HIGH COURT OF JUSTICE (CHANCERY DIVISION)—14TH MAY, 1959

COURT OF APPEAL—18th JULY, 1960, AND
21ST, 22ND, 23RD AND 24TH MARCH, 1961

HOUSE OF LORDS—9TH, 10TH AND 11TH JULY, AND 8TH OCTOBER, 1962

Pilkington and Another

v.

Commissioners of Inland Revenue and Others [1]

Trusts—Will settlement—Infant beneficiary with contingent interest—Statutory power of advancement—Whether exercisable by resettlement on new trusts—Rule against perpetuities—Whether new trusts to be treated as if contained in original settlement—Trustee Act, 1925 (15 & 16 *Geo.* V, *c.*19), *Section* 32.

By the will of a testator, who died in 1935, *a fund was bequeathed in trust in equal shares for his nephews and nieces (therein called the "beneficiaries") living at his death who attained* 21 *or being female married under that age, for life, with remainder as to each share to the children or remoter issue of the beneficiary as he or she should appoint, and in default of appointment to those children on attaining* 21 *or marriage. A beneficiary was empowered to appoint in favour of a surviving spouse, and the trustees were empowered to revoke the trusts of a share, or part of a share, of a male beneficiary and pay it to him absolutely. The power of advancement under Section* 32, *Trustee Act*, 1925, *was applicable.*

In 1959 *the trustees of the will issued an originating summons to determine whether they were entitled to advance part of the share of one nephew, with his consent, to his danghter born in* 1956, *by paying it to the trustees of a new settlement to be created for the purpose. Under the trusts of the new settlement the income until the daughter attained* 21 *was to be applicable for her maintenance, education and benefit and the balance accumulated, and thereafter it was to be paid to her until she attained* 30. *At* 30 *she was to be entitled to the fund absolutely, but if she died before that age leaving children it was to be held in trust for them equally at* 21.

The Chancery Division approved the proposed exercise of the power of advancement. Subsequently, in order to clarify the position for the purpose of adjudication of Stamp Duty, the Commissioners of Inland Revenue were, with their consent, joined as Defendants and were given leave to appeal. The grounds of their appeal were, inter alia, (a) *that the proposed transaction was a resettlement of the relevant capital upon trusts and with powers not contemplated by the will and not authorised by Section* 32, *and it was irrelevant that the trustees thought them to be for the daughter's benefit; and* (b) *that the trusts declared by the proposed new settlement would have been void for remoteness if contained in the testator's will.*

Held, (1) *that the trustees were entitled to exercise the power of advancement in favour of the daughter by applying money to form a trust the provisions of which they thought to be for her benefit; but* (2) *that for the purpose of the rule against perpetuities the power of advancement was analogous to a special power of appointment, so that the trusts of the proposed settlement must be treated as if contained in the testator's will and some of them were accordingly void as violating the rule.*

(1) Reported (Ch. D. and C.A. *sub nom. In re* Pilkington's Will Trusts) (Ch.D.) [1959] Ch. 699; [1959] 3 W.L.R. 116; 103 S.J. 528; [1959] 2 All E.R. 623; 227 L.T.Jo. 347; (C.A.) [1961] Ch. 466; [1961] 2 W.L.R. 776; 105 S.J. 422; [1961] 2 All E.R. 330; 231 L.T.Jo. 235; (H.L.) [1962] 3 W.L.R. 1051; 106 S.J. 834; [1962] 3 All E.R. 622; 233 L.T.Jo. 614.

By originating summons the trustees sought a declaration that they could lawfully exercise the power of advancement conferred by Section 32, Trustee Act, 1925, by advancing part of a beneficiary's expectant interest in the testator's residuary trust fund subject to new trusts created by a new settlement. Danckwerts, J., in the Chancery Division on 14th May, 1959, approved the proposed power of advancement and settlement. The costs of both parties were ordered to be paid from the capital of the residuary trust fund.

Mr. B. L. Bathurst, Q.C., and Mr. James Cunliffe appeared as Counsel for the trustees, and Mr. John Pennycuick, Q.C., and Mr. Eric Griffith for the beneficiaries.

Danckwerts, J.—This is a case on which the authorities seem to me far from clear. It depends basically on the will, dated 14th December, 1934, of William Norman Pilkington, who died on 8th February, 1935. The will dealt with the residuary estate held on trusts under which the fund was to be held

> "in equal shares if more than one for all or any my nephews and nieces"

being children of his brothers and their wives, whom he names, living at his death

> "who attain the age of 21 years or being female marry under that age and for all or any of the children living at my death who attain the age of 21 years or being female marry under that age of any such nephew or niece as aforesaid".

The shares are settled, and I am concerned only with the share of the one nephew who survived the testator. Clause 13 of the will provides:

> "The share of the Trust Fund hereinbefore given to a Beneficiary as hereinbefore defined shall not vest absolutely in such Beneficiary but shall be retained by my Trustees and held by them upon the trusts hereinafter declared concerning the same (A) So long as such Beneficiary being male is under the age of 25 years or being female is under the age of 25 years and has not married under that age Upon Trust to pay all or such part (if any) as my Trustees in their absolute discretion shall think fit of the income of such share to or apply the same for the maintenance education or personal support or benefit . . . of such Beneficiary [and then follows a trust to accumulate the balance] as an accretion . . . to the capital of the share in the Trust Fund of such Beneficiary . . . Provided Always that the trusts powers and provisions in this sub-clause contained shall determine at the expiration of 21 years from my death".

Sub-clause (B) states that subject as aforesaid the trustees are to hold the income of such share on express protective trusts for the benefit of the beneficiary during his or her life with a provision that any consent to the exercise of any applicable form of advancement shall not cause a forfeiture of his or her life interest. Then there are provisions as to when the trust may be determined. I turn to sub-clause (F):

> "After the death of such Beneficiary my Trustees shall stand possessed of the capital and future income of such share In Trust for all or such one or more exclusively of the other or others of the children or remoter issue of such Beneficiary at such age or time or respective ages or times if more than one in such shares and with such trusts for their respective benefit and such provisions for their respective advancement (either during the life of such Beneficiary with the consent of such Beneficiary or after the death of such Beneficiary) and maintenance and education at the discretion of my Trustees or any other person or persons as such Beneficiary shall from time to time by any deed or deeds revocable or irrevocable or by Will or Codicil without transgressing the rule against perpetuities appoint And in default of and subject to any appointment as aforesaid In Trust for all or any the children or child of such Beneficiary who shall be living at my death or born afterwards and who being male attain the age of 21 years or being female attain that age or marry and if more than one in equal shares".

There is a power under sub-clause (I) to a beneficiary to appoint in favour of a spouse, and there is power in sub-clause (J) to permit the trustees

> "to revoke the trusts of the whole or any part of the share of such Beneficiary being a male and pay or transfer the portion of such share in respect of which such revocation takes effect to such Beneficiary absolutely".

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That provision, however, does not affect the issue in the present case. There is no reference to any power of advancement, but the power of advancement under Section 32 of the Trustee Act, 1925, is applicable.

A settlement is proposed to be executed by Colonel Pilkington (the settlor), by his son (the testator's nephew), and by the present trustees of the testator's will, which settlement will recite that the settlor desires to make some provision

> "for the benefit of Penelope Margaret Pilkington (hereinafter called 'Penelope') who was born on the 29th day of December 1956 and who is a daughter of Richard Godfrey Pilkington who is a son of the Settlor".

In pursuance of that desire, the settlor settles £10 in cash on trusts of the settlement which are thereinafter declared. I need not refer to the administrative provisions of the settlement. Clause 5 is the one which is important. It is as follows:

> "(i) Until Penelope shall attain the age of 21 years or die under that age the Trustees shall have power at their discretion to pay or apply the whole or any part of the income of the Trust Fund to or for the maintenance education or benefit of Penelope in such manner as they may think fit and may either themselves so apply the same or pay the same to the parent or guardian of Penelope without seeing to the application thereof and in so doing shall not be bound to consider whether there is any other income available or any person bound by law to provide for her maintenance or education and shall accumulate all the residue of such income by investing the same and the resulting income thereof in some form of investment hereby authorised as an addition to the capital of the Trust Fund with power from time to time to apply all or any part of such accumulations as if they were income of the current year (ii) If Penelope shall attain the age of 21 years then until she shall attain the age of 30 years or die under that age the Trustees shall pay the income of the Trust Fund to her (iii) The Trustees shall hold the capital of the Trust Fund Upon Trust for Penelope if she shall attain the age of 30 years absolutely (iv) If Penelope shall die under the age of 30 years leaving children or a child living at her death the Trustees shall hold the Trust Fund and the income thereof in trust for all or any her children or child who shall attain the age of 21 years and if more than one in equal shares and in such event the provisions of paragraph(i) of this clause shall apply *mutatis mutandis* to any such child and the income of his or her expectant share of the Trust Fund".

Clause 6 provides:

> "Subject as aforesaid the Trustees shall hold the Trust Fund in trust for all or any the children or child of the said Richard Godfrey Pilkington (other than Penelope) who being male attain the age of 21 years or being female attain that age or marry if more than one in equal shares".

By clause 7, in the case of the failure of the trust the fund is to be held on the trusts of the testator's will, which would take effect after the death of the settlor's son as if he had died without having been married. In clause 8 there are certain modifications of Section 31 of the Trustee Act, 1925, as to education and maintenance. Clause 9 provides that the power of advancement contained in Section 32 of the Trustee Act, 1925, shall apply.

It is suggested that, in execution of the power of advancement existing under the testator's will, the trustees of the will should raise a sum of £7,590 and pay it to the trustees of the proposed settlement to be held on trust. That is much less than the total share of the nephew and his issue as appointed under the testator's will. The question has been raised whether it will be a legitimate exercise of the power of advancement; the particular matters mentioned in the summons being whether it would infringe the rule against perpetuities or whether it would amount, by reason of the power of advancement contained in the proposed settlement and various other things, to a delegation which is prohibited. If the provisions of the proposed settlement are to be read into the testator's will, which was made in 1934, that might offend against the rule against perpetuities, which applies to a person who is not a life in being at the date of the testator's death. The point about delegation seems to me one which is slightly different, but depends possibly on the same principles. It has been

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submitted that a proposed settlement of this kind would amount to an application of the sum advanced for non-objects of the power of advancement, i.e., Penelope's children.

