Reservations, retentions, and the property comprised in the disposition by the creation of a trust

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When making a disposition of property the difference between the donor reserving an interest in that property to himself and retaining an interest in that property to himself is of vital significance to a possible application of the notional estate provisions of the Estate and Gift Duties Act 1968. Michael French here reexamines the two relevant lines of cases, refers to some recent decisions in other jurisdictions and questions the generally accepted view of the nature of reservations and retentions of interests in property which has been disposed of through the medium of a trust.

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 (referred to as the Act in this paper) 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 a distinction between the situation where a donor is absolutely excluded from a gift because he has retained and not given 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 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]

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1 Estate and Gift Duties Act, 1968, s. 10.
2 E.g. *Wheeler* v. *Humphreys* [1898] A.C. 506.

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. A line of authority concerning the transfer of land has illustrated how the courts have dealt with the issues involved.

Munro v. *C.S.D.*,[4] *C.S.D.* v. *Owens*[5] and *Re Nichol, Johnstone* v. *C.S.D. (No. 2)*[6] 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.[7] It is significant however that all these cases involved situations where the interests retained or reserved by the donor were interests 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 separate from the corpus of the gift if he chose to do so.

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) of the Act.

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.

3 *Adams and Richardson's Law of Estate and Gift Duties* (5th ed., Wellington, 1978) 89.
4 [1974] A.C. 61. 5 (1952) 88 C.L.R. 67. 6 [1931] N.Z.L.R. 718 (C.A.).
7 Y. F. R. Grbich, 'Dispositions with Strings' in Richardson (ed.) *Essays on the Estate and Gift Duties Act 1968* (Wellington, 1969) 86-88 where the cases are analysed. See also W. D. Goodman, 'Some Famous Cases in Estate Planning Which Went Sour' (1973) 1 Estates and Trusts Quarterly, 13.

(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 are they 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 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,[8] 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 as 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[9] approach. 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 — 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[10] 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 refer briefly to some special cases which have presented analytical difficulties for the courts. It will be suggested that these cases are in no real sense a departure from the *Sneddon* 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.

8 *Adams and Richardson,* op. cit., 89.
9 *C.S.D.* v. *Perpetual Trustee Co. Ltd.* [1943] A.C. 425.
10 *Sneddon* v. *Lord Advocate* [1954] A.C. 257.

Some 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 principal 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). This paper is 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 difficulties raised by applying the definition of 'disposition of property' to the creation of a trust have been well canvassed by Congreve.[11] However, issue is taken with that writer on two counts.

It appears to have been accepted that the emphasis of the general words in the definition of 'disposition of property' is on the alienation of property and that all imply a change of ownership of the property in question.[12] There would be some difficulty however in bringing a disposition by way of trust within the scope of these general words in certain circumstances. There are two basic methods of creating a trust. The first is by the transfer of the trust property from the settlor to the trustee — and there is no difficulty in bringing this 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. In this situation there is conflicting opinion as to whether any transfer of property can be said to have taken place.[13] If there has been no transfer of property there might be some difficulty in applying the general words of the definition to such a situation.

It is generally accepted[14] that

> paras (a) to (f) were included in the definition of disposition of property for the

11 R. L. Congreve, 'Gifts for Duty Purposes' in Richardson (ed.) op. cit., 38-49.
12 *C.S.D.* v. *Card* [1940] N.Z.L.R. 637, 649 (C.A.); Adams and Richardson, op. cit., 27.
13 See infra Part IV.
14 *Grimwade* v. *F.C.T.* (1949) 78 C.L.R. 199, 208 per Williams J. See also the judgment of Cooke J. in *Carmody* v. *C.I.R.* [1975] 1 N.Z.L.R. 118. But note the contrary view held by Barwick C.J. and McTiernan J. in *Ord Forrest Pty Ltd.* v. *F.C.T.* (1974) 130 C.L.R. 124.

purpose of including within the definition transactions which might otherwise not be held to fall within the ordinary meaning of disposition or other alienation of property and that each paragraph is complete in itself.

Congreve argues[15] that

If para (b) referred only to the "declaration of a trust", and not to the "creation of a trust", it might be concluded that the provision was included in the scheme of the definition to catch trust dispositions which do not involve an actual transfer or conveyance of property to trustees.

The writer goes on to suggest however that because para. (b) refers to the "creation of a trust" the more appropriate conclusion is that para. (b) has the effect of putting the creation of a trust in a special category for gift duty purposes — that is, 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.[16]

It is suggested that the inclusion of para. (b) in the definition of disposition of property merely reflects the legislature's desire for comprehensiveness in its efforts to avoid the difficulties encountered where there has been a declaration of trust.[17] Certainly, there appears to be no reason why a disposition by the "creation of a trust" should be treated in any way different to absolute dispositions except insofar as the concept of the trust itself prevents an application of the principles of the Estate and Gift Duties Act 1968 which is totally consistent with their application to an absolute disposition.

