How far does the rule in Saunders v Vautier apply to charitable trusts?

Article

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How far does the rule in *Saunders v Vautier* apply to charitable trusts?

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Introduction

This article explores the application to charitable trusts of the rule in *Saunders v Vautier*.[1] That is, the well-known rule that – as generally understood – in the context of beneficiary trusts (basically) empowers beneficiaries of full capacity, who are wholly entitled to the benefit of trust assets, to collapse the trust and take its property in disregard of the trust's terms. In a passing remark in the Court of Appeal, a judgment of Richards, Newey LJJ and Dame Elizabeth Gloster said:[2]

> '[Counsel] also made reference to the rule in *Saunders v Vautier* (1841) Beav 115 … In the case of a charity, [counsel] said, the Attorney General represents the beneficial interest. None the less, it is hard to see how the rule can apply in the case of a charity…'

The court was presumably (and perhaps understandably) unmindful of case law – examined below – deciding clearly that the rule *does* apply to charitable trusts. But, nevertheless, the court was right: it *is* hard to see how the rule can apply in the case of a charity...

It will be suggested here that the solution to this puzzle is that, in truth, only *half* of the rule applies to charitable trusts. (And otherwise, if the *whole* rule applies, there are dramatic unrecognised consequences for our understanding of the law.)

The meaning of 'the rule in Saunders v Vautier'

First, it is necessary to clarify what is meant by 'the rule in *Saunders v Vautier*'. A key point to recognise is that there was an original rule, which then grew into an expanded rule. And a source of difficulty for understanding how the rule applies to charitable trusts – and indeed applies more generally – is that the expression 'the rule in *Saunders v Vautier*' can be found to refer to *either* version of the rule, depending on the context.

The decision in the case itself

In *Saunders v Vautier*,[3] the settlor's will left valuable stock in the East India Company on trust for a child beneficiary. It was directed the income should be accumulated until the beneficiary was 25, and then the capital and accumulated income should be transferred to him. The beneficiary, on reaching 21, the age of majority at the time, claimed an immediate transfer of the whole fund. It was held that the beneficiary was indeed entitled to an immediate transfer of the fund at 21. Lord Langdale MR held simply:[4]

> 'I think that principle has been repeatedly acted upon; and where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the

[1] (1841) 4 Beav 115, 49 ER 282.
[2] *Children's Investment Foundation Fund (UK) v A-G* [2018] EWCA Civ 1605 [2019] Ch 139, [58].
[3] (1841) 4 Beav 115, 49 ER 282. Aleksi Ollikainen-Read, 'The Origin and Logic of *Saunders v Vautier*' [2020] Conv 296 provides historical context.
[4] (1841) 4 Beav 115, 49 ER 282, 116.

> expiration of that period, but may require payment the moment he is competent to give a valid discharge.'[5]

The original rule

The decision in *Saunders v Vautier* was therefore that a beneficiary who is sui juris (adult and of sound mind), and is wholly entitled to the trust property, is able to override a stipulation in the trust terms for postponement of possession for use. And that narrow point alone is sometimes stated as being 'the rule in *Saunders v Vautier*'. Of course, it follows that several beneficiaries can do the same: if they are all sui juris, between them entitled to the whole beneficial interest, and unanimously agreed. Equally, it follows that beneficiaries can exercise this power over some severable *part* of a trust's assets, if they hold the whole beneficial interest in that part – provided this will not unduly prejudice the remainder of the trust.

The expanded rule

But, in time, the case was seen as authority for a wider proposition, which can be inferred from the specific decision on this limited point.[6] As usually now understood, 'the rule in *Saunders v Vautier*' empowers beneficiaries – if sui juris, entitled to the whole beneficial interest, and unanimously agreed – to terminate a trust and take the property out *in violation of any of the trust terms*, not just terms postponing possession for use.

