THE MODERN LAW REVIEW

WILEY

Grey, Oughtred and Vandervell. A Contextual Reappraisal

Author(s): Brian Green

Source: *The Modern Law Review*, Jul., 1984, Vol. 47, No. 4 (Jul., 1984), pp. 385-421

Published by: Wiley on behalf of the Modern Law Review

Stable URL: https://www.jstor.org/stable/1095817

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at https://about.jstor.org/terms

Modern Law Review and *Wiley* are collaborating with JSTOR to digitize, preserve and extend access to *The Modern Law Review*

JSTOR

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

THE

MODERN LAW REVIEW

Volume 47 July 1984 No. 4

GREY, OUGHTRED AND VANDERVELL—A CONTEXTUAL REAPPRAISAL

Section 53(1)(*c*) of the Law of Property Act 1925 enacts that a disposition of a subsisting "equitable interest or trust" must be made in writing if it is to be effective.[1] It is a provision of considerable practical importance in all fields where the division between legal and equitable property rights is adopted, from the commercial arena to the family home. There have been four seminal cases on the ambit of paragraph (*c*), each of them difficult, and yet this area has attracted minimal academic attention, either in the United Kingdom or in Commonwealth countries where parallel provisions apply. It is a common complaint among academic lawyers, though not among successful litigants, that judges confine their attention to adjudicating upon the specific facts of the cases before them, and often fail to perceive the wider implications of their particular determinations. Nowhere is this tendency more apparent than in the cases to which this article is directly addressed—where first taxation and then a family squabble provide the occasions for dispute, and section 53(1)(*c*) is the field upon which the disputants collide. Those embroiled in fighting and deciding those cases were not concerned to provide an answer to the question: "What is the ambit of section 53(1)(*c*)?" This article attempts to do so. In this writer's view, to wholly understand the section 53(1)(*c*) cases, it is first necessary to examine precisely what was at issue in them. Hence the contextual element of this article—principally, but not exclusively, fiscal. The main concern of the article is, however, reappraisal—having clarified the issues, to critically dismantle the internal reasoning of the cases to assess their impact on section 53(1)(*c*), to highlight inconsistencies between them, and then to build on such authority as one can deduce to suggest a uniform and coherent picture of the transactions which are caught by that paragraph.

Introduction

In addressing itself to subsisting equitable interests, section 53(1)(*c*) took up the mantle of section 9 of the Statute of Frauds 1677,[2] and

[1] s.53(1)(*c*): "a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will."

[2] s.9: "And be it further enacted, that all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect."

This content downloaded from 31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

like that provision was designed (i) to prevent hidden oral transactions in equitable interests in fraud of those truly entitled and (ii) to enable trustees to know where the equitable interests behind their trusts reside at any particular time.[3] The reference to "trust" in section 53(1)(*c*) is anachronistic, and was seemingly simply intended by the draftsman as an alternative rendering of the term "equitable interest" which precedes it. In the present context, the employment of the word "trust"—although establishing a certain continuity with section 9 which had referred, even more obtusely, solely to "trust or confidence," and although echoed by the odd nineteenth-century authority[4]—is both archaic and misleading; and is best, as it generally is, ignored. The notion of disposing of a "trust" could, of course, have been taken to refer to the conduct of a retiring trustee in parting with the trust property to his successor in the event of the trust continuing, or to (or at the direction of) those absolutely beneficially entitled in the event of the trust's termination: but it simply never has been.

Section 9 of the 1677 Act, being concerned solely with "grants and assignments" of subsisting equitable rights, and hence exclusively with dispositions by equitable proprietors themselves, fell squarely within the twin policy objectives noted above. By replacing the words "grants and assignments" with the single word "disposition," the draftsman (as a matter of language at least) potentially extended the requirement of writing to transactions effected by persons other than the equitable owner for the time being, *e.g.* to trustees exercising a power of revocation and new appointment: a case clearly outside the twin policy objectives in that (i) if the consent of the person entitled in equity pending the revocation and new appointment is (as is usually the case) irrelevant to the trustees exercising their power, divestment of his previously subsisting interest behind his back cannot be a cause for concern and (ii) since it is the trustees who will be exercising the power it can hardly be said that writing is necessary to enable them (at least so long as they are viewed as a single and continuing body of persons) to ascertain to whom their fiduciary duties are owed.

A principal reason for singling out subsisting equitable interests for protection is because evidence of their movement will often be the only indicator of where a particular right resides at any given time. There is no documentary paper title, nor generally is there physical possession[5]: two indicia which facilitate the identification of a legal proprietor. In general there is only an invisible entitlement to certain rights perceived by courts of equity behind the veil of legal title.

Those with interests in equity will commonly enjoy the valuable rights—"the beneficial interest"—in the property over which their

[3] Isolated by Lord Upjohn in *Vandervell* v. *I.R.C.* [1967] 2 A.C. 291, 311B–D.

[4] See, *e.g.* Lord Langdale M.R. in *Rycroft* v. *Christey* (1840) 3 Beav. 238, 241.

[5] Although there may be, *e.g.* where the life tenant of certain property is given a right to occupy it.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

equitable interests subsist. Indeed, it is this valuable aspect which makes the protection of equitable interests a matter of pressing importance: without the annexation of beneficial rights equitable interests and legal property rights are of equally little significance. This is an important point since, although where an equitable interest is first carved out of a legal estate the beneficial interest will have followed that equitable right, as transactions behind the legal title become more complex and equitable interests behind sub-trusts proliferate, one will commonly be dealing with subsisting equitable interests from which the beneficial interest has been detached, beneficial entitlement having followed subsidiary equitable rights.[6] Section 53(1)(*c*) draws no distinction between dealings with equitable interests carrying beneficial rights and dealings with equitable interests shorn of beneficial rights: between valuable and valueless equitable interests. All fall equally within its ambit. On the other hand, it is said that a declaration of trust over a subsisting equitable interest, involving the carving out of a subsidiary equitable interest with beneficial entitlement annexed thereto, is not within section 53(1)(*c*) since it merely entails a disposition of beneficial interest, and not of the subsisting equitable interest itself which continues to exist in its original proprietor despite the declaration having taken place. If this is right—and the point is discussed in detail below[7]—then section 53(1)(*c*) is seen to operate in a somewhat arbitrary fashion: permitting the oral declaration of trust which shifts the valuable beneficial rights out of a subsisting equitable interest, but requiring written assignment if at a later stage the declarant decides to part with the valueless equitable interest retained by him.