Following on from his contention that para. (b) puts the creation of a trust in a special category for gift duty purposes, Congreve argues that where there has been a disposition by "the creation of a trust" the disposition is made to the beneficiaries of the trust.[18] It is suggested that this is not the correct approach and rather that the disposition is made to the trustees of the trust although the donees of the disposition are the beneficiaries under the trust.

If the following interconnecting propositions extracted from the authorities[19] are accepted — (i) section 2(2)(b) deems "the creation of a trust" to be a disposition of property within the terms of the Act; (ii) the creation of a trust arises when the trust property is vested in the trustees; and (iii) 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 — then logically the only conclusion 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*.[20] Lord Morton for example said:[21]

. . . I feel no doubt that the property taken under the disposition was the sum of £5,000. 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.

15 R. L. Congreve, op. cit., 40.

16 Ibid., 41.

17 There might be an argument (a fairly weak one admittedly) that the *expressio unius exclusio alterius* maxim would have prevented the legislation's merely referring to "the declaration of a trust" in para. (b).

18 R. L. Congreve, op. cit., 42.

19 Ibid., 39-41.

20 [1954] A.C. 257.

21 Ibid., 263-264—(emphasis added).

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 Lord Morton 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'. It is submitted that this wording indicates that there may be situations, such as occur 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:[22]

> 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".[23] Similarly Lord Russell in delivering the judgment of the Court in *Hall's* case was of the opinion that:[24]

> The donee was the recipient of the gift; whether the son was 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:[25]

> 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.

The effect of this approach 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. And if this is accepted there is support for the proposition 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 this approach is incorrect. For example, in *MacCormick* v. *F.C.T.*[26] Stark J. took

22 Section 86(3).
23 [1954] A.C. 257, 282.
24 [1943] A.C. 425, 439-440. See also *Young Davies Ltd* v. *C.S.D.* [1951] G.L.R. 524, 528.
25 [1954] A.C. 257, 282.
26 (1945) 71 C.L.R. 283, 303: see also per Rich J. at 301.

the view that the various equitable interests under a trust each constituted a separate disposition. If this view 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,[27] then for the purposes of the relevant statutory provisions 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.

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 purpose of this paper. Under the Act it is necessary to ascertain the 'property comprised' in the disposition in only two circumstances:[28]

(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).[29]

It should be noted at this point that while the two conflicting lines of authority to be discussed 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 in other jurisdictions are only of persuasive authority because of the different statutory language under which they were decided.[30] 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.

A. The Hall's Case Approach

In 1900 the case of *Earl Grey* v. *Attorney General*[31] went before the House of Lords. The donor had, in that case, conveyed real estate, leaseholds and personalty to the donee by deed. The donee in turn covenanted (inter alia) to pay certain

27 As suggested by R. L. Congreve, op. cit., 42.
28 *Adams and Richardson,* op. cit., 84.
29 Section 18.
30 A point emphasised in *Adams and Richardson,* op. cit., 86.
31 [1900] A.C. 124.

annuities and mortgages 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 donee's 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 principal value of all the property comprised in the deed under the equivalent of section 11.[32] Lord Halsbury L.C. said:[33]

> . . . 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*.[34] Here the donor was entitled to a mortgage debt charged on land. 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 asumed and retained by the donee "to the entire exclusion of any benefit to the donor by contract or otherwise".[35]

The case which seems to have marked the turning point in this line of authority is *In re Cochrane*.[36] 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, 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.[37]

32 Section 2(1)(c) Finance Act, 1894, and s. 38 Customs and Inland Revenue Act, 1881 (as amended by s. 11 Customs and Inland Revenue Act, 1889).
33 [1900] A.C. 126: Lords Macnaughten, Morris, Shand and James concurred.
34 [1895] 1 Q.B. 99.
35 Ibid., 105 per Lord Esher M.R.; 107 per Lopes L.J.; 108 per A. C. Smith L.J.
36 [1905] 2 I.R. 626: [1906] 2 I.R. 200.
37 [1906] 2 I.R. 200 at 204 per Holmes J.

It is the judgment of Palles C.B. in the Divisional Court[38] which provides the starting point for the line of authority which followed *In re Cochrane*. In the Appeal Court all three judges[39] 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 on the same statutory provisions as those relied on in *Earl Grey's* case[40] 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, because of 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".

The response of Palles C.B. to this contention is vitally important. He said:[41]

> 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 it is submitted that 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 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".[42] 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:[43]

> 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?

38 [1905] 2 I.R. 626.
39 [1906] 2 I.R. 200: at 201 per Walker C.; at 203 per FitzGibbon L.J.: at 204 per Holmes L.J.
40 Supra n. 32.
41 [1905] 2 I.R. 626, 634-636.
42 Ibid., 636.
43 Ibid., 636-637.

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, it is suggested that this is not correct.

