unascertained. The decision, it is suggested, is clearly in conformity with the *Report* of the Law Reform Committee. To have allowed a

²⁷⁷ [1960] Ch. 122, [1959] 2 All E.R. 689 (Ch.D.).

beneficiary under a non-operating discretionary power to qualify under paragraphs (a), (b) or (c) so that benefit to him would have been required to be shown, would have defeated the whole purpose of the Committee's recommendation.

In Canada there would appear to be no reason why the courts should not resolve the question of overlapping in the same way. Some difficulty may arise from the fact that there is no section 33 to which a court could turn as an aid to interpretation and theoretically it might be improper to look to the Committee *Report* for guidance. An amendment to the legislation would, of course, cure the uncertainty but, even allowing for differences in the language of the Acts, the Canadian courts will probably find it a simple matter to follow the English precedent.

Benefit to the beneficiaries

The Act provides that except in the case of beneficiaries within paragraph (d) the court shall not approve an arrangement unless it is for the benefit of those for whom consent is being given. The status of the beneficiaries within paragraph (d) has already been explained and it is now proposed to deal with the judicial attitude towards the question of benefit. The majority of the English cases have been concerned either with the extension of investment clauses or the avoidance of taxation. Since the passing of the Trustee Investments Act, 1961, and the subsequent decisions that investment clauses would be extended only in exceptional circumstances,²⁷⁸ the stream of investment cases has dried up, but the taxation cases continue unabated. Often the advantage sought is a direct diminution of either estate or income tax.²⁷⁹ In some instances, though the motive for the change is still tax avoidance, the benefit to the beneficiaries for whom the court is consenting may arise, partially at least, in some other fashion. This is true of the cases which have arisen out of settlements where a life tenant had a power of appointment over the remainder with a gift over in default of appointment. The courts have approved variations of such settlements whereby the life tenant was paid a portion of the capital and in return released his power. As well as effecting some

²⁷⁸ For a discussion of these decisions see *supra*.

²⁷⁹ *In Re Cohen's Will Trusts*, [1959] 1 W.L.R. 865, [1959] 3 All E.R. 523 (Ch.D.); *In Re Seale's Marriage Settlement*, *supra*, footnote 253; *In Re Burney's Settlement Trusts*, [1961] 1 W.L.R. 545, [1961] 1 All E.R. 856 (Ch.D.); *In Re Druce's Settlement*, *supra*, footnote 222; *In Re Munro's Settlement Trusts*, [1963] 1 W.L.R. 145, [1963] 1 All E.R. 209 (Ch.D.); *In Re Michelman's Will Trusts*, [1963] 2 W.L.R. 1240, [1963] 2 All E.R. 188 (Ch.D.).

saving in estate duty on the life tenant's death, this scheme also benefited those entitled in default by giving them an amount certain in substitution for a mere possibility of taking dependant upon the life tenant failing to exercise the power.²⁸⁰ In a few other cases the relief from taxation was obtained not for the beneficiaries, but for the settlor. An example of this type of case is *In Re Clitheroe's Settlement Trusts*.²⁸¹ In that case a possible recipient of income under a discretionary trust was the settlor's wife. Any income she received would have been deemed income of the settlor and to avoid that eventuality a proposal was made to vary the trust by excluding any wife of the settlor as beneficiary, the settlor's then wife consenting and benefit to any future wife being ensured by a covenant on the part of the settlor to pay her £100 a year. The court approved this arrangement on behalf of the possible future wife and also on behalf of certain infant beneficiaries. Presumably the benefit to the infants was the demise of a rival beneficiary for otherwise the variation does not appear to have affected their interests.