In particular, the rule can be used to override a settlor's stipulation of the beneficial entitlement to be received. *Saunders v Vautier* was decided in 1841. Two early examples of this expansion, both from 1860, are *Re Skinner's Trusts*[7] and *Stokes v Cheek*.[8] In *Re Skinner*, the settlor's will left manuscripts he had written to trustees 'for my grandson, that they may provide for the said books being published to the best advantage for the interests of the said child, so as to contribute towards raising a fund to assist him when he goes to [college]'. And he left the trustees £1,000 towards the printing. There were doubts whether the book would prove profitable if published. The grandson, now adult, was held entitled to take the £1,000 rather than have it applied towards publication. Page Wood V-C said:[9]

> 'There is no doubt that, if the main object of a gift is to benefit the person who is to take, and no other person is interested in the bequest—in such a case … if the legatee prefers to have it otherwise applied, he has the option of saying that, although the testator has expressed his desire that the benefit shall be conferred in a particular form, he does not like to take it in that manner, and may ask the Court to give him the property absolutely.'

And in *Stokes v Cheek*, the settlor's will directed trustees to use money to buy annuities for beneficiaries; specifically adding the beneficiaries were not to be allowed to take out the money

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[5] At a later hearing, *Saunders v Vautier* (1841) Cr & Ph 240, 41 ER 482, it was disputed whether the beneficiary *was* entitled to the whole beneficial interest under the trust. Lord Cottenham LC interpreted the trust to mean that the beneficiary was wholly entitled to the property, but that he was not to receive it into his possession until he was 25. If he died before he was 25, it was still his property, and could pass under his will, or to his next of kin. In other words, the beneficiary was found to have a *vested*, not merely a *contingent* interest (contingent on his actually reaching 25).

[6] Paul Matthews, Charles Mitchell, Jonathan Harris, and Sinéad Agnew (eds), *Underhill and Hayton Law Relating to Trusts and Trustees* (20th edn, LexisNexis 2022), para 69.10: '[T]he *Saunders v Vautier* principle has developed well beyond utilisation for stopping accumulations.'

[7] (1860) 1 John & H 102, 70 ER 679. (On the interpretation of this case, see David Wilde, 'Trusts and Purposes - Settlors Assigning Purposes to Beneficiary Trusts' (2023) 36 TLI 141, 146.)

[8] (1860) 28 Beav 620, 54 ER 504.

[9] (1860) 1 John & H 102, 70 ER 679, 105.

instead of receiving the annuities. Sir John Romilly MR nevertheless held the beneficiaries could take out the money:[10] 'The annuitants are entitled to such a sum as would be required to purchase their annuities'.

No exclusion of the rule

The latter *Stokes v Cheek* case is generally cited as authority that a settlor cannot exclude the rule in *Saunders v Vautier*.[11]

Variation of trusts under the expanded rule

Modern statements of 'the rule in *Saunders v Vautier*' usually add that it includes the power to vary the terms of a trust, rather than terminating it.[12] This was statutorily recognised and extended by the Variation of Trusts Act 1958, which enables the court to approve an exercise of the power on behalf of those not able to exercise it themselves, because not sui juris – for example, children – or not ascertained.

The indeterminate basis of the rule in Saunders v Vautier

It might, of course, be easier to identify how the rule in *Saunders v Vautier* should apply to charitable trusts if the rule had a clear rationale. But it does not. The general view is that the *Saunders v Vautier* power has a proprietary basis: it is a power a beneficiary holds *because they are equitable beneficial 'owner' of the trust assets*.[13] For example, an oft-cited statement of principle is that of Mummery LJ, delivering the leading judgment in the Court of Appeal in *Goulding v James*:[14]

> '[T]he consent principle embodied in the rule in *Saunders v Vautier* … recognises the rights of beneficiaries, who are sui juris and together absolutely entitled to the trust property, *to exercise their proprietary rights* to overbear and defeat the intention of a testator or settlor to subject property to the continuing trusts, powers and limitations of a will or trust instrument.'