It seems to have been generally assumed in each of the four cases to which this article is directly addressed, that section 53(1)(*c*) applies equally to equitable interests in personalty as to equitable interests in realty.[8] Academic opinion on the question of whether section 9 of the 1677 Act extended to personalty was divided,[9] although there is evidence of a judicial willingness to assume the extension justified, at least in the absence of argument on the point.[10] It is, however, a peculiar feature of *Grey, Oughtred* and the two *Vandervell* cases, that at no stage does it appear that section 205(1)(x) of the Law of Property Act 1925 was ever cited to the

6 An example may help to make this clear. If, at the outset, L. is absolute legal owner of certain property and absolutely beneficially entitled to it, and then L. declares himself trustee of the property for A. for life remainder to B., the beneficial interest in the property will become distributed between A. and B. in proportions reflective of the actuarial values of their equitable interests. If B. then assigns his remainder interest to T. as trustee for his grandchildren: T. will hold the original equitable interest, but the beneficial interest will have been extracted from it and invested in the grandchildren's equitable interests behind the new trust.

7 See text following note 47 at "Declarations of Trust . . . and 'Dropping Out of the Picture.' "

8 *Cf.* Lord Upjohn in *Vandervell* v. *I.R.C.* [1967] 2 A.C. 291, 310 F–G, and also Wilberforce Q.C. in argument, particularly as reported before the Court of Appeal, in *Grey* v. *I.R.C.* [1958] Ch. 690, 694; [1960] A.C. 1, 9.

9 Maitland: for. Lewin and Scott: against.

10 See, *e.g.* Page-Wood V.-C. in *Jerdein* v. *Bright* (1861) 2 J. & H. 325, 330–331.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

courts: for that paragraph of the definition subsection of the Law of Property Act 1925 clearly defines "equitable interests" as "interests . . . in or over *land* or in the proceeds of sale thereof."[11] It must, of course, immediately be added that paragraph (x), in common with all other terms defined in subsection (1), is overlain with the draftsman's favourite caveat "unless the context otherwise requires"—and it is indeed strongly arguable that section 53(1)(*c*), despite its location within the 1925 Act, is just such a provision where the context compellingly requires one to repudiate a distinction between interests in land and interests in personalty: "equitable interests" being equally worthy and needy of protection whatever the subject matter over which they subsist. Thus if, at an academic level, it is difficult to resist the temptation of damning three House of Lords cases with the label "decided per incuriam," there is good reason as a matter of principle to suppose that the decisions in each case would have been completely unaffected by section 205(1)(x)'s being drawn to their Lordships' attention. And as a matter of practice, it is inconceivable that in the light of those three decided House of Lords cases section 53(1)(*c*) will ever come to be confined to realty interests in the future.

Grey v. I.R.C.[12]

The Facts[13]

(1) On February 1, 1955, Hunter ("H.") transferred 18,000 shares to Grey and Randolph ("G." and "R."), to be held by them as nominees for him.

(2) On February 18, 1955, in the presence of G. and R. and of his solicitor, H. orally and irrevocably directed G. and R. to hold the shares in six separate equal blocks upon the trusts contained in each of six pre-existing settlements in favour of H.'s grandchildren, of which G. and R. were already the trustees, to the intent that H. should thenceforth cease to be entitled to any interest in the shares.

(3) On March 25, 1955, G. and R. jointly declared by six separate deeds (each of which was supplemental to one of the six grandchildren's settlements) that they had since February 18 held, and continued then to hold, each parcel of shares on the trusts of the respective grandchildren's settlements as accretions to the trust funds governed by each of such settlements. Although H. was not expressed to be a party to these deeds of declaration they were executed by him as well as by G. and R.

[11] Emphasis added. I am indebted to Mr. R. S. Nock for first bringing this point to my attention.

[12] [1960] A.C. 1 (H.L.); [1958] Ch. 690 (C.A.); [1958] Ch. 375 (Upjohn J.).

[13] The facts below are set out in numbered "stages." This approach is adopted throughout this article in the hope of increasing clarity and facilitating reference back in the course of discussion to a particular time in the history of events.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

Positioning Grey

Before passing on to a detailed consideration of *Grey,* two prefatory observations will, it is hoped, serve to clarify the true points of contact and distinction between it and the two *Vandervell* cases.

First, and most straightforwardly, it is important to note in the light of section 53(2) of the Law of Property Act 1925.[14] and in particular of Lord Denning M.R.'s creative use of that subsection in relation to dispositions of equitable interests behind resulting trusts in *Re Vandervell's Trusts* (*No.* 2),[15] that at stage (1) G. and R. were express trustees for H., not resulting trustees for him. Nomineeship, *stricto sensu,* involves a deliberate consensual establishment of a bare trust for the benefit of the settlor: it is the very essence of the relationship between the settlor qua "nominator" and his nominee that equitable ownership should be retained by him and there is neither need nor scope for any raising of an equitable interest by implication of law.

Secondly, although the verbal directions given by H. at stage (2) and the acknowledging deeds executed at stage (3) purported to concern themselves merely with shifting equitable entitlement to the shares, it is clear from the operative parts of the deeds that a subtle change in legal proprietorship was being worked at the same time—a change masked by the unaltered identity of the trustees before and after the movement of equitable rights from H. to his grandchildren, but nonetheless analytically discernible. At stage (1), G. and R. were trustees of seven factually and legally distinct trusts; six settlements in favour of H.'s grandchildren and one bare trust in favour of H. himself. By the end of stage (3), the bare trust had been terminated, not merely in equity but at law as well, G. and R. having come to hold the shares as accretions to the grandchildren's settlements, not on like trusts to those contained in such settlements, but in six blocks, each of which was held as a single fund with such other assets as were then comprised in each of the six recipient settlements. At stage (1), G. and R. held the shares as trustees of the bare trust established on February 1, 1955. After stage (3), G. and R. held the shares in their quite separate capacities as trustees of the six grandchildren's settlements. This transformation would have been clear enough if the identities of the nominees and the trustees of the grandchildren's settlements had been distinct. It is nonetheless real for the coincidence of trustees.