Of the cases which have not been concerned with investment clauses or taxation, perhaps the most interesting is *In Re T's Settlement Trusts*,²⁸² a case which has already been discussed in another context. The court there approved a variation whereby the interest of an infant which would have become absolute on the infant attaining twenty-one was changed to a protected interest which would become absolute at a later age if no forfeiture had by that date occurred, or if it had, then when the trustees so decided. The court found that this arrangement was for the benefit of the infant because it protected her against her irresponsibility and immaturity in handling money. Although the case may be regarded as rather unique, nonetheless it does indicate that matters other than financial advantage may satisfy the need for a showing of benefit.

Few applications have failed because of a failure to show bene-

²⁸⁰ *In Re Rouse's Will Trusts*, [1959] 1 W.L.R. 374, [1959] 2 All E.R. 50 (Ch.D.); *In Re Robertson's Will Trusts*, *supra*, footnote 243; *In Re Turner's Will Trusts*, *supra*, footnote 277; *In Re Suffret's Settlement*, *supra*, footnote 270; *In Re Moncrieff's Settlement*, [1962] 1 W.L.R. 1344, [1962] 3 All E.R. 838 (Ch.D.). It has been pointed out that in this type of case the bargaining position of those entitled in default may be quite strong and that generally they may be able to demand more than the mere actuarial value of their prospective share; *In Re Van Gruisen's Will Trusts*, [1964] 1 W.L.R. 449, [1964] 1 All E.R. 843 (Ch.D.).

²⁸¹ [1959] 1 W.L.R. 1159, [1959] 3 All E.R. 789 (Ch.D.), following *In Re Robert's Settlement Trusts*, *supra*, footnote 266.

²⁸² *Supra*, footnote 256.

fit for those for whom the court was asked to consent. Of those that have, one, *In Re Tinker's Settlement*,²⁸³ is worthy of comment. There property was settled on the settlor's son and daughter in equal shares. If the son reached thirty his interest was to become absolute, but if he died under that age his share was to pass to the daughter. When the daughter reached thirty she was to have the income of her share for life, with a remainder to children. It was sought to vary the settlement by providing that if the son died under thirty leaving children who attained the age of twenty-one, one half of the son's share would be held for the children. At the date of the application the son and daughter were twenty-five and twenty-two respectively and both were unmarried. The court refused to approve the arrangement because it was not for the benefit of the unborn children of the daughter. It was argued that the variation would "in a broad sense be beneficial to the sister's [the daughter's] children as members of this whole family",²⁸⁴ but Russell J. felt that that type of consideration might be used "to increase a financial benefit which is already established, yet one cannot regard it as a benefit on its own right".²⁸⁵ The court, and rightly if perhaps unfortunately in this case, cannot, it appears, be altruistic at the expense of the beneficiaries for whom it is asked to consent.

As well as the nature of the benefit being clear, it has also been fairly certain in most of the cases that the benefit in question would in fact accrue to the beneficiaries. Nonetheless, while recognizing that absolute certainty is out of the question and that in no case can it be dogmatically stated that any undue risk was taken, yet it may be that the general judicial attitude to the degree of risk which is permissible is rather unsatisfactory. In *In Re Cohen's Will Trusts*²⁸⁶ the benefit to the beneficiaries for whom the court was consenting was contingent on two daughters surviving their mother, who at the time of the application was eighty. Danckwerts J. did not think it necessary to insure against the possibility of the mother dying first. "If people ask the court to sanction this sort of scheme, they must be prepared to take some risk and if it is a risk that an adult would be prepared to take, the court is prepared to take it on behalf of an infant."²⁸⁷ As a statement of general principle, it can be forcefully argued that this gives the court greater licence than it ought to have in its dealing with and

²⁸³ [1960] 1 W.L.R. 1011, [1960] 3 All E.R. 85 (Ch.D.).

²⁸⁴ *Ibid.*, at pp. 1014 (W.L.R.), 87 (All E.R.).

²⁸⁵ *Ibid.*

²⁸⁶ *Supra*, footnote 279.