However, a compelling argument has been made by Langbein that the supposed proprietary basis for the rule in *Saunders v Vautier* is not a legally coherent justification; and, indeed, the rule cannot be rationally explained at all.[15] Nor is the proprietary basis, in truth, reconcilable with the case law, when viewed as a whole.[16] An alleged proprietary basis is a particularly meaningless starting point when dealing with charitable trusts – which are, of course, for purposes rather than beneficiaries.

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[10] (1860) 28 Beav 620, 54 ER 504, 621.

[11] cf Joseph Jaconelli, 'Premature Trust Termination' [2020] Conv 29, 39-42.

[12] The existence of a power to vary trusts is sometimes questioned, because of its potential to foist on trustees a different trust from the one they agreed to: but see Joel Nitikman, 'Variation Under the Rule in *Saunders v Vautier*: Yes or No?' (2015) 21 T&T 923. (cf Ying Khai Liew and Charles Mitchell, 'Beneficiaries' Consent to Trustees' Unauthorised Acts' in Paul S Davies, Simon Douglas, and James Goudkamp (eds), *Defences in Equity* (Hart 2018), 92-96.)

[13] In particular, see Paul Matthews, 'The Comparative Importance of the Rule in *Saunders v Vautier*' (2006) 122 LQR 266.

[14] [1997] 2 All ER 239 (CA), 247 (emphasis added).

[15] John H Langbein, 'Why the Rule in *Saunders v Vautier* is Wrong' in PG Turner (ed), *Equity and Administration* (CUP 2016). (cf Paul Matthews, 'Why the Rule in *Saunders v Vautier* is Wrong: A Commentary' in PG Turner (ed), *Equity and Administration* (CUP 2016); and also Derwent Coshott, 'Contextualising the Rule in *Saunders v Vautier*: a Modern Understanding' (2020) 136 LQR 658.)

[16] David Wilde, 'The Nature of *Saunders v Vautier* Applications: Does the Court have a Discretion to Refuse?' (2023) 37 TLI 67.

Application of the original rule in Saunders v Vautier to charitable trusts

It has been established for over a century that the rule in *Saunders v Vautier* applies to charitable trusts. But almost all of the case law applies the *original* rule in *Saunders v Vautier*, leading to the overriding of trust terms postponing possession for use; not the *expanded* rule in *Saunders v Vautier*, which would involve potential overriding of any trust terms. This may be thought to suggest that only the original rule applies to charitable trusts – although this ultimately turns out to be too simplistic.

Charitable institutions (corporate or unincorporated) can use the original rule in Saunders v Vautier

In *Wharton v Masterman*,[17] the settlor's will left property on trust to pay annuities, so far as the trust fund's income for each year permitted; and at the death of the last annuitant the trust fund, plus accumulations from surplus income, was to be paid to specified charitable institutions in equal shares. The House of Lords held the charities could, rather than waiting, as the terms of the trust stipulated, for distribution when the final annuitant died, claim the surplus income to which they were solely entitled immediately, under the rule in *Saunders v Vautier*. Lord Herschell LC, delivering the leading judgment, said:[18]

> 'Wickens V.C., when this case came before him in 1871, intimated an opinion that the rule in *Saunders v. Vautier* [4 Beav. 115; Cr. & P. 240] was inapplicable where the beneficiaries were charitable corporations or the trustees of charities. I have carefully considered the reasons which he adduced for this opinion with the respect due to any opinion of that learned Judge, and certainly with no indisposition to give effect to the intention of the testator if I could see my way to do so. But I am unable to find any sound basis upon which a distinction can be rested in this respect between bequests to charities and those made in favour of individual beneficiaries.'