No doubt, it has always been maintained that as a result of the decision in *Grey,* a direction to bare trustees that they do transfer assets to other trustees of a separate settlement to be held on the trusts of that settlement involves as much a disposition of a subsisting equitable interest within section 53(1)(*c*) as a direction to such bare

[14] s.53(2): "[Subsection (1)] does not affect the creation or operation of resulting, implied or constructive trusts."

[15] [1974] Ch. 269, 320D–E. Discussed in text commencing at note 134 below.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

trustees that they should henceforth continue to hold the property in question in an unchanged capacity but on more complex trusts. What is not generally recognised, however, is that *Grey* was actually an example of the former class of case, not of the latter; and that, accordingly, *Grey* was a good deal closer than was generally imagined to the facts which confronted the court in *Vandervell* v. *I.R.C.* (although it remains factually distinguishable from it.)[16]

The Context

Grey v. *I.R.C.* concerned what the House of Lords ultimately confirmed to be a botched stamp duty avoidance scheme. Stamp duty is levied on instruments, not on transactions. It does not, generally speaking, have "loopholes" as such: rather it has limitations arising from its preoccupation with dispositions effected or completed by instruments—limitations which often make it appear an unwieldy and sometimes downright perverse fiscal device, but which are part of its internal logic as accepted by those who operate it.[16a] If a disposition is effected or completed without recourse to an instrument, no stamp duty (*ad valorem* or fixed) can be charged thereon. On the other hand, if (*inter alia*) an *inter vivos* voluntary disposition is effected by instrument, *ad valorem* stamp duty calculated by reference to the market value of the property disposed of is attracted.[17] It was this *ad valorem* duty that H. sought to avoid.[18]

H.'s original transfer of the shares to G. and R. at stage (1), although by instrument, attracted no *ad valorem* duty since the beneficial interest in the shares was at that time retained by him, and there had therefore occurred no *ad valorem* stamp duty attracting disposition of value.[19] At stage (2), H. sought to work a disposition of his beneficial interest in the shares without recourse to writing which would have attracted duty. Stage (3), executed five weeks later with a view to establishing documentary proof of what had gone before, did not purport to constitute a disposition of itself, but simply to record what was supposed to have been a hitherto effective transaction, and was therefore conceived as being *ad valorem* stamp duty neutral.[20]

The argument and judicial pronouncements in *Grey* concentrated exclusively on section 53(1)(*c*). There was only the faintest suggestion, and that abandoned by the Crown in the face of its rejection by Upjohn J. in *Grey* at first instance[21] that, even if the Revenue's

[16] See text at notes 119–123 below.

[16a] Although how long this happy state of innocence can be expected to survive the House of Lords decision in *Furniss* v. *Dawson* [1984] 1 All E.R. 530 is perhaps another question.

[17] s.74(5) Finance (1909–1910) Act 1910. Dispositions made in exercise of fiduciary powers do not attract *ad valorem* duty: s.74(6), *ibid.*

[18] The meeting of stamp duty liability was acknowledged to be the responsibility of the transferees. Hence the case of *Grey (and Randolph)* v. *I.R.C.*, and not *Hunter* v. *I.R.C.*

[19] This instrument merely attracted the fixed stamp duty of 50 pence on a deed.

[20] Although it too would have borne the fixed 50 pence stamp on the taxpayers' understanding of things.

[21] [1958] Ch. 375, 379–380.

This content downloaded from 31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

contention as to the effect of section 53(1)(*c*) on the scheme adopted by H. were incorrect, *ad valorem* duty might nonetheless be raised as a matter of stamp duty law on the principle enunciated by Finlay J. in *Cohen & Moore* v. *I.R.C.*[22]: that a document reciting trusts completely constituted verbally some weeks before, and not of itself involving a disposition at all, could be stamped *ad valorem* on the basis that it and the earlier verbal constitution were together capable of being treated as a single composite. In *Grey,* Upjohn J. distinguished *Cohen & Moore* from the facts before him as having been a case where the later document existed in draft at the time of verbal constitution, and hence could be treated as having been intended not merely to reflect, but in a premeditated way to perfect, what had gone before. A distinction that might well have surprised Finlay J., but it is nonetheless at the limit set by Upjohn J. that the *Cohen & Moore* principle has rested ever since.

In the light of this confinement of *Cohen & Moore,* it is possible to assert with confidence that, had H. adopted the following course, no *ad valorem* stamp duty would have been exigible: (1)[23] H. orally declares himself trustee of the shares on trust for his grandchildren; (2) H. retires as trustee in favour of G. and R., and legal title to the shares is transferred to G. and R. by instrument accordingly[24]; (3) some time later an instrument is drafted and executed whereby G. and R. acknowledge that they hold the shares on the trusts earlier declared by H., and set out such trusts.[25]

The Decision

In *Grey,* the Revenue invoked section 53(1)(*c*) in order to attack the proposition that H. had made an effective disposition of his equitable interest in the shares at stage (2), and building on this sought to treat the deeds executed at stage (3) as constituting *ad valorem* stamp duty attracting dispositions in their own right. It was conceded by the taxpayers that, if the Revenue were right on section 53(1)(*c*), stage (3) did indeed attract *ad valorem* duty: a concession which seems only to have troubled Lord Evershed M.R. of the nine judges who heard the case, he raising the question whether—given the avowedly documentary intention behind the deeds—they could be construed as instruments of disposition at all. In the event, he somewhat unconvincingly retreated behind the fact that each stage (3) deed declared not only that the trustees had since February 18 been holding shares, but also that they were "now holding" shares, upon the specified trust[26]; conveniently ignoring the fact that H., the alleged disponor of the beneficial interest in the shares, was not a party to the deeds; and that given the structure of the scheme, the