I have been referred to a certain amount of authority, but I do not propose to go through the cases in detail. They establish plainly that it is a proper exercise of a power of advancement for the benefit of a named person if money is advanced on terms which are for the benefit of that person, or for the purposes of a settlement by that person, or in the form of a settlement for that person's benefit. There are benefits to be found in the present case because of the liability to the payment of death duties in certain events. That is the kind of reasoning which was accepted as perfectly legitimate in In re *Ropner's Settlement Trusts*, [1956] 3 All E.R. 332.

The latest case on the subject is In re *Wills' Will Trusts*, [1958] 2 All E.R. 472. In that case there are certain observations of Upjohn, J., which have given me some difficulty. The point which has troubled me in this case is whether there is anything in the decision in In re *Wills' Will Trusts* which requires me to come to the conclusion that it is not proper to do what is proposed to be done in the present case. I think that it is a correct argument that a power of advancement is not the same as a power of appointment. It is plain on principle that, when a power of advancement is exercised, the fund is taken right out of the trust estate and devoted to the benefit of some person who holds it clear of the limiting trusts of the settlement under which the power of advancement is exercised. It is different in this respect from a limited power of appointment, which is merely a power to mark out the trusts of the settlement or will and, therefore, operates when the power of appointment is exercised, so that a trust which is appointed by somebody else is read into the settlement or will. In such a case, far from the property being taken out of the settlement or will, the trusts in question are incorporated in the settlement or will. Therefore, in the case of the exercise of a power of appointment which is not a general but a limited power, the rule against perpetuities cannot be applied in relation to the date of the proposed exercise of the power of appointment, whether made by settlement or will.

That seems to me to be the whole point in the present case. I should have thought that, quite plainly, the exercise of the power of advancement was something which took the money so advanced out of the settlement and either resulted in the money being handed over to the object of the power of advancement or, as the cases show, resulted in its being resettled on new trusts, which necessarily have nothing to do with the trusts of the original settlement at all but are created as a result of the exercise of the power of advancement and nothing else.

As regards the suggestion that the power of advancement cannot be exercised so as to incorporate provisions in favour of persons who are not objects of the original settlement, it seems to me—as Counsel for the beneficiaries said—to be common form that, when a settlement is made of a fund which is advanced to the beneficiary under such powers, the settlement may include trusts in favour not only of the beneficiary himself but his wife (or it may be his widow) and issue, and, consequently, I do not think that in the present case, if I am right on my general point, the trust in favour of Penelope is bad. That seems to me, on principle, the correct answer to be given to the point which is raised. If I am right in the view which I have taken that a power of advancement is essentially different from a power of appointment, that also seems to me to dispose of the point about delegation.

(Danckwerts, J.)

In the course of his judgment in In re *Wills' Will Trusts*, Upjohn, J., after saying that in several other cases the Court had not had the benefit of certain arguments which had been put before him, continued ([1958] 2 All E.R., at page 478):

> "Nevertheless so far as this court is concerned these authorities establish the proposition that trustees exercising a power of advancement may make settlements on objects of the power if the particular circumstances of the case warrant that course as being for the benefit of the object of the power."

Those remarks about the object of the power were relied on by Counsel for the trustees in the course of his argument that the present proposed settlement was inadmissible because of Penelope's children not being born, but I do not think that Upjohn, J.'s mind was directed to that point. He was referring generally to the question that there can be a settlement in the course of the exercise of the power of advancement. Then Upjohn, J., continued:

> "The authorities typified by *Re May* (1) and *Re Mewburn* (2) establish to my mind that any settlement made by way of advancement on an object of the power by trustees must not conflict with the principle delegatus non potest delegare. Thus unless on its proper construction the power of advancement permits delegation of powers and discretions a settlement created in exercise of the power of advancement cannot in general delegate any powers or discretions at any rate in relation to beneficial interests to any trustees or other persons, and in so far as the settlement purports to do so it is pro tanto invalid. I say that without prejudice to the possible propriety of including ordinary powers of advancement in such a settlement; see *Re Morris' Settlement Trusts, Adams* v. *Napier* ([1951] 2 All E.R. 528)."

In In re *Morris' Settlement Trusts* it was held by the Court of Appeal that the inclusion of a general simple power of advancement in what is called the standard form was not objectionable; and in the present case, so far as the power of advancement which is proposed is concerned, it merely refers to a statutory power. That is by the way. What puzzles me about this passage in the judgment of Upjohn, J., is his reference to In re *May's Settlement* and In re *Mewburn's Settlement* as authorities for the proposition which he put forward; but it is quite plain that In re *May's Settlement* and In re *Mewburn's Settlement* are both cases of the exercise of powers of appointment—which, as I have already indicated, are different matters from the exercise of powers of advancement—and, therefore, the cases to which Upjohn, J., referred were not really relevant to the remarks that he subsequently made. I am not quite sure what the learned Judge had in his mind, and I feel that I should not adopt that passage in his judgment in the somewhat different circumstances of the present case. It may be that the distinction between powers of advancement and powers of appointment was not really in Upjohn, J.'s mind at that time, and, consequently, I do not feel bound to regard what he said as ruling out a conclusion in the present case in favour of the other proposition which is being put forward. I have come to the conclusion, on principle, that the exercise of the power of advancement is not objectionable if it is in the form of providing benefits for the objects of the power which are coupled with a settlement of the moneys so raised and allocated in such a way that the children or issue of the objects will become beneficiaries under the settlement. Such a settlement with discretionary powers, particularly if they are of a reasonable kind, is quite proper. A further conclusion is that, in effect, it is a resettlement of the money, which is taken right out of the original settlement in the will. For the purposes of the rule against perpetuities, the relevant period and the relevant purposes for the application of the rule are those contained in the proposed settlement. It is not so tied up with the original will that the proposed provision is obnoxious to the rule against perpetuities.

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(1) [1926] Ch. 136. (2) [1933] Ch. 112.

On 18th July, 1960, on the motion of the trustees of the will, the Court of Appeal (Lord Evershed, M.R., and Willmer and Upjohn, L.JJ.) ordered that the Crown might be added as parties and that either the trustees or the Crown might have leave to appeal against the above decision despite the expiry of the time limit for appealing. The Crown undertook to pay the costs of all parties to both the motion and the subsequent appeal.

Mr. B. L. Bathurst, Q.C., appeared as Counsel for the trustees, Mr. E. B. Stamp for the Crown, and Mr. Eric Griffith for the beneficiaries.

The Crown having appealed against the decision of Danckwerts, J., the case came before the Court of Appeal (Lord Evershed, M.R., and Upjohn and Pearson, L.JJ.) on 21st, 22nd, 23rd and 24th March, 1961, when judgment was given unanimously in favour of the Crown, reversing the decision of the Court below save as regards costs.

Mr. Peter Foster, Q.C., and Mr. E. B. Stamp appeared as Counsel for the Crown, Mr. B. L. Bathurst, Q.C., and Mr. James Cunliffe for the trustees, and Sir Milner Holland, Q.C., and Mr. Eric Griffith for the beneficiaries.

Lord Evershed, M.R.—The problem raised by this appeal is, so far as reported authority goes, in large degree novel, as it is novel in form. The Crown have been added as parties for the purposes of this appeal and have, therefore, argued the case before us for the view that what is intended is something outside the scope of the statutory power of advancement contained in the relevant will. That will was made some two months before his death in February, 1935, by Mr. William Norman Pilkington. It is a will of considerable elaboration, and, after a number of legacies and other provisions, the residue of his estate was left

> "Upon Trust in equal shares if more than one for all or any my nephews and nieces (being children of [three named brothers]) living at my death who attain the age of 21 years or . . . marry under that age".

The gift of residue so expressed was followed by a number of other clauses of considerable elaboration which had the effect of qualifying what appeared to be the absolute gift to these nephews and nieces, so that their interests, though remaining contingent on attaining 21, became life interests with final gifts in favour of their children: that is, to the testator's grand-nephews and grand-nieces. There were included the usual powers of appointment, of applying income for maintenance and the like. The power of advancement, as it is commonly and briefly called, was incorporated into the will from Section 32 of the Trustee Act, 1925, and it is, therefore, essential that I should refer at once to the language of Sub-section (1):

> "Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs".

It is said that the language which I have read from the Trustee Act, 1925, substantially reflects what had become the practice of conveyancers of inserting into settlements or wills powers of advancement—and again I use the convenient label. To what extent that is so is a matter upon which I am not confident that

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I could express any very firm view, more particularly since I do have in mind what was said by Sir George Jessel, M.R., in the case of *Lowther* v. *Bentinck* (1874), L.R. 19 Eq. 166. The corresponding power in the will there before the Court was thus(1):

> "the testator declared that it should be lawful for the trustees, at any time or times during the life of *Francis William Lowther*, to levy and raise any part of the trust moneys, stocks, funds, and securities, not exceeding in the whole one moiety thereof, and to apply the same in or towards the preferment or advancement of *Francis William Lowther*, or otherwise for his benefit, in such manner as the trustees should in their discretion think fit."

Mr. Cookson, in argument before the Master of the Rolls, said(2):

> "This is not an ordinary advancement clause, such as is found in wills or settlements containing provisions for the benefit of infants."

And it is certain that Sir George Jessel's view was that the words of the clause there before him should be given their sense according to the English language.

> "It seems to me [he said] that the words 'or otherwise for his benefit' are evidently put in for the purpose of not confining the trustees to preferment or advancement; and therefore, so far from finding any context which restricts the words, I think the context shews that the words could not mean something of the same kind(3)."

That is to say, he rejected the view that "or otherwise for his benefit" was to be treated as meaning something *ejusdem generis* with what might be called, in a strict use of the word, advancement.

