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RESERVATIONS, RETENTIONS and the PROPERTY COMPRISED in the DISPOSITION by the CREATION of a TRUST

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I. INTRODUCTION

Having decided to bring into the dutiable estate 'any property comprised in any dutiable gift made by the deceased within three years before his death',[1] it was necessary for the legislature to prevent an anomaly arising in situations where the deceased had made an inter vivos gift outside this three year period, but reserved benefits out of those dispositions which he enjoyed within the three year period before his death. Sections 11 and 12 of the Estate and Gift Duties Act 1968 (hereafter called the Act) were designed to prevent a person escaping estate duty in this way. In such situations these sections operate to bring into the dutiable estate the entire corpus of the gift, no matter when the gift was made.

However, it is possible for the donor to withhold an interest from a gift in such a way that sections 11 and 12 do not apply. These sections operate only on the corpus of what was given and the courts have drawn the distinction between a gift to which the donor is absolutely disentitled, retaining to himself a specific interest, and the reservation out of the gifted property itself. If the donor gives away particular interests or estates in property and retains

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[1] Estate and Gift Duties Act 1968 section 10.

other interests in the same property for himself, the interests so retained never pass to the donee and do not form part of the corpus of the gift.[2] The interest retained is not part of the subject-matter of the gift and the donor can enjoy that interest consistently with his entire exclusion from the subject-matter of the gift.

The difficulty arises in trying to decide whether the interest which the donor has is a retained or a reserved interest. It has been suggested[3] that there are three separate elements which have to be considered in determining this question: first, did the donor have the ability to give away the particular interest which, it is alleged, is reserved to him?; secondly, if he had the ability, did he give that interest away with the rest of the corpus at the time the gift was made?; thirdly, if he intended to retain the interest was that interest capable of being severed and retained from the remainder of the corpus of the gift? Or was it necessarily a reservation out of that which was given?

In the main it has been the first and second of these questions that the courts have been concerned with in this area. A line of authority concerning the transfer of land has illustrated how the courts have dealt with the issues involved. The leading case here is Munro v C.S.D.[4] The facts

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[2] See e.g. Wheeler v Humphreys [1898] A.C. 506.

[3] Adams and Richardson, Law of Estate and Gift Duties (4th ed. 1970) p.92.

[4] [1934] A.C. 61.

of that case are as follows: in 1909 the donor entered into a verbal partnership with his children in respect of his farm; in 1913 he gifted part of the property to trustees on trust for his children. The partnership continued to use the land until the donor's death although there was no formal partnership agreement until 1919.

The Judicial Committee considered it relevant that 'the transfers made in 1913 were intended to be subject to the partnership right',[5] and held, under statutory language similar to that in section 11,[6] that the gift was not dutiable.

In a similar fact situation the majority of the High Court of Australia in C.S.D. v Owens[7] distinguished Munro's case on the grounds that there the[8]

> ...agreement with respect to land had created an interest in the land; so that the gift of the land, if it was a gift subject to the right of partnership, was necessarily a gift, not of a fee-simple but of a fee-simple 'shorn' (to quote their Lordships' expression) 'of the right which belonged to the partnership'.

In this case the donor and his son had agreed verbally to work the donor's two properties in common and share profits and losses. Five years later the donor gave one of the properties to the son by registered transfer, without any

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[5] ibid 67.

[6] Section 102(2)(d) Stamp Duties Act 1920-31 (New South Wales).

[7] (1952) 88 C.L.R. 67.

[8] ibid 84.

indication of any rights reserved to the donor. The donor, however, told his son he was not required to continue under the earlier arrangement but the son chose to do so.

Dixon C.J. and Kitto J., in a joint judgment, went on to say:[9]

> And even if the fact had been that a tendency or other interest in the land had been created before the gift, the case would still have differed fundamentally from Munro's case, because the deceased and his donee, being the only persons concerned, would have been competent to determine by their own agreement whether the gift should comprise the fee-simple subject to the outstanding right or the fee-simple freed from that right, and the declarations make it very clear that the fee-simple, undiminished by anything at all, was what they joined in making the subject of their transaction.

Taylor J., on the other hand, in his dissenting judgment, thought[10]

> ...that it was the father's intention to give the property subject to the rights of both parties under the existing arrangement for no other intention could in the circumstances of this case be consistent.

In Re Nichol, Johnstone v C.S.D. (No. 2)[11] the New Zealand Court of Appeal looked at another transaction involving land. In that case the donor owned a half share

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[9] ibid 86-87.

[10] ibid 98.

[11] [1931] N.Z.L.R. 718 (C.A.).

FRENCH, M.P. Reservations, retentions and the property comprised in the disposition by the creation of a trust.

of the land and two of his sons owned the other half equally. All three were in a farming partnership using the land. The donor gifted part of his land by transferring it to the two sons (and one other son). After the gift the partnership continued as before. Four years later there was a new arrangement by which each partner got a one-third share in the partnership.

Smith J.[12] who delivered the leading judgment in the Court of Appeal considered that the parties, by their actions, showed that the donor intended to give the whole estate and land free from any tenancy or rights in the partnership. Adams J.[13] reached a similar conclusion. It was held that all the land comprised in the gift came into the donor's dutiable estate under the equivalent of section 11.

These cases do show that it is possible for a donor to tie up the benefits back to himself before the gift and make the gift expressly subject to the earlier interests, thereby avoiding the effects of section 11.[14] It is significant however that all these cases involved situations where the interests retained or reserved by the donor were interests

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[12] ibid 750.

[13] ibid 733. Reed and Ostler J.J. concurred in the judgments delivered.

[14] See e.g. Y.F.R. Grbich, 'Dispositions with Strings' in Essays on the Estate and Gift Duties Act 1968 I.L.M. Richardson (ed.) (4th ed. 1970) p.88.
W.D. Goodman, 'Cases in Estate Planning Which Went Sour' Estates and Trusts Quarterly vol. 1 p.15.

which existed in a legal sense before the gifting took place - they were interests which any of the parties concerned could have acted upon to have various rights or obligations performed vis-a-vis any of the other parties. In each case the question whether the gift was made subject to the partnership rights of the donor or whether it was made freed from those rights was determined by the Court by considering such factors as the form of the transaction and the intention of the donor. The important point is however that it was possible for the donor to sever and retain the partnership rights in the land from the corpus of the gift if he chose to do so.

FRENCH, M.P. Reservations, retentions and the property comprised in the disposition by the creation of a trust.

II. DEFINING THE ISSUE

Many of the cases which the Courts have had to consider in this area have concerned the settlement of trusts where the settlor has purported to retain certain of the beneficial interests in the settled property. It is the implications of this type of case for the application of the notional estate provisions which form the basis of this paper. The provisions in those sections with which we shall be primarily concerned are the first limb of section 11(1) and section 12(1)(a).

Consider, for example, the following situations:

(1) A transfers property to trustees to hold on trust for B for life, with the reversion to A himself.

(2) A transfers property to trustees to hold on trust with an annuity of $X from the trust income to B for life and any excess income from the trust property to A, and then on A's death to B absolutely.

The question which arises in each of these cases is: Are the rights retained by A not included in the subject-matter of the gift, or a reservation from that subject-matter? It is the object of this paper to show that in such cases the donor has necessarily reserved his interest out of the subject-matter of the gift and that therefore the relevant provisions in sections 11 and 12 operate to bring the whole gift back into the dutiable estate.

The basis for this conclusion is that the interest which A has is incapable of being severed and retained from the remainder of the corpus of the gift and, because of the nature of the interest, it is necessarily a reservation out of that which was given - that is, such cases fall under the third element which, it has been suggested,[15] has to be considered in determining whether the donor has a retained or a reserved interest in the property given.

The paper will be considering various areas in support of this proposition. Initially it will examine the relevant provisions in the Act and determine how these relate to the concept of a transfer of property to trustees on trust. Obviously this is important since the conclusion reached on the issue must be consistent with the provisions in the governing statute.

Probably the most important issue to be answered is the question of the subject-matter comprised in a disposition. Both section 11 and section 12 operate to bring into the dutiable estate 'any property comprised in' any disposition...

There are two conflicting lines of authority on this question where it concerns transfers of property to trustees on trust in cases where the donor has purported to retain an interest in that property to himself. The first is what is referred to in this paper as the Hall's case[16] approach.

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[15] Ante. p. 2

[16] C.S.D. v Perpetual Trustee Co. Ltd. [1943] A.C. 425.

The cases following this approach established that a donor only disposes of those interests which are taken by the donees of the disposition - that is, the beneficiaries of the trust[17] - and does not dispose of an interest which he retains for himself. Clearly if this approach is accepted the proposition put forward in this paper is incorrect.

The second, and preferred, approach is what is referred to as the Sneddon's case[18] approach. This line of authority established that the property comprised in the disposition is the actual property which the donor transferred to the trustees. This approach is consistent with the proposition put forward in this paper.

The paper will also consider some 'special' cases which have presented analytical difficulties for the Courts. Their relationship to the Sneddon principle will be examined but it is suggested that these cases are in no real sense a departure from that principle.

Further support for the above proposition is found in an examination of the trust concept itself and the differing interests which arise under it. It is suggested that the very nature of the trust precludes the application of the Hall's case approach and supports the Sneddon's case approach.

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[17] Post, p 20

[18] Sneddon v Lord Advocate [1954] A.C. 257.

FRENCH, M.P. Reservations, retentions and the property comprised in the disposition by the creation of a trust.

Recent decisions in the English, Canadian and Australian jurisdictions indicate that the trend of the Courts is towards an acceptance of the approach taken in Sneddon's case and away from the approach taken in Hall's case. These cases and their implications will be examined.

Finally, the paper will consider some of the problems which occur when the approach taken in Sneddon's case is applied. It will also be suggested that perhaps the operation of equitable doctrines should have no bearing on the application of statutes concerned with areas of the law not concerned with the machinery of the trust or its workings - for example, taxing statutes.

III. THE DISPOSITION OF PROPERTY AND THE CREATION OF A TRUST

One of the principle elements of a 'gift' within the meaning of the Act is the concept of the 'disposition of property'. An exhaustive definition of these words is set out in section 2(2). For the purposes of this paper we are primarily concerned with para (b):

> 'Disposition of property' means any conveyance, transfer, assignment , settlement, delivery, payment, or other alienation of property, whether at law or in equity; and, without limiting the generality of the foregoing provisions of this definition, includes -
> ...
> (b) The creation of a trust
> ...

The particular reason for 'placing the creation of a trust' in a special category is unclear. It is suggested that the express inclusions in the definition of 'disposition of property' cover those situations which might be difficult to fit under the general words in the definition. It appears to have been accepted that the emphasis of these general words is on the alienation of property and all imply a change of ownership of the property in question.[19]

There are two basic methods of creating a trust. The first is by the transfer of the trust property from the settlor to the trustees and there is no difficulty in bringing this

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[19] C.S.D. v Card [1940] N.Z.L.R. 637, 649 (C.A.)
Adams and Richardson supra n.3 p.29.

situation under the general words of the definition. The second method is by the declaration of trust - that is, a unilateral act of the owner of the property whereby he states that he thenceforth holds certain of his property on trust for others. Here there is conflicting opinion as to whether any transfer of property can be said to have taken place.[20] It might be arguable therefore that a declaration of trust does not fall under the general words in the definition and needs to be placed in a special category in the definition. If this were so the expressio unius exclusio alterius maxim[21] would probably prevent the legislature merely placing 'the declaration of a trust' in a special category. Hence this could be the reason that 'the creation of a trust' is so treated.

Alternatively, the reason might be, as one commentator[22] has suggested, that because of the special nature of the trust, dispositions by way of 'the creation of a trust' are intended to be treated in a different way to absolute dispositions.

The application of the definition of 'disposition of property' to 'the creation of a trust' raises a number of preliminary issues[23] which have to be considered; When is a trust created?; How many dispositions are involved? To whom is a trust disposition made?

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[20] Post. pp 32-3

[21] See generally Maxwell on the Interpretation of Statutes (12th ed. 1969) 293-297.

[22] Adams and Richardson, supra n.3 p.33.

[23] See generally, Adams and Richardson supra n.3 pp. 32-34.

When is a Trust Created?