[22] [1933] 2 K.B. 126.
[23] Declaration of trust of personalty outside s.53(1)(*b*), L.P.A.
[24] Fixed duty as a deed of 50 pence.
[25] Oral transactions of this sort are, particularly where the underlying property is valuable, repudiated by settlors in practice.
[26] [1958] Ch. 690, 706–707.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

language of the deeds was more likely to be descriptive than dispository. Neither point is insurmountable however. As for the former, there is Holt C.J.'s long standing statement of principle in *Salter* v. *Kidley*[27] that a person who executes a deed can be bound by it notwithstanding the fact that he is not a party to it; and whilst the latter raises questions as to the volitional and purposive character of a "disposition" similar to those which confronted, but little detained, the Court of Appeal in *Re Vandervell's Trusts* (*No. 2*),[28] it would not be unreasonable to assume that the stage (3) deeds were intended as a "belt and braces" device capable of making a disposition if and in so far as was necessary should the stage (2) directions be ineffective.[29]

In order successfully to resist the Revenue's claim to *ad valorem* duty, it was necessary for the taxpayers to establish two points in their favour. First, that the word "disposition" in section 53(1)(*c*) was intended by the draftsman to constitute a modern rendering of the words "grants and assignments" as employed in section 9 of the Statute of Frauds 1677, and was not intended to carry a wider meaning. And secondly, that H.'s verbal direction to G. and R. was most properly to be classified as falling outside the ambit of the terms "grants and assignments," and therefore that it no more fell within section 53(1)(*c*) than it had within section 9 of the 1677 Act.[30]

In the event, the House of Lords[31] did not find it necessary to determine the second question, being convinced on a consideration of the statutory history of the paragraph that section 53(1)(*c*) represented a substantive reworking and not a simple consolidation of section 9, and that that being so, the word "disposition" should be permitted its "ordinary and natural meaning." And adopting its "ordinary and natural meaning"—though finding it unnecessary to define what that "meaning" was—the House of Lords had no doubt that H.'s "direction," whereby he sought beneficially to substitute the objects of the grandchildren's settlements for himself, constituted a "disposition" within section 53(1)(*c*). Their Lordships' approach side-stepped the detailed argument which had been addressed to them as to the precise mechanism by which the transformation in beneficial ownership pursuant to a "direction" was achieved; as far as they were concerned the intended consequence of H.'s "direction" sufficiently proved it to involve a "disposition." And yet, even in the

[27] (1688) 1 Show.K.B. 59. *Cf.* Wilberforce Q.C. in argument before the C.A. at [1958] Ch. 690, 695.

[28] [1974] Ch. 269.

[29] In conceding the liability to *ad valorem* duty of the deeds, the taxpayers were no doubt concerned to avoid the conclusion that H.'s conduct in 1955 had been completely ineffective, all parties having since conducted themselves on the footing that H. had divested himself of the beneficial interest in the shares at that time. One only has to look to *Vandervell* v. *I.R.C.* to see the potential consequences for H. of G. and R. failing to hold the concession before the courts.

[30] A point which had never, in the 250 years between the enactment and repeal of s.9, had to be decided.

[31] Only Viscount Simonds (with whom Lord Reid agreed) and Lord Radcliffe delivered judgments. Lords Cohen and Keith of Avonholm concurred.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

unambitious approach adopted by the Lords, one finds a divergence in emphasis suggesting a divergence of opinion. For Viscount Simonds, it is the movement of the beneficial interest in the shares to others which is emphasised[32]; whereas Lord Radcliffe spoke of H.'s diversion of his equitable interest in the shares into the beneficial ownership of others.[33] Lord Radcliffe's is the language of assignment: the shifting of a subsisting equitable interest intact from the beneficial ownership of one to another. Viscount Simonds' words are capable of bearing a wider connotation, capturing assignments and declarations of trust alike. The distinction is an important one, not merely, on the facts of *Grey*, for appreciating exactly how it is that a "direction" comes to fall within section 53(1)(*c*), but also for the general exercise of pinpointing the width of the demands of section 53(1)(*c*) in practice.

It appears, particularly from a reading of the judgments[34] and the arguments[35] in the Court of Appeal, that the taxpayers were not relying solely on "consolidation" in attempting to establish the proper equation of "dispositions" with "assignments"; but attempted to press the view that the word "disposition" required not merely a disposal but also an acquisition of the very interest disposed of—"the interest which is transferred must remain identifiable throughout." Hence, the argument runs, whilst the word "disposition" is capable of catching "assignments," it is inappropriate to describe "declarations of trust," which operate by way of carving a new interest out of an existing interest which is retained by the declarant; nor is it appropriate to describe "directions" which properly understood operate by way of "extinction and rebirth," the director's interest disappearing with an entirely new interest being created in another, not being transferred to that other.[36] Indeed, added the taxpayers, when analysed in this light "directions" are seen to be more closely akin to "declarations of trust," since in both cases one is dealing with the creation of new equitable interests and not the transfer of subsisting ones, as is the case with "assignments"; and pointed to authority which spoke of one who gives a "direction" to his trustees "declaring trusts."[37]

One has to look to the majority judgments in the Court of Appeal for authority as to why the taxpayers' submission was misguided—indeed, the observations of Morris L.J.[38] and, in particular, Ormerod L.J.[39] represent the only real attempt in any of the judgments in *Grey* to come to grips with the concept of a "disposition" at all.

[32] [1960] A.C. 1, 12–13.
[33] [1960] A.C. 1, 15.
[34] [1958] Ch. 690, 710, 721, 723.
[35] [1958] Ch. 690, 703, 704.
[36] Both sides in *Grey* adopted as a common point of embarkation the threefold conventional Chancery classification of voluntary dealings with equitable interests perceived by Romer L.J. in *Timpson's Executors* v. *Yerbury* [1936] 1 K.B. 645: "assignment," "declaration of trust" and "direction."
[37] *Tierney* v. *Wood* (1854) 19 Beav. 330.
[38] [1958] Ch. 690, 721.
[39] [1958] Ch. 690, 723.