Is the transaction, then, with which we are concerned within the contemplation of that phraseology? I have found this matter one of considerable difficulty. I am conscious that views have been taken about this matter which may have affected many settlements; and it is a subject upon which practitioners in the Chancery Division, I gather, have taken sometimes one view and sometimes another. After, I confess, some changes of view in the course of the argument, I have in the end come to the conclusion that the question now before us, which I have tried to pose, ought to be answered in the negative. I think the question has been formulated most properly—and, for my purposes, most conveniently—in the first paragraph of the notice of appeal. The ground for the appeal is stated in this form:

> "Because the proposed transaction is nothing less than a resettlement of the capital over which it extends upon trusts and with and subject to powers and discretions not contained or contemplated by the Testator's Will and not authorised by the power of advancement contained in the said section and because it is irrelevant that the trustees think it for the benefit of the Defendant Penelope Margaret Pilkington that it should be so resettled".

It is obviously necessary at this stage that I should say something about the transaction, as I have called it, which is here in question. It has taken this form. There is intended to be executed a settlement. (It is possible that it has been executed, but I understand I am right that it has not yet been executed.) It is a settlement made by Colonel Guy Pilkington, who is one of the brothers of the testator and who is the grandfather of the child mentioned in the notice of appeal, to whom I will hereafter allude as Penelope. The trustees of this settlement are in fact the same persons as are the trustees of the testator's will, and it recites that the settlor is desirous of making provision for the benefit of Penelope. Penelope was born on 29th December, 1956, so that on the date when this document was exhibited to the affidavit in support of the summons she was somewhat less than two and a half years of age. The terms of the settlement proposed to be made—which was, incidentally, of the sum of £10 in cash—were that the trust money and any other moneys which the trustees might receive

(1) L.R. 19 Eq., at p. 167. (2) *Ibid.*, at p. 168. (3) *Ibid.*, at p. 170.

should be invested in the usual way and should then be held upon trust so that until Penelope was 21 the income should be available for her maintenance, education and the like. From the age of 21 to 30 she should be entitled to receive the income, and then on her attaining 30 years of age she was to be entitled to the capital: and there followed provisions so that if she were to die under 30 leaving children, those children would take the capital, and if she did not leave children, then there were trusts over. Clause 9 of this document reads:

"The power of advancement contained in Section 32 of the Trustee Act 1925 shall apply".

I do not intend to attempt any kind of definition by way of limitation or otherwise of the vital language which I have already read from Section 32(1) of the Trustee Act. But to my mind the power which is conferred by that Section contemplates something being done for the advancement or benefit (and I accept entirely what Sir George Jessel said, that the benefit should be construed in the widest sense) of the particular person in question according as that course may seem to be called for by the circumstances at the time—that is, at the time when the advancement or benefit is conferred. I would observe from the Sub-section that it is intended to deal with capital of the trust fund and to deal with the case of a person who is entitled to some share in the capital of the trust fund which, for one reason or another, he or she cannot at the time touch, either because it is liable to be divested or because the interest is contingent or because it is subject to some prior interest. In those circumstances the Sub-section contemplates that—subject to the limitation as to amount in the first proviso and to such other limitations as there are, and to which I need not allude—the trustees are entitled to take part of the capital out of the trust fund, to liberate it from the trusts which prevent the person concerned receiving it or enjoying it, and then to make it available to or apply it for the benefit of the person concerned; but, as I have indicated and as I construe it, in the light of the circumstances affecting that person as they then exist.

What I have said has, at any rate, the support of the language, which I will not cite, of Pickford, L.J., in the case of In re *Joicey*, [1915] 2 Ch. 115, at page 122. When I look at this settlement it seems to me that it does not, as a matter of common sense, fulfil that qualification. As Maugham, J., observed in another case which I shall again mention, In re *Mewburn's Settlement* (1), these are matters which may strike one mind one way and one mind another. I have very high regard, if I may say so, in a matter such as this; for the view of the learned Judge from whom this appeal comes; but it has seemed to me, looking at it as I have tried to do against the background which I have tried to state, that what is proposed just does not fall within the contemplation of the statutory power. I cannot escape the conclusion that it is in truth a resettlement, an addition of supplementary trusts to those which you find in the original will, which I am of course fully prepared to assume the trustees quite properly think is for the benefit of the various persons concerned—including of course, Penelope, though, try as I have, I cannot persuade myself that it really relates to Penelope and her benefit in the sense which I think the Section contemplates. There has been some discussion of the question of the avoiding, for the benefit of those concerned, of liability to taxation, and quite properly doing so. The case of In re *Collard's Will Trusts*, [1961] 2 W.L.R. 415, to which Mr. Bathurst alluded a moment ago and to which our attention was earlier this morning called by Sir Milner Holland, is an example of what is now accepted, that if you can prevent the diminution of the trust estate by the impost of taxation, that is a perfectly legitimate thing to do and is clearly a benefit to those who are interested in the fund. It is quite true

(1) [1934] Ch. 112, at p. 115.

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also, as Mr. Bathurst pointed out, that you can enumerate advantages which will result to Penelope. She will have an income available, and immediately available for her maintenance. She will have that without having to suffer herself, unless she has other funds I know not of, the imposition of Surtax. Her capital—the capital here in question—cannot be divested by any exercise of the power of appointment by her father, the testator's nephew; and if her father should live (as seems reasonable to hope, since he is only 42) for five years, then the sum which is proposed to be transferred to the trustees of the intended settlement will not bear Estate Duty which otherwise might be imposed. The last of Mr. Bathurst's advantages is reflected in something said in the affidavit of Mr. Winder supporting the summons, that although she will be entitled to the income at 21, she will not get the capital until she is 30; and so—and I now read from Mr. Winder's affidavit—she

> "would be protected from the risk that she might at the age of 21 or on her earlier marriage be able to dissipate the capital of the amount so applied."

Well, this child is now four and upwards, and who can tell what, in the twentieth century, her interests will be and for what her talents may fit her? She might become a member of a great profession, she might become an artist, a musician, a politician or an explorer. She might, on the other hand, follow the example of domesticity which was more common in past centuries. But can it be said, and ought it to be said, now, that she should be in the position when she cannot "dissipate"—and I would qualify that by saying "or, alternatively, use"—capital at 21, or only do so if the trustees then think it would be for her benefit? It seems to me that it cannot be in contemplation in a statutory power of this sort as applied to a will that you should assume all these things about a child aged two or three and not, as I think the clause intends, deal with the problem when really in some sensible form it arises for determination. The advantages which Mr. Bathurst enumerated are, to my mind, of an impersonal kind when related to Penelope, whereas, according to my understanding of the Section, the advancement or benefit intended should be personal to the person concerned in the sense of being related to his or her own real or personal needs. All the many cases to which our attention was properly drawn, as it seems to me, were cases where for one reason or another it was desirable that a fund should be made available to meet a particular circumstance affecting a particular person—though it does not follow (and there are instances which show it) that all you can do or ought to do is to hand over a capital sum. I have said that because I for my part am not prepared to accept, and make a general rule of, certain of the propositions by which Mr. Foster supported the case for the Crown. I prefer strictly to confine myself to the facts of this case and the impression which my mind has formed upon this transaction, and to give in regard to it the answer which I think is in accordance with the contemplation of the statutory language. Thus, I am not saying anything which might cast any doubt on transactions which might involve the making of some settlement in some form or another, doing the kind of thing that was done, for example, in In re *Halsted's Will Trusts*, decided by Farwell, J., [1937] 2 All E.R. 570, or in the case I have already mentioned of In re *Mewburn's Settlement*, decided by Maughan, J., [1934] Ch. 112. And I also bear in mind, again, what Buckley, J., said in In re *Collard's Will Trusts* (1), on which I most certainly do not desire to cast any doubt: namely, that if what is to be achieved can quite properly be achieved by two documents, it is no necessary objection that you happen to do it by one.

(1) [1961] 2 W.L.R. 415, at p. 419.

(Lord Evershed, M.R.)

I will add a word or two about the grounds on which Mr. Foster, in opening the case, founded his objections. First, I would not like to accept the view that this Section only contemplates acceleration as distinct from postponement. That, no doubt, is a form of words; but it is, if Mr. Foster will forgive me for saying so, merely a form of words, and I do not think you can improve upon the matter, certainly not try to qualify or expound the fairly clear words of this Statute, by introducing some such formula: no postponement, only acceleration. Similarly, I would not accept that anything which appeared to involve, or might be said at first sight to involve, an infringement of the rule *delegatus non potest delegare* is of itself necessarily fatal to what is done. Again, I think it depends on the circumstances and the form of the transaction. And instances have been cited from the cases which show that if in other respects what is done is fairly within what I take to be the intendment of the Statute, it is no objection that, as ancillary to what is done, you would confer powers, including powers of advancement, which might, if you looked at it otherwise and with great strictness, be thought at first blush to involve some encroachment on that principle. Nor, as a somewhat similar ground, would I condemn this transaction so far as this matter is concerned by saying there are persons who would be entitled to benefit who are not objects of the benefaction under the original will: namely, issue of Penelope. Again, the cases which I have cited show that if what is done is being done as an exercise of what I think the Section contemplates, it may not be an objection that there are added to it provisions which will, or might, result in persons taking a benefit who were not themselves objects of the original settlement or will. I also cannot attach so narrow a significance as Mr. Foster would suggest, I think, with all respect to him, to the words "pay or apply". I think as a matter of English, if you have a fund available, you can be said to apply it for the benefit of some person in any manner you like by quite an elaborate transaction.

Of those grounds put forward, however, I have, I confess, felt more force in the problem raised by reference to the rule against perpetuities. In the circumstances of this case I would prefer, myself, not to express any concluded view. It is plain that if the transaction to be entered into, in purported exercise of the power of advancement, postpones final distribution of the funds to a date that would not have been legitimate in the original will and settlement, then there may be difficulty over the rule against perpetuities. Unless you can say that the fund—the sum of money which is made the subject of the new settlement in the exercise of the power—has been altogether severed from the original settlement so that it makes, so to speak, a new start, it involves considering whether the trusts of the new document ought to be treated in some sense as read into, and by way of qualification or expansion of, the trusts of the original document. Put in other and familiar phraseology, it might depend on whether you thought that the power of advancement as exercised was in the nature of a special power.