Lord Macnaghten, concurring, spelled out:[19] '… I am unable to see any substantial distinction between the case of an incorporated charity and a charity not incorporated …'

The Attorney-General (or Charity Commission) can seemingly use the original rule in Saunders v Vautier

In *Re Green's Will Trusts*,[20] Nourse J ruled – in a situation where there was no charitable institution available to invoke the rule – that the Attorney-General can use the rule in *Saunders v Vautier* in respect of a charitable trust, to override a postponement of possession for use; although how far this is part of the ratio decidendi of the case may be debated. The settlor's will left property on trust to invest the capital and accumulate the income for her long-missing son. But if the son had not come forward to claim the capital and accumulated income by 1 January 2020, the trustees were to establish a charitable foundation for animals. Nourse J made a *Benjamin* order,[21] authorising the trustees to distribute the property on the assumption that the son had predeceased the settlor. He *seemed* to interpret the will as impliedly meaning that – on this assumption – the property went to the charity immediately, without postponement to

[17] [1895] AC 186 (HL).
[18] [1895] AC 186 (HL), 194.
[19] [1895] AC 186 (HL), 195.
[20] [1985] 3 All ER 455 (Ch).
[21] *Re Benjamin* [1902] 1 Ch 723 (Ch).

2020: so there was apparently no postponement of possession for use, and so no need to invoke the rule in *Saunders v Vautier* to overcome any postponement. But he added:[22]

> '[C]harity [represented by the Attorney-General] is entitled to stop the accumulations and take … (see *Wharton v Masterman* [above] [1895] AC 186, [1895–9] All ER Rep 687 and *Re Knapp, Spreckley v A-G* [1929] 1 Ch 341, [1928] All ER Rep 696).'

By contrast, in *Re Jefferies*,[23] Clauson J had previously held that the Attorney-General could not use the rule in *Saunders v Vautier* in respect of a charitable trust, to override a postponement of possession for use, where the trust was for charitable institutions *not yet ascertained*. The settlor's will left property on trust to pay M an annual sum out of the income. And after M's death, the property and accumulated surplus income were to be divided in the trustees' discretion between London hospitals within the administrative County of London. Clauson J held the Attorney-General could not invoke the rule in *Saunders v Vautier* to terminate the accumulation of surplus income. He said:[24]

> '[I]t appears to me in this case that I am outside any of the authorities which are indicated in *Saunders v Vautier*, or *Wharton v Masterman* [above], because this is a case of a future gift to legatees to be ascertained in the future, by a process which is not to take place until a future time, and which is also to be effected by persons who are, at present, not ascertained, namely, the persons who happen to be trustees of the will at that date …
>
> It has, however, been most forcibly argued … for the Attorney-General, that on this will I can come to a different conclusion. The argument is put in this way. It is suggested that the only beneficiary, other than Mr Martin, under this will is an entity, if I may use a word which is not a very satisfactory one in this context, which can be spoken of as charity. Charity, therefore, is the beneficiary. Although the exact means of ascertaining the proper method of administering the fund so as to carry out the charitable wishes of the testator is, it is said, no doubt a form which looks to the future, there is one beneficiary only, namely, charity, which nothing can divest of the gift; and accordingly the case is strictly analogous to the case of an annuity in favour of an annuitant, with a gift over to a person now ascertained, but subject to directions given by the testator which the court is bound to disregard, if it can be said that they merely postpone the enjoyment of the person in whom the absolute enjoyment of the gift is vested.
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> The conception put forward is one of great interest and is one which may become embodied in English law, but I think it is not for me, sitting as a judge of first instance, to admit this ingenious, and, I think, quite novel theory ... Now in my view, even if I were able to accept the principle put forward, I am not clear that it ought to be applied to this will, because this will did not make the gift to charity, subject only to the trustees' power of selection. This will is one in which certain objects, which are certainly charitable institutions, are, at a future time, if selected by a future process, to be legatees of the ultimate fund. In other words there is no interest vested in anybody, but it is a case of a future gift to a class of institutions to be ascertained in the future by a process of selection marked out by the testator.'