²⁸⁷ *Ibid.*, at pp. 868 (W.L.R.), 524 (All E.R.).

protection of an infant's property. Moreover even if it were a correct statement of the general rule, what virtue is there in running a risk which, as was the case here, could have been quite easily avoided by insurance? Be that as it may, the later cases have adopted the same general approach. In *In Re Druce's Settlement*²⁸⁸ the risk involved was the giving of wide discretionary powers to the trustees who, however, had declared in advance, that they would use them to achieve the result sought by the variation, the avoidance of taxation. On these facts the court was probably not unjustified in approving the arrangement, but once again Russell J. used language indicating that the courts would be prepared to consent to an arrangement if it was such that an adult beneficiary would have accepted it.²⁸⁹ In a more recent case, *In Re Michelham's Will Trusts*²⁹⁰ the proposal was that all the trust funds be transferred absolutely to two brothers, who were the sole existing beneficiaries, and that insurance be taken out to protect possible future beneficiaries by ensuring the payment to the trustees for their benefit of an amount ten per cent more than would have been available if the life tenant had died at the date of the application. The benefit to the beneficiaries was dependent on several contingencies, including the future possible domicile or residence of the two brothers and the possible investment policy of the trustees with respect to tax exempt securities which formed part of the corpus. The case so far as the quantum of the benefit was concerned was admittedly "a little nearer the line than some",²⁹¹ but in the end it was approved by the court. It was not his function Buckley J. said "to consider whether the scheme is bound to confer a benefit on everyone who may become interested under the trusts in every event, but whether in the probable events it is calculated to confer a benefit".²⁹² Again if this be intended as a statement of general principle it may be giving to the courts greater freedom than they ought to have. It would perhaps be desirable if the courts reconsidered their approach to this question of the de-

²⁸⁸ *Supra*, footnote 222.

²⁸⁹ The learned judge said: "If the possible beneficiaries under this settlement had all been sui juris and ascertained, they could have done so [i.e. conferred discretionary powers on the trustees] in an arrangement without reference to the court. This jurisdiction in effect enables the court to contract on behalf of certain beneficiaries, or possible beneficiaries and I do not see why it would not agree to that which in other circumstances they might have agreed for themselves": *Ibid.*, at pp. 369 (W.L.R.), 567 (All E.R.).

²⁹⁰ *Supra*, footnote 279.

²⁹¹ *Ibid.*, at pp. 1244 (W.L.R.), 191 (All E.R.).

²⁹² *Ibid.*

gree of risk to be run and decided to be a little more cautious than their statements might indicate they are now prepared to be.

(iii) *Some points of procedure.*

Initiation of schemes and application

In *In Re Druce's Settlement Trusts*²⁹³ Russell J. commented on the role of the trustees in the initiation of arrangements and in the making of applications under the Act. As a general rule he thought both these matters ought to be left to the beneficiaries and that the trustees should take the initiative only when they are satisfied the arrangement would be for the benefit of those interested and that there is no beneficiary willing to act.²⁹⁴ Even then it appears that the trustees are not compelled to suggest a scheme or make an application for as yet it is not a breach of trust for them not to seek the advantages of the Act on behalf of infant and other incompetent beneficiaries. Speaking particularly of applications, Russell J. gave two reasons to support the view he took. In the first place if the trustees applied under the Act they would be arguing in favour of the scheme, but at the same time would have to protect the interests of those for whom the court was asked to consent and this might require them to oppose all or part of the proposal.²⁹⁵ Obviously this is a position into which they ought not to put themselves unless it is absolutely necessary to do so. In the second place it was felt that applications might be made by trustees in the hope that, whatever the result, costs would come out of the trust fund and this again would clearly be an undesirable practice.

Parties and representation

(a) *The settlor.*

The Law Reform Committee recommended that the settlor be granted the right to be heard on an application under the Act.²⁹⁶

²⁹³ *Supra*, footnote 222, at pp. 370-371 (W.L.R.), 568 (All E.R.).

²⁹⁴ In discussing initiation of schemes Russell J. referred only to the variation of beneficial interests, but presumably the same comments would apply to dealings with administrative provisions.