Now, in this case it is to be noted that the trustees have not merely declared, of the part of the funds in their hands as trustees of Mr. Pilkington's will, new trusts. What they have done, or what they propose to do, is in effect this. They say: "It so happens that there is another settlement made by someone else; and what we are going to do is to take part of the testator's capital and transfer it to the trustees of this other convenient settlement, which is a settlement for the benefit of Penelope, and therefore there is a complete break and you avoid the problem of perpetuities". By perhaps a parity, if not an inversion, of the reasoning which appealed to Buckley, J., in In re *Collard's Will Trusts* (1), I find

(1) [1961] 2 W.L.R. 415.

(Lord Evershed, M.R.)

it a little difficult to think that the transaction can be looked at quite so disjunctively. And there is the difficulty that unless that be so, then at what point can the sum become the subject-matter of the new settlement—become, so to speak, free of any subsisting trusts? For the trustees themselves would have no power to make a settlement in this form for the benefit of Penelope and her issue. On the other hand, it might be that if the other settlement, to the trustees of which the transfer is to be made, had a wholly independent existence, then, other things being equal, the trustees might, in consideration of the circumstances of the day as they affected a particular beneficiary, say: "The best thing we can do for this person now is to take part of the capital of the trust fund and hand it over to this other subsisting trust"— and, if that were done, you might avoid any question of perpetuity and you might in other respects, as I have indicated, be within the scope and intendment of the Section. For myself, therefore, I prefer to express no view upon the perpetuity question.

I came back in the end, therefore, to the simple point which is one—and I repeat the language of Maughan, J.([1])—which might appeal to different minds in different ways. I do not attempt any further definition of the language of Section 32. I venture to suggest that it means what it says; but I do not forget, as Mr. Foster pointed out, that it is, after all, contained in a group of Sections which bears the statutory cross-heading "Maintenance, Advancement and Protective Trusts", and that cross-heading, at least to my mind, emphasises the point which I have tried to make clear and which has in the end influenced my mind, that the exercise of the power, if truly within the Section, must be an exercise done to meet the circumstances as they present themselves in regard to a person within the scope of the Section whose circumstances call for that to be done which the trustees think fit to do. Unless this be so, I see no limitation to the scope of the power. I hope that I have not, in anything that I have said, suggested that the trustees in this case have not been acting in what they properly feel to be the best interests of those whom it is their duty to look after. It is no part of the Crown's argument so to suggest, and, indeed, the presence of the Crown, though it has been of great assistance to the Court, might in some sense have been an embarrassment to the Crown because they were arguing in a sense an academic case.

But I hope I have not transgressed the limits within which the Court has to decide this matter; and, without further repetition, I have in the end concluded that the first ground stated in the notice of appeal correctly states what the position is, with the result that we should hold, in my judgment, that what is proposed to be done is not within the intendment of the statutory power of advancement, and so that this appeal should be allowed.

Upjohn, L.J.—I agree, and in deference to the learned Judge from whom we are differing and the arguments that have been presented to us, I propose to add a few words of my own, although I agree with all that has fallen from my Lord.

I start with the assumption that proposed new trusts (if valid) are for the benefit of Penelope: certainly any reasonable body of trustees may properly think so, and I do not myself dissent from that view. The bona fides of the trustees are not in question, and they do not surrender their discretion to the Court. The sole question, therefore, is whether the proposed transaction of raising and applying the sum of £7,000 to £8,000 out of Penelope's expectant share under her great-uncle's will and transferring it to new trustees upon the trusts of another settlement is within the powers of the trustees. That question depends entirely on whether they are so empowered by virtue of Section 32 of

([1]) In *In re* Mewburn's Settlement, [1934] Ch. 112, at p. 115.

(Upjohn, L.J.)

the Trustee Act, 1925. I do not propose to read it as it has been read by my Lord. Sir Milner Holland has argued that, having regard to the very wide construction that has been put on the word "benefit" by Sir George Jessel, M.R., in *Lowther* v. *Bentinck* (1874), L.R.19 Eq. 166, and followed by Farwell, J., in In re *Halsted's Will Trusts*, [1937] 2 All E. R. 570, once the trustees are satisfied that it is for the benefit of Penelope, it must follow that to carry out the transaction must be within the powers of the trustees under Section 32. There being no challenge to the propriety of the exercise of their powers, it follows, therefore, that the proposed transaction is necessarily, so it has been argued, a proper one. That is a very attractive argument, and it makes necessary a close examination of the true scope and ambit of the powers conferred upon trustees by Section 32. As is well known and was pointed out by Maugham, J., as he then was, in In re *Mewburn's Settlement*, [1934] Ch. 112 Section 32 produced in statutory form the power which had for many years been inserted in all properly drawn instruments, rendering it unnecessary to insert such powers in such documents in future. It must not, however, be overlooked that the power is one which, if the settlor so desires, may be excluded altogether or varied, as indeed was recently done in the case of In re *Collard's Will Trusts* (1). The Section, therefore, must be considered in the light of its historical background and of judicial interpretations of similarly expressed powers of advancement in pre-1926 settlements. Furthermore (and in my judgment this is very important), it must never be forgotten that the power of advancement, whether expressed in the settlement or incorporated by virtue of Section 32, is essentially a power which is ancillary to the trusts declared by the settlor and, when exercised in favour of the object of the power, operates in derogation of the beneficial trusts declared by the settlor.

With those preliminary observations I propose to mention one or two cases to which we have been referred to illustrate how the power of advancement has been exercised in the past, and I use the words "power of advancement" as including the wide form of words to be found in Section 32. The normal and usual exercise of a power of advancement is the raising and application of a sum of money out of the expectant share of the object of the power by paying it directly to him or for his benefit: for example, to buy him a business or to pay his debts, or (in the old days) to buy him a commission in the army. In such cases the trustees are merely anticipating his interest in the trust fund; but the exercise of the power is not, however, necessarily confined to that type of advancement. In special circumstances, and provided (and this, I think, is essential) it is for the benefit of the object of the power, the power may be exercised in favour of non-objects: see, for example, In re *Kershaw's Trusts* (1868), L.R. 6 Eq. 322, where money was raised to purchase a business in England for the husband of the object of the power, the circumstances being that otherwise he would have to leave his wife and children and reside abroad. Then, again provided always that it is for the benefit of the object of the power, in special circumstances it may be proper to raise money and hold it upon trusts for his benefit and for others in succession, who may be non-objects such as the wife and children of the object of the power, and possibly remoter issue: see *Roper-Curzon* v. *Roper-Curzon* (1871), L.R. 11 Eq. 452, and In re *Halsted's Will Trusts*, [1937] 2 All E.R. 570. The extent of the class of non-objects who may take under such settlements has not yet been judicially defined and probably is incapable of definition, for it must depend on the particular circumstances of each case. No reported case, however, apart from In re *Ropner's Settlement Trusts*, [1956] 1 W.L.R. 902, decided by Harman, J., without argument, has gone so far as to authorise trustees to

(1) [1961] 2 W.L.R. 415.

(Upjohn, L.J.)

raise money for the benefit of the object of the power merely because the trustees bona fide thought that it was for his benefit but there was no evidence of any circumstances making it desirable to benefit the particular object of the power on that particular occasion.

Like my Lord, I do not think it is possible to lay down any rule as to the ambit of the powers conferred by Section 32 except to say that the exercise of the power must have reference to the actual circumstances of the object of the power requiring to be benefitted at the time of the exercise of the power.

My Lord has referred to In re *Joicey*, [1915] 2 Ch. 115. I propose to refer to this case in greater detail, making clear, however, that it is only relevant for the contrast drawn by two Judges of the Court of Appeal between the exercise of a wide and unlimited power and the exercise of the ordinary power of advancement. The daughter of the settlor had a power of appointment, and she exercised that power of appointment and added this:

> "Provided always that the said trustees shall (if and so far as I can authorise the same) have power from time to time or at any time during the said period of twenty-one years in their absolute discretion to transfer and make over the share or shares for the time being of the appointed funds of any son of mine who shall have attained the age of twenty-one years, or any part of such share or shares, to such son for his own use absolutely."

That power was held to be far beyond the power of advancement and to be invalid as a delegation of the power of appointment conferred upon the appointor. Pickford, L.J., as he then was, referring to this power, said this, at page 122:

> "I do not think it is a power of maintenance or advancement at all. It is not confined in any way to circumstances requiring maintenance or advancement and may be exercised by the trustees irrespective of such considerations."

Warrington, L.J., said this, at page 123:

> "It is not even a mere power of advancement which might possibly be said to be so common an incident to such interests as the donee has here created as to be fairly within the words 'in such manner in all respects'—as to this I express no opinion. It is I think impossible to deny that under the provision in question the trustees might of their own mere motion and without reference to the circumstances of the son or any other consideration convert a contingent interest into an absolute one and thus completely alter the dispositions made by the testatrix."

Those observations assist the conclusion which, like my Lord, I reach independently, that the power conferred by Section 32 is not to be exercised by the trustees without reference to the particular circumstances of the object of the power at the time of its exercise.

As I ventured to point out in In re *Wills's Will Trusts* (1), the Section does not, in my judgment, permit the trustees, under the guise of making an advancement, to create new trusts or to make a resettlement merely because they think that such new trusts or new settlement will be more beneficial to the object of the power than those which the settlor has chosen to declare. But that, in my judgment, in this particular case is just what the trustees—acting, of course, perfectly bona fide—are trying to do. On the facts of this case I cannot see that there are any circumstances in reference to this child of under five with a rich father aged 42, well capable of providing for her and her education, which can justify at the present time—and I emphasise those last four words—the invocation of the powers conferred by Section 32. I agree with my Lord that paragraph 1 of the notice of appeal gives the true picture of what the trustees are attempting to do, and I think that is beyond their powers.

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(1) [1959] Ch. 1, at pp. 12–13.

(Upjohn, L.J.)