According to the provisions under consideration in that case property passing on death was deemed to include any "property taken . . . under a disposition purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust, or otherwise". It is suggested that the scheme of this definition is to catch trust disposition which do not involve an actual transfer or conveyance of property to trustees.[44]

A declaration of trust may be regarded as a transfer of the trust property from the settlor as owner to the settlor as trustee.[45] 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 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.[46]

If Palles C.B. was wrong in his reasoning then the rest of his judgment is open to 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 declaration it was then a simple matter for him 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.[47]

Applying this reasoning to the trust for the donor of the surplus income during the daughter's life, Palles C.B. said:[48]

> 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.

44 See supra Part III, where a similar argument is made in respect of s. 2(2)(b).
45 See, for example, R. L. Congreve, op. cit., 40.
46 [1954] A.C. 257, 280
47 [1905] 1 I.R. 626, 637.
48 Ibid., 637-38.

That surplus was something altogether outside the gift. It follows that there was not any reservation of any benefit to the settlor *out of the gift.*

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.

The Judicial Committee in *C.S.D. (N.S.W.)* v. *Perpetual Trustee Co. Ltd* (*Hall*'s case)[49] 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 because the benefits back to the donor in those two 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.

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 twenty-one, 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 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.[50]

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.[51] The High Court of Australia[52] 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:[53] "The gift in this case was a gift to the son by the creation of a trust of the beneficial interest in the shares".

Similarly, Stark 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".[54]

The Judicial Committee agreed with the High Court of Australia. Lord Russell of Killowen, in delivering the advice of their Lordships, said:[55]

> . . . 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

49 [1943] A.C. 425.

50 Stamp Duties Act, 1920 (N.S.W.) s. 102(2)(d).

51 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, it is suggested that this finding is incorrect — see supra Part III.

52 (1941) 64 C.L.R. 492.

53 Ibid., 500.

54 Ibid., 505.

55 [1943] A.C. 425, 439-40.

> 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.

Hall's case was followed in the Canadian case *M.N.R.* v. *National Trust Co. Ltd.*[56] 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:[57]

> 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 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.)*[58] 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:[59]

> 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.[60]

However in this case the deed gave the settlor wide powers of management and, in particular, provided that in addition to reimbursing himself for 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:[61]

56 [1948] C.T.C. 339: [1949] S.C.R. 127.
57 [1948] C.T.C. 339, 351.
58 [1954] A.C. 57 .
59 Ibid., 76.
60 Supra n. 50.
61 [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.

B. The Sneddon's Case Approach

The law relating to the question of what was to be valued at the date of the donor's death where there had been a disposition by way of trust[62] was somewhat uncertain when *Sneddon* v. *Lord Advocate*[63] came before the House of Lords.

In *Sneddon*'s case the settlor had settled £5,000 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 whose value increased to £9,250 by 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, £9,250.

However the House of Lords held, with one dissent, that the dutiable value of the gift was £5,000 and not the value of the shares at death.

Lord Morton of Henryton said:[64]

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

62 The view taken in *Lord Strathcona* v. *I.R.C.* [1929] S.C. 800, 805-807 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 has been generally accepted — see e.g. *Attorney-General for Ontario* v. *National Trust Co. Ltd.* [1931] A.C. 818, 822-23 and *Attorney-General* v. *De Preville* [1900] 1 Q.B. 223, 231.
However where there is a disposition by way of trust the position is not quite so clear. The trends in the relevant cases of *In re Payne, Poplett* v. *Attorney-General* [1931] Ch. 865 [1940] 1 Ch. 576; *Trustees, Executors & Agency Co. Ltd.* v. *F.C.T.* (*Teares* case) (1941) 65 C.L.R. 134, and *Vicars* v. *C.S.D.* (N.S.W.) (1945) 71 C.L.R. 309 have been analysed in R. L. Congreve, op. cit.

63 [1954] A.C. 257.

64 Ibid., 263-264.

that the property taken under that disposition was the sum of £5,000. 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. 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, 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:[65]

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 £5,000 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 £5,000.

C. 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.*[66] Kitto J. said:[67]

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'.

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

One commentator[68] has suggested that these two cases can be reconciled because in *Sneddon*'s case the property passing to the trustee was the complete legal and beneficial interest in £5,000, 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 interest in that money created in the beneficiaries of the trust simply did not arise. This attempt at reconciling the two cases is questionable.

The House of Lords in *Sneddon's* case was 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".[69] Their Lordships clearly saw the contrast between legal and beneficial interests passing from the donor. Lord Morton, for example, could

65 Ibid., 265-266. For the use of the "fund" argument in a different context see Carroll's essay in this volume and particularly his analysis of *James* v. *I.R.C.* [1973] 2 N.Z.L.R. 119, *Rossiter* v. *C.I.R.* [1977] 1 N.Z.L.R. 195 and *McGain* v. *F.C.T.* (1966) 116 C.L.R. 172.

66 (1960) 102 C.L.R. 1.