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[22] [1985] 3 All ER 455 (Ch), 459.
[23] [1936] 2 All ER 626 (Ch).
[24] [1936] 2 All ER 626 (Ch), 632-3.

However, the decision has been criticised and may not be correct.[25] The better view appears to be that – given the rule in *Saunders v Vautier* does apply to charitable trusts – the Attorney-General must be able to use it, to override a postponement of possession for use in a charitable trust. And by extension, so may the Charity Commission.[26]

Trustees of a charitable can seemingly unilaterally use the original rule in Saunders v Vautier

A difficult case is *Re Knapp*.[27] The settlor's will left property 'for the trustees of the Scarborough Municipal Charities … and my wish is that the interest on my investments may be allowed to accumulate for a period of 21 years or so long as the law will allow, and from that time the interest only from my investments be applied for the [charitable] purchase of land and the building thereon of almshouses for the aged poor of Scarborough, and to the payment of the rates upon the same and the keeping of the buildings in a good state of repair.' Maugham J held:[28]

> 'The result of [*Wharton v Masterman*, above] is that the trustees in the present case, who are bound by the [charitable] trust, are not strictly bound by the direction to accumulate. That direction is a directory provision of a kind which trustees of charities ought prima facie to bear in mind and to carry out in the performance of their trusts; but it is no more than that. The testator, however, has shown that he desires the fund to be such that income shall be available for buying land and building houses, and it will therefore be desirable to accumulate until the income is large enough for the scheme to be carried out. There will be a reference in Chambers to settle the scheme.'

This decision appears to be influenced by a strand of thought that understands the effect of the rule in *Saunders v Vautier* – or at least the *original* version of the rule, concerned with settlors' stipulations for postponement of possession for use – as being to treat such settlor stipulations as *repugnant* to the trust, and therefore void.[29] However, this void-for-repugnancy approach is not consistent with conventional modern statements of the rule in *Saunders v Vautier*, which instead view settlors' stipulation as initially valid, but as capable of being overridden. For example, Lord Maugham LC, delivering the leading judgment in the House of Lords – in a case dealing specifically with a settlor's stipulation for postponement of possession for use – said in *Berry v Green*:[30]

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[25] WHD Winder, 'Charity as a Legal Person' (1938) 54 LQR 25, argued the cy-près jurisdiction was available on the facts; adding (27): 'And even in respect of [the rule in *Saunders v Vautier*], it is submitted, it would not be a violent departure from equitable principles to concede to Charity, that *persona fictissima*, yet another privilege.'

[26] Charities Act 2011, s 114.

[27] [1929] 1 Ch 341 (Ch).

[28] [1929] 1 Ch 341 (Ch), 344. (Note that the Attorney-General was broadly supportive of upholding the stipulation for accumulation: see the reported arguments of counsel.)

[29] In particular, it has been suggested that a settlor's stipulation for postponement of possession for use beyond the age of majority is repugnant to a gift to a beneficiary. For example, see the oft-cited explanation of the *Saunders v Vautier* rule by Page Wood V-C in *Gosling v Gosling* (1859) John 265, 70 ER 423, 272. Although, it is hard to see how repugnancy reasoning in respect of gifts to beneficiaries makes sense in the context of a charitable trust. The element of repugnancy reasoning has been so strong in cases where settlors have stipulated for postponement of possession for use that it has been argued that 'the rule in *Saunders v Vautier*' in fact encompasses two separate rules: (1) a rule based on repugnancy, by which stipulations for postponement of possession for use after the age of majority are simply void; and (2) a distinct rule by which beneficiaries – if sui juris, entitled to the whole beneficial interest, and unanimously agreed – have the right to decide to collapse trusts contrary to their *other* terms. See Ronald B Cantlie, 'A Case of Mistaken Identity: The Rule in *Saunders v Vautier* and Section 61 of the Trustee Act of Manitoba' (1986) 15 Manitoba LJ 135.