A trust is 'created' for the purposes of para (b) when specific property is impressed with the terms of a trust. In Baldwin v C.I.R.[24] Macarthur J. considered the words 'a trust has been created'.[25] He said:[26]

> In my opinion the phrase 'a trust has been created' in section 84A simply means 'a trust has been brought into legal existence'. No particular method of creation of a trust is indicated by the section. I think therefore that if it is shown that trust obligations have been imposed or constituted in respect of certain property by one or more of the specified persons then a trust has been created by that person or those persons within the meaning of the section.

The trust only comes into existence when the original trust property becomes vested in the trustees - that is, when the trustees have the legal interest in the property. A gratuitous promise by the settlor to convey property will not constitute the trust because the promise is unenforceable. This is supported by the much quoted passage from the judgment of Turner J. in Milroy v Lord:[27]

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[24] [1965] N.Z.L.R. 1.

[25] Section 84A Land and Income Tax Act 1954 (now repealed).

[26] [1965] N.Z.L.R. 1, 6.
See also Tucker v C.I.R. [1965] N.Z.L.R. 1027, 1030.

[27] (1862) 4 De G.F. & J. 264 at 274.

> I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes ... but, in order to render the settlement binding, one or other of these modes must, as I understand the law of the Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift.

It is clear from this statement that a settlement is 'complete and perfect' and 'a trust has been created' when the assignor has performed some act which passes the beneficial (though not necessarily the legal) interest in the property to another.[28]

The terms of a trust may be established in a deed executed by the settlor and the trustees of the proposed trust. Often the deed provides that the trust fund is to consist of a certain sum which is to be vested in the trustees at a later date. In these circumstances it is suggested that the trust is created

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[28] However when the donor has done everything which it is necessary for him to do to render the transfer effectual, but something remains to be done by a third party, the transfer, though invalid at law, is nevertheless valid in equity:

See e.g. Re Rose, Rose v I.R.C. [1952] 1 All E.R. 1217.

when the sum in question is actually transferred to the trustees and not upon the execution of the deed. In Sneddon v Lord Advocate Lord Keith in his dissenting judgment was of the opinion that such a deed effected the disposition of property at the time it was executed and that the later payment to the trustees merely satisfied the trust which had already been declared.[29]

Lord Keith's conclusion is consistent with his view that the property taken under the disposition was 'the corpus of the trust estate whatever that might be from time to time' and it was this which was to be valued for death duty purposes.[30] However, it is well established that this view of the property comprised in a disposition is incorrect.[31] To apply Lord Keith's conclusion as to what constitutes the creation of a trust could have absurd results for the application of the notional estate provisions no matter whether the Hall's case approach or the Sneddon's case approach to the subject-matter question was accepted. To hold that the execution of a trust deed constituted the creation of the trust would mean that later payments to the trustees to hold under the same trust deed would not be regarded as separate dispositions.

There is support for this conclusion in Truesdale v F.C.T.[32] where Menzies J. did not consider the words 'created a trust'[33]

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[29] [1954] A.C. 257, 282.

[30] ibid 283.

[31] Post. pp 40-44

[32] 1 A.T.R. 667.

[33] Section 102 Income Tax Assessment Act 1936-1966.

apt to describe the payment of money to a trustee to hold under a trust already constituted:[34]

> To read the section as if it applied to such a transfer would be, in the absence of a context, to expand it. Such a reading would be tantamount to saying that the transfer to the trustee of property to be held as part of the assets of an already constituted trust would be to create a second trust, whereas, from the point of view of both the trustee and the beneficiary, there would be but one trust and the property transferred would be nothing more than an addition to the property subject to the trust.

To apply this interpretation to the words in para (b) however would be contrary to the legislature's intention. It would enable the donor to execute a trust deed, for example, and under the terms of the trust reserve (assuming for the sake of argument that the interest is reserved out of what was given) to himself the income from the trust property for life. The donor could then transfer vast sums to the trustees on the trusts already constituted and enjoy large benefits during his life knowing that on his death section 11 and section 12(1)(a) could only operate to bring into the dutiable estate that property which was actually transferred to the trustees on trust at the time of the execution of the trust deed.

Clearly this would be an absurd result and would allow estate planners to escape what the legislature plainly intended

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[34] 1 A.T.R. 667, 670.

should be caught by the notional estate provisions. It would, in these circumstances, be unreasonable to apply the Truesdale approach. As Lord Reid said in Gill v Donald Humbershaw & Co. Ltd:[35]

> If the language is capable of more than on interpretation we ought to discard the more natural meaning if it leads to an unreasonable result and adopt that interpretation which leads to a reasonable and practicable result.

Similarly in Shannon Realities Ltd. v Ville de Michel,[36] Lord Shaw said:[37]

> Where alternative constructions are equally open that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system.

Certainly the conclusion of Menzies J. in Truesdale's case is contrary to that reached by Macarthur J. in Baldwin's case.[38] Macarthur J. held that where the terms of the trust are set out in a trust deed executed by the settlor and the trustees, a trust is 'created' only in respect of that property which is actually impressed with a trust at the time the deed is executed. Later transfers of property to the trustees

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[35] [1963] 3 All E.R. 180, 183.
See generally Maxwell on the Interpretation of Statutes (12th ed. 1969) 45, 203-5.

[36] [1924] A.C. 185.

[37] ibid 192-93.

[38] [1965] N.Z.L.R. 1, 6-7.

to be held on the terms of the deed create further trusts in respect of that property. Each separate transfer is the creation of a separate trust, and is consequently a separate disposition of property under para (b).

How Many Dispositions are Involved?

One commentator[39] has suggested that since, by virtue of para (b), the creation of a trust is itself to be regarded as a disposition then any transfers, payments or conveyances made in performance of the trust are not separate dispositions, for they are incidental to the creation of the trust or flow from it. With respect I think this is correct.

However the question still arises as to how many dispositions are involved when the creation of a trust creates a number of beneficial interest in different beneficiaries. Do the different equitable interests vested in different beneficiaries each constitute a separate disposition or is there only the one disposition - namely, the transfer of the property to the trustees.

This problem was considered by the High Court of Australia in MacCormick v F.C.T..[40] That case concerned a marriage settlement in which the settlor had settled a fund on certain specified trusts. One of the questions to be decided was

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[39] Adams and Richardson, supra n.3 p.33.

[40] (1945) 71 C.L.R. 283.

whether one of the equitable interests created fell within the exemption which the provision under consideration allowed for gifts made for or towards the maintenance, education or apprenticeship of any person.[41] The question was whether a settlement creating interests in a number of donees was one gift or a number of separate gifts of each interest created by the settlement.

Both Latham C.J. and Dixon J. rejected the argument that there were as many gifts as there were limitations to the donees.[42] Starke J. disagreed with the majority on this point:[43]

> Disposition of property by way of gift may therefore be created by trusts giving rise, as in this case, to various beneficial interests. And I see no reason why those various interests may not, in themselves, be gifts within the meaning of the Act...

Unfortunately there are no New Zealand decisions on this question. However in the MacCormick case Latham C.J. and Dixon J. in reaching the conclusion that the creation of a single trust involved only one gift, relied on certain provisions in the Act under consideration which contemplated that different interests might be taken by a number of donees as a consequence of a single gift. There are corresponding provisions in the New Zealand Act.[44] While these alone do not

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[41] Section 14 (i)(ii) Gift Duty Assessment Act 1941-42 (Commonwealth

[42] (1945) 71 C.L.R. 283, at 297 per Latham C.J. : at 304 per Dixon J. McTiernan J. concurred with Dixon J.

[43] ibid 303 : See also per Rich J. ibid 301.

[44] The definition of 'donee' in section 2(2) : section 86(2) section 85(1).

necessarily mean that the creation of a single trust must constitute a single gift, irrespective of the number of separate interests involved, the wording of para (b) itself, which refers to 'the creation of a trust' and not to 'the creation of a beneficial interest in a trust fund', does provide strong support for this conclusion.

To Whom is the Disposition Made?

The relationship between the definition of 'donee' in section 2(2) and the concept of a disposition of property raises an interesting problem in the trust situation. Where the disposition is a direct transfer or conveyance of property or interests in property there is usually no problem:[45] the donee is the person to whom the disposition is made. It is suggested however that where the disposition is by way of trust the effect is different and the disposition is not made to the donee. Here, it is suggested, the disposition is made to the trustees of the trust whereas the donee or donees of the disposition are the beneficiaries under the trust.

Our arguments so far support this conclusion: First, section 2(2) para (b) deems 'the creation of a trust' to be a disposition of property within the terms of the Act; Secondly, 'the creation of a trust' arises when the trust property is vested in the trustees; Thirdly, there is only

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[45] Note however that in some cases the Court has taken a substance approach in determining the question : To whom is the disposition made?

See Post. p. 50 et seq.

one disposition involved in 'the creation of a trust' and that is the transfer of the property from the donor to the trustees. Logically the only conclusion to be drawn from these propositions is that a payment or transfer of property to trustees is a disposition to the trustees.

This was certainly the view taken in Sneddon v Lord Advocate.[46] Lord Morton for example said:[47]

> ... I feel no doubt that the property taken under the disposition was the sum of £5000. That was the only property which passed from the truster, and it was the only property taken by the trustees from the truster under his disposition. They took that property, of course, as trustees for the beneficiaries under the deed of trust.

It does not necessarily follow from this though that the trustees are also the donees of the gift and quite clearly this is not the case, as the quote from Lord Morton in Sneddon's case (cited above) indicates. The donees of a disposition by way of trust are the beneficiaries under the trust. 'Donee' is defined in section 2(2) as meaning 'any person becoming entitled to any beneficial interest under a gift' (emphasis added). It is submitted that this wording indicates that there may be situations, such as occurs in a disposition by way of trust, where the beneficial interest under a disposition may not be vested in the person to whom the disposition was made. This conclusion is supported by another provision in the Act which says:[48]

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[46] [1954] A.C. 257.

[47] ibid 263-264 (emphasis added)

[48] section 86(3).

> Where a gift has been made by way of trust for any donee, the gift duty shall, without excluding the liability of the donor or the donee, also constitute a debt due and payable to the Crown by the trustee in his capacity as trustee.

Lord Keith in his dissenting judgment in Sneddon's case, having decided that the execution of the trust deed was the disposition, came to the conclusion that 'the donees here were the beneficiaries under the trust deed'.[49] Similarly Lord Russell in delivering the judgment of the Court in Hall's case was of the opinion that:[50]

> The donee was the recipient of the gift; whether the son [the beneficiary of the trust] alone (as their Lordships think) or whether the son and the body of trustees together constituted the donee, seems immaterial. The trustees alone were not the donee.

It seems clear therefore that a payment or transfer of property can be a disposition to one person but a gift to another person. If this is the situation it would help reconcile the difficulty Lord Keith had in Sneddon's case where he refused to find that the dispositions were the separate payments to the trustees. He illustrated the difficulty he had in the following way:[51]

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[49] [1954] A.C. 257, 282.

[50] [1943] A.C. 425, 439-440.
See also Young and Davies Ltd. v C.S.D. [1951] G.L.R. 524, 528.

[51] [1954] A.C. 257, 282.

> The mere passing of the cheque, as I see it, did not operate as a gift. If it did the trustees could have put the proceeds in their pockets. The passing of the cheque was purely executorial, a piece of machinery to satisfy a trust which had already been declared.

If however it were to be accepted that in such a case the passing of the cheque could at the same time be a disposition to the trustees and a gift to the beneficiaries of the trust then clearly no difficulty arises since the trustees take the payments under the terms of the trusts and hold them for the beneficiaries as the donees of the gift.

Summary

The conclusions so far can be summarised in terms of four interconnecting propositions:

(1) The creation of a trust is itself a disposition of property within the terms of the Act.

(2) The creation of the trust occurs when the trust property is vested in the trustees.

(3) There is only one disposition involved in the creation of a trust and that is the transfer of the property from the donor to the trustees.

(4) The creation of the trust results in a disposition being made to the trustees of the trust but the donees of the gift are the beneficiaries under the trust.

It should be noted that the effect of these conclusions is that the focus is placed on the trustees as the persons to whom the disposition is made and on the property which passes from the donor to the trustees. In this respect they support the proposition put forward in this paper that: Where there is a creation of a trust the property comprised in the disposition is the actual property which the donor transfers to the trustees.