I desire to add a few words on the application to this case of the rule against perpetuities. In the ordinary conventional case, where an advancement is made to an adult who can settle the sum advanced to him, no doubt no question as to reading back a new settlement into the head settlement would arise; but in this case the object of the power, being of tender years, is incapable of making any settlement. Consequently, the trustees can only justify the making of a settlement provided it is within the powers conferred upon them by Section 32. That is plainly a special power; and that power, like all special powers—whether of appointment, advancement, distribution or administrative powers like powers of sale—must all be exercised within the period permitted by the rule against remoteness. Moreover, being a special power it is clear that its exercise must for the purpose of the rule be written into the instrument creating the power: see In re *Fane*, [1913] 1 Ch. 404, *per* Buckley, L.J., at page 413.

To this the answer was made below (1), and accepted by the learned Judge (2) that a sum advanced is taken out of the settlement for all purposes and, therefore, in the case of a power of advancement the new settlement ought not to be read back into the testator's will. No doubt the law has been stated that a sum advanced is taken out of the settlement for all purposes: see In re *Fox*, [1904] 1 Ch. 480, and the cases there referred to. But examination of that case and of the earlier cases shows that they were all cases where a sum had been advanced to the object of the power out and out; and questions arose as to whether, as in *Lawrie* v. *Bankes* (3), the purpose having failed, the object of the power ought to repay it to the trustees or might keep it. In In re *Fox* the question was as to whether the sum did not have to be repaid in the one case or accounted for in the other. But none of the cases touch—or, indeed, could touch—on any question relating to the rule against perpetuities because, being an out and out payment, it could not arise. It is a cardinal rule that the observations of Judges, and the law as stated by them, must be read in relation to the issues which they had to try, and their remarks cannot safely be applied to questions which could not have been in the Judges' minds at the time. The position seems to me to be this. Section 32 either empowers the trustees to make a settlement or it does not. If the former, they are exercising a special power of advancement conferred by Section 32, and exercising that special power, it must be, subject to the usual rule for the purposes of the rule against perpetuities. If they have no power to make a settlement, *cadit quaestio*. The one thing which it seems to me they cannot do in law is to say: "Let us make an out and out advancement and then transfer it to the trustees of the existing settlement, and that is a new settlement which need not be read back into the will". All they can do is to say: "Under the powers conferred by Section 32 we are going to create a new settlement containing new trusts". It matters not whether they themselves declare the trusts or whether they hand it over to the trustees of an existing trust whose terms are thought to be appropriate to the circumstances. They are still plainly exercising a special power, and it seems to me, therefore, that these new trusts must, for the purposes of the rule against perpetuities, be read into the testator's will.

What, then, is the consequence of that? I must examine briefly the terms of the new settlement. I am content to assume that the gift of income to Penelope from the time that she shall attain the age of 21 years until she shall attain the age of 30 years is good; but the next direction, that the trustees shall hold the capital of the trust fund upon trust for Penelope if she shall attain the age of 30 years absolutely, is prima facie bad. It may be—the question has not been

(1) [1959] Ch., at p. 703. (2) *Ibid.*, at p. 705 (*see* p. 419 *ante*). (3) 4 K. & J. 142.

(Upjohn, L.J.)

argued before us—that Section 163 of the Law of Property Act, 1925, saves it. If it does save it, it does so by directing the trustees to hold the capital of the trust fund for Penelope absolutely upon attaining the age of 21 years. The next trust, for the children of Penelope if she shall die under the age of 30 years, is plainly bad on any footing. The effect, therefore, of the rule against perpetuities upon the proposed settlement is basic: it entirely alters the settlement, and that seems to me to be fatal to this case, for the trustees have never been asked to express any opinion as to whether they would think the proposed settlement, cut down by reason of the rule against perpetuities in the manner I have mentioned, is for the benefit of Penelope. That is a matter to which they have never addressed their minds, and, therefore, it cannot possibly be justified under Section 32, for it has not been shown that the trustees think that the settlement, as so cut down, is for the advancement or benefit of Penelope. On that ground, too, therefore, I would think that the transfer to the trustees of this new settlement is entirely beyond the powers of the trustees.

I would only add one further matter, and that is that I think Danckwerts, J., has read more into certain observations which I made in In re *Wills's Will Trusts* (1) than I intended, or, with all respect, than is justifiable on reading what I said. In the passage which he quoted, in [1959] Ch., at the foot of page 706(2), I pointed out the general rule that a person upon whom powers are conferred cannot delegate those powers unless he is expressly authorised so to do. That rule applies, as I venture to think I was quite right in saying, not only to a person exercising a power of appointment but to a person exercising a power of advancement.

For those reasons I would allow this appeal.

Pearson, L.J.—I agree, for the reasons which have been given by my Lords, that the proposed transaction would not be a valid exercise of the powers conferred by Section 32 of the Trustee Act, 1925. I do not find it necessary to express any opinion with regard to the application to this case of the rule against perpetuities.

I agree that the appeal should be allowed.

Lord Evershed, M.R.—Mr. Foster, I think there should be one variation, if I may suggest it, in the form of Order which Mr. Stamp proposed, that in lieu thereof it may be declared: "that upon the true construction of the Testator's said Will and of section 32 of the Trustee Act 1925 the powers conferred upon the Trustees of the Testator's Will do not authorise them to make any part of the capital of the said expectant interest subject to the trusts powers and provisions of any such new Settlement" — I would suggest "of the proposed Settlement being the exhibit . . . ."

Mr. Peter Foster.—I had thought to amend it exactly in that form, "the proposed Settlement being the exhibit. . . ."

Lord Evershed, M.R.—Yes.

Mr. Foster.—The terms upon which the Crown were permitted to be added and to appeal were that they paid the costs on a common fund basis.

Lord Evershed, M.R.—Will you just repeat that, Mr. Foster?

Mr. Foster.—Will your Lordship look at document 3? I did not refer your Lordships to it.

Lord Evershed, M.R.—You agreed to pay all the costs on a common fund basis.

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(1) [1959] Ch. 1. (2) *See* page 420 *ante*.

Mr. Foster.—Yes, and I would ask for a direction for taxation.

Lord Evershed, M.R.—Mr. Griffith and Mr. Bathurst, you agree about that?

Mr. B. L. Bathurst.—Yes, my Lord.

Mr. Eric Griffith.—Yes, my Lord. Will your Lordship give us leave to appeal to the House of Lords?

Upjohn, L.J.—You are appearing, I suppose, for the infant and for the infant's father?

Mr. Griffith.—Yes.

Upjohn, L.J.—The father has an indirect interest, but he has no direct interest in the case, has he? Would he be entitled to appeal? Of course, I know he gets off some Surtax, to put it bluntly.

Mr. Griffith.—Yes, he has an indirect further interest.

Upjohn, L.J.—I doubt whether that would justify him in appealing.

Mr. Griffith.—If the main object of this transaction was achieved—that is, an exemption from Estate Duty in the event of him surviving five years—then the effect would be beneficial to him and his estate.

Lord Evershed, M.R.—I think if we give you leave, you had better look out for this point. The House might say you really have no interest.

Upjohn, L.J.—That deals with your client, but I do not know who is the next friend of the infant.

Mr. Griffith.—I believe her father is the next friend.

Upjohn, L.J.—I was afraid you were going to say that. It would not be right on this infant's behalf to litigate this matter at a very serious risk as to costs if she fails in the House of Lords. What does it matter to her? The trustees, so far as she is concerned, can come along in 15 or 16 years' time, when circumstances are quite different, and make proper provision when, as my Lord has pointed out, she has disclosed what her métier in life is. I know a lot of people want to have the matter decided, but I am thinking of this infant.

Mr. Griffith.—If I may borrow the words of Buckley, J., in the case to which your Lordship referred (1), having regard to the whole object of this, the sooner it is done the better for the father because one does not know when the father will die.

Upjohn, L.J.—Speaking for myself (and I am only speaking for myself), I am very reluctant to think that perhaps this will go to the House of Lords and some Order for costs of a substantial nature will be made. I do not know if it will be out of the amount to be received for the infant—or is it to come on to the estate as a whole? Is your client prepared to bear the risk of costs out of his own pocket? I mean by that, the father. It seems to me a shocking thing to place on this estate the burden of an appeal to the House of Lords to determine a question which is very interesting to practitioners but which does not seriously affect the infant. It does affect the father, I agree.

Mr. Griffith.—It does affect the trust estate of the testator as a whole in that your Lordships' decision will affect a number of earlier transactions which have been done in regard to other members of the family.

Upjohn, L.J.—What I am concerned with is the costs.

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(1) *In re* Collard's Will Trusts, [1961] 2 W.L.R. 415, at p. 420.

Mr. Griffith.—I have no direct instructions on the matter, but I apprehend, if any question arose as to paying the costs in the House of Lords, my friend Mr. Bathurst on behalf of the trustees would probably not oppose some direction for their coming out of the residuary estate of the testator.

Lord Evershed, M.R.—I follow what my brother says, but on the other hand I am well aware that this raises an important question.

Upjohn, L.J.—I agree with that, but I am concerned with the costs on the infant's estate.

Mr. Bathurst.—It might be done subject to the father indemnifying the infant against costs.

Upjohn, L.J.—If he is next friend he is liable for the costs anyway, but what about the costs falling on the estate?

Lord Evershed, M.R.—The Crown is concerned, otherwise it would not have made the agreement to pay the costs. In the circumstances, would the Crown say they would not ask for costs themselves in the House?

Mr. Foster.—I have not got instructions to that effect. We have agreed to pay the costs in this Court. My instructions are that if my learned friends ask for and get leave, then for the costs to be at large in the House of Lords.

Lord Evershed, M.R.—I am disposed to think if we gave the father leave to appeal it would be on terms that he would have to assume the responsibility that he might have to provide for all the costs himself. If he accepts that, well, so be it.

Upjohn, L.J.—And not ask for them out of the estate. I think that would be a reasonable compromise: that he would not ask for any part of his costs or the infant's, either personally or as guardian *ad litem*, to come out of the estate.