[30] [1938] AC 575 (HL), 582.

> '[I]t is not now in dispute that the rule in *Saunders v. Vautier* … has no operation unless all the persons who have any present or contingent interest in the property are sui juris and consent.'[31]

If it is correct, as is generally believed, that the rule in *Saunders v Vautier* is not one that automatically invalidates trust provisions for repugnancy, but is instead a rule that a party must invoke to override trust provisions, then the *Re Knapp* case appears to be authority that – in effect – *the trustees of a charitable trust* may, in their discretion, *unilaterally* invoke the rule in *Saunders v Vautier*, in the interests of the trust's charitable purpose, to override a trust's provision postponing possession for use.[32]

A party designated to receive the property of a charitable trust when the trust is discharged may be able to use the original rule in Saunders v Vautier

There is a suggestion – both statutory and judicial – that even a non-charitable body might be able to exercise the *Saunders v Vautier* power, so as to override a settlor's stipulation postponing possession for use, to claim the property of a charitable trust, if payment to that body would constitute the sole means of discharging the charitable trust's purpose. In *HM Attorney General v Zedra Fiduciary Services (UK) Ltd*,[33] Zacaroli J explained the Superannuation and other Trust Funds (Validation) Act 1927, s 9(1), as being passed to ensure the National Debt Commissioners could not exercise the *Saunders v Vautier* power to take immediately funds that were settled, to accumulate for a period, in trusts for the charitable purpose of paying down the national debt.

Application of the expanded rule in Saunders v Vautier to charitable trusts

There would be a degree of convenience, at least, in being able to say the law stops there: that the *original* rule in *Saunders v Vautier* applies to charitable trusts – the rule concerned simply with overriding stipulations for postponement – but not the *expanded* rule. We would at least have a neat, bright-line distinction. And this would be consistent with the way in which the rule in *Saunders v Vautier* is discussed in the major works on charity.[34] But, it is submitted, the law

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[31] See similarly *Wharton v Masterman* [1895] AC 186 (HL), 198, where Lord Davey said, '[T]he Court holds that a legatee may put an end to an accumulation which is exclusively for his benefit.' And Lord Macnaghten, rather than talking about an immediate right – despite the terms of the will – *to* accumulations instead spoke about (194) a right to 'to call upon the trustees to hand over' accumulations.

[32] Suggesting charity trustees can invoke the rule in *Saunders v Vautier* admittedly seems odd. But it is less odd than the suggestion already found in the books, that in the case of beneficiary trusts, *IRC v Hamilton-Russell Executors* [1943] 1 All ER 474 (CA) – despite what, again, looks like void-for-repugnancy reasoning in the case – is instead authority for the proposition that a trustee can invoke the rule in *Saunders v Vautier* to override a settlor's stipulation for postponement of possession, and simply hand the trust fund over to the beneficiary or pay it into court, whether the beneficiary likes it or not. See Paul Matthews, Charles Mitchell, Jonathan Harris, and Sinéad Agnew (eds), *Underhill and Hayton Law Relating to Trusts and Trustees* (20th edn, LexisNexis 2022), para 69.5; Lynton Tucker, Nicholas le Poidevin, and James Brightwell (eds), *Lewin on Trusts* (20th edn, Sweet & Maxwell 2020), para 22.019. Saying charity trustees can invoke the rule in *Saunders v Vautier*, in the absence of a beneficiary, and in the interests of their charitable purpose, looks considerably less out of place than saying trustees for beneficiaries can invoke the rule in *Saunders v Vautier*, despite the presence of a beneficiary, and despite the trustees acting contrary to the wishes and interests of the beneficiary – the very person the rule in *Saunders v Vautier* was designed to serve. (The decision in *Re Knapp* could alternatively perhaps be explained on the basis of the precatory wording of the stipulation for accumulation – compare the treatment of the word 'wish', as not creating a binding trust direction, in *Re Hamilton* [1895] 2 Ch 370 (CA); and likewise, even a detailed list of 'wishes' in *Re Williams* [1897] 2 Ch 12 (CA).)