There is an obvious contrast between this result and the result which occurs if different conclusions are reached above. For example, if Starke J's.[52] view that the various equitable interests under a trust each constituted a separate disposition was to be accepted or, alternatively, if the view that the creation of a trust results in a disposition to the beneficiaries under the trust was accepted, then the focus would be on the beneficiaries as the persons to whom the disposition is made and on the property which passes from the donor to the beneficiaries. In these circumstances the proposition put forward in this paper would not be valid because the property comprised in the disposition would be the property transferred from the donor to the beneficiaries under the trust - that is, the equitable interests of the beneficiaries in the property transferred by the donor to the trustees.

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[52] Ante. p 19

This crucial distinction will be discussed further after examining the two lines of authority which exist on the question of the subject-matter comprised in the disposition. It is to this issue which the paper now turns.

IV. The 'PROPERTY COMPRISED' in a DISPOSITION

This is the most important issue for the purposes of this paper. Under the Act it is necessary to ascertain the 'property comprised' in a disposition in only two circumstances:[53]

(1) In order to determine the issue raised in this paper - namely, whether a donor has been excluded from the property 'comprised in' a disposition under the first limb of section 11(1) or under section 12(1)(a).

(2) In order to value property at the date of disposition (under sections 10 and 11) or at death (under section 12).[54]

In the New Zealand context few problems have arisen in the valuation area. It is significant to note that where the property is to be valued at the date of death under section 12, there is express provision in subsection (2) of that section for the tracing and valuation of the property substituted 'for the property originally comprised in that settlement, trust, or other disposition of property'.

It is submitted that this provision is a strong indication that the property originally comprised in a disposition by way of trust is the actual property transferred by the donor to the trustees and not merely the equitable interests of the donee in that property. For example, the provision deems the 'property comprised in any' disposition 'to include

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[53] Adams and Richardson, supra n.3 p.87.

[54] Section 18.

the proceeds of its sale or conversion'. This would seem to be inconsistent with the view that the property 'comprised in' the disposition is merely the equitable interests of the donee in that property.

It should be noted at this point that while the two conflicting lines of authority to be discussed here appear on the face of it to be considering different issues - that is, the cases which have followed the Hall's case approach have been primarily concerned with the reservation-retention question, while the cases which have followed the Sneddon's case approach have been primarily concerned with the valuation question - it is suggested nevertheless that this is not a real ground for distinction for the purposes of this paper. It should be recognised that these cases arising from other jurisdictions are only of persuasive authority having regard to the different statutory language under which they were decided. Also, it would be extremely unlikely that the words 'property comprised in' under sections 11 and 12 would be given different interpretations depending on the issue before the Court unless giving the words the same interpretation would lead to an unreasonable or absurd result.

The Hall's Case Approach

In 1900 the case of Earl Grey v Attorney General[55] went before the House of Lords. The donor had, in that case,

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[55] [1900] A.C. 124.

conveyed real estate, leaseholds and personalty to the donee by deed. The donee in turn covenanted (inter alia) to pay certain annuities and mortgage and other debts, to pay an annual rent charge of £4,000, to pay all the donor's funeral and testamentary expenses and to pay all his debts. In the event of the donees death in the donor's lifetime or of any breach of covenant by the donee, the donor had power to revoke the deed.

The Crown claimed estate duty upon the principle value of all the property comprised in the deed under the equivalent of section 11.[56] Lord Halsbury L.C. said:[57]

> ...nothing appears to me much more plain than this, that what the Act of Parliament intended to prevent was that what has been described as a gift should nevertheless reserve to the settlor some benefit, or some part of that which purported to be given inter vivos. In this case can anybody doubt that something has been reserved to the settlor? The settlement itself has reserved £4,000 a year, and has reserved a right also on the part of the settlor that all his debts up to the period of his death should be paid, and the payment secured by the estate.

A similar conclusion had been reached five years earlier by the Court of Appeal in Attorney General v Worrall.[58] Here the donor was entitled to a mortgage debt charged on land.

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[56] Section 2(1)(c) Finance Act 1894 and section 38 Customs and Inland Revenue Act 1881 (as amended by section 11 Customs and Inland Revenue Act 1889).

[57] [1900] A.C. 126 : Lords Macnaghten, Morris, Shand and James concurred.

[58] [1895] 1 Q.B. 99.

FRENCH, M.P. Reservations, retentions and the property comprised in the disposition by the creation of a trust.

The mortgagors conveyed the equity of redemption to the donor's son for consideration (provided by the son himself) and the donor then released the mortgage debt. By the same deed which gave effect to this transaction 'and obviously as part of the same transaction', the son convenanted to pay to the donor an annuity during his lifetime.

Under the same provision as that considered in Earl Grey's case, the Court found that possession of the property was not assumed and retained by the donee 'to the entire exclusion of any benefit to the donor by contract or otherwise'.[59]

The case which seems to have marked the turning point in this line of authority is In re Cochrane.[60] In that case the donor, by way of settlement, conveyed to trustees the sum of £15,000 invested on mortgage on trust to pay out of the income a sum of £575 to his daughter for life. After her death the sum of £15,000 was to be held on trust for such child or children of the daughter as she should appoint. In default of appointment there was provision for division amongst the children equally. Power was given to the daughter to appoint by will to her husband for his life an annuity of £300 in the event of his surviving his wife. If no child of the daughter should attain a vested interest in the trust funds they were to be held in trust for the donor absolutely. Also,

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[59] ibid 105 per Lord Esher M.R. : 107 per Lopes L.J. : 108 per A.C. Smith L.J.

[60] [1905] 2 I.R. 626 : [1906] 2 I.R. 200.

there was a trust of the balance of the yearly income for the donor absolutely. The mortgage in which the £15,000 was invested produced £675 per annum - therefore the donor received a yearly income of around £100 out of the trust property.

It was apparently not the usual practice of the Inland Revenue Department to bring a claim for estate duty in such cases and it was the decision of the House of Lords in Lord Grey v Attorney General which prompted it to raise the action in this case.[61]

It is the judgment of Palles C.B. in the Divisional Court[62] which provides the starting point for the line of authority which followed In re Cochrane. In the Appeal Court all three judges[63] accepted the conclusion and reasoning of the Chief Baron and it was on the decision in this case that the Judicial Committee relied in Hall's case.

The Crown contended[64] that because of the ultimate trust for the donor, subject to the events specified in the settlement, of the entire corpus of the fund after the death of the daughter and, secondly, the trust for the donor of the surplus of the income from the £15,000 during the life of the daughter, the possession and enjoyment under the deed was prevented from being one 'to the entire exclusion of the settlor, or of any benefit to him'.

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[61] [1906] 2 I.R. 200 at 204 per Holmes J.

[62] [1905] 2 I.R. 626.

[63] [1906] 2 I.R. 200 : at 201 per Walker C. : at 203 per FitzGibbon L.J. : at 204 per Holmes L.J.

[64] Supra n.56.

The response by Palles C.B. to this contention is vitally important. He said:[65]

> This contention assumes that the subject matter of the 'gift' effected by the settlement is the entire equitable interest in the £15,000, and upon that assumption I think the contention would be correct. This assumption, however, is contested by the appellant; and, therefore, whether it is, or is not, correct in law is the question for us.
> ... The question turns upon the meaning of the word 'gift' in the statute. In such a case as the present, is the subject matter of the gift the entire interest in the capital sum, or is it only the beneficial interest of which the settlor is, or may be divested by the dispositions.

With respect I think this is correct. As has already been indicated the relevant legislation (the equivalent of sections 11(1) and 12(1)(a)) only operates where the interest has been reserved out of that which was given and not where the interest has been kept back and not given at all. Clearly therefore the vital issue is: What is the subject-matter comprised in the disposition? Having established the answer to this question there should be no real difficulty in determining whether the interest which the donor has has been reserved or retained.

Palles C.B. concluded that there was no benefit reserved to the settlor out of the gift. He argued that even had there not been an ultimate trust contained in the settlement

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[65] [1905] 2 I.R. 626, 636.

nevertheless, 'there would have been a resulting trust to the donor, to the extent to which the trusts expressed in the deed did not exhaust the entire equitable interest in the fund'. He then considered the 'simplest' situation where there has been a mere declaration of trust by the donor to hold a sum of money on trust for his son for life and thereafter for such of his son's children as would answer a particular description:[66]

> In such a case, what would have been the gift? The legal interest did not pass; therefore the subject-matter of the gift could not be measured by reference to that interest. The only equitable interest which was capable of passing consisted of the interests provided for the son and his children. The residue of the equitable interest remained in the settlor. It did not pass, it never moved. In what conceivable sense can it be said that it was given?

The essence of what Palles C.B. was saying is that a declaration of trust does not involve any actual conveyance or transfer of property and therefore the only interests which are given are those equitable interests which the settlor expressly disposes of. With respect I do not think this is correct.

According to the provisions under consideration in that case property passing on death is deemed to include any 'property taken... under a disposition purporting to operate

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[66] idem.

as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust, or otherwise'. It is submitted that the scheme of this definition is to catch trust dispositions which do not involve an actual transfer or conveyance of property to trustees.[67]

A declaration of trust may be regarded as a transfer of the trust property from the settlor as owner to the settlor as trustee. There is support for this proposition in the judgment of Lord Reid in Sneddon's case where he considered the situation where a donor simply makes a declaration of trust with himself as sole trustee. He said[68] with reference to the same legislation as that considered in In re Cochrane:

> In that case, it is argued, no property actually passes when the gift is made and the 'property taken' must be the rights conferred and taken by the beneficiaries under the declaration of trust. But that view only leads to another difficulty. If the terms of the declaration are such that there is no immediate vesting of the fee, then on that view I do not see how there can be any immediate gift of the fee because there cannot be a gift until there is someone to take it. What happens in such a case is that, although the title to the property is still held by the donor, the property ceases to belong to him, and all beneficial rights of property pass away from the donor as an individual to himself as trustee. I think that that can be regarded as a real passing of property and therefore the analysis which is valid in the ordinary case is still valid in this case.

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[67] Ante, p.n Where a similar argument is made in respect of section 2(2).

[68] [1954] A.C. 257, 280.

If Palles C.B. was wrong in his reasoning then the rest of his judgment is open to severe criticism. Returning to the hypothetical declaration of trust situation, the Chief Baron concluded that in such a case there would be 'an entire exclusion of the donor from the property taken under the disposition by way of gift' because the property passing would be the interests provided for the son and the children only. Having reached this conclusion with regard to the hypothetical it was then a simple matter for the learned Judge to find, "as in these questions of revenue, matters of mere conveyancing form are immaterial; as we are to view the substance only of the transactions, and as 'gift' in the context means 'beneficial gift'", that in the actual case before him there had been no reservation out of the property given.[69]

Applying this reasoning to the trust for the donor of the surplus income during the daughter's life, Palles C.B. said:[70]

> What was given to Mrs Day [the daughter] was not the entire income during her life. It was no more than £575 a year, parcel of that income. The beneficial interest in the surplus above that sum did not pass. It remained in Sir Henry Cochrane [the donor]. It was not given... The receipt by Sir Henry of the surplus of the yearly income, above the £575, to which Mrs Day was entitled, was not a participation in the gift. That surplus was something altogether outside the gift. It follows that there was not any reservation of any benefit to the settlor <u>out of the gift</u>.

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[69] [1905] 2 I.R. 626, 637.
[70] <u>ibid</u> 637-38.

However, while the value of the judgment may be limited because of the process of reasoning followed by Palles C.B., the validity of the conclusion has been supported by a line of authority which has followed.

Before turning to these cases, it should be pointed out that in In re Cochrane the earlier cases of Attorney General v Worrall and Earl Grey v Attorney General were distinguished on the ground that the benefits back to the donor in those cases were secured by personal covenants entered into by the donee collaterally and in reference to the gift - some arising out of the property actually conveyed and assigned by way of gift to the donee.

The Judicial Committee in C.S.D.(N.S.W.) v Perpetual Trustee Co. Ltd (Hall's case)[71] considered that the situation which they had to consider was covered by the decision in In re Cochrane. It also agreed with the Court in the latter case that Attorney General v Worrall and Earl Grey v Attorney General were distinguishable on their facts.