²⁹⁵ It has been suggested that this may represent a confusion of the question of application with that of representation: Evans, *The Variation of Trusts in Practice* (1963), 27 Conv. (N.S.) 6, at p. 8. While there may be some merit in the suggestion it can be argued that one of these factors may legitimately influence the other. If the trustees make the application and thereby render themselves incompetent to protect the beneficiaries, the court may have to appoint someone to represent them. If however the trustees do not make the application, they will be free to protect the beneficiaries. Thus the matter of representation may affect the question of who should make the application.

²⁹⁶ *Supra*, footnote 173, paras 21 and 27(3).

In England this recommendation was implemented by an amendment to the Rules of the Supreme Court, this procedure being adopted on the ground that it, rather than the insertion of a provision in the Act itself, was the more appropriate way of handling the matter.²⁹⁷

Order 55, rule 14a (3A) reads:²⁹⁸

In the case of an application under the Variation of Trusts Act, 1958, the settlor and any other person who provided property for the purposes of the trusts in question shall, if still alive and not an applicant and unless the Court of a Judge for special reasons otherwise directs, be made a respondent to the summons in addition to any other persons who are necessary and proper respondents thereto.

Thus, although he is in the end given no power of veto, the settlor has the opportunity of airing his objections to, or voicing his approval of, a proposed arrangement. In itself this is something of a notable development for, while the intention of the settlor as expressed in the trust instrument is the controlling factor in the administration of the trust, he has as a general rule no *locus standi* after the trust has been created. This principle has now been breached by this amendment to the Rules, but, in the circumstances, few will begrudge the settlor his day in court.

In Canada it seems that none of the provinces which have adopted the Variation of Trusts Act have made any provision for the settlor to be a party. To some degree the fact that the court, in the exercise of its general discretion, considers the arrangement in the light of general intent of the trust instrument is a compensating factor, but this is far removed from the settlor himself being permitted to state his views and consideration ought to be given to adopting the English rule.

(b) *Other parties.*

The English courts have made a number of comments on who should be made a party to an application and on how they ought to be represented.²⁹⁹ Two cases are of particular interest. One *In Re Moncrieff's Settlement*,³⁰⁰ raised the question whether prospective next of kin were necessary parties. There the ultimate remaindermen of a settlement were the statutory next of kin of the settlor. At the date of the application among those who might eventually have taken in that capacity were the settlor's adopted son and

²⁹⁷ House of Lords: Hansard, Vol. 209, p. 846.

²⁹⁸ Annual Practice (1964), p. 1506.

²⁹⁹ See generally *Re Chapman's Settlement (No. 2)* and the other cases reported therewith: [1959] 2 All E.R. 47 (Ch.D.).

³⁰⁰ *Supra*, footnote 280.

four infant grandchildren of the settlor's maternal aunt. The son was a respondent to the summons, but being an adult³⁰¹ and being excluded from paragraph (b) of section 1(1) of the English Act by the proviso to the paragraph³⁰² he consented in person to the arrangement. The four infants were also made respondents but on two grounds the court thought they ought not to have been joined. Firstly the infants might never in fact take an interest for that depended, *inter alia*, on the son not surviving his mother. This is hardly sound for, to take the opposite approach, the infants might in fact take an interest and so could well be affected by the variation. The court's second and more compelling reason was that the infants' interests could in fact be protected by the trustees. Although it was not therefore necessary in the events that happened for the infants to be parties to the summons, had the trustees been acting in a capacity adverse to theirs, the court would have had to consider their adequate representation in some other fashion.

The representation of the objects of a power of appointment came under scrutiny in *In Re Christie Miller's Marriage Settlement*.³⁰³ There the court held that to the extent that the power could and would³⁰⁴ be released the objects did not need to be joined or represented. At common law all powers, other than powers collateral and powers coupled with a duty, could be released.³⁰⁵ In four of the jurisdictions which have adopted the Variation of Trusts Act — England, New Brunswick, Ontario and Prince Edward Island — this rule has been changed and powers collateral may now also be released.³⁰⁶ In other provinces in Canada the common law apparently still prevails and so in Alberta, Manitoba and Nova Scotia and in any other province that adopts the Act this should be borne in mind in preparing an application where there are objects of a power to be considered.