This content downloaded from 31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

Whether a "disposition" has occurred or not may be judged, so they held, by reference to the disponor alone; it is unnecessary to look for some link between a disponor and a disponee (or, one might add, for a disponee at all). The essence of a "disposition" is the termination or "getting rid of" an interest. "Disposition," thus understood, is as apt to describe the destruction of, as it is to describe the transfer of, an equitable interest. H.'s direction, the intent of which was to determine his equitable interest in the shares was, therefore, a purported "disposition" falling squarely within section 53(1)(*c*).

It is difficult to tell how far this analysis stands with the approach adopted by the House of Lords in *Grey*. Counsel for the Revenue clearly gratefully adopted the jurisprudential approach of the majority in the Court of Appeal[40]—yet the two members of the House who delivered judgments felt it appropriate, in justifying the treatment of H.'s "direction" as a "disposition," to cast it in the language of transfer: language tracing a movement from disponor to disponee, and not concentrating on the disponor alone.[41] It should be added however, that Lord Radcliffe's view on this point must be read in the light of an enigmatic passage later in his judgment[42] which appears to be consistent with the Court of Appeal view to the extent of saying that even though a "direction" may well involve a "declaration of trust" in that a new equitable interest is created by it, nonetheless in so far as there is also present a determination of the director's hitherto subsisting equitable interest, there will be a "disposition" within section 53(1)(*c*) which would arguably have fallen to be treated as a "grant or assignment" under section 9 of the 1677 Act because of this last characteristic.

It is submitted that the approach of the majority of the Court of Appeal is perfectly tenable, not only as a matter of language, but also in practice. Where the disponor is beneficial owner of the interest in question, the issue of whether there has been a "disposition" can be judged simply by reference to the diminution of the disponor's estate. Thus an assignment, a direction or a surrender[43] works a "disposition" and, in so far as the subject matter over which such operate is a subsisting equitable interest, the assignment, direction or surrender fall within section 53(1)(*c*).

[40] [1960] A.C. 1, 8.

[41] [1960] A.C. 1, 12–13, 15.

[42] [1960] A.C. 1, 16. The passage reads: ". . . there is warrant for saying that a direction to his trustee by the equitable owner of trust property prescribing new trusts of that property was a declaration of trust. But it does not necessarily follow that such a direction, if the effect of it was to determine completely or *pro tanto* the subsisting equitable interest of the maker of the direction, was not also a grant or assignment for the purposes of section 9."

[43] *Cf. I.R.C.* v. *Buchanan* [1958] Ch. 289, 296. But not a "disclaimer" which operates by way of prevention of an equitable interest vesting in its target recipient, and not by way of disposition of the already vested: *Re Paradise Motor Co. Ltd.* [1968] 2 All E.R. 625, C.A.; rightly decided despite the fact that nobody thought to cite to the court s.205(1)(ii), L.P.A. 1925 defining "disposition" to include "conveyance," which in turn includes "disclaimer."

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

A little more care is required in analysing the position when the disponor is not beneficial owner of the interest to be dealt with, but is enabled to work an alteration in subsisting equitable rights by virtue of a power for that purpose vested in him by a settlement. Where the person in question is a trustee exercising a power of advancement or a power to distribute capital for the benefit of persons who are presumptively or actually entitled to an income interest in trust property, an exercise of the power effects a termination of the limited interest on the occasion of the property in which such interest hitherto subsisted being released from the settlement and vested in its recipient freed from the trusts hitherto governing it. Similarly, where a person is exercising a power of revocation and new appointment, he will be engaging in an exercise analogous to that undertaken by a beneficial owner giving a "direction": a revocation extinguishing an existing equitable entitlement, and an appointment declaring or directing that henceforth the trust property is to be held subject to a newly created substitute equitable interest. In each case, the extinction of a hitherto subsisting equitable right is capable of being cast as a "disposition" within section 53(1)(*c*) on the majority Court of Appeal approach[44]; shifting one's emphasis slightly to adjudicate the "disposition" issue by reference to a diminution in the estate of someone entitled in equity behind the trust. A complication in this connection might be thought to arise where what is being exercised is an overriding power of appointment over capital and income under an old-style discretionary settlement where the selection for preferment of a particular beneficiary is at the expense of persons—the objects of the discretionary class at large—who did not hitherto enjoy fully fledged equitable proprietary rights in the trust property, but pending a diversionary appointment had "mere expectancies" of benefiting in the future. But even here, it is submitted that the "snuffing out" of the expectancy for the duration of an inconsistent appointment can be legitimately classed as a "disposition" of a subsisting equitable interest for the purpose of section 53(1)(*c*). Just because a "mere expectancy" did not constitute an "interest" for certain estate duty purposes (*Gartside* v. *I.R.C.*[45]), it does not follow that, subsisting in equity behind a trust, it does not constitute an "interest" for section 53(1)(*c*) or any other purposes (*Leedale* v. *Lewis*[46]). In this writer's view, *all* exercises of dispositive powers behind settlements are potentially within section 53(1)(*c*), a perspective of importance when one comes on to discuss *Re Vandervell's Trusts* (*No. 2*).[47]

Declarations of Trust over Subsisting Equitable Interests and "Dropping Out of the Picture"

In the light of the House of Lords decision in *Grey*, the question of any potential technical overlap between "declarations of trust"

[44] *Cf. Stanyforth* v. *I.R.C.* [1930] A.C. 339 and *Fuller* v. *I.R.C.* [1950] 2 All E.R. 976.
[45] [1968] A.C. 553, H.L.
[46] [1982] 1 W.L.R. 1319, H.L. (Capital Gains Tax).
[47] [1974] Ch. 269.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

and "assignments" for the purposes of sections 7 and 9 of the 1677 Act is of merely historical significance. What remains is the question of potential overlap between "declarations of trust" and "dispositions of subsisting equitable interests," between paragraphs (*b*) and (*c*) of section 53(1). Given section 53(1)(*b*)'s more lenient requirement,[48] the answer to this question carries significance for equitable interests in land as well as in personalty.