In Hall's case the settlor settled shares on trustees to hold the corpus for his son during his minority on trusts for the son's maintenance, advancement or benefit and then, on his attaining 21, to transfer the surplus to the son absolutely. The settlor was one of the five trustees and remained legal owner of the shares. There was no gift over in the event of the son's death before he attained a vested

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[71] [1943] A.C. 425.

interest and therefore the settlor would have been entitled on resulting trust. On the death of the settlor the revenue authorities claimed that the shares, the subject of the settlement, had formed part of the settlor's dutiable estate under a provision similar to section 11.[72]

One of the questions to be determined by the Judicial Committee was: What was the property comprised in the gift, was it the shares themselves or only a particular kind of interest in the shares? The Supreme Court of New South Wales had based its decision on the view that the gift was a gift of the shares.[73] The High Court of Australia[74] however reversed the decision of the lower Court, the four learned judges being substantially unanimous in their opinions. Rich A.C.J. was of the opinion that what was given was the beneficial interest in the shares created by the settlement, and that the donee was the son. He said:[75]

> The gift in this case was a gift to the son by the creation of a trust for the beneficial interest in the shares.

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[72] Section 102 (2)(d) N.S.W. Stamp Duties Act 1920.

[73] See [1943] A.C. 425, 436-37.
The Supreme Court was also of the opinion that the donee of the gift was the body of trustees. However, with respect this finding is incorrect.
See Ante, pp 20 - 22

[74] (1941) 64 C.L.R. 492.

[75] ibid 500.

Similarly, Starke J. was of the opinion that the property comprised in the gift was not the shares, but 'the subject given or the interests in the property created or limited by the act of disposition of the property'.[76]

The Judicial Committee agreed with the High Court of Australia. Lord Russell of Killowen, in delivering the judgment of their Lordships, said:[77]

> ... the property comprised in the gift was the equitable interest in the eight hundred and fifty shares, which was given by the settlor to his son. The disposition of that interest was effected by the creation of a trust, i.e., by transferring the legal ownership of the shares to trustees, and declaring such trusts in favour of the son as were co-extensive with the gift; whether the son alone was the donee (as their Lordships think) or whether the son and the body of trustees together constituted the donee, seems immaterial. The trustees alone were not the donee. They were in no sense the object of the settlor's bounty...
>
> .... the son was (through the medium of the trustees) immediately put in such bona fide beneficial possession and enjoyment of the property comprised in the gift as the nature of the gift and the circumstances permitted.

On this basis the Judicial Committee reasoned that there was an entire exclusion of the deceased or of any benefit to him.

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[76] ibid 505.

[77] [1943] A.C. 425, 439-40.

Hall's case was followed in the Canadian case M.N.R. v National Trust Co. Ltd.[78] There, by deed of settlement, the settlor transferred to trustees certain securities in trust to pay the annual income arising therefrom to his daughter during the lifetime of the settlor. On the settlor's death, the trustees were to transfer the securities and the accumulated income therefrom to the daughter absolutely. However, the settlement provided that if the daughter should die before the settlor the trustees should transfer the securities and the accumulated income to the settlor absolutely.

Kerwin J. said:[79]

> So far as the father is concerned the principle is well understood that a contingent reversion reserved to the donor of the property is not reserved out of the gift but is something not comprised in it. 'The property, the subject matter of the gift', to use the phraseology of clause (g) [section 7(1) Dominion Succession Duty Act], is the daughter's equitable interest and the daughter assumed such bona fide possession and enjoyment of the property immediately upon the making of the gift as the nature of the gift and the circumstances permitted. In similar circumstances it was held to be so by the Judicial Committee in C.S.D. (N.S.W.) v Perpetual Trustee Co. Ltd. [1943] A.C. 425, and that decision should be followed... The only other condition to be met under clause (g) is that actual possession and enjoyment should be assumed and retained by the daughter 'to the entire exclusion of the donor or of any benefit to him'. It logically follows

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[78] [1948] C.T.C. 339 : [1949] S.C.R. 127.

[79] [1948] C.T.C. 339, 351.

> from the principle set forth above, that is, that the reversion of the father is something not comprised in the gift to the daughter, that the former was excluded from any benefit in the subject matter of the gift.

In Oakes v C.S.D. (N.S.W.)[80] the donor had executed a deed under which he held property in trust for himself and his four children as tenants in common in equal shares. Lord Reid, delivering the judgment of their Lordships, applied Hall's case:[81]

> If a donor reserves to himself a beneficial interest in property and only gives to the donees such beneficial interests as remain after his own reserved interest has been satisfied, it is now well established that such reservation of a beneficial interest does not involve any benefit to the donor within the meaning of the section.[82]

However in this case the deed gave the settlor wide powers of management and, in particular, provided that in addition to reimbursing himself of all expenses incurred in the administration of the trust, he was entitled to remuneration for all work done by him in managing the trust property. In holding that this was an interest reserved out of that which was given, Lord Reid said:[83]

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[80] [1954] A.C. 57.

[81] ibid 76.

[82] Supra n.72.

[83] [1954] A.C. 57, 79.

> The contrast is between reserving a beneficial interest and only giving such interests as remain on the one hand, and on the other hand reserving power to take benefit out of, or at the expense of, interests which are given.

Summary

The basic proposition established by the Hall's case approach is that where a disposition is effected by the creation of a trust the donor only disposes of those equitable interests taken by the donees of the gift. Any interest which the donor reserves to himself is not reserved out of the gift but is something not comprised in it except where that interest arises out of, or at the expense of, interests which are given.

Consequently, the donee is put in 'bona fide possession and enjoyment' of the property (as far as the nature of the gift and the circumstances permit) and there is an 'entire exclusion of the deceased or of any benefit to him'. Therefore the provisions in section 11(1) and section 12(1)(a) do not apply.

The Sneddon's Case Approach

It was decided in Lord Strathcona v I.R.C.[84] that in the case of an absolute disposition the property to be valued at the date of the donor's death was the actual thing which had originally been given. However where there is a disposition by way of trust the position is not quite so clear.

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[84] [1929] S.C. 800, 805-807. See also Attorney General for Ontario v National Trust Co. Ltd. [1931] . A.C. 818, 822-23 : Attorney General v De Preville [1900] 1 Q.B. 223, 231.

There is authority for the proposition that such dispositions are to be regarded as standing on a different footing from absolute gifts when considering their liability to duty. The facts in In re Payne, Poplett v Attorney General[85] were rather complicated but, in effect, the settlor conveyed to the trustees £10,000 and an option. The trustees exercised the option and bought shares and there were also changes of investment and receipts of bonus shares. When the settlor died less than three years later the trust fund was worth £50,000.

At first instance, Simonds J.[86] looked on trust property subject to a settlement which persisted to the settlor's death as an immutable, continuing entity so there was no room for applying any 'following-the-res' doctrine which might have been implicit in Lord Strathcona's case.

The Court of Appeal[87] agreed with the decision of Simonds J. but there was such a difference of opinion between the various Judges as to the property which had to be valued that it is difficult to see how In re Payne can be regarded as definite authority for any proposition. It is difficult to determine whether the case stands for the proposition that the property taken was the settled fund or that, whatever the nature of the property taken by virtue of the trust, it was to be valued at the date of death by taking the value of the trust fund at that date.

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[85] [1939] Ch. 865 : [1940] 1 Ch. 576.

[86] [1939] Ch. 865, 874-75.

[87] [1940] 1 Ch. 576.

The High Court of Australia in Trustees, Executors & Agency Co. Ltd. v F.C.T. (Teare's case)[88] thought that the latter of these explanations was the correct one. There the settlor had settled money which was subsequently invested in shares by the trustees. All the members of the High Court were of the opinion that although the settlement was one of money, ''the property' to be valued at the death of the deceased is represented by the shares into which the money had been transmogrified'.[89]

However in Vicars v C.S.D. (N.S.W.)[90] the majority of the High Court clearly took In re Payne and Teare's case to establish that the subject-matter of a trust disposition is the settled fund. Only Latham C.J. in his dissenting judgment drew a distinction between the subject-matter problem and the valuation problem. He held that the property comprised in the gift in Vicars' case was the money that had been paid to the trustees, and he rejected any suggestion that this money could be followed into the trust fund in a case which did not involve a valuation as at the date of death.[91]

This was the rather uncertain state of the law when Sneddon v Lord Advocate[92] came before the House of Lords.

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[88] (1941) 65 C.L.R. 134.

[89] ibid 140 per Rich J. See also 143 per Starke J : 145 per Williams J.

[90] (1945) 71 C.L.R. 309.

[91] ibid 330-31.

[92] [1954] A.C. 257.

FRENCH, M.P. Reservations, retentions and the property comprised in the disposition by the creation of a trust.

In that case the settlor had settled £5000 on trust with a direction that the sum, or the investments representing it, be held and applied for the settlor's daughter for life and then to her issue, with a provision on failure of issue. The trustees invested the money in shares which value increased to £9250 on the settlor's death two years later.

The Crown relied on section 38(2)(a) of the Customs and Inland Revenue Act 1881 and section 2 of the Finance Act 1894 together with the decision of Simonds J. in In re Payne. It argued that the trust fund was a continuing corpus and that what had to be valued was that property which the beneficiaries got under the trust. It therefore claimed death duties on the value of the settled fund on the settlor's death - that is, £9250.

However the House of Lords held, with one dissent, that the dutiable value of the gift was £5000 and not the value of the shares at death.

Lord Morton of Henryton said:[93]

> What, then, is the property which is deemed to pass? The Statute says it is the 'property taken' under the disposition made by the truster. My Lords, I feel no doubt that the property taken under that disposition was the sum of £5000. That was the only property which passed from the truster, and it was the only property taken by the trustees from the truster under his disposition. They took that property, of course, as

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[93] ibid 263.

> trustees for the beneficiaries under the deed of trust. The truster never owned the 5,000 Creamola shares and, therefore, these shares could not be 'taken' under any disposition made by him.

In dealing specifically with the main contention of the Crown (above), the House of Lords treated In re Payne as having decided that the property which is taken by virtue of a trust disposition is the settled fund. This proposition was strongly rejected by the majority of their Lordships. Lord Morton said:[94]

> Counsel for the Crown submitted that what was settled was a trust fund, and that a trust fund retains its identity as a trust fund notwithstanding any changes in its investment. I agree that the £5000 became a trust fund as soon as it passed from the settlor to the trustees, but the property which the trustees 'took' from the settlor was £5000.

Can Hall's case and Sneddon's case be Reconciled?

The conclusion reached in Sneddon's case is clearly in conflict with that reached in Hall's case. In Gale v F.C.T.[95] Kitto J. said:[96]

> Yet there may be difficulty in applying Sneddon's case and at the same time giving effect to the principle in Hall's case. ... It seems hardly satisfactory to say, with the learned editors of Dymond's Death Duties, 12th ed. (1955), p.148, that in such a case the principle of Sneddon's case breaks down.

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[94] ibid 265-66.

[95] (1960) 102 C.L.R. 1.

[96] ibid 27.

The learned Judge did not find it necessary to attempt to resolve the difficulty.

One commentator[97] has suggested that these two cases can be reconciled because in Sneddon's case the property passing to the trustees was the complete legal and beneficial interest in £5000, whereas in Hall's case the settlor withheld the beneficial interest to the extent of his resulting trust and it did not therefore pass from him to the trustees. It is argued that because the settlor in Sneddon's case did not retain any interest in the sum which he paid to the trustees, the question whether the property taken was the money itself or the interests in that money created in the beneficiaries of the trust simply did not arise. With respect I do not think that this is correct.

The House of Lords in Sneddon's case were emphatic that the primary issue for consideration in such a case is 'the ascertainment of the property 'taken' under the disposition purporting to operate as an immediate gift, whether outright or by way of settlement'.[98] Their Lordships clearly saw the contrast between legal and beneficial interests passing from the donor. Lord Morton, for example, could see no logical distinction 'for the present purpose' between an outright gift to C, a declaration that the donor held property on trust for C, and a transfer to trustees to be held on trust for C:[99]

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[97] Y.F.R. Grbich, 'Dispositions with Strings', supra n.14, 91-92.

[98] [1954] A.C. 257, 267 per Lord MacDermott : see also 263 per Lord Morton : 271-72 per Lord Reid.

[99] ibid 265.