³⁰¹ This is made clear in the statements of facts in the All England Reports; it is not expressly stated in the Weekly Law Reports.

³⁰² For a discussion of the effect of section 1(1)(b) see *supra*.

³⁰³ [1961] 1 W.L.R. 462, [1961] 1 All E.R. 855 (Ch.D.).

³⁰⁴ Apparently not necessarily in advance of the application. The release in the instant case was incorporated into the order approving the arrangement. This express release of the power made it unnecessary to consider the argument put forward in the case that by concurring in the application the donee had released the power *pro tanto*.

³⁰⁵ Farwell on Powers (3rd ed., 1914), p. 16 *et seq.*

³⁰⁶ England: Law of Property Act, 1925, *supra*, footnote 217, s. 155 (re-enacting Conveyancing and Law of Property Act, 1881, 44 & 45, Vict., c. 41, s. 52(1)); New Brunswick: Property Act, R.S.N.B., 1952, c. 177, s. 52(1); Ontario: Conveyancing and Law of Property Act, R.S.O., 1960, c. 66, s. 26(1); Prince Edward Island: *supra*, footnote 109, s. 31c.

Open court

During the debates in England on the Variation of Trusts Act there was much discussion on whether hearings should be in open court. On one side it was thought publicity was necessary, particularly to ensure some measure of uniformity of practice; on the other it was argued that it was undesirable that the affairs of infants and of families in general should be dealt with in the public view.³⁰⁷ Eventually the Lord Chancellor gave an undertaking which favoured the proponents of publicity: the Chancery judges, he stated, fully appreciated the problems involved and "will take steps to ensure a proper measure of publicity is accorded to their decisions".³⁰⁸

At the outset a considerable number of applications were heard in open court.³⁰⁹ Vaisey J. in particular emphasized that as a general rule applications should be heard in open court.³¹⁰ This he thought advisable for three reasons: (i) it would ensure uniformity of practice; (ii) such a serious matter as the variation of trusts ought not to be decided on behind closed doors; (iii) it would ensure that all parties were represented by counsel for, while casting no aspersions on solicitors, the court required critical and separate representation by counsel to ensure the case was fully considered.³¹¹ Of these it is suggested the first is of greatest importance. For one of the difficulties in determining the scope of the inherent jurisdiction was the confusion about the practice in Chambers.³¹² However it now seems

³⁰⁷ During the debates on the Bill the Solicitor General stated he thought the profession was fairly evenly divided on the question: House of Commons Hansard, Vol. 579, p. 799.

³⁰⁸ House of Lords: Hansard, Vol. 209, p. 854.

³⁰⁹ With only a few exceptions. In *In Re United Synagogue*, The Times, June 4th, 1959, in which it was sought to vary the investment clause of a charitable trust, Danckwerts J. allowed a motion to adjourn the case into Chambers, stating there were special reasons to justify this being done. (*Quaere*, the trust being charitable, if the Act was applicable: see *supra*.) In two other cases, *In Re Joseph's Will Trusts*, *supra*, footnote 212, and *In Re Clitheroe's Settlement Trusts*, *supra*, footnote 281, the courts approved the arrangements in principle, but then adjourned the cases into chambers for a more detailed discussion of the financial aspects of the proposals.

³¹⁰ *In Re Rouse's Will Trusts*, *supra*, footnote 280, at pp. 375 (W.L.R.), 51 (All E.R.). See also dicta to the same effect by the same learned judge: *In Re Chapman's Settlement Trusts* (No. 2), *supra*, footnote 299; *In Re Byng's Will Trusts*, *supra*, footnote 132.