Analytically, a declaration of trust over a subsisting equitable interest operates by way of sub-trust so as to carve out a subsidiary equitable entitlement from the original equitable proprietary right: beneficial interest following such subsidiary equitable right as is created, but with the superior equitable interest remaining formally vested in the declarant. A declaration cannot, by definition, constitute a disposition of the entirety of the interest hitherto present in the declarant, for if the declaration is to be effective as a declaration, the declarant must retain some proprietary right which can form the subject-matter for the sub-trust created by him. All declarations (by beneficial owners) clearly entail a complete or *pro tanto* disposition of beneficial interest by the declarant in diminution of the value of his estate. But, at most, a declaration of trust over a subsisting equitable interest involves a disposition "out of" that interest, not a disposition of the interest itself—and it is to dispositions of subsisting equitable interests, not to dispositions "out of" such interests, that the literal words of section 53(1)(*c*) are addressed.

One influential writer[49] has expressed the view that, in deciding whether a "declaration of trust" over a subsisting equitable interest falls within section 53(1)(*c*), it is necessary to distinguish between declarations under which the declarant purports to reserve to himself an active role as trustee of the derivative equitable interest established by him, and declarations whereby the declarant renders himself a bare trustee for others. The former case is said to fall outside section 53(1)(*c*), whilst the latter is said to be within it on the basis that the declarant having no further role to play simply "drops out of the picture" from the moment of declaration onwards. Three nineteenth-century cases are cited in support of this view, *Onslow* v. *Wallis*,[50] *Re Lashmar*[51] and *Grainge* v. *Wilberforce*.[52] In

[48] L.P.A. 1925, s.53(1)(*b*): "a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will." All that is required is a written memorandum of declaration: not that the declaration be in writing itself.

[49] David Hayton in *Nathan & Marshall: Cases & Commentary on the Law of Trusts* (7th ed., 1980), p.54; and in Underhill's *Law Relating to Trusts and Trustees* (13th ed., 1979), p.170. It is very interesting to compare the confidence with which the proposition is put forward in the 7th ed. of *Nathan & Marshall*, with the hesitancy of the author on identical authority in the 6th ed. of the work at p.54.

[50] (1849) 1 Mac. & G. 506.

[51] [1891] 1 Ch. 258.

[52] (1889) 5 T.L.R. 436. To which may be added, and indeed in *Underhill* is added, Upjohn J. in *Grey* v. *I.R.C.* at first instance [1958] Ch. 375, 382—a view expressed without citation of authority, and in the context of an analysis repudiated by higher courts, determined to demonstrate that "directions" operated like "declarations of trust" with the director and declarant respectively *both* "dropping out of the picture": seemingly ignoring the point that when it comes to it assignors "drop out of the picture" too.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

this writer's submission, however, this somewhat inelegant distinction between declarations within section 53(1)(*c*) and declarations outside it, whatever its intuitive appeal, is certainly not justified by the nineteenth-century authorities marshalled in its support, and is inconsistent with the view adopted by the House of Lords in *Oughtred* v. *I.R.C.*[53] in relation to a constructive bare trustee of an equitable interest who most definitely remained "in the picture" until the execution of a "completion document" deliberately removed him from it.[54]

As to the nineteenth-century authorities: both *Onslow* and *Lashmar* involved a somewhat unusual dispute between two sets of trustees as to entitlement to property in the complete absence of any persons who could claim to be beneficially entitled behind their respective trusts, there being no room for the doctrine of resulting trusts to break the impasse, with the real argument being as to which of the trustees was to get a windfall. In both cases T_1 held for B absolutely and B had died leaving his estate to T_2 as trustee. In *Onslow,* T_2 was to realise the property in question and pay certain debts which did not exhaust the trust estate, B having failed ever to communicate to T_2 what was to be done with the remainder. In *Lashmar,* T_2 was to hold upon trusts which failed. Unsurprisingly, Lord Cottenham L.C. found for T_2 in *Onslow* on the basis that he had outstanding duties to fulfil over the disputed property whereas T_1 had none; whilst in *Lashmar,* the Court of Appeal held in favour of T_1 on the basis that, T_2 having no outstanding responsibilities in respect of the property either, there was no reason to prefer him to T_1 in disturbance of the status quo. Had it been decided in *Onslow* that T_1 could resist T_2's suit on consenting to meet the outstanding debts himself, T_2 being ignored on the basis that (if properly described as a trustee at all) he was a bare trustee for B's creditors, it might be arguable that *Onslow* was at least instructive on the declaration of bare trust point. As it is, it is irrelevant; and *Lashmar* only more so.

As to *Grainge* v. *Wilberforce,* that was simply a case where it was confirmed that a tenant for life under the Settled Land Act 1882 could successfully pass the legal estate to settled land without any need for the trustee of a sub-trust behind the settlement joining in the conveyance: an entirely justifiable result which owed nothing whatsoever to the fact that the sub-trustee was a bare trustee, and which would clearly have been the same even if the sub-trustee had had substantial outstanding active duties to perform. Indeed, more instructive than *Grainge* itself is the one authority referred to by Chitty J. in the course of his judgment: *Head* v. *Lord Teynham.*[55] In that case it had been held that where all the persons beneficially interested in property held at law by T_1 consented to T_1's dealing

[53] [1960] A.C. 206.
[54] See text at notes 78–80 below.
[55] (1783) 1 Cox 57. Itself referred to as a "dropping out of the picture" authority (the only one cited) in Snell's *Principles of Equity* (28th ed., 1982), p.104.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

with the property in a certain way, it was irrelevant that no consent had been obtained from T_2 who was a trustee of a sub-trust under which certain of the beneficiaries were interested. In *Head,* T_2 happened to be a bare trustee, but the result would have been the same even if he had held on a more complex basis. The true position is not so much that T_2 "drops out of the picture," rather that T_2 cannot stand in the way of T_1's accession to the wishes of the beneficiaries behind T_2's trust (within the strictures of the *Saunders* v. *Vautier* principle[56]).