In each case the property taken is the cash or shares which the donor gives or transfers or whereof he declares trusts. The tax under section 2(1)(c) is a tax upon 'property taken under a disposition...purporting to operate as an immediate gift inter vivos'. It is a tax upon certain defined property, and it is necessary to look at the moment when the gift was made in order to see what that property was; it is not a tax upon beneficial interests in property and it matters not whether the gift was made (to quote the subsection) 'by way of transfer, delivery, declaration of trust or otherwise'.

Similarly, Lord Reid expressly disagreed[100] with the view taken by Scott L.J. in the Court of Appeal in In re Payne[101] that the property given 'was simply the totality of equitable rights created by that declaration of trust in the beneficiaries'; no other form of kind of property was the real subject of the gift; the transfer to the trustees of the legal title was mere machinery to effect the gift.

It is suggested therefore that if there had been a resulting trust to the settlor in Sneddon's case as there was in Hall's case, the House of Lords in the former would still have found that the property which the trustees 'took' from the settlor was the £5000. On this view it is hard to see how the two cases could be reconciled.

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[100] ibid 275.

[101] [1940] 1 Ch. 576, 589-90.

It has already been suggested[102] that where there has been a disposition of property by virtue of the 'creation of a trust' the only disposition involved is the disposition from the donor to the trustees (although the donees of the disposition are the beneficiaries under the trust). With respect, it is submitted that the approach taken by the Courts in the Hall's case line of authority is based on an erroneous assumption - namely, that in these cases the disposition is to the donees (the beneficiaries) of the trust. For example, Lord Russell in Hall's case said:[103]

> ... the property comprised in the gift was the equitable interest in the eight hundred and fifty shares, which was given by the settlor to his son [the donee under the trust].

Statements made by Lord Radcliffe in St Aubyn v Attorney General[104] support this conclusion. After reviewing the approach taken in In re Cochrane and Hall's case his Lordship said:[105]

> All these decisions proceed upon a common principle, namely, that it is the possession and enjoyment of the actual property given that has to be taken account of, and that if that property is, as it may be, a limited equitable interest distinct from another such interest which is not given or an interest in property subject to an interest that is retained, it is of no consequence for this purpose that the retained interest remains in the beneficial enjoyment of the person who provides the gift.

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[102] Ante. p. 20

[103] [1943] A.C. 425, 439 (emphasis added).

[104] [1952] A.C. 15.

[105] ibid 49.

It must be conceded that if the disposition by way of trust is a disposition to the donees, and not a disposition to the trustees as this paper suggests, then there is a strong argument to be made in favour of the proposition that the subject-matter of the disposition is those interests which the donees take. In effect the difference is essentially one of timing. If the disposition is to the trustees then, according to the proposition put forward in this paper, the actual property with its entire legal and beneficial interests must be the subject-matter of the disposition because that is what is transferred from the donor to the trustees. If however the disposition is to the donees then, in a conceptual sense, the disposition does not arise until after the actual property is transferred to the trustees because the donees have no rights in the property until it becomes vested in the trustees. In these circumstances it is arguable that the Hall's case approach is correct and that the property comprised in the disposition is only those interests which will, immediately or in the future, be taken by the donees. For the reasons outlined earlier however, it is submitted that this approach is not the correct one.

The principle enunciated in Sneddon's case was accepted by the High Court of Australia in C.S.D. v Gale[106] where it was held that the property comprised in the gift was that which the donor parted with. Dixon C.J. said:[107]

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[106] (1958) 101 C.L.R. 96.

[107] ibid 109.

> There is much in the speeches of their Lordships who form the majority in Sneddon v Lord Advocate [1954] A.C. 257 that supports the view that in legislation such as that under consideration you look for what has been alienated by the deceased. The legislation there considered was cast in a different form and moreover was referential but plainly enough Lord Morton regarded the form of the property as it passed from the donor as a test (ibid 264) and so did Lord MacDermott (ibid 267, 268) and Lord Reid (ibid 273, 274)...
> In the end one may say for the present purposes it comes down to the question what did the deceased alienate.

Again in Gale v F.C.T.[108] the High Court decided that where an initial gift of money had been made the property to be valued at the date of death was the money itself and not the property in which it had been invested. The Court took the view that Sneddon's case was inconsistent with Teare's case and Vicars' case, but chose to follow the House of Lords' decision. Although the issue did not directly arise in this case, the High Court followed the reasoning in Sneddon's case on the nature of the property which passes by virtue of a settlement.

There is however a group of cases which has presented the Courts with particular difficulties in determining the question of the subject-matter comprised in the disposition. It is proposed at this stage to examine these cases in order to determine if possible what effect they might have on the general principle laid down in Sneddon's case.

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[108] (1960) 102 C.L.R. 1.

V. SPECIAL CASES - The Substance Approach and the Sneddon Principle

The type of situation which occurs in these cases is well illustrated by the Australian case, Union Trustee Co. of Australia Ltd. v Webb.[109] In that case the donor promised his wife that he would give her a house as a present. It was arranged between the wife and the donor that she should purchase the house and the donor would supply her with the purchase money.

The question faced by the Court (inter alia) was: What was the subject-matter comprised in the gift, the money or the house? Griffith C.J. expressed the view that the substance of the matter was preferable to form and he held that the subject of the gift was the house.[110] Isaacs J. on the other hand thought that the gift was of the money:[111]

> The house never was the property of the husband, and no one can give away as his own property that he never had. The facts are that the wife herself purchased in her own name and on her own behalf, and signed the contract creating a contractual obligation on her own part to pay the purchase money.

The situation which arose in Potter v Lord Advocate[112] was slightly different. There the father, wanting to provide his son with an opening in business, entered into negotiations which resulted in a private company being formed to acquire

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[109] (1915) 19 C.L.R. 669.

[110] ibid 674.

[111] ibid 676.

[112] (1958) S.C. 213.

the business of a firm. It was the agreed intention of all parties that the son should acquire shares in the company and become a director.

At a meeting of the company at which shares were allotted, the son presented a letter of application for 10,000 one pound shares, together with a cheque for £10,000, and the shares were duly allotted to him. He had received the cheque from his father immediately beforehand, together with a letter to the effect that the cheque, which was drawn in favour of the company, was to enable him to purchase the shares.

The Court was in no doubt as to the intention of the parties in transacting as they did and acknowledged that there were a number of means by which they could have achieved the same ends. In determining the subject-matter of the gift, the majority of the Court thought that regard should be had to the exact form which the transactions took. Lord Mackintosh said:[113]

> While it is true that what the son in the present case got at the end of the day through his father's bounty was shares in John Greig & Sons Ltd., I am unable to see how it can be said that he 'took' these shares 'under a disposition' made by his father.... the father never at any time owned these shares or had any right over them. They cannot therefore, in my opinion, have been taken by the son under a disposition made by the father, far the latter never had any right in them or power to dispose of them.

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[113] ibid 225.

In reaching this conclusion his Lordship relied on the judgment of Lord Morton in Sneddon's case.[114] Difficulty arises however in reconciling this approach with some dicta of Lord Reid which appears in his judgment in Sneddon's case[115] where he considers a situation in which the donor hands over money with instructions to use it in some particular way and the taker is obliged to follow these instructions. Lord Reid suggests that, in such a case, 'it might be said that the real subject of the gift is the investment'. With respect, I agree with the Court in Potter's case in expressly rejecting this suggestion.[116]

I suggest that this tentative dicta is inconsistent with earlier reasoning in Lord Reid's judgment when he is discussing the difference between the rights which the donor had in the property given and the rights which the trustees have in that property:[117]

> ... by reason of their fiduciary position and of the directions of the truster, the trustees do not have the same freedom to deal with the property as the truster had: they are obliged to use the rights of property which have come to them in certain ways and precluded from using them in other ways, but the property remains the same.

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[114] [1954] A.C. 257, 263 : Ante. pp 43 - 44

[115] ibid 280.

[116] (1958) S.C. 213 : 223 : 227-28.

[117] [1954] A.C. 257, 279.

There appears to be no real distinction, for present purposes, between the situation where property is handed over to trustees for use under a trust for certain limited purposes and the situation where the property is given directly to the donee but, under the terms and conditions of the gift, he is to use it only in one particular way.

The majority judgments in Sneddon's case and Potter's case and the reasoning of Isaacs J. in Webb's case all support the principle that it is not possible for the donor to dispose of property which he does not have any power over. However these cases have all been concerned with the situation where the property has been gifted to the donee (or the trustee as the case may be) and then transmuted, either voluntarily or as a condition of the gift, into property which was never vested in the donor. Different considerations apply in the situation where the donor, by a series of transactions before the disposition to the donee (or trustee) takes place, is able to gift property which was never vested in him. The next two cases considered concern this type of situation.

The facts of Ralli Brothers Trustee Co. Ltd. v Inland Revenue Department[118] are complicated by the fact that the settlor's adviser was at the material time employed by the company which was to act as trustees for the trusts which the settlor intended to settle. The settlor authorised her

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[118] [1968] Ch. 215.

adviser to effect policies of life assurance on her life and to settle these on trusts in favour of her grandsons. The proposal was made in the name of the trustee company and the settlor covenanted to procure the issue of the policy in the name of the trustee. The premium on the policy was paid out of proceeds of securities of the settlor which were realised by the trustee company at the direction of the settlor's adviser and as agent for the settlor.

It was held that in the circumstances of the case, the settlor had made a gift of the policies and not of the premiums. Goff J. said:[119]

> If the quotation or acceptance of the proposal had established a contract between the trustee company and the insurance company binding the trustee company to take up the policy and pay the first premium, and to buy the annuity which had to be purchased as a term of the contract, then clearly the answer would be that the deceased gave only the money. However....it is clear that at the time the deceased tendered the premium the trustee company had not come under any liability to pay the premium... So, here, the deceased got the right, by paying the premium, to require the insurance company to issue a policy to the trustee company because the insurance company accepted it on that footing.

The Court placed some reliance on the dicta of Lord Reid discussed above, but, with respect, I submit that even if that dicta was correct, which is extremely doubtful, it would have no application in the present case. The trustee company

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[119] ibid 236.

received the money as a conduit pipe for payment to the insurance company it is true, but the trustee company handled the money as agent for the settlor and not as trustees for the settlements which she had set up. It does appear therefore that this case is distinguishable from the situation which arose in Sneddon's case.

The reasoning of the Court in the Ralli Brothers case does indicate that the Courts are prepared in some instances to take a substance approach to the question of the subject-matter comprised in a disposition. In the New Zealand case, Public Trustee v C.S.D.,[120] the donor agreed in writing to purchase from the vendor a block of land for £10,350 and a deposit of £250 was paid. The contract was completed at the agreed date but at the donor's request the vendor executed a memorandum of transfer to the donor's wife. Payment was received by the vendor directly from the purchaser himself. The issue was whether gift duty[121] was payable on the £10,350 or on the government valuation of the land at the date of the gift which was only £6,745.

Salmond J. held:[122]

> The transaction seems to me to be just as truly a gift of land as if the husband had first taken a conveyance from the vendor to himself in consideration of purchase money, and had then conveyed the land to his wife in

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[120] [1925] N.Z.L.R. 237.

[121] Under Part IV Death Duties Act 1921.

[122] [1925] N.Z.L.R. 237.

> consideration of natural love and affection. In order that a donor should make a gift of property it is not necessary that he should first have that property vested in himself. He just as effectually makes the gift of it if he procures it to be transferred directly to donee by a vendor to whom he himself pays the purchase money.

The obvious difficulty which arises on the facts of the Public Trustee case, for example, is that there are two dispositions involved: the first is the payment by the husband to the vendor; the second is the transfer of the land from the vendor to the wife. Can either of these dispositions constitute a gift? If any gift is involved it is obviously a gift from the husband to the wife but there has been no direct disposition from the husband to the wife.

The Court in the above case got around the problem by looking at the real nature of the transaction as a whole, rather than at the mechanics by which that effect was achieved. A similar approach was taken in Chadwick v C.S.D. (N.S.W.)[123] where the equitable tenant for life paid for improvements to land in his possession under a family settlement. It was held that these payments were voluntary dispositions to the remaindermen, operating as gifts inter vivos to them. The Chief Justice said:[124]

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[123] (1919) 19 S.R. 39.