³¹¹ A consideration which would not, of course, apply in Canada.

³¹² See Lord Simonds in *Chapman v. Chapman*, *supra*, footnote 2, at pp. 446-447 (A.C.), 803 (All E.R.). In the same case a passage in Lord Morton's judgment indicates the difficulties which may arise out of a jurisdiction exercised in Chambers: *ibid.*, at pp. 464-465 (A.C.), 816 (All E.R.); see *supra*, footnote 41. However Lord Evershed M.R. stated that applications under section 57 of the Trustee Act, 1925 *supra*, footnote 108,

to be the case in England that, the general scope of and procedure under the Act being settled, hearings in Chambers are presently much more common. Provided the cases include only the analysis of the "facts" of an arrangement and do not raise new points of law or procedure this is not an undesirable practice and can be taken as complying with the pledge to accord "a proper measure of publicity" to applications under the Act.

Conclusions

Under the inherent jurisdiction the intent of the settlor as expressed in the trust instrument reigned supreme and, but for the extremely narrow emergency and maintenance jurisdictions, the courts had no power to secure for the beneficiaries greater benefit from their trust or to protect them from imminent disasters. The present century has seen a gradual departure from this position, beginning with some rather ill co-ordinated legislation and culminating in the English Act of 1958, which, having already been adopted in Alberta, Manitoba, New Brunswick, Nova Scotia, Ontario and Prince Edward Island will in all probability soon be of general application in Canada.

The general aim of the 1958 Act was to enable beneficiaries to vary their trust when this would be to their benefit and from the English experience this end is being achieved in a smooth and satisfactory fashion. The cases have revealed some, though perhaps no serious defect in the drafting of the legislation, but there is room for improvement and in some cases where the Act is not applicable the earlier law may still be needed to fill in some of the gaps. The following suggestions may be worthy of consideration:

(a) expressly conferring the power of variation on the court, and, in so doing, giving thought to whether the power ought to extend in appropriate cases to the overriding of the objections of adult beneficiaries;

(b) "re-defining" the word "arrangement" along the lines suggested earlier;

(c) clarifying the application (or non-application) of the Act to charitable trusts;

(d) in England, deleting the proviso to section 1(1)(b) of the Act;

(e) in Canada, redrafting in narrower form the Canadian equivalent of section 1(1)(d) of the English Act;

were "almost invariably, and rightly, heard and disposed of in Chambers": *supra*, footnote 6, at pp. 248 (Ch.), 119 (All E.R.).

(f) in Canada, either by amendment to the legislation or to the Rules of Court, making provision for the settlor to be heard on an application under the Act.

The Act has been liberally applied by the English courts. Indeed in one instance, in deciding on the certainty of the accrual of benefit to the beneficiaries for whom they are asked to consent it may be argued the courts have carried their liberality too far. The one exception to the generally generous approach has been the decision to curtail the widening of investment clauses in the light of the Trustee Investment Act, 1961. This is a dangerous precedent for it seems to be almost a throwback to the emergency jurisdiction and it is to be hoped the question is not yet finally settled. Naturally enough, there are some aspects of the Act which the cases have not yet fully explored. Thus, while it is clear that the courts may in the exercise of their overall discretion take into account the events leading up to and the purpose of the proposed variation, there have not been enough decisions to give any precise idea of what factors will be considered relevant in applying this rule. Another, and perhaps more important, unanswered question is the extent to which the courts will veto an otherwise *prima facie* acceptable arrangement on the ground that it runs contrary to the basic intent of the settlor. This could be a fairly potent limitation on variations, and with only one decision in point, it cannot yet be said that an exact balancing of the interest of the settlor and his beneficiaries has been reached. Nonetheless the general balance of power is clear—it is now the interests of the beneficiaries and not the intent of the settlor which controls the trust. There is little doubt that this reversal of the original equitable position had to come about if the trust was to continue to serve as a useful method of handling property in modern social and economic conditions.