In the light of *Onslow* v. *Wallis,* it is difficult to resist the conclusion that if T_1 holds property exclusively governed by a bare sub-trust under which T_2 is trustee for X, T_1 would *not* be able to resist a claim by T_2 that T_1 pass the property over to him. When all is said, it should be X, not some arbitrary doctrine of law, that determines when, if at all, T_2 drops out of the picture. It is the lesson of *Head* v. *Lord Teynham* that T_2 can no more stand in the way of X's wishes than can any other bare trustee. If X directs T_2 to step aside, or opposes T_2's attempts to call in the property from T_1, X's wishes must prevail. But until such an occurrence (or until T_2 deliberately assigns his outstanding bare equitable title to X) T_2 is still around to accept a conveyance of the legal estate at some future date and to hold to X's order from that time onwards.

If one abandons the notion of declarants who have constituted themselves bare trustees of subsisting equitable interests "dropping out of the picture," the question of whether a declaration of trust over a subsisting equitable interest needs to comply with section 53(1)(*c*) admits of a uniform answer whatever the complexities of the trusts declared. The orthodoxy is that such declarations are outside section 53(1)(*c*), but there is no authority which directly supports that view, and in its absence this writer would make the following plea on behalf of the contrary position. It has already been noted that the characteristic which makes a subsisting equitable interest worthy of protection is the beneficial interest attached to it.[57] When looked at in this way, it will readily be seen that assignments and declarations of trust, both of which have the effect of extinguishing the beneficial interest in the owner of a hitherto subsisting equitable interest, are equally deserving of formal protection. And both should be caught by section 53(1)(*c*) by adopting the notion of a declaration of trust working a "part-disposal" of a subsisting equitable interest, a disposal of the beneficial part of the bundle of hitherto subsisting equitable rights.[58] (In this connection one might enlist Viscount Simonds' judgment in *Grey* as supportive

[56] (1841) Cr. & Ph. 240.
[57] Text at notes 5–7 above.
[58] An alternative view, that "equitable interest" might be read as "equitable beneficial interest" is more an abuse of language than that now argued for, and would involve rejecting the notion that dispositions of bare equitable interests detached from beneficial entitlement need to comply with section 53(1)(*c*)—a conclusion inconsistent with the views of Lords Cohen and Denning in *Oughtred* v. *I.R.C.*: see text at note 82 below.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

of the view that it is to dispositions of beneficial interests that section 53(1)(*c*) is addressed.[59]) Adopting this view, one would escape the absurd suggestion that a declaration of trust shifting beneficial ownership lies outside section 53(1)(*c*), whilst a subsequent assignment of the declarant's outstanding valueless equitable right falls within it; and one would have the satisfaction of treating like transactions in a like manner, finally jettisoning the incoherent formal distinction adopted by the draftsman in 1677.

Indeed, authority in support of this approach may be gleaned from the judgments of Lords Radcliffe and Cohen in the House of Lords in *Oughtred* v. *I.R.C.*[60] In that case, as discussed below, it was clearly held by the minority that a constructive trust of a subsisting equitable interest took effect pursuant to section 53(2) of the Law of Property Act 1925. Such a conclusion involves the assumption that section 53(1)(*c*) would otherwise have been applicable to the carving out of a subsidiary equitable interest thus achieved—for if section 53(1)(*c*) was not applicable, why was it necessary to rely on section 53(2) at all?[61]

Oughtred *v.* I.R.C.[62]

The Facts

(1) Mrs. Oughtred ("Mrs. O.") owned 72,700 shares in a particular company absolutely. A further 200,000 shares in the same company were held by the trustees of a settlement on trust for Mrs. O. for life and after her death for her son, Peter, absolutely.

(2) On June 18, 1956, Mrs. O. and Peter orally agreed that they would on June 26 effect an exchange whereby Mrs. O. would swap her 72,700 shares for Peter's reversionary interest in the 200,000 shares.

(3) On June 26, 1956, the agreement was implemented as follows[63]:

(a) Mrs. O. transferred her 72,700 shares to Peter[64];

(b) Mrs. O., Peter and the trustees of the settlement entered into a deed of release which recited the oral agreement, that the 200,000 shares were "accordingly now held by the trustees in trust" for Mrs. O. absolutely and that the shares were forthwith intended to be transferred to Mrs. O. or at her direction; and by its operative part, expressed to be made in consider-

[59] [1960] A.C. 1, 12–13. See text at notes 32–33 above.

[60] [1960] A.C. 206.

[61] Although, when s.53(2) was first mooted before Upjohn J. in *Oughtred* at first instance ([1958] Ch. 375) it was there used to support the proposition that Peter had disposed of his subsisting equitable interest by virtue of the contract, an approach which found favour with a judge for whom "dropping out of the picture" was a valid approach: see note 52 above.

[62] [1960] A.C. 206 (H.L.); [1958] Ch. 383 (Upjohn J.) and [1958] Ch. 678 (C.A.).

[63] The three documents are listed in the order adopted by the House of Lords as lending them maximum logical coherence and being most favourable to the taxpayer: [1960] A.C. 206, 225, 229, 236.

[64] Actually to nominees for Peter but nothing turns on this additional factor.

This content downloaded from 31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

ation of the matters previously recited *and* of the transfer about to take place,[65] released and discharged the trustees from all their responsibilities under the settlement; and

(c) the trustees transferred the 200,000 shares to Mrs. O. absolutely.