Mr. Griffith.—I would have submitted that it might be a little unfair to preclude him from asking the House of Lords to allow costs to come out of the estate, for the reason that there are questions of a precisely similar nature affecting the estate.

Lord Evershed, M.R.—I am disposed to think we should accept Mr. Bathurst's suggestion that we give the father leave but it must be—subject to anything the House may say—on terms that you must be prepared to provide for the costs yourself.

Mr. Griffith.—Yes, I must accept that.

Lord Evershed, M.R.—Sometimes the House says: "This is an academic point". That is a risk you will have to take.

Mr. Bathurst.—Your Lordships will make the usual Order, if and in so far as the trustees' costs are larger—

Lord Evershed, M.R.—I do not think we make it.

Mr. Bathurst.—Without prejudice to my rights.

Mr. Foster.—Your Lordships usually say, without prejudice to the rights of the trustees.

Lord Evershed, M.R.—We will put it in that form.

Mr. Foster.—Have your Lordships given leave to the father alone to appeal to the House of Lords? I do not quite follow.

Lord Evershed, M.R.—I do not want to cause separate representation. If you appeal, the father may appeal for himself and as next friend of the infant;

but in that case, as my brother has pointed out, he must as father assume the burden of the costs without seeking to get them out of the infant's estate.

Mr. Griffith.—That is how I had understood what your Lordships said.

Mr. Foster.—Then your Lordships are granting leave to both to appeal?

Lord Evershed, M.R.—Yes, otherwise it might mean another party.

Mr. Foster.—If your Lordships please.

The beneficiaries having appealed against the above decision, the case came before the House of Lords (Viscount Radcliffe and Lords Reid, Hodson, Jenkins and Devlin) on 9th, 10th and 11th July, 1962, when judgment was reserved. On 8th October, 1962, their lordships unanimously allowed the beneficiaries' appeal in so far as they held that there was nothing in Section 32, Trustee Act, 1925, which prohibited the proposed power of advancement contemplated by the trustees. On the other hand, they were of the opinion that for the purpose of the rule against perpetuities, such power of advancement was analogous to a special power of appointment and therefore the trusts of the proposed settlement had to be treated as if they were contained in the testator's will; which meant that some of them were void for perpetuity. The Crown was ordered to pay the beneficiaries' costs, while those incurred by the trustees were to be met from the testator's residuary trust fund.

Sir Milner Holland, Q.C., and Mr. Eric Griffith appeared as Counsel for the beneficiaries, Mr. Peter Foster, Q.C., and Mr. E. B. Stamp for the Crown, and Mr. B. L. Bathurst, Q.C., and Mr. James Cunliffe for the trustees.

Lord Reid.—My Lords, I have had the advantage of reading the speech about to be delivered by my noble and learned friend, Viscount Radcliffe. I entirely agree with what he says about the application of the rule against perpetuities; but I am only reluctantly persuaded by his reasoning to agree that Section 32 of the Trustee Act, 1925, can be applied to the present case. I do not think that it is disputed that the main purpose of the Appellants' scheme, and its main benefit to the infant Penelope, is avoidance of death duties and Surtax. This is to be achieved by taking funds out of the testator's estate and resettling them on Penelope and any family she may have by means of a new trust with trust purposes different from those provided by the testator. It may be that one is driven step by step to hold that the power conferred by Section 32 to

> "pay or apply any capital money subject to a trust, for the advancement or benefit . . . of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently . . ."

must be interpreted as including power to resettle such money on an infant in such a way as will probably confer considerable financial benefit on her many years hence if she survives. But that certainly seems to me far removed from the apparent purpose of the Section, and considerably beyond anything which it has hitherto been held to cover. Nevertheless, I am compelled to recognise that there is no logical stopping place short of that result. You cannot say that financial benefit from avoidance of taxation is not a benefit within the meaning of the Section. Nor can you say that the Section only authorises payments for some particular or immediate purpose or that the benefit must be immediate and certain and not future or problematical. And again, you cannot say that the beneficiary must consent to the course which the trustees have decided is for his benefit, for that would rule out all payments where the beneficiary is under age.

I have [more 'difficulty about the resettlement. My difficulty does not arise from the rule *delegatus non potest delegare*, for if the Section authorises the creation of a new trust it must do so by writing into the testator's will authority

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to his trustees to do this; and new trust purposes almost inevitably mean that in certain events certain persons will take benefit who were not beneficiaries under the testator's will. But I think that the cases show that it is too late now to say that this power can never authorise trustees to convey funds to new trustees to hold for new trust purposes: to say that might endanger past transactions done on the faith of these authorities. If that be so, then I must hold that, if trustees genuinely and reasonably believe that it is for the benefit of a beneficiary contingently entitled to a share of capital to resettle a sum not exceeding half of his prospective share, they are empowered to do so in ways which do not infringe the rule against perpetuities. To draw a line between one class of case and another would be legislating and not proceeding on an interpretation of the existing statutory power.

I realise that this case opens a wide door and that many other trustees may seek to take advantage of it. But if it is thought that the power which Parliament has conferred is likely to be used in ways of which Parliament does not approve, then it is for Parliament to devise appropriate restrictions of the power.

I agree that this appeal must be allowed.

Viscount Radcliffe (read by Lord Hodson).—My Lords, this is a difficult case, and at first impression I would not have expected to find it so hard to return a certain answer to a question concerned with the time-honoured and much used power of advancement, long inserted in settlements of personalty and now applied to all such settlements made since 1925 by virtue of Section 32 of the Trustee Act of that year.

Fortunately, the facts themselves are of contrasting simplicity. Here we have one of the two Appellants, Miss Penelope Pilkington, spinster and an infant still only of some five and a half years of age, who belongs evidently to a family of some substance and is entitled to a contingent reversionary interest in a trust fund set up by the will of her father's uncle, William Norman Pilkington. Her father, Richard Godfrey Pilkington, the other Appellant, is entitled during his life to the income of a share of that trust fund (the share is said to be worth some £90,000), and after his death, subject to the possible exercise of certain powers to which I will refer in a moment, his share is to be held in trust for his children attaining 21 or, if female, marrying under that age, and if more than one in equal shares. The father is, I believe, now about 43 years of age and is married, and Miss Penelope has at present a small sister and a small brother, both presumptively entitled to a portion of his share when it falls into possession; and, of course, other children may come into existence to add to the number of possible inheritors.

It is obvious, I think, that, as things stand today and are likely to stand for some time to come, Miss Penelope is very far from having any certain or assured rights to any part of this trust fund. If she were to die under 21 unmarried she would take nothing, except in the contingency of her father having previously exercised his special power of appointment in her favour. On the other hand, since this power of appointment extends to all the children or issue of his marriage, an exercise of it by him at any time might exclude her from any interest in his share of the fund, or alternatively might reduce her interest to any extent. Powers of appointment apart, her presumptive one-third of his share is variable according to the number of her brothers and sisters, existing or born hereafter, who may ultimately become entitled to divide her father's share with her. There is a separate contingency that this share may never descend to his children at all, because under a special clause of the testator's will (clause 13 (J)) his trustees have power to revoke the trusts affecting the share and transfer it outright to the

father for his own absolute use. This would cut out Miss Penelope altogether. Her title to any capital in the trust fund is, therefore, both contingent and defeasible. So far as concerns rights to derive any income from it, nothing can come to her so long as her father is alive (unless he forfeits his interest and so brings into operation a discretionary trust, under which she might receive some payments), and even after his death her right to income may be further deferred if he appoints a life interest, as he has power to do, to a surviving wife.

Now, what the trustees of the testator's will, the second Respondents, are proposing to do, if they lawfully can, is to take a sum of about £7,600 or investments of equivalent value out of Miss Penelope's expectant share (I do not think that it can make any difference whether they actually realise the sum or merely appropriate existing investments) and set it apart for her upon the trusts of a new settlement for her benefit which is to be brought into existence for the purpose by her great-uncle, the Respondent Guy Reginald Pilkington. The first trustees of this proposed new settlement are intended to be the same persons as the will trustees; but again I do not think that anything turns on this, nor has anyone suggested that it does. What matters is that there are new trusts, not that there are old trustees.

The trusts of the new settlement can be sufficiently stated as follows. Until Miss Penelope is 21, the trustees are to apply the income of her trust fund for her maintenance, education or benefit and to accumulate any unexpended balance. When she attains 21, the income is to be held on protective trusts for her until she is 30; and if she attains 30 the capital and income are to be hers absolutely. If she dies before that age leaving children surviving her, those children take her share; but if she does not leave any such children, her share is to go over to such of her brothers and sisters as attain 21 or being female marry, with an ultimate gift over back to the testator's residuary trust fund. Under this new settlement, therefore, Miss Penelope could not take a capital share unless and until she attained the age of 30.

The trustees are satisfied that if money were thus raised out of her expectant share and settled on these trusts, its disposition would be for her benefit. They are able to analyse under various heads the ways in which her situation in life would be improved by having part of her prospective share withdrawn from the shadow of the contingencies or defeasances that might defeat it and secured as provision for herself and, it may be, her children. When one compares her situation under the proposed arrangement with her existing situation it is very natural to conclude that the give and take results to her advantage; but, apart from the actual variation of interests, the trustees have also to take into account the incidence of death duties, a very present matter of consideration for all who have interests in settled property. If she must wait to come into her share until it passes on her father's death, it will be reduced by the payment of duty on its capital value, and, under our eccentric system of determining the rate on separate funds by aggregating the values of all properties passing on death in any form, that rate may well be a heavy one. On the other hand, if this settlement is made, her fund will, it is thought, become free from duty on her father's death if he survives the making by five years. There are, too, more sophisticated calculations, derived from tax experts, which show that the net income resulting from the investments that are to form her fund will be considerably larger if it accrues to her trustees on her behalf than if it came to her father and he had to maintain her.