[33] [2020] EWHC 2988 (Ch), [19]-[21].

[34] William Henderson, Jonathan Fowles, Gregor Hogan, Julian Smith, and Laetitia Ransley (eds), *Tudor on Charities* (11th edn, Sweet & Maxwell 2022), paras 6.005 and 6.031. Hubert Picarda, *The Law and Practice*

does not quite stop there: at least *some* of the expanded rule in *Saunders v Vautier* must apply to charitable trusts.

Use of the expanded rule in Saunders v Vautier to vary the property entitlement within charitable trusts

It seems clear that the parties identified above as capable of exercising the *Saunders v Vautier* power in relation to a charitable trust may use that rule to *vary the quantity of property within a trust that is to be dedicated to charity*. In *Tod v Barton*,[35] the settlor's will left property on trust to accumulate the income until his son was 65 or became blind. From that point, an annuity was to be paid to the son with the residue held on trust for a charity, the Royal Society of Chemistry, to be used for the charitable advancement of public education in the field of chemistry. The charity and the son agreed to vary the trust so that, with immediate effect, the son would receive a lump sum and the charity would receive the residue, on trust for the settlor's stated charitable purpose. Lawrence Collins J held the variation valid, saying:[36]

> 'By English law, by virtue of the principle known as the rule in *Saunders v Vautier* (1841) 4 Beav 115; *affd* Cr & Ph 240, 41 ER 482, beneficiaries who are sui juris and together entitled to the whole beneficial interest can put an end to the trust and direct the trustees to hand over the trust property as they may direct.
> The sole beneficiaries of the trust were William Barton and the society.'

It could be said that the variation here to the quantity of property to be received by the charity was minimal and was merely incidental to overriding the settlor's stipulation postponing possession for use. However, there is no reason to believe that the power to vary property entitlements is restricted to such a situation.

Suppose, for example, a trust for 50 years of a substantial fund, with most of the benefits going to the settlor's family, but 10% of the trust income payable annually to a charity during the trust period. Suppose those benefiting under the trust wish to vary it, and within that negotiation the charity agrees to take a guaranteed fixed annual sum, rather than the stipulated percentage of income, which would be liable to fluctuate. If such an overall arrangement were to be put before the court for approval under the Variation of Trusts Act 1958, because one of the family members was under 18, is there any reason to believe the court would say, 'No, we cannot approve this arrangement, because the rule in *Saunders v Vautier*, which underlies the Variation of Trust Act jurisdiction, cannot be used to vary the quantity of property within a trust that is to be dedicated to charity'? So, this would be use of the rule in *Saunders v Vautier* in respect of a charitable trust, where no postponement of possession for use is being overridden – the charity would continue to receive annual payments at exactly the same times – and where the variation in the amount of property dedicated to charity might prove to be quite substantial.

Warren J assumed it to be the law that the rule in *Saunders v Vautier* can be used in this way to vary the amount of property dedicated to charity within a trust in *A v B*.[37]

Use of the expanded rule in Saunders v Vautier to vary the use to be made of property within charitable trusts?

However, we have now probably reached the outer limits for application of the rule in *Saunders v Vautier* to charitable trusts. To suggest that its application could be taken even further, in particular so as to allow the settlor's stipulations for how the charitable fund is to be applied –

Relating to Charities (4th edn, Bloomsbury Professional 2010), 408-9. Peter Luxton, *The Law of Charities* (OUP 2001), para 2.20.

[35] [2002] EWHC 265 (Ch), 4 ITELR 715.

[36] [2002] EWHC 265 (Ch), 4 ITELR 715, [8]-[9].

[37] [2016] EWHC 340 (Ch).

the charitable purposes to be served – to be overridden seems a step too far, on prevailing understandings of the law.