67 Ibid., 23.

68 Y. F. R. Grbich, op. cit., 91-92. See also R. L. Congreve, op. cit., 45-46.

69 [1954] A.C. 257, 267 per Lord MacDermott; see also 263 per Lord Morton; 271-72 per Lord Reid.

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:[70]

> 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[71] with the view taken by Scott L.J. in the Court of Appeal in *In re Payne*[72] that the property given "was simply the totality of equitable rights created by that declaration of trust in the beneficiaries"; no other form or 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 £5,000. On this view it is hard to see how the two cases could be reconciled.

It has already been suggested[73] 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:[74] " . . . 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.*"

Statements made by Lord Radcliffe in *St Aubyn* v. *Attorney General*[75] support this conclusion. After reviewing the approach taken in *In re Cochrane and Hall*'s case his Lordship said:[76]

> 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.

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 has been suggested, 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, the actual

70 Ibid., 265.
71 Ibid., 275.
72 [1940] Ch. 576, 589-90.
73 Supra Part III.
74 [1943] A.C. 425, 439 (emphasis added).
75 [1952] A.C. 15.
76 Ibid., 49 (emphasis added).

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, 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.

The principle enunciated in *Sneddon's* case was accepted by the High Court of Australia in *C.S.D.* v. *Gale*[77] where it was held that the property comprised in the gift was that which the donor parted with. Dixon C.J. said:[78]

> There is much in the speeches of their Lordships who form the majority in *Sneddon* v. *Lord Advocate* 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 and so did Lord MacDermott and Lord Reid . . . . 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.*[79] 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 arise directly 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.

D. Certain Special Cases: Support for the Sneddon Principle?

There is a group of cases which has presented the courts with particular difficulties in determining the question of the subject-matter comprised in the disposition. On the face of it difficulties arise with the *Sneddon* approach in those cases where the property which the donor purports to give and the property which the donee takes are in completely different forms. Assume that A wishes to gift Blackacre to C and that Blackacre is at present owned by B. The cases show and there are a number of ways in which A can achieve his wish:

(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* v. *I.R.C.*[80]

(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 Trustee Co. Ltd.* v. *I.R.C.*,[81] and *Public Trustee* v. *C.S.D.*[82]

77 (1958) 101 C.L.R. 96. 78 Ibid., 109. 79 (1960) 102 C.L.R. 1.
80 [1929] S.C. 800. See also *A-G for Ontario* v. *National Trust Co. Ltd* [1931] A.C. 818; *A-G* v. *De Preville* [1900] 1 Q.B. 223.
81 [1968] Ch. 215. 82 [1925] N.Z.L.R. 237.

(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* v. *I.R.C.*,[83] *Union Trustee Co. of Australia Ltd.* v. *Webb*.[84]

(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* v. *Lord Advocate*.[85]

(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 extinguishing of the debt: *Re Hall, Holland* v. *A-G*.[86]

(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 Trustees* v. *C.I.R.*[87]

These various cases indicate that while the courts have been prepared in some instances to take a substance approach to the question of the property comprised in a disposition they have only done so in those cases where the donor, by a series of transactions before the disposition to the donee takes place, is able to gift property which was never vested in the donor. They have not done so in those cases where the disposition to the donee has actually taken place and then the property taken transmuted into some other form. This result has important implications for the situation where there has been a disposition by the creation of a trust. If, as Congreve suggests,[88] the disposition is made to the donees (i.e. the beneficiaries of the trust) in such a situation then it could be argued on the above authorities that the courts could take a substance approach and look to the interests derived by the individual beneficiaries under the trust in order to determine the property comprised in the disposition. However the view taken here is that the disposition is made to the trustees.[89] It is suggested therefore that while the courts may take a substance approach in determining the subject matter of the disposition to the trustees, they will not go beyond that point to look at the interests taken by the individual beneficiaries in determining that question. 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 such as that which arose in *Potter*'s case, where the property is given directly to the donee but, under the terms and conditions of the gift, the donee is to use it only in one particular way. It is submitted therefore that these cases do not challenge the general validity of the

83 (1973) 3 A.T.R. 597.
84 (1915) 19 C.L.R. 669, 676 (per Isaacs J.).
85 (1958) S.C. 213.
86 [1942] 1 All E.R. 10.
87 [1968] N.Z.L.R. 872. For a wider analysis of the law in this area see *Adams and Richardson*, op. cit., 29-30.
88 R. L. Congreve, op. cit., 42.
89 Supra Part III.

proposition laid down in *Sneddon*'s case[90] that the property comprised in a disposition by the creation of a trust is the subject matter of the disposition to the trustees.

However, even having established that the property comprised in a disposition by the creation of a trust is the subject matter of the disposition to the trustees there is still the problem of determining what comprises the subject matter of the disposition. If a settlor purports to give certain equitable interests in specific property and to keep back other equitable interests in the property what is the property constituting the subject matter of the disposition to the trustees?