I am not sure how much independent weight I should give to the last consideration, but that does not matter, because the fact is that from beginning to

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end of these proceedings it has not been in dispute that the proposed arrangement can properly be described as being for the benefit of Miss Penelope—or, more accurately, since the trustees have not surrendered their discretion to the Court but merely wish to know whether they have power to exercise it in the way outlined, that it is open to them honestly to entertain this view. What she herself thinks about it all is, of course, at present unascertainable, since she has other concerns with which to occupy herself; but it is at any rate permissible to expect that, when she brings her mind to bear on these matters in more mature years, she will regard the provision now being planned for her and her possible offspring as having been on the whole to her advantage, and will be grateful for the forethought that has established her so early in life as a lady of independent means.

Why, then, would it not be lawful for the trustees to exercise their statutory power of advancement in the manner proposed? Danckwerts, J., who heard their originating summons in the High Court, seems to have felt no doubt that they had the necessary authority. The first Respondents, the Commissioners of Inland Revenue, refused, however, to accept that his conclusion was correct, and with their consent they were made parties to the proceedings for the purposes of an appeal. The Court of Appeal unanimously upheld their objection and reversed the Order of Danckwerts, J. I must notice later the reason for the Court of Appeal's decision; but it does not, I think, coincide with the general position adopted by the Crown on the legal question, nor was any active attempt made to support it in argument before this House.

The Crown's main propositions (there is a subsidiary point about the application of the rule against perpetuities which I will deal with later) centre round the construction which, they say, must be given to the words of Section 32 of the Trustee Act, 1925. In fact, to me it seems that their several propositions are little more than different ways of illustrating the inherent limitation which they find in, or extract from, the words of the Section. It is necessary, therefore, to begin by saying something about the form and nature of what is known as the power of advancement.

No one doubts that such a power was frequently conferred upon trustees under settlements of personalty and that its general purpose was to enable them, in a proper case, to anticipate the vesting in possession of an intended beneficiary's contingent or reversionary interest by raising money on account of his interest and paying or applying it immediately for his benefit. By so doing they released it from the trusts of the settlement and accelerated the enjoyment of his interest (though normally only with the consent of a prior tenant for life); and, where the contingency upon which the vesting of the beneficiary's title depended failed to mature or there was a later defeasance or, in some cases, a great shrinkage in the value of the remaining trust funds, the trusts as declared by the settlement were materially varied through the operation of the power of advancement. This possibility was recognised and accepted as an incidental risk attendant upon the exercise of such a power, whose presence was felt on the whole to be advantageous in a system in which the possession of property interests was often deferred long beyond adult years.

No one disputes, either, that, when Section 32 was framed and inserted in the Trustee Act of 1925 as a general enabling provision applying to trusts coming into existence after that date, it was expressed in terms that corresponded closely with the previous common form recommended in books of conveyancing precedents and adopted in practice. I do not see any particular importance in this circumstance apart from the fact that it makes it the more natural to refer to

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what had been said in earlier reported decisions that bear upon the meaning and range of a power of advancement.

The word "advancement" itself meant, in this context, the establishment in life of the beneficiary who was the object of the power, or at any rate some step that would contribute to the furtherance of his establishment. Thus it was found in such phrases as "preferment or advancement" (*Lowther* v. *Bentinck* (1874), L.R. 19 Eq. 166), "business, profession, or employment, or otherwise for the advancement or preferment in the world" (*Roper-Curzon* v. *Roper-Curzon* (1871), L.R. 11 Eq. 452) and "placing out or advancement in life" (In re *Breeds' Will* (1875), 1 Ch. D. 226). Typical instances of expenditure for such purposes under the social conditions of the nineteenth century were an apprenticeship, or the purchase of a commission in the army or of an interest in business. In the case of a girl there could be an advancement on marriage (*Lloyd* v. *Cocker* (1860), 27 B. 645). Advancement had, however, to some extent a limited range of meaning, since it was thought to convey the idea of some step in life of permanent significance; and accordingly, to prevent uncertainties about the permitted range of object for which monies could be raised and made available, such words as "or otherwise for his or her benefit" were often added to the word "advancement". It was always recognised that these added words were "large words" (see Sir George Jessel, M.R. in In re *Breeds' Will* (1)), and indeed in another case, *Lowther* v. *Bentinck* (2), the same Judge spoke of "preferment and advancement" as being "both large words" but of "benefit" as being the "largest . . . of all." So, too, Kay, J., in In re *Brittlebank* (1881), 30 W.R. 99. Recent Judges have spoken in the same terms—see Farwell, J., in In re *Halsted's Will Trusts*, [1937] 2 All E.R. 570, and Danckwerts, J., in In re *Moxon's Will Trusts*, [1958] 1 W.L.R. 165. This wide construction of the range of the power—which evidently did not stand upon niceties of distinction provided that the proposed application could fairly be regarded as for the benefit of the beneficiary who was the object of the power—must have been carried into the statutory power created by Section 32, since it adopts without qualification the accustomed wording

> "for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit".

So much for "advancement", which I now use for brevity to cover the combined phrase "advancement or benefit". It means any use of the money which will improve the material situation of the beneficiary. It is important, however, not to confuse the idea of "advancement" with the idea of advancing the money out of the beneficiary's expectant interest. The two things have only a casual connection with each other. The one refers to the operation of finding money by way of anticipation of an interest not yet absolutely vested in possession or, if so vested, belonging to an infant: the other refers to the status of the beneficiary and the improvement of his situation. The power to carry out the operation of anticipating an interest is not conferred by the word "advancement" but by those other words of the Section which expressly authorise the payment or application of capital money for the benefit of a person entitled

> "whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion", etc.

I think, with all respect to the Crown, a good deal of their argument is infected with some of this confusion. To say, for instance, that there cannot be a

(1) (1875) L.R. 1 Ch., at p. 228. (2) (1874) L.R. 19 Eq., at p. 169.

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valid exercise of a power of advancement that results in a deferment of the vesting of the beneficiary's absolute title (Miss Penelope, it will be remembered, is to take at 30 under the proposed settlement instead of at 21 under the will) is in my opinion to play upon words. The element of anticipation consists in the raising of money for her now before she has any right to receive anything under the existing trusts; the advancement consists in the application of that money to form a trust fund, the provisions of which are thought to be for her benefit. I have not forgotten, of course, the reference to powers of advancement which are found in such cases as In re *Joicey*, [1915] 2 Ch. 115, In re *May's Settlement*, [1926] Ch. 136, and In re *Mewburn's Settlement*, [1934] Ch. 112, to which our attention was called, or the answer supplied by Cotton, L.J., in In re *Aldridge* (1886), 55 L.T. 554 at page 556, to his own question "what is advancement?"; but I think that it will be apparent from what I have already said that the description that he gives (it cannot be a definition) is confined entirely to the aspect of anticipation or acceleration which renders the money available, and not to any description or limitation of the purposes for which it can then be applied.

I have not been able to find in the words of Section 32, to which I have now referred, anything which in terms or by implication restricts the width of the manner or purpose of advancement. It is true that, if this settlement is made, Miss Penelope's children, who are not objects of the power, are given a possible interest in the event of her dying under 30 leaving surviving issue. But if the disposition itself—by which I mean the whole provision made—is for her benefit, it is no objection to the exercise of the power that other persons benefit incidentally as a result of the exercise. Thus a man's creditors may in certain cases get the most immediate advantage from an advancement made for the purpose of paying them off, as in *Lowther* v. *Bentinck* (1); and a power to raise money for the advancement of a wife may cover a payment made direct to her husband in order to set him up in business (In re *Kershaw's Trusts* (1868), L.R. 6 Eq. 322). The exercise will not be bad, therefore, on this ground.

Nor, in my opinion, will it be bad merely because the moneys are to be tied up in the proposed settlement. If it could be said that the payment or application permitted by Section 32 cannot take the form of a settlement in any form but must somehow pass direct into or through the hands of the object of the power, I could appreciate the principle upon which the Crown's objection was founded. But can that principle be asserted? Anyone can see, I think, that there can be circumstances in which, while it is very desirable that some money should be raised at once for the benefit of an owner of an expectant or contingent interest, it would be very undesirable that the money should not be secured to him under some arrangement that will prevent him having the absolute disposition of it. I find it very difficult to think that there is something at the back of Section 32 which makes such an advancement impossible. Certainly neither Danckwerts, J., nor the members of the Court of Appeal in this case took that view. Both Lord Evershed, M.R., and Upjohn, L.J., explicitly accept the possibility of a settlement being made in exercise of a power of advancement. Farwell, J., authorised one in In re *Halsted's Will Trusts* (2), a case in which the trustees had left their discretion to the Court. The trustees should raise the money and "have it settled", he said (3). So, too, Harman, J., in In re *Ropner's Settlement Trusts*, [1956] 1 W.L.R. 902, authorised the settlement of an advance provided for an infant, saying that the child could not

> "consent or request the trustees to make the advance, but the transfer of a part of his

(1) (1874) L.R. 19 Eq. 166. (2) [1937] 2 All E.R. 570. (3) *Ibid.*, at p. 572.

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> contingent share to the trustees of a settlement for him must advance his interest and thus be for his benefit (1)".

All this must be wrong in principle if a power of advancement cannot cover an application of the moneys by way of settlement.

The truth is, I think, that the propriety of requiring a settlement of moneys found for advancement was recognised as long ago as 1871 in *Roper-Curzon* v. *Roper-Curzon* (1871), L.R. 11 Eq. 452, and, so far as I know, it has not been impugned since. Lord Romilly, M.R.'s decision passed into the textbooks, and it must have formed the basis of a good deal of subsequent practice. True enough, as Counsel for the Crown has reminded us, the beneficiary in that case was an adult who was offering to execute the post-nuptial settlement required; but I find it impossible to read Lord Romilly's words as amounting to anything less than a decision that he would permit an advancement under the power only on the terms that the money was to be secured by settlement. That was what the case was about. If, then, it is a proper exercise of a power of advancement for trustees to stipulate that the money shall be settled, I cannot see any difference between having it settled that way and having it settled by themselves paying it to trustees of a settlement which is in the desired form.