[124] ibid 40.

> If A knowingly and voluntarily spends his money in building upon B's land and with B's knowldge and approval he makes a gift to B as effectively as if he handed him the money for the purpose of building on it himself.

However in Finch v C.S.D.[125] the Judicial Committee held that sums spent by the husband on alterations to the wife's property which was used as the family home, were not gifts within the meaning of the Act. The payments to the builder in this case were held not to constitute dispositions to the wife because they were not made with the intention or for the purposes of improving the value of the wife's estate. This reversed the earlier finding of the New Zealand Court of Appeal[126] who thought that the payment could be regarded as a disposition if it had the effect of a disposition without regard to its purpose.

The effect of the decision of the Privy Council in Finch's case therefore is to restrict the substance approach taken in Chadwick's case to those situations in which a disposition is made for the purpose or object of benefiting third party. It has been suggested[127] that the inclusion of para (f) in the definition of 'disposition of property' precludes the possibility of a 'substance' approach to the interpretation of the general words in the definition and that on their

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[125] [1929] A.C. 427.

[126] [1927] N.Z.L.R. 807, 815.

[127] Adams and Richardson supra n.3, 31.

plain meaning the general words of the definition can be applied only to transfers, assignments, payments or other alienations of property which are made direct to the person benefiting. Indirect benefits must be caught by para (f) or by the Finch gloss on the general words which has the same requirement of intent. It is suggested that the results in both the Ralli Brothers case and the Public Trustee case would be the same under this 'intention' test.

The substance approach taken in Finch's case was adopted by the New Zealand Court of Appeal in Overton's Trustees v C.I.R..[128] In that case the husband had a life interest in his wife's estate with the remainder to two daughters. The husband who was a trustee of the estate paid from his own funds the duty payable on his wife's estate and certain other administrative expenses and debts owing by the estate. The payments which totalled £21,597 were not reimbursed to the husband in his lifetime nor repaid to his executors on his death.

The Commissioner included the £21,597 in the final balance of the husband's estate for the purposes of estate duty under the predecessor to section 12(1)(a) and (b). Counsel for the appellants however argued that the property comprised in the disposition was not the money sum but the extinguishment of the charge and the discharge of the obligations.

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[128] [1968] N.Z.L.R. 872.

North P. delivering the judgment of the Court, said:[129]

> From the beginning his [the husband's] intention was to make a gift to his wife's estate of the money required to meet these charges. The fact that he paid the Commissioner and the creditors directly in our opinion, can make no difference. It must not be overlooked that he was a trustee of his wife's estate; he could have just as easily have paid the £21,500 into the estate trust account and then drawn the several cheques necessary to discharge the obligations of the estate to the Commissioner of Inland Revenue and the other creditors. We see no reason for dealing with the matter in any different way because he took the simpler course of paying the £21,500 directly to the Commissioner and to the creditors. It seems to us to be purely a matter of bookkeeping and the result in law is the same.

Significantly, in the case stated the appellants had agreed to regard the payments as gifts by Mr Overton to the trustees of his wife's estate. North P. considered that they were 'bound by the agreement' and found support for his decision in this fact (although the strength of his reasoning suggests that even if this 'agreement' had not existed, he would have reached the same conclusion).[130] It is implicit in this finding that the learned Judge took the view that in a disposition by way of trust the disposition is to the trustees and the property comprised in the disposition is the property transferred by the donor to the trustees.

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[129] ibid 882.

[130] idem.

This conclusion is supported by dicta in the judgment of North P.. Considering the issue of the reservation of an interest by the donor, the learned Judge said:[131]

> If Mr Overton had executed a separate trust of the £21,500 in favour of his two daughters reserving to himself a life interest there could be no question that the settlement would be caught by s. 5(1)(j) para (i) [the equivalent of section 12(1)(a)].

In applying the substance approach in Overton's case the New Zealand Court of Appeal distinguished the earlier English Court of Appeal decision in Re Hall, Holland v Attorney General.[132] The facts in that case were very similar to those which arise in Overton's case. Mrs Hall, the life tenant in her husband's estate, paid the estate duty payable on the estate of £7,900. Upon her death the Commissioner claimed duty on the sum paid under the equivalent of section 11.

In that case Lord Greene M.R., delivering the judgment of the Court, said:[133]

> In order to answer this question, it is necessary to ascertain the subject-matter of the gift... The payment of £7,900 accomplished a dual purpose. It extinguished the liability of Mrs Hall as between herself and those interested in remainder to keep down the interest, and it extinguished a charge on the inheritance. It was the extinguishment of that charge by means of a money

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[131] ibid 883.

[132] [1942] 1 All E.R.10.

[133] ibid 15.

> payment which was the subject-matter of the gift, and not the money payment itself. The fact that the money payment operated also to relieve Mrs Hall of a liability did not derogate from the completeness of that gift. It was not a reservation from the subject-matter of the gift, nor was it a benefit conditioning the gift. As regards Mrs Hall, it was merely the extinguishment of her liability.

Tompkins J. in the Supreme Court in Overton's case[134] had distinguished Re Hall on the ground that it was decided upon the equivalent of section 11(1) and was therefore not an authority on section 12(1)(a) and (b). With respect, this begs the question. The basis, for the decision in Re Hall was the finding that the extinguishment of the charge was the subject-matter of the gift and it is suggested that the case would be good authority for the subject-matter issue whether section 11 or section 12 was under consideration.

A further distinction was drawn by the Court of Appeal on the fact that in Re Hall, 'while the estate duty was paid by Mrs Hall in 1911 she did not release the charge on her husband's estate until 1920'.[135] It had been argued on behalf of the Crown in Re Hall that when Mrs Hall paid the duty on her husband's estate, she obtained a charge upon it and this was accepted by Morton J. in the Lower Court.[136] However in the Court of Appeal Lord Greene M.R. did not consider it

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134 [1968] N.Z.L.R. 603, 607.

135 [1968] N.Z.L.R. 872, 881-82.

136 [1941] 2 All E.R. 358.

necessary to express any opinion on the question because he considered that the result would be the same whichever view was taken.[137] His Lordship accordingly determined the subject-matter of the gift without deciding whether or not Mrs Hall had obtained a charge on the estate. It is submitted, with respect, therefore, that the distinction drawn on this basis by the Court of Appeal in Overton's case is not a valid one.

However the bases for distinguishing Re Hall in Overton's case were accepted in another New Zealand case, Tatham v I.R.C..[138] In that case Mrs Tatham had a life interest in her husband's estate, the main asset of which was the Homewood Station which was subject to mortgages approximating £16,000. The trustees established a Mortgage Redemption Account to which were credited various amounts transferred from Mrs Tatham's income account in her husband's estate. No other amounts were ever paid into the account. Mrs Tatham was not reimbursed during her lifetime, nor were the amounts ever returned to her income account. Upon her death the Commissioner included the above amounts in Mrs Tatham's estate for death duty purposes.

In the Supreme Court, Haslam J. had no hesitation in applying the substance approach taken by the Court of Appeal in Overton's case. The learned Judge found that the deceased

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137 [1942] 1 All E.R. 10, 13.

138 3 A.T.R. 597.

disposed of the £7,000 by way of gift to the trustees to be held by them on the trusts appearing in the will of the husband even though he agreed that the sums were earmarked in advance by Mrs Tatham to reduce encumbrances. He said:[139]

> The reasoning in Overton's case (p. 882, lines 5-25) as applied to the facts here emboldens me at the outset to find that the deceased intended to make a gift to the estate at the time that each transfer was made and that the capital charge thereon to which she was prima facie entitled did not arise, as her express intention at all times was to reduce the mortgages on the farm property for the benefit of her family.

While Haslam J. applied the approach taken in Overton's case it is suggested that in fact the situation which arose in Tatham's case is more related to the type of situation which was examined by the Court in Potter's case.[140] In effect Mrs Tatham had transferred sums to the trustees on the condition that they be used for a defined purpose - namely, a reduction of the mortgage debts. According to the decision in Potter's case, the subject-matter of the disposition in such a situation must be the sums of money transferred to the trustees to hold in the Mortgage Redemption Account. Significantly, the ultimate result under each of these approaches is the same.

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[139] ibid 599.

[140] Ante. p. 51.

R FRENCH, M.P. Reservations, retentions and the property comprised in the disposition by the creation of a trust.

Summary

What overall picture emerges from the analysis of these special cases? Assume that A wishes to gift Blackacre to C but that property is at present owned by B. The cases have shown that there are a number of ways in which A can carry out his purpose:

(1) A contracts to buy Blackacre from B and then makes a conveyance to C. It is well established that in such a situation the disposition is the transfer executed by A in favour of C, and that the property comprised in the disposition is Blackacre: Lord Strathcona's case.

(2) There is no contract but A hands B the purchase price and requests B to transfer Blackacre to C. The Courts in this situation have taken a substance approach and held the disposition to be that which A directed to be made of Blackacre, and the property comprised in the disposition to be Blackacre: Ralli Brothers' case; Public Trustees' case.

(3) C contracts to buy Blackacre from B and A pays C the price to discharge his debt to B. In this case the disposition in question is the transfer of money by A to C, and the property comprised in the disposition is the money: Tatham's case; Webb's case (per Isaacs J.).

(4) A gives C the money to buy Blackacre on the condition that it is to be used for no other purpose. Here the disposition is the transfer of the money by A to C, and the property comprised in the disposition is the money: Potter's case.

(5) C contracts to buy Blackacre from B and A pays B the price thus discharging C's liability to B. There are two varying authorities as to the effect of this transaction.

(i) the disposition is the discharge of the debt, and the property comprised in the disposition is the extinguishment of the debt: Re Hall.

(ii) the substance approach is that the disposition is the 'fictional' transfer of money from A to C, and the property comprised in the disposition is the money: Overton's case.

The propositions put forward in the above cases apply equally whether the disposition is made to C as donee or to C as trustee for the donees. But while the Courts have been willing in some instances to take a substance approach to the question of the property comprised in a disposition it is suggested that these decisions in no way challenge the general validity of the proposition laid down in Sneddon's case: that the property comprised in a disposition, whether the disposition is of cash or other property and whether made outright or through the medium of trustees, will be that which the donor parted with.

VI. RECENT DECISIONS

Minister of Revenue for the Province of Ontario v McCreath[141]

The settlor settled shares on trust whose terms were that the income was to be divided among the settlor and her issue or such of them as the trustee should determine with the capital going to her issue as she might by Will appoint and, failing appointment, equally.

Counsel for the taxpayer argued that in effect the settlor had made two gifts, one of the equitable interests in the net income from the trust fund and the other of the equitable remainder in the corpus. This argument was made because if the Court found (as in fact the Supreme Court did) that the settlor had retained an interest in the income portion of the settled property by making herself one of the possible objects of the discretionary trust,[142] then the entire settlement would be subject to duty unless it could be shown that the corpus of the trust fund was a separate gift and exempt from tax by the operation of clause 5(1)(g) of the Successions Duty Act as a disposition made more than five years

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141 [1976] C.T.C. 157 (Ontario H.C.) : [1976] C.T.C. 178 (Ontario C.A.) : [1976] C.T.C. 178 (Supreme Court of Canada).

142 For the New Zealand position on this difficult issue. See e.g., Y. F.R. Grbich, 'Dispositions with Strings' Supra n.14 pp. 137-42.

before death and held to the exclusion of the donor.[143]

In the Ontario High Court[144] Fraser J., relying on the decision in Hall's case, found that the gift of the corpus was clearly severable from the gift of the income and therefore it could not be said that the donees did not have possession and enjoyment to the exclusion of the settlor. The Ontario Court of Appeal[145] in a very short judgment agreed with the reasons and conclusion of Fraser J..

This finding was reversed in the Supreme Court of Canada. Dickson J., delivering the decision of the majority, said:[146]

> On the wording of the trust document I can find no reason to regard the property which passed here as two separate and distinct dispositions, one of income and one of corpus. Essentially the subject-matter of the gift was a block of shares... Thus, when Mrs McCreath received income, the benefit came from property which she had purported fully to have given away, her interest in the shares... The substance of the matter in my view is that

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[143] In fact this argument would not have succeeded anyway in view of the Supreme Court's finding that the settlor had also retained an interest in the corpus of the gift by reserving the right to designate by her Will which of her children should receive the corpus on her death and subject to what terms and conditions:

[1976] C.T.C. 178, 191 per Dickson J. ; 192 per Judson J.