V. 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 then 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 makes up the total ownership of the trust property. If property is owned absolutely the bundle of legal and equitable rights in that property are vested in the owner. If that property is transferred absolutely to a donee, the donee's 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.

A trust is "created" for the purposes of para. (b) when specific property is impressed with the term of a trust. In *Baldwin* v. *C.I.R.*[91] Macarthur J. considered the words "a trust has been created".[92] He said:[93]

> 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.

90 Although it is recognised that the approach taken by the court in *Overton*'s case is difficult to reconcile with the decision in *Sneddon*'s case with respect to the importance of identifying the property after the subject matter of the original gift has changed in character: *Adams & Richardson,* op. cit., 111. See also the comments by Haslam J. in *Tatham* v. *I.R.C.* (1973) 3 A.T.R. 597, 601.

91 [1965] N.Z.L.R. 1.

92 Section 84A Land and Income Tax Act 1954 (now repealed).

93 [1965] N.Z.L.R. 1, 6. See also *Tucker* v. *C.I.R.* [1965] N.Z.L.R. 1027, 1030.

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 L.J. in *Milroy v. Lord:*[94]

> 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 this 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.[95]

94 (1862) 4 De G.F. & J. 264 at 274.

95 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] Ch. 499.

The terms of a trust may be established in a deed executed by the settlor and the trustees of the proposed trust: R. L. Congreve, op. cit., 34.

In *Sneddon* v. *Lord Advocate* Lord Keith in his dissenting judgment (at 282) was of the opinion that a trust deed, which provided for the trust fund to consist of a certain sum which is to be vested in the trustees at a later date, 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.

Lord Keith's conclusion is consistent with his view (at 283) 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. 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.* (1970) 1 A.T.R. 667, where Menzies J. did not consider (at 670) the words "created a trust" in s. 102 Income Tax Assessment Act 1936-1966 (Aus.), apt to describe the payment of money to a trustee to hold under a trust already constituted:

> 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

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 to it without assigning the source of that income.[96] Where the right to income has been validly assigned the income will attach to that right when it occur. 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*.[97] Whether the beneficiary has rights *in rem* or rights *in personam* or even whether this is a relevant dichotomy is not of great import for present purposes. 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 as a question of form has to reserve that interest out of the property as a beneficiary under the trust.

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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 trustee on the trusts already constituted and enjoy large benefits during his life knowing that on his death s. 11 and s. 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 should be caught by the notional estate provisions.

96 *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] 1 N.Z.L.R. 592.

97 E.g. D. W. M. Waters, 'The Nature of Trust Beneficiary's Interest', (1967) 45 Can. Bar Rev. 219.

VI. RECENT DECISIONS

A. *Minister of Revenue for the Province of Ontario v. McCreath*[98]

This action was brought under the Succession Duty Act 1960 of Ontario and is particularly relevant for present purposes because it concerned a disposition's being the "creation of trust".[99]

Some preliminary comments need to be made about the scheme of the Ontario Act. In New Zealand, as in most other jurisdictions, the charging section levies death taxes only in respect of dispositions made within a certain number of years before the death of the deceased and in respect of dispositions whenever made, if the disponee has not assumed actual and bona fide possession and enjoyment of the property, to the entire exclusion of the deceased or of any benefit to him.

In Ontario the situation is that where dispositions are brought back into the deceased's estate and held dutiable, exemption is available only if actual and bona fide possession and enjoyment of the donated property was assumed more than five years before the date of death of the deceased by the disponee or by a trustee for him and thenceforward retained to the entire exclusion of the deceased or any benefit to him.

In *McCreath* the settlor settled shares on trust the terms of which 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.

In the Ontario High Court[1] Fraser J., relying on the decisions[2] in *Attorney-General* v. *Heywood*[3] and *Attorney-General* v. *Farrell*[4] found that by making herself one of the possible objects of the discretionary trust[5] the settlor had retained an interest in the income portion of the settled property and that the property therefore fell within the scope of the recapture provision contained in the Act.[6]

The disposition had been made by the creation of the trust more than five years before the date of the death of the settlor but the question remained whether the

> 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 . . . and thenceforward retained to the entire exclusion of the deceased or of any benefit to him whether voluntary or by contract or otherwise.

Counsel for the taxpayer raised no question with respect to the income but because the entire settlement would be subject to duty unless it could be shown

98 [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).
99 Succession Duty Act, R.S.O. 1960, C.386, s. 1(f)(ix). This is the equivalent of para. (b) in the N.Z. Act.
1 [1976] C.T.C. 157, 168.
2 For an analysis of the cases and the New Zealand position on this difficult issue see Y. F. R. Grbich, op. cit., 137-42. See also: *Sainsbury* v. *I.R.C.* [1969] 3 All E.R. 919 and *Re Weir* [1969] 3 W.L.R. 860.
3 (1887) 19 Q.B.D. 326.
4 [1931] 1 K.B. 81.
5 Subclause 1(p)(viii).
6 Clause 5(1)(g).

that the corpus of the trust fund was a separate gift and exempt from tax as a disposition made more than five years before death and held to the exclusion of the donor[7] it was 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. The Crown argued that for the purpose of the case the corpus and the income were not completely separate or severable.

