COMMENTARY ON THE RULES OF CONVERSION OF TRUST FUNDS

It is of interest to study the effect of non-conversion of trust funds from unauthorized securities to authorized securities and the rules of trusts which apply to these circumstances.

On studying In Re Beach (1) we find that it was a simple application of the so called rule in Howe-v-Earl of Dartmouth (2). The rule simply stated is that

"the tenants for life are not entitled to the whole income coming in from unauthorized investments and that the same ought to be valued as at the date of the testators death, and interest on the amount of the valuation so ascertained . . . at some rate be paid the tenants for life."

The case concerned the application of the principle and the determining of the rate at which the tenant for life would be allowed the interest. The effect was that the Court would take into consideration the then prevailing financial position of the country and allow the proper rate upon the then existing conditions.

However the seemingly plain rule is actually much more involved than appears from that judgement and it bears investigation.

The case of In Re Wareham (3) held that the rule of Howe-v-Earl of Dartmouth must be applied unless it appears upon the particular construction of the particular will that the testator had shewn an intention the rule should not apply.

However on looking at the case of Howe-v-Lord Dartmouth (2) we find that the rule as laid down there has been greatly extended and possibly misquoted. The headnote of that case reads as follows:

"General rule, that, where personal property is bequeathed for life with remainders over, and not specifically, it is to be converted in the 3 per cents. subject in the case of a real security to an inquiry, whether it will be for the benefit of all parties; and the tenant for life is only entitled upon that principle."

It is very hard to find the ratio decided out of the judgement of Lord Eldon and the whole principle seems to be based upon the small line in the judgement

". . . . . and the advantage, if any, ought not to accrue to the tenant for life."

From this single clause the courts have developed a great and far-reaching rule which must be carefully analyzed to find its true meaning.

Howe-v-Earl of Dartmouth was a case concerning a WILL and annuities which could not be called proper investments. The case seemed to be based upon the principle that where there is a WASTING ASSET, the court will hold that conversion must be deemed to have taken place at the proper time and accordingly the tenant for life would only be allowed the rate of interest that would be allowed on proper investments. There was considerable doubt in the mind of Lord Eldon as to what would be the result where there was a SAFE security but he took the stand that all securities must be taken to have been converted. This did not apply to real estate.

(1)—1920 1 ch 40
(2)—7 Ves 137a
(3)—1912 2 Ch 321

It would seem that the subsequent courts have taken the rule and tried to extend it far beyond its rightful use.

Happily the case of Slade-v-Chaine (4) clarifies the point to a large degree. Cozens-Hardy in his judgement makes the assumption that the rule of Howe-v-Lord Dartmouth applies only to funds left under a will and not to trust funds established under a deed.

The case explains the rule by saying "Howe-v-Lord Dartmouth rests on the principel that where a testator leaves property which is WEARING OUT, ... that property must be realized, and that the tenant for life can only have interest on the amount thus realized."

At the time when the case was decided every investment which was not in Consols was considered as an investment which was wearing out. Today there has been a radical change in financial matters and this idea has no foundation on present conditions.

The case was based to a large degree upon that of Stroud-v-Gwyer (5). This case held that where there had been an unauthorized investment, the trustees have discharged their liability in favour of the cestui que trust who are entitled to the capital in remainder when they have made good the capital and any increase that capital has received. It went on further that no case had held that the increased profit made by the unauthorized investment was to be divided partly between the capital and partly between the income, and the excess to be turned into capital for the benefit of the person entitled in remainder.

Romilly M. R. went on to say that the rule of Howe-v-Lord Dartmouth applied where property was found in a particular state of investment at the death of the testator. This was supported by the Court of Appeal in the Slade case.

Thus the conclusion seems to be that where there are INVESTMENTS AT THE DEATH of the testator, and a trust is created by will, the tenant for life is only entitled to the proper rate of interest as determined on the sum which would have been realized if the investments had been converted into proper investments. Any extra goes to the remainderman.

This rule does not apply in the case of a trust created by deed or settlement.

If at any time there is a subsequent UNAUTHORIZED INVESTMENT, the tenant for life is entitled to the FULL INTEREST on such investment PROVIDED that the capital or corpus IS NOT DIMINISHED.

Thus it appears that the RULE so glibly stated is actually not as all embracing as it first appears, and is much more qualified and restricted than one might think on first considering it.

(4)—1908 1 Ch 522
(5)—28 Beav 130.

GROSS negligence is simply negligence with the addition of a vituperative epithet . . . . Rolfe, B. 1843 11 M & W 113.

"There shall be no felony if a lunatic kill a man, or the like, because felony must be done animus felonieo. Yet in trespass, which tends only to give damages according to hurt or loss, it is not so, and, therefore, if a lunatic hurt a man he shall be answerable in trespass." —Weaver v Ward 1616 Hob 134.