For a contrary view see Y.F.R. Grbich, 'Dispositions with Strings'. Supra n.14 pp. 135-37.

[144] [1976] C.T.C. 157 at 176.

[145] [1976] C.T.C. 178.

[146] [1976] C.T.C. 178, 190-91.

> there was one gift, the subject-matter being 99,986 common shares... The income from the 1948 Trust was part of the gift and not something 'not comprised in' the gift of corpus. If a father gives a parcel of revenue-bearing real estate to his son and retains the income or a portion of the income from the real estate, it could not seriously be contended that the father had been entirely excluded from the property disposed of.

In reaching this decision, the learned Judge reviewed the various cases dealing with the reservation-retention issue and distinguished the Hall's case approach on the ground that there was a 'major structural difference' in the respective Statutes under consideration.[147] With respect, however, it is suggested that the basic policy underlying the various Acts is very similar. In considering the Act under consideration in Re McCreath, Dickson J. said, 'We must read clause 5(1)(g) and subclause 1(p)(viii) in light of the policy of the Act, which is to tax all inter vivos gifts from which the donor failed to detach himself'.[148] In this respect the Ontario Act does not differ at all from the relevant provisions in the New Zealand Act.

It is unfortunate that the Court in Re McCreath did not consider the broader spectrum of cases dealing generally with the question of the subject-matter of the gift, especially

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[147] ibid 188-89.

[148] ibid 190.

in view of the fact that the tenor of Dickson J's. judgment indicates that he based his reasoning on the view that the property comprised in the gift was the totality of the interests in the asset and that retention of any interest at all by the donor will prevent him being entirely excluded from the gift.[149]

Nichols v I.R.C.[150]

This was not a case which involved a disposition to a trust but both the Lower Court and the Court of Appeal thought that the reasoning which applied here would be equally applicable in the trust situation.

The deceased who was the owner of a fee simple estate decided to make a gift of the estate to his son but desired that his wife and himself continue to live on the estate. Accordingly, the deceased transferred the estate to his son and the son immediately leased the majority of the estate back to the deceased for the term of five years and thereafter from year to year at an agreed rental. The plan was preconceived although the lease was in fact not executed until three weeks after the gift had taken effect.

In the Chancery Division, Walton J. commented:[151]

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[149] W.D. Goodman, 'Dispositions Under the Ontario Succession Duty Act' (1977) 25 Can. T.J. 188, 196.

[150] [1973] 3 All E.R. 632 : [1975] 2 All E.R. 120.

[151] [1973] 3 All E.R. 632, 636.

> If I consider the matter in principle, it appears to me that if a donor D conveys property to a trustee T to hold on trust as to some interest therein for a beneficiary B and as to the remainder of the property for the donor D himself, all that the donor has given to the beneficiary is the property shorn of the rights to be held in trust for D... The case would be indistinguishable from Munro v C.S.D., a decision of the Privy Council.
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> Now, suppose that there is no intermediate trustee, so that B takes the property directly, but burdened with an equitable obligation to grant the lease back. Does this make any difference? In my opinion, the answer must be in the negative. For in such a case, in very truth, B takes the property as trustee, and the coincidence in identity of B and T cannot make any real difference to the legal analysis.

With respect, I do not think this is correct for the reasons put forward in this paper. However, in the event the comments of Walton J. are dicta only because on the facts of the case Walton J. found that there was no obligation legal or equitable on the son to lease back and that therefore the subject-matter of the gift was the whole estate in fee simple. He concluded that the obligation to lease back was rooted only in honour or filial piety and that consequently the father was not 'entirely excluded' from the property that comprised the subject-matter of the gift.

On appeal to the Court of Appeal, the Crown contended that even if the donee took the property subject to an equitable obligation to grant the lease back, for the purposes of estate duty the property taken under the gift was the fee simple in possession. Goff. J., delivering the judgment of the Court, held, contrary to Walton J., that the son received the estate in fee simple at law and in equity but subject to an obligation binding in equity to grant the lease back and the property was accordingly brought to charge.

After reviewing the authorities and concluding inter alia that there was no relevant distinction between dispositions made by the creation of a trust and dispositions made by absolute conveyance, the learned Judge said:[152]

> ... we think that a grant of the fee simple, subject to and with the benefit of a lease back, where such grant is made by a person who owns the freehold free from any lease, is a grant of the whole fee simple with something reserved out of it, and not a gift of a partial interest leaving something in the hands of the grantor which he has not given. It is not like a reversion or remainder expectant on a prior interest. It gives an immediate right to the rent, together with a right to distrain for it, and, if there be a proviso for re-entry, a right to forfeit the lease. Of course,

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152 [1975] 2 All E.R. 120, 126.

> where, as in the Munro case, the lease, or as it then may have been, a license coupled with an interest, arises under a prior independent transaction, no question can arise because the donor then gives all that he has, but where it is a condition of the gift that a lease back shall be created, we think that must, on a true analysis, be a reservation of a benefit out of the gift and not something not given at all.

Goff J. appears to distinguish the situation in the present case where there was 'an immediate right to the rent' from the type of situation which arose in Hall's case where there was 'a reversion or remainder expectant on a prior interest'. However it is suggested that the existence or futurity of the benefits which accrue to any particular interest in property has no relevance at all to the issue in question. Rather, it is suggested that the proper inquiry should be whether the interest which the donor has purported to retain was something which was capable of being severed and retained as something not given.

The Court however based its decision on other grounds and did not find it necessary to reach a final conclusion on the question of whether the lease back was a reservation out of what was given. The Court found that the repair covenant contained in the lease had not previously existed and therefore could not be something which was not given and this benefit to the donor was a benefit by contract or otherwise 'referable to the gift'. The second ground was

an alteration to the lease to require the son to pay a tithe redemption annuity - this improvement of the father's interest, according to Goff J., could not be something that was not given, but cut down the original gift.

Glynn v C.S.D. (N.S.W.)[153]

The deceased was the registered holder of over 17,000 fully paid up shares. The taxpayer contended that 13,000 of these shares should be excluded from the dutiable estate of the deceased on the ground that at all material times the deceased held these shares on trust for his children. The evidence showed that there had been various transfers and allotments of shares to the children and these were recorded in the returns and accounts of the respective periods.

At no time however had the deceased communicated the existence of the trust to any of his children and neither had he at any time accounted to any of his children for the dividends which he received on the shares, or appropriated the dividends in any way which preserved their separate identity as belonging beneficially to each of them. It was common ground between the parties that the whole of the dividends were received by the deceased and appropriated to his own use.

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[153] 7 A.T.R. 417.

FRENCH, M.P. Reservations, retentions and the property comprised in the disposition by the creation of a trust.

The judgment of Waddell J. in the New South Wales Supreme Court was primarily concerned with establishing whether or not the deceased had intended to create a trust and he concluded:[154]

> On the whole of the evidence in the present case there must, I think, be considerable doubt as to the nature of any trusts which the deceased intended to create. In my opinion the inference most favourable to the plaintiffs which the evidence supports is that the deceased intended to create immediate trusts of each of the parcel of shares in question but to reserve to himself the right to apply the dividends in any way which seemed to him appropriate, that is to say, he reserved a life interest in the dividends on the shares.

Summary

These recent decisions[155] show that there is a trend towards the approach taken in Sneddon's case. However these cases are unsatisfactory in so far as the broader subject-matter question has not been canvassed in the decisions. The Courts in both Re McCreath and Nichols case have seemed reluctant to come to grips with the decisions in the Hall's case line of authority and have been content to distinguish those cases on their facts.

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[154] ibid 424.

[155] At the time of writing another Australian case, Hutchinson v Commissioner of Probate Duties (Victoria) (1977) 7 A.T.R. was in the course of publication and had not yet come to hand.

VII. The TRUST CONCEPT and EQUITABLE DOCTRINES

The trust grew out of a unique English creation known as 'Equity', which could conceive of someone owning property - that is, having legal title - but yet having to administer it for the benefit of others. The sui generis trust concept essentially divides the attributes of ownership between two persons, the rights of disposition and management being in the trustee and the right of enjoyment in the beneficiary.

This separation of the beneficial interest from the dispositive and managerial interests enabled equity to treat the beneficial interest as an equitable estate which, like the legal estate, was capable of disposition. Equity was now able to permit successive persons to be entitled simultaneously to successive rights of enjoyment in the trust assets, and it could allow a class of persons to share in the same right of enjoyment.

The agglomeration of all these legal and equitable interests together make up the total ownership of the trust property. If property is owned absolutely the bundle of legal and equitable in that property are vested in the owner. If that property is transferred absolutely to a donee, his rights in it are as complete as the donor's were. If that same property is then transferred on trust for various donees, equity permits the legal and equitable interests to be divided between the trustees and the beneficiaries, but the total rights of ownership in the property remain the same.

Even without the machinery of the trust, it is possible to assign particular equitable interests in property. In New Zealand, for example, it has been accepted that it is possible to alienate income through an assignment of the right thereto without assigning the source of that income.[156] Where the right to income has been validly assigned the income will attach to that right when it occurs. However the income does not arise because of the existence of that right, it arises out of something entirely separate - namely, the corpus of the property itself. The point is that while the right itself may determine who has the ownership of the income when it does arise, it has nothing to do with the 'production' of that income. Therefore, it is suggested, the right to income cannot exist as an effective interest entirely separate, and with no connections with, the corpus of the property which contains the source of that right.

A similar argument can be made with respect to the equitable interests arising under a trust. There is support for this conclusion in the various arguments which have been put forward on the as yet unresolved question of the juristic nature of the cestui que trust.[157] Whether the beneficiary has rights

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156 Arcus v C.I.R. [1963] N.Z.L.R. 324 : Spratt v C.I.R. [1964] N.Z.L.R. 272. McKay v C.I.R. [1973] N.Z.L.R. 592.

157 See e.g. D.M. Waters, 'The Nature of the Trust Beneficiary's Interest' (1967) 45 Can. Bar Rev. 219.

in rem or rights in personam or even whether this is a relevant dichotomy is not of great import for the purposes of this paper. What is significant is that whatever rights the beneficiary may have are directly connected to either the trustees as legal owners of the trust property or to the trust property itself.

For the greater part, the beneficiary asserts his right through the personal remedy which he has against the trustee to perform his duties of proper control and administration of the trust fund. From the remedial angle therefore, the beneficiary only has personal, obligatory rights. From the substantive angle however, the trust beneficiary's remedial right exists because the beneficiary has a material interest in the trust property.

For these reasons, it seems incredible that the donor is able to say, as The Hall's case approach suggests, that he has retained a particular interest from the corpus of the property as something not given. The equitable interest is inextricably connected to the corpus of the property transferred, and the donor's ability to enjoy the interest which he has depends entirely on the equitable doctrines operating through the trust concept. Rather, if the donor wants to retain a benefit to himself out of the property which is to be settled on trust he necessarily has to reserve that interest out of the property as a beneficiary under the trust.

The Resulting Trust

The approach taken in this paper is not without problems particularly as regards the resulting trust. The Courts have been willing to imply a resulting trust in situations where, for example, an express trust has failed or where there has been a failure to exhaust the beneficial interest. It is therefore arguable on the proposition put forward in this paper that the Courts could always bring back into the dutiable estate of the settlor all trust settlements, whether or not he had reserved to himself an express benefit, on the ground that there was always the possibility that the express trust might fail or that the beneficial interests might not be exhausted and a resulting trust would arise. This obviously would be a ludicrous result and contrary to the intention of the legislature.

This problem was considered by Ostler J. in In re Adams, Adams v C.S.D..[158] There the settlor had settled property on various trusts for his son and his son's wife and children. There was also an express provision that if the son should die in the settlor's lifetime, then the corpus should return to him.

The learned Judge argued that where the objects of a settlement become exhausted or fail there is always in law an implied resulting trust of the corpus of the fund to the settlor and he found that the settlor in this case had done no

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158 [1932] N.Z.L.R. 741.

more than to provide expressly for a right which the law gave to him in any case. He recognised that if he held otherwise then every settlement would be caught by the equivalent of section 12(1)(1):[159]

> This was not the intention of the legislature: on the contrary, the legislature plainly intended to exclude property comprised in settlements from the dutiable estate of the settlor, except in cases where the settlor reserved a life interest to himself or an interest for a period determined by his death or the death of some other person.