Fraser J. disagreed with the Crown's contention and following the *Hall's* case line of authority, held that the gift of the corpus was clearly severable from the gift of income:[8]

> The subject-matter of this gift was the equitable remainder in the corpus and not the income. Each of these dispositions has a different subject and a different object. With respect to the gift of the corpus it cannot be said that the donees did not have possession and enjoyment to the exclusion of the settlor after the making of the agreement.

With due respect to the learned judge, his reasoning appears to contain some inherent contradictions. Under the Ontario Act there are two clear steps: First, it is necessary to bring the property within the scope of the recapture provision as property passing on death: secondly, where the property has been recaptured and is prima facie subject to duty certain dispositions can be exempted if they come within the scope of particular provisions. It is only necessary to implement the exempting provisions once the property has been brought back into the deceased's estate.

Fraser J. argued that the income was property passing on the death of the settlor because the settlor had reserved an interest out of the income portion of the settled property while later in his reasoning he exempted the corpus of the trust fund from succession duty on the ground that it was severable from the income portion of the settlement and held to the entire exclusion of the donor. If the corpus were severable from the income it should not be necessary in this case to make use of the exempting provisions to escape duty on the corpus. It should be sufficient to say that the corpus was not brought back into the deceased's estate in the first place because the income and the corpus were severable and the settlor's interest was reserved out of the income not the corpus.[9]

The implication of Fraser J.'s approach is that by reserving an interest out of the income portion of the settlement the settlor caused everything given (that is, the income and the corpus) to be brought back into her estate for duty purposes as property passing on her death. However, having recaptured the whole the implication is that the income and the corpus are able to be severed for the purpose of applying the exemption provisions. It is difficult to see how there can be a severance at this later stage while there is not severance at the initial stage of determining what is to be brought back into the estate as property passing on death.

7 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 the contrary view see Y.F.R. Grbich, *op. cit.*, 135-37.

8 [1976] C.T.C. 157, 176.

9 Supra n. 6.

In the Ontario Court of Appeal, only Jessup J.A. appears to see this apparent self contradiction.[10] He implies that there can be a severance of the corpus from the income and because of this[11]

> . . . in my view the corpus of the trust did not attract succession duty under section 6 for the reason that it was not property passing on death within the meaning of subclause 1(p)(viii) because no interest in the corpus was reserved to herself by the settlor.

The decision of the High Court and the Court of Appeal was reversed in the Supreme Court of Canada. Dickson J., delivering the decision of the majority, said:[12]

> 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 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.[13]

In reaching this decision, the learned judged reviewed some of the 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.[14] With respect, however, it is suggested that the basic policy underlying the various Acts is very similar. In considering the Act under consideration in *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".[15] In this respect the Ontario Act does not differ at all from the relevant provisions in the New Zealand Act.

The court in *McCreath* did not consider the broader spectrum of cases dealing generally with the question of the subject-matter of the gift and it did not mention the *Sneddon* approach at all. This was unfortunate, especially in view of the fact

10 [1976] C.T.C. 178. Evans and McGillivray J.J.A. assume without deciding that the corpus of the trust in question would attract succession duty and agree with the reasoning of Fraser J. in the Ontario High Court on the application of the exempting provisions to the corpus.

11 Idem.

12 [1976] C.T.C. 178, 190-191. Note however p. 184 of the case where Dickson J. expresses The view that the 'property passing' under the settlement was the equitable interest in a voting trust certificate". In the light of his later reasoning it is submitted that the learned judge must mean the total equitable interest — that is, all the interests in both income and corpus.

13 An analogous situation may be whether the income from shares can be severed from the corpus of the shares. Note Dickson J.'s comments at 190 on the American case of *Commissioner of Internal Revenue* v. *Estate of Church* 335 U.S. 632 (1948). See also the discussion of *Re Alex Russell* [1968] V.R. 285 by Kite and Willis in this volume.

14 Ibid., 190.

15 Idem.

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 property and that retention of any interest at all by the donor will prevent his being entirely excluded from the gift.[16]

B. Nichols v. I.R.C.[17]

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 was applied to the situation in this case 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 greater part 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:[18]

> 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.
>
> 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, there is a very clear distinction between the situation which arose in *Munro* v. *C.S.D.*[19] and the situation which arose in the *Nichols* case and this distinction is, in essence, the crux of the argument presented here. In *Munro*'s case the interest kept by the donor was able to be severed and retained as something not given; the owner of some land had established partnership rights in the property before he gifted it and those rights contained after the disposition had been made; it was possible for the donor to sever the partnership rights from the rest of the property so that what was given consisted of the property shorn of those rights. A simpler illustration is given by Lord Simonds in *St. Aubyn* v. *Attorney-General.*[20]

> If A, being the owner in fee of an estate in Yorkshire and an estate in Wiltshire, gives outright to B his estate in Yorkshire, it is an irrelevant circumstance that he retains his estate in Wiltshire: equally it is irrelevant, if, being the tenant for life of the two estates, he surrenders his interest in one and retains it in the other: and equally so, if,

16 W. D. Goodman, 'Dispositions Under the Ontario Succession Duty Act,' (1977) 25 Can. Tax J. 188, 196.

17 [1973] 3 All E.R. 632: [1975] 2 All E.R. 120.