It seems obvious that the rule in *Saunders v Vautier* could not be used to take the property within a charitable trust out of charitable use altogether. The courts have said many times that property unreservedly dedicated to charity is permanently so dedicated.[38] The only realistic question, therefore, is whether the rule in *Saunders v Vautier* could be used to override the settlor's stipulated charitable use under the terms of the trust, to change it for another charitable use. This might seem initially an attractive idea, conferring flexibility in the reformation and modernisation of charitable trusts, which are often notoriously idiosyncratic and antiquated. But it would be opening up a Pandora's box. For example, do we really want the possibility of an Attorney-General from a left-leaning government purporting to decide it is in the public interest to asset-strip 'elitist' charitable trusts, to divert their funds to charitable causes pursuing 'social justice'; or an Attorney-General from a right-leaning government purporting to decide it is in the public interest to asset-strip 'woke' charitable trusts, to divert their funds to the 'living-in-the-real-world' charitable purpose of reducing the national debt.

And it would also step well outside current understandings of the law to suggest the rule in *Saunders v Vautier* could be used to override the settlor's stipulated charitable use under the terms of the trust, in favour of some other charitable purpose. In case law expounding the very limited cy-près jurisdiction, to apply charitable trust funds to other charitable purposes, the courts lamented that, in the words of Sir John Romilly MR in *Philpott v St George's Hospital*,[39] '[I]nstances of charities of the most useless description have come before the Court, but which it has considered itself bound to carry into effect.' It would be quite extraordinary if the courts had omitted to add, if true, 'By the way, there is simple solution to this problem: invoking the rule in *Saunders v Vautier* rather than the cy-près jurisdiction'. And such an approach would drive a coach and horses through the statutory limits, carefully designed, to the modern expansion of the cy-près jurisdiction found in (what is now) Charities Act 2011, s 62.

Conclusions

The books, of course, repeat what the courts have pronounced: that the rule in *Saunders v Vautier* applies to charitable trusts. But this appears to be a half-truth. The position seems to be that only half of the rule applies. The original rule in *Saunders v Vautier* clearly applies to charitable trusts: allowing a settlor's stipulation postponing possession for use of trust property to be overridden (by a designated recipient charitable institution; or by the Attorney-General or Charity Commission; or seemingly by trustees of a charitable trust acting unilaterally; or perhaps by a party the trust fund is payable to, as the sole means of discharging the charitable trust). This original rule was later expanded in the case of beneficiary trusts, so that any other of the trust terms could be overridden. But the law appears to be that only *part* of this expansion applies in the case of charitable trusts. It seems that a settlor's stipulation as to the quantity of property within a trust dedicated to charity can be overridden. But a settlor's stipulation as to the specific charitable use to be made of trust property cannot. When it comes to a settlor's stipulation of the specific charitable use to be made of trust property, the law appears to

[38] For example, in *National Anti-Vivisection Society v IRC* [1948] AC 31 (HL), 74, Lord Simonds, delivering the leading judgment, said: 'A charity once established does not die, though its nature may be changed.' And in *Re Faraker* [1912] 2 Ch 488 (CA), 495, Farwell LJ said: 'Suppose the Charity Commissioners or this Court were to declare that a particular existing charitable trust was at an end and extinct, in my opinion they would go beyond their jurisdiction in so doing. They cannot take an existing charity and destroy it; they are obliged to administer it.' See to similar effect *Re Slevin* [1891] 2 Ch 236 (CA), *Re Wright* [1954] Ch 347 (CA), *Re Tacon* [1958] Ch 447 (CA).

[39] (1859) 27 Beav 107, 54 ER 42, 112. See also *Re Weir Hospital* [1910] 2 Ch. 124 (CA), esp 135-36.

recognise scope for alterations *only* under the cy-près jurisdiction: so here, application to charitable trusts of the expanded rule in *Saunders v Vautier* is excluded.