There does not appear to be a logical solution to this dilemma. The solution might be, as Ostler J. suggests, to exclude entirely resulting trusts from the operation of the notional estate provisions, but this too has its drawbacks. It would always be open to the settlor in this situation to manipulate the terms of the trust settlement so that he was virtually assured of benefiting from a resulting trust within a foreseeable period of time. Perhaps the only satisfactory answer is for the Courts to take a substance approach to each case and to ask whether the trust is such that it can be said that the settlor did his utmost to ensure that the property did not revert to him, or whether it could reasonably be foreseen that some interest would ultimately revert to the settlor.

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159 ibid 743.

It is suggested that these difficulties arise because of conflicting policies of trust law on the one hand and the notional estate provisions on the other. The development of the equitable concept of trust in this area has been based on the assumption that where a settlor transfers property to trustees on trust he should dispose of the property completely and it should not revert to him at all. As Harman J. said in Re Gillingham Bus Disaster Fund[160] on the question of resulting trusts:

> This doctrine does not, in my judgment, rest on any evidence of the state of mind of the settlor, for in the vast majority of cases no doubt he does not expect to see his money back: he has created a trust which so far as he can see will absorb the whole of it. The resulting trust arises where that expectation is for some unforeseen reason cheated of fruition, and is an inference of law based on after knowledge of the event.

Equity has therefore developed means by which the settlor can avoid any possibility of having the settled property brought back into his estate. The most obvious way of course is for the settlor to make a gift over to a charity.[161] It is therefore possible for the settlor to ensure that property settled on trust will not revert to him because as far as trust

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160 [1958] 1 All E.R. 37 (emphasis added).

161 See e.g. Nathan and Marshall, A Casebook on Trusts (5th ed. 1967) p.150 : Charitable Trusts Act 1957.

law is concerned the question of an implied resulting trust only arises where the express trust has actually failed or where the beneficial interests have actually been exhausted.

The notional estate provisions on the other hand operate on the basis that the donor, while purporting to dispose of property inter vivos, has reserved to himself an interest in that property. The Courts in such cases are therefore concerned with the question whether the donor has reserved any interest out of what was given. According to the implied resulting trust that interest which arises if the express trust fails or if the beneficial interests are exhausted is reserved to the settlor. Therefore strictly speaking the settlement should be caught by the notional estate provisions. Obviously this interpretation is not appropriate in these cases.

This, in fact, raises the wider issue of whether the operation of equitable doctrines should affect the operation of statutes which have nothing to do with the working machinery of trusts but are concerned with determining the nature of certain interests for other purposes - for example, the claims of the revenue authorities.

The attitude of the American Courts to this problem is expressed by Mr Justice Frankfurter in Helvering v Hallock:[162]

> The law of contingent and vested remainders is full of casuistries... The implication of these distinctions and controversies from the law of property into the administration of the estate tax, precludes a fair and workable tax system.

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[162] (1940) 309 U.S. 106, 116.
See also J.R. Shiff, 'Death Taxes and the Inter Vivos Trust'. (1966) 14 Can. T.J. 190, 191.

> Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending on subtle casuistries, which may have their historic justification but possess no relevance for tax purposes. These unwitty diversities of the law of property derive from medieval concepts as to the necessity of a continuous seisin. Distinctions which originated under a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures now so largely directed towards intangible wealth.

As one commentator has said,[163] it appears that the radical reforms envisaged by the American position will not be acceptable in New Zealand in the near future, and it is outside the scope of this paper to examine the question further. However it does appear on the face of it that the effect of the proposition put forward in this paper would follow fairly closely the effect that an adoption of the American position would have.

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[163] Y.F.R. Grbich, 'Dispositions with Strings' supra n.14 p.93.

VIII. CONCLUSION

The contention made in this paper has been that where the donor has purported to retain an interest in property which he has settled on trust, he necessarily reserves that interest out of the subject-matter comprised in the gift and that sections 11 and 12 therefore operate to bring the whole gift back into the dutiable estate.

In conclusion therefore how is the settlor to avoid the provisions in section 11 and section 12? It is suggested that the answer, subject to other issues being resolved,[164] is to be found in another American case, Commissioner of Internal Revenue v Estate of Church[165] where Mr Justice Black said:[166]

> ... an estate tax cannot be avoided by any trust transfer except by a bona fide transfer in which the settlor, absolutely, unequivocally, irrevocably and without possible reservations, parts with all of his title and all of his possession and all of his enjoyment of the transferred property.

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[164] For example, whether the settlor as a beneficiary under a discretionary trust has a reserved interest and whether the settlor as a trustee has a reserved interest : supra n.142 : n.143.

[165] (1948) 335 U.S. 632.

[166] ibid 645.

APPENDIX: RELEVANT STATUTORY PROVISIONS

NEW ZEALAND - ESTATE and GIFT DUTIES ACT 1968

11. Gift with reservation—(1) Subject to this section, the dutiable estate shall include any property comprised in any gift, whether a dutiable gift or not, made by the deceased at any time, whether before or after the commencement of this Act, unless bona fide possession and enjoyment has been assumed by the donee—

(a) Immediately on the making of the gift or not less than three years before the death of the deceased; and

(b) In either case, has been thenceforth retained to the entire exclusion of the deceased or of any benefit to him by contract or otherwise.

(2) Where property comprised in such a gift was an interest in land or in chattels, retention or assumption by the deceased of actual occupation of the land or actual enjoyment of an incorporeal right over the land or actual possession of the chattels shall be disregarded if for full consideration in money or money's worth paid before or owing at the date of death of the deceased.

Cf. 1955, No. 105, s. 5 (1) (c), (1A); 1960, No. 43, s. 10

12. Settlement or other disposition made by deceased—(1) Subject to this section and to section 34 of this Act, the dutiable estate shall include any property comprised in any settlement, trust, or other disposition of property made by the deceased, whether before or after the commencement of this Act,—

(a) By which an interest in that property, or in the proceeds of the sale thereof, is reserved either expressly or by implication to the deceased for his life or for the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; or

(b) Which is accompanied by the reservation or assurance of, or a contract for, any benefit to the deceased for the term of his life or of the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; or

(c) By which the deceased has reserved to himself the right, by the exercise of any power, to restore to himself or to reclaim that property or the proceeds of the sale thereof;—

unless that interest, benefit, or right (together with any interest, benefit, or right, whether of the same or of any different kind, which may have been substituted therefor) has, by any release, surrender, merger, cesser, forfeiture, determination, alienation, or disposition, wholly ceased to exist or to be vested in the deceased at any time more than three years before his death, whether before or after the commencement of this Act.

(2) The property comprised in any such settlement, trust, or other disposition of property shall be deemed to include the proceeds of its sale or conversion, and all investments for the time being representing it, and all property which has in any manner been substituted for the property originally comprised in that settlement, trust, or other disposition of property.

Cf. 1955, No. 105, s. 5 (1) (j), (3) (a), (b)

FRENCH, M.P. Reservations, retentions and the property comprised in the disposition by the creation of a trust.

ENGLAND

Section 2(1)(c) Finance Act 1894 deems property passing on the death of the deceased to include property which would be required on the death of the deceased to be included in an account under section 38 Customs and Inland Revenue Act 1881, as amended by section 11 Customs and Inland Revenue Act 1889 with certain deletions. The relevant provisions as amended and altered are set out with those amendments.

Section 38(2):

> The [real or] personal or moveable property to be included in an account shall be property of the following descriptions, viz:-
>
> (a) Any property ... taken under a disposition, made by any person so dying, purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bona fide made [twelve] months before the death of the deceased [and shall include property taken under a gift whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforth retained, to the entire exclusion of the donor or of any benefit to him by contract or otherwise.]
>
> (c) Any property passing under any past or future settlement [or any trust whether expressed in writing or otherwise ..., and to the proceeds of sale thereof] made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property [or the proceeds of sale thereof] for life or for any period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right by the exercise of any power to restore to himself, or to reclaim the absolute interest in such property [or the proceeds of sale thereof].

R FRENCH, M.P. Reservations, retentions and the property comprised in the disposition by the creation of a trust.

NEW SOUTH WALES

Section 102 Stamp Duties Act 1920-56 as amended by section 2(b)(ii)

mp Duties (Amendment) Act 1952.

For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property:-

(2)(c) Any property passing under any settlement, trust, or other dispositiom of property made by the deceased whether before or after the passing of this Act -

(i) by which an interest in or benefit out of or connected with that property, or in the proceeds of the sale thereof, is reserved either expressly or by implication to the deceased for his life or for the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; or

(ii) which is accompanies by the reservation or assurance of, or a contract for, any benefit to the deceased for the term of his life or of the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; or

(iii) by which the deceased has reserved to himself the right, by the exercise of any power, to restore to himself or to reclaim that property or the proceeds of the sale thereof.

Where, in respect of any property passing under any settlement, trust or other disposition made by the deceased whether before or after the passing of this Act, there was in existence at any time (either before or after the commencement of the Stamp Duties (Amendment) Act 1952) within the three years before the death of the deceased any such interest, benefit, reservation, assurance, contract or right as is referred to in the foregoing provisions of this sub-paragraph, the settlement, trust or other disposition shall, notwithstanding that such interest, benefit, reservation, assurance, contract or right had ceased to exist before the death of the deceased, be read and construed for the purposes of this sub-paragraph as if such interest, benefit, reservation, assurance, contract or right had continued in existence until the death of the deceased.

2(d) Any property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act, of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died.

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SOUTH AUSTRALIA

Section 18(3) Succession Duties Act Further Amendment Act 1919

as amended by section 10 Succession Duties Act Further Amendment Act 1923.

Duty shall be chargeable ... upon the net present value of any property disposed of by certain forms of disposition, including gift, immediately upon such disposition, and irrespective of the time of the death of the person making the same, if the person taking under such disposition does not immediately upon the disposition bona fide assume the beneficial interest and possession of such property and thenceforward retain such interest and possession to the entire exclusion of the person making such disposition, and without reservation to such person of any benefit from or interest in such property by contract or otherwise.

CANADA

Section 3(1) Estate Tax Act, S.C. 1958

There shall be included in computing the aggregate net value ...
(d) property disposed of by the deceased under a disposition whenever made, of which actual and bona fide possession and enjoyment was not, at least three years prior to the death of the deceased,
(i) assumed by the person to whom the disposition was made or by a trustee or agent for that person, and
(ii) thereafter retained to the entire exclusion of the deceased and to the entire exclusion of any benefit to him, whether by contract or otherwise,
(e) property comprised in a settlement whenever made, whether by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the deceased as settlor or whereby the deceased has reserved to himself the right, by the exercise of any power, to restore to himself or to reclaim the absolute interest in such property;

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ONTARIO

THE SUCCESSION DUTY ACT, RSO 1960

Section 12 imposes the liability:

12. (1) Every person... for whose benefit any property ... passes on the death of the deceased is liable...

'Property passing on the death of the deceased' is broadly defined and is deemed to include, according to subclause 1 (p)(viii):

> any property passing under any past or future settlement, including any trust, whether expressed in writing or otherwise and if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not, as between the settlor and any other person, made by deed or other instrument not taking effect as a will, whereby an interest in such property or the proceeds of sale thereof for life, or any other period determinable by reference to death, is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right by the exercise of any power to restore to himself, or to reclaim the absolute interest in such property, or the proceeds of sale thereof, or to otherwise resettle the same or any part thereof....

Clause 5 (1)(g) exempts certain dispositions:

5. (1) No duty shall be levied on any of the following property, nor on any person to whom there are any transmissions of any of the following property, with respect to such transmissions, nor on any person to whom any of the following dispositions are made, with respect to such dispositions, and such property and dispositions shall not be included in the aggregate value nor included for the purpose of determining any rate of duty,

...

> (g) any disposition where actual and bona fide enjoyment and possession of the property, in respect of which the disposition is made, was assumed more than five years before the date of death of the deceased by the person to whom the disposition is made, or by a trustee for such person, and thenceforward retained to the entire exclusion of the deceased or of any benefit to him whether voluntary or by contract or otherwise;

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