18 [1973] 3 All E.R. 632, 636.

19 [1934] A.C. 61 (P.C.).

20 [1952] A.C. 15, 22.

his interest being not in two geographically separate estates but in land and capital moneys subject to the same settlement, he surrenders his interest in the one form of property and retains it in the other.

In all these situations it is clear that it is possible for the property involved to be split up prior to the disposition taking place so that the donor does not have to give that part of the property which he wants to retain.

A different type of situation arose in the *Nichols* case. In that case the interest which the donor purported to retain was not capable of being severed and retained from the corpus of the gift as something not given. Here the owner of a fee simple estate wanted to gift the estate but keep back a lease in the estate. In this situation, it is submitted, the interest in the property which the donor wanted to keep (that is, the lease back) could not be severed from the fee simple before the disposition took place simply because no such interest existed until the disposition took place. It is not possible for the owner of a fee simple estate to create a lease in favour of himself until the estate has been disposed of to another party.[21] Therefore, the lease back must necessarily be reserved out of the property given.

Similar considerations must apply where there has been a disposition by the creation of a trust. Because Equity only operates to facilitate the separation of the beneficial interest from the dispositive and managerial interests, once the specific property is impressed with the terms of the trust in question,[22] it is not possible to sever particular equitable interests in the property before the disposition takes place. These interests do not come into being as separate and severable interests until the property has been transferred to the trust and the trust created and therefore any such interest which the settlor purports to retain must necessarily be reserved out of the property given.

For these reasons it is suggested that Walton J. is not correct in his analysis of the *Nichols* situation. However, in the event, the comments of the learned judge 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:[23]

21 See *Rye* v. *Rye* [1962] A.C. 496, at 505 (per Viscount Simonds) and at 514 (per Lord Denning); cf. s. 49 of the Property Law Act 1952.

22 See supra Part IV.

23 [1975] 2 All E.R. 120, 126.

> . . . 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, 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.

This decision, along with *McCreath,* shows 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 *McCreath* and *Nichols* 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.

C. *Hutchinson v. Commissioner of Probate Duties (Vic.)*[24]

The deceased had paid a sum of money to a trust for the benefit of his daughter provided that she attained a stated age and, in the event of that trust failing, for the benefit of his wife. In the event that both trusts failed the capital was to be paid to the deceased and accumulated income to named charities. Before the daughter reached the required age and more than three years after making the gift the deceased died, and the value of the gift was included in the estate subject to probate duty by the Commissioner of Probate Duties.

It was held in the Supreme Court of Victoria that an appeal against the Commissioner's decision should be dismissed on the basis that, in fact, the deceased had a contingent residual interest in the estate.

24 (1977) 7 A.T.R. 612.

The relevant provisions of the Probate Duty Act 1962 on which this decision was based were section 7(1)(d)(ii) and section 7(2)(a). Section 7(1)(d)(ii) is the broad equivalent of section 11(1) of the Estate and Gift Duties Act 1968 (N.Z.) but section 7(2)(a) has no equivalent in the New Zealand legislation. That section provides

> For the purposes of paragraph (d) of subsection (1) of this section — (a) Where the subject matter of any gift *inter vivos* by the deceased consisted of an estate or interest in property which was less than the estate or interest in that property which was held by the deceased immediately prior to the making of the gift the donee shall be deemed not to have assumed *bona fide* possession and enjoyment of the subject-matter of the gift so long as the deceased had or retained any estate or interest in that property . . . .

It was on the basis of this provision that the court held that the gift fell within section 7(1)(d)(ii), and was correctly treated by the Commissioner as property which formed part of the estate of the deceased. Anderson J. said:[25]

> Immediately before the deceased paid $100,000 to the trustees he had the full legal and equitable title to that money: to use the words of s. 7(2)(a), he had the full "estate or interest in that property". Upon payment of that money to the trustees, he divested himself of his legal interest and, *by means of the trust,* he divided the beneficial interest in that sum between his daughter, his wife and himself. What he did was to carve out of the congeries of rights which he had as legal and equitable owner of the $100,000 various limited equitable interests, one of which he retained for himself. But for the operation of s. 7(2)(a) each would have assumed bona fide possession and enjoyment of the limited gift, and as the deceased lived for more than three years after making the gift, none of the gift would have been part of the property of the deceased at the time of his death within the operation of s. 7(1)(d)(ii).