It is not as if anyone were contending for a principle that a power of advancement cannot be exercised "over the head" of a beneficiary—that is, unless he actually asks for the money to be raised and consents to its application. From some points of view that might be a satisfactory limitation, and no doubt it is the way in which an advancement takes place in the great majority of cases. But if application and consent were necessary requisites of advancement, that would cut out the possibility of making any advancement for the benefit of a person under age, at any rate without the institution of Court proceedings and formal representation of the infant; and it would mean, moreover, that the trustees of an adult could not in any circumstances insist on raising money to pay his debts, however much the operation might be to his benefit, unless he agreed to that course. Counsel for the Crown did not contend before us that the power of advancement was inherently limited in this way; and I do not think that such a limitation would accord with the general understanding. Indeed, its "paternal" nature is well shown by the fact that it is often treated as being peculiarly for the assistance of an infant.

The Crown's objections seem to be concentrated upon such propositions as that the proposed transaction is "nothing less than a resettlement" and that a power of advancement cannot be used so as to alter or vary the trusts created by the settlement from which it is derived. Such a transaction, they say, amounts to using the power of advancement as a way of appointing or declaring new trusts different from those of the settlement. The reason why I do not find that these propositions have any compulsive effect upon my mind is that they seem to me merely vivid ways of describing the substantial effect of that which is proposed to be done and they do not in themselves amount to convincing arguments against doing it. Of course, whenever money is raised for advancement on terms that it is to be settled on the beneficiary, the money only passes from one settlement to be caught up in the other. It is, therefore, the same thing as a resettlement. But, unless one is to say that such moneys can never be applied by way of settlement—an argument which, as I have shown, has few supporters and is contrary to authority—it merely describes the inevitable effect of such an advancement to say that it is nothing less than a resettlement.

(1) [1956] 1 W.L.R., at p. 906.

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Similarly, if it is part of the trusts and powers created by one settlement that the trustees of it should have power to raise money and make it available for a beneficiary upon new trusts approved by them, then they are in substance given power to free the money from one trust and to subject it to another. So be it: but unless they cannot require a settlement of it at all, the transaction they carry out is the same thing in effect as an appointment of new trusts.

In the same way I am unconvinced by the argument that the trustees would be improperly delegating their trust by allowing the money raised to pass over to new trustees under a settlement conferring new powers on the latter. In fact, I think that the whole issue of delegation is here beside the mark. The law is not that trustees cannot delegate; it is that trustees cannot delegate unless they have authority to do so. If the power of advancement which they possess is so read as to allow them to raise money for the purpose of having it settled, then they do have the necessary authority to let the money pass out of the old settlement into the new trusts. No question of delegation of their powers or trusts arises. If, on the other hand, their power of advancement is read so as to exclude settled advances, *cadit quaestio*.

I ought to note for the record (1) that the transaction envisaged does not actually involve the raising of money, since the trustees propose to appropriate a block of shares in the family's private limited company as the trust investment; and (2) there will not be any actual transfer, since the trustees of the proposed settlement and the will trustees are the same persons. As I have already said, I do not attach any importance to these factors: nor, I think, do the Crown. To transfer or appropriate outright is only to do by short cut what could be done in a more roundabout way by selling the shares to a consenting party, paying the money over to the new settlement with appropriate instructions and arranging for it to be used in buying back the shares as the trust investment. It cannot make any difference to follow the course taken in In re *Collard's Will Trusts*, [1961] 2 W.L.R. 415, and deal with the property direct. On the other point, so long as there are separate trusts the property effectually passes out of the old settlement into the new one, and it is of no relevance that, at any rate for the time being, the persons administering the new trust are the same individuals.

I have not yet referred to the ground which was taken by the Court of Appeal as their reason for saying that the proposed settlement was not permissible. To put it shortly, they held that the statutory power of advancement could not be exercised unless the benefit to be conferred was

> "personal to the person concerned in the sense of being related to his or her own real or personal needs (1)."

Or, to use other words of Lord Evershed, M.R. (2), the exercise of the power

> "must be an exercise done to meet the circumstances as they present themselves in regard to a person within the scope of the Section whose circumstances call for that to be done which the trustees think fit to do."

Upjohn, L.J., expressed himself in virtually the same terms.

My Lords, I differ with reluctance from the views of Judges so learned and experienced in matters of this sort, but I do not find it possible to import such restrictions into the words of the statutory power which itself does not contain them. First, the suggested qualification, that the considerations or circumstances must be "personal" to the beneficiary, seems to me uncontrollably vague as a guide to general administration. What distinguishes a personal need from any other need to which the trustees in their discretion think it right to attend in the beneficiary's interest? And if the advantage of preserving the funds of a bene-

(1) *See* page 424 *ante*. (2) *See* page 426 *ante*.

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ficiary from the incidence of death duty is not an advantage personal to that beneficiary, I do not see what is. Death duty is a present risk that attaches to the settled property in which Miss Penelope has her expectant interest, and even accepting the validity of the supposed limitation, I would not have supposed that there was anything either impersonal or unduly remote in the advantage to be conferred upon her of some exemption from that risk. I do not think, therefore, that I can support the interpretation of the power of advancement that has commended itself to the Court of Appeal, and, with great respect, I think that the judgments really amount to little more than a decision that in the opinion of the members of that Court this was not a case in which there was any occasion to exercise the power. That would be a proper answer from a Court to which trustees had referred their discretion with a request for its directions; but it does not really solve any question where, as here, they retain their discretion and merely ask whether it is impossible for them to exercise it.

To conclude, therefore, on this issue, I am of opinion that there is no maintainable reason for introducing into the statutory power of advancement a qualification that would exclude the exercise in the case now before us. It would not be candid to omit to say, though I think that that is what the law requires, I am uneasy at some of the possible applications of this liberty, when advancements are made for the purposes of settlement or on terms that there is to be a settlement. It is quite true, as the Crown have pointed out, that you might have really extravagant cases of resettlements being forced on beneficiaries in the name of advancement, even a few months before an absolute vesting in possession would have destroyed the power. I have tried to give due weight to such possibilities, but when all is said I do not think that they ought to compel us to introduce a limitation of which no one, with all respect, can produce a satisfactory definition. First, I do not believe that it is wise to try to cut down an admittedly wide and discretionary power, enacted for general use, through fear of its being abused in certain hypothetical instances. And moreover, as regards this fear, I think that it must be remembered that we are speaking of a power intended to be in the hands of trustees chosen by a settlor because of his confidence in their discretion and good sense and subject to the external check that no exercise can take place without the consent of a prior life tenant, and that there does remain at all times a residual power in the Court to restrain or correct any purported exercise that can be shown to be merely wanton or capricious and not to be attributable to a genuine discretion. I think, therefore, that, although extravagant possibilities exist, they may be more menacing in argument than in real life.

The other issue on which this case depends, that relating to the application of the rule against perpetuities, does not seem to me to present much difficulty. It is not in dispute that, if the limitations of the proposed settlement are to be treated as if they had been made by the testator's will and as coming into operation at the date of his death, there are trusts in it which would be void *ab initio* as violating the perpetuity rule. They postpone final vesting by too long a date. It is also a familiar rule of law in this field that whereas appointments made under a general power of appointment conferred by will or deed are read as taking effect from the date of the exercise of the power, trusts declared by a special power of appointment—the distinguishing feature of which is that it can allocate property among a limited class of persons only—are treated as coming into operation at the date of the instrument that creates the power. The question, therefore, resolves itself into asking whether the exercise of a power of advancement which takes the form of a settlement should be looked upon as more closely analogous to a general or to a special power of appointment.

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On this issue I am in full agreement with the views of Upjohn, L.J., in the Court of Appeal. Indeed, much of the reasoning that has led me to my conclusion on the first issue that I have been considering leads me to think that for this purpose there is an effective analogy between powers of advancement and special powers of appointment. When one asks what person can be regarded as the settlor of Miss Penelope's proposed settlement, I do not see how it is possible to say that she is herself or that the trustees are. She is the passive recipient of the benefit extracted for her from the original trusts; the trustees are merely exercising a fiduciary power in arranging for the desired limitations. It is not their property that constitutes the funds of Miss Penelope's settlement: it is the property subjected to trusts by the will of the testator and passed over into the new settlement through the instrumentality of a power which by Statute is made appendant to those trusts. I do not think, therefore, that it is important to this issue that money raised under a power of advancement passes entirely out of the reach of the existing trusts and makes, as it were, a new start under fresh limitations, the kind of thing that happened under the old form of family resettlement when the tenant in tail in remainder barred the entail with the consent of the protector of the settlement. I think that the important point for the purpose of the rule against perpetuities is that the new settlement is only effected by the operation of a fiduciary power which itself "belongs" to the old settlement.

In the conclusion, therefore, there are legal objections to the proposed settlement which the trustees have placed before the Court. Again I agree with Upjohn, L.J., that these objections go to the root of what is proposed, and I do not think that it would be satisfactory that the Court should try to frame a qualified answer to the question that they have propounded which would express the general view that the power to advance by way of a settlement of this sort does exist and the special view that the power to make this particular settlement does not. Nor, I think, is such a course desired either by the Appellants or the trustees. They will, I hope, know where they stand for the future, and so will the Crown, and that is enough.

Lord Hodson.—My Lords, my noble and learned friends, **Lord Jenkins** and **Lord Devlin,** who are unable to be here today, are in full agreement with the opinion which I have just read. I am also in complete agreement and have nothing further to add.

Questions put:

That the Order appealed from be discharged except as to costs.

The Contents have it.

That it be declared that the application of the capital proposed by the Plaintiffs, as trustees of the will of William Norman Pilkington, deceased, would be improper and unauthorised because the trusts of the new settlement, if contained in the said will of the testator, would be void for perpetuity.

The Contents have it.

That the Respondents, the Commissioners of Inland Revenue, do pay to the Appellants their costs in this House, such costs to be taxed as between solicitor and client.

The Contents have it.

That the costs of the second, third, fourth and fifth Respondents in this House be paid out of the estate of the testator, William Norman Pilkington, deceased, such costs to be taxed as between solicitor and client.

The Contents have it.

[Solicitors:—Alsop, Stevens, Beck & Co., for the beneficiaries and the trustees; Solicitor of Inland Revenue.]