Anderson J. appears to accept that the donor was only able to create severable equitable interests through the operation of the trust and only when the property involved had been transferred to the trustee. Yet he follows the *Re Cochrane* and *Hall*'s case approach and agrees with counsel for the appellant's contention[26] that

> in the situation existing in this case, the property the subject matter of any gift *inter vivos* referred to in s. 7(1)(d) is what is given, and that where what is given bestows equitable, but not legal, rights upon the donee, the gift is of such equitable rights as are given, however limited and whatever they be.

It is suggested that this is not correct for the reasons elaborated earlier.

However, the *Hutchinson* case is useful insofar as it indicates the direction which the legislation is taking in some jurisdictions. In Victoria it is obviously felt as a matter of policy that when a settlor seeks to keep for himself an equitable interest out of property transferred to trustees on trust that interest should be treated as if it were reserved out of the property given thus negating any assumption of bona fide possession and enjoyment. The Victorian legislature obviously felt that a provision such as section 7(2)(a) was necessary to override the weight of authority contained in the *Hall*'s case line of decisions.

McCreath and *Nichols* on the other hand suggest that the same result can be achieved by the proper interpretation and application of the basic principles of

25 Ibid., 615 (emphasis added). 26 Idem.

trust law as it stands. The proposition put forward here is that the latter approach is the correct one and there is support for the policy underlying this approach in the fact that legislation in certain jurisdictions is seeking to arrive at a similar result.

VII. DIFFICULTIES — The Resulting Trust, Equitable Concepts and Taxation

The approach taken 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 problem was considered by Ostler J. in *In re Adams, Adams* v. *C.S.D.*[27] 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 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)(a):[28]

> . . . 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.

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. It 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

27 [1932] N.Z.L.R. 741.

28 Ibid., 743.

trusts but are rather concerned with determining the nature of certain interests for other purposes — for example, the claims of the revenue authorities. The issue is well illustrated by Dickson J. in *McCreath* where he says regarding the facts in that case:[29]

> This case mirrors the ongoing struggle between taxing authorities, casting an ever wider net to garner succession duties or estate taxes, and taxpayers adopting ever more sophisticated means of escaping that net. One cannot reproach the taxpayer or his professional advisers for so arranging affairs as legitimately to minimise tax impact but there are times when the schemes devised introduce rather fine legal distinctions and the line determining tax liability becomes difficult to draw. The complexity is enhanced by the importation of concepts from traditional conveyancing law and the injection of fine subtleties from the law of trusts. The casuistry reaches its apogee in the case of *inter vivos* transactions in which the donor wants to retain effective, but unobtrusive, lifetime control of the property gifted and yet create the impression, through the language of the gifting instrument, that he or she has disposed wholly and irrevocably of the subject-matter of the gift.

The attitude of the American courts to this problem is expressed by Frankfurter J. in *Helvering* v. *Hallock:*[30]

> 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. 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.

With respect, the American position seems to be a sensible one.

In the case of the resulting trust, the equitable concept of trust has developed 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*[31] 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 unforseen 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.[32] It is

29 [1976] C.T.C. 178, 180.
30 309 U.S. 106, 116 (1940). See also J. R. Shiff, 'Death Taxes and the Inter Vivos Trust' (1966) 14 Can. Tax J. 190, 191.
31 [1958] Ch. 300, 310; (emphasis added).
32 See e.g. Nathan and Marshall, *A Casebook on Trusts* (6th ed., London, 1975) p. 197, and the Charitable Trusts Act, 1957.

therefore possible for the settlor to ensure that property settled on trust will not revert to him because as far as trust law is concerned the question of an implied 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.

It might well be asked why any such settlement should not be caught by these provisions. After all it is always open to the settlor to leave a gift over to charity in the event of any of the beneficial interests under the trust failing so that all interests in the property given are irrevocably put away from the settlor. On policy grounds there should be no reason why a settlor should be able to escape the application of the notional estate provisions by relying on the equitable concept of the resulting trust as the settlor in the *Adams* case was able to do. As Dickson J. said in *McCreath*[33] "I do not believe that the niceties and arcana of ancient property law should be fastened upon with mechanical rigidity to determine the effect of a modern taxation statute whose purpose is plain".

VIII. CONCLUSION

The argument that has been put forward is 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 either section 11 or 12 therefore operate to bring the whole gift back into the dutiable estate. Thus, although the writer would agree that as a matter of principle the arcana of trust law should not be determinative of estate tax liability, in the trust situation those arcana yield the correct policy result.

How therefore is the settlor to avoid sections 11 and 12? It is suggested that the answer, subject to other issues being resolved,[34] is to be found in another American case, *Commissioner of Internal Revenue* v. *Estate of Church*[35] where Black J. said:[36]

> . . . 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.

33 [1976] C.T.C. 178, 187.

34 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. 3 and n. 6.

35 335 U.S. 632 (1948).

36 Ibid., 645.