The Context

In *Oughtred,* the Revenue sought to stamp *ad valorem* the trustees' transfer of the 200,000 shares to Mrs. O. at stage 3(c), on the basis that that transfer constituted a "conveyance on sale."[66] Although what had been agreed upon between Peter and his mother was strictly an "exchange" not a "sale,"[67] the Stamp Act 1891 enabled the stamping authorities to treat consideration in shares as though such consideration were cash.[68] Hence the transaction consisted, for stamp duty purposes, of a sale of an equitable reversionary interest for the cash value of Mrs. O.'s 72,700 shares. Hence the appropriate instrument (if any) to pick out for *ad valorem* stamping as a "conveyance on sale" was the instrument whereby the purchaser, Mrs. O., took a conveyance of property pursuant to the sale which had occurred: and the natural candidate for such treatment was the transfer at stage 3(c).[69]

Oughtred is essentially a stamp duty case, rather than a trusts case. What was primarily in issue was the scope of section 54 of the Stamp Act 1891, ostensibly a question of objective statutory construction, but in truth a matter which—like all stamp duty questions—could only be determined with one eye on stamp duty practice. What was actually decided in *Oughtred* was that a "completion document" executed against a backdrop of a sale could be stamped *ad valorem* by reference to the consideration paid pursuant to the sale agreement, notwithstanding that the beneficial interest in the property sold had passed preceding completion, and that the value of such property right as was transmitted or extinguished by the completion document bore no relation to the price paid, and

[65] As appears from the judgment of the Court of Appeal: [1958] Ch. 678, 688.

[66] Stamp Act 1891, s.54: "conveyance on sale" includes every instrument, and every decree or order of any court or of any commissioners whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction.

[67] An "exchange" is a transaction in which property belonging to one person is transferred to another person in consideration of that other person's property being transferred to the first: *Viscount Portman* v. *I.R.C.* (1956) 35 A.T.C. 349. There is no "price" in the legal sense. "Sales" involve a price in money paid or promised: *Littlewoods Mail Order Stores Ltd.* v. *I.R.C.* [1963] A.C. 135, 152.

[68] s.55(1): "where the consideration, or any part of the consideration, for a conveyance or sale consists of any stock or marketable security, the conveyance is to be charged with ad valorem duty in respect of the value of the stock or security."

[69] It would have been a nice question, if stage 3 (c) had not been executed, whether the instrument at stage 3(b) could have borne the duty as itself perfecting Mrs. O.'s equitable, as distinct from legal or beneficial, entitlement to the 200,000 shares.

This content downloaded from 31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

might even be nil.[70] The point may be clarified by reference to the ordinary case of a sale of land.

When V enters into a specifically enforceable contract to sell a plot of land to P, a qualified trusteeship[71] arises with the concomitant generation of an equitable interest in P, which equitable interest is elevated to the status of an interest behind a full bare trust once P has fulfilled all his obligations under the contract.[72] At this pre-completion stage, all beneficial interest in the land has passed to P, V merely holding paper title to the property. None the less, when V comes to pass legal title to the land to P, the conveyance[73] by him may be stamped *ad valorem* by reference to the purchase price paid by P, not by reference to the value of the bare legal property right actually passing under the instrument stamped. So long as the finalising instrument passes something to P which he did not previously own, it is capable of being characterised as a "conveyance." And so long as that "conveyance" is made against a backdrop of "sale," the instrument is a "conveyance on sale" under section 54. The passage by instrument of a contract completing property right is all that is looked for, notwithstanding that the completion document is of minimal significance to P as compared to the right already constructively vested in him by virtue of the specifically enforceable contract.

Similarly *Oughtred*, where it was assumed without argument that the oral agreement between Peter and Mrs. O. amounted to a specifically enforceable contract and not simply a family arrangement.[74] When Peter entered into a specifically enforceable contract to sell his equitable reversionary interest in the 200,000 shares to Mrs. O., a qualified trusteeship arose with the concomitant generation of a subsidiary equitable interest in Mrs. O., which equitable interest was elevated to the status of an interest behind a full bare trust (of which Peter was trustee) once Mrs. O. had transferred her 72,700 shares to Peter (stage (2)) and thus fulfilled her side of the bargain. At this pre-completion stage, all beneficial interest in the reversionary interest had passed to Mrs. O. who, by virtue of her subsisting life interest in the settlement fund, was then beneficially entitled to the 200,000 shares absolutely, Peter holding only a bare equitable interest in the reversion shorn of all value and signifi-

[70] The *ratio* of the majority approach in *Oughtred* is to be found in the following passage in Lord Jenkins' judgment at [1960] A.C. 206, 241: "The parties to a transaction of sale and purchase may no doubt choose to let the matter rest in contract. But if the subject matter of a sale is such that full title to it can only be transferred by an instrument, then any instrument they execute by way of transfer of the property sold ranks for stamp duty purposes as a conveyance on sale notwithstanding the constructive trust in favour of the purchaser which arose on the conclusion of the contract."

[71] See Lord Cairns in *Shaw* v. *Foster* (1872) L.R. 5 H.L. 321, 338 and Jessel M.R. in *Lysaght* v. *Edwards* (1876) 2 Ch.D. 499, 506.

[72] *Cf. Bridges* v. *Mees* [1957] Ch. 475.

[73] Or transfer in the case of registered land.

[74] It being the essence of the scheme that the oral agreement should be specifically enforceable, it was hardly difficult to infer an intention to create legal relations.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

cance.[75] Had Peter then proceeded formally to assign his bare equitable interest to his mother, there is no doubt that such assignment, in complying with section 53(1)(*c*) of the Law of Property Act,[76] would have attracted *ad valorem* duty by parity of reasoning with the position in regard to the plot of land discussed above. A more tortuous route was actually adopted in *Oughtred* in the hope of avoiding this consequence, and the essential issue in the case was whether the stage 3(c) transfer could be characterised as a completion document in relation to Peter's sale, a question which turned on whether the stage 3(c) transfer carried with it or else extinguished Peter's bare equitable reversionary interest or whether such equitable interest remained vested in Peter after the stage 3(c) transfer had taken place.

There would have been nothing unusual in this latter alternative prevailing. It is a common practice amongst those intent on avoiding *ad valorem* stamp duty to enter into a specifically enforceable agreement to transfer property which is left uncompleted: the promisee relying on his equitable proprietary right behind the bare trust thus established by his vendor. The documentary disadvantages of "leaving the matter in contract" in this way are regularly seen as being outweighed by the stamp duty saving; and the purchaser always has the safety net of having a right to call for a conveyance if such becomes necessary at a later date.[77]

The Decision

At the end of the day, what separates the minority[78] from the majority[79] in the House of Lords in *Oughtred* is that the former considered that Peter's equitable reversionary interest remained vested in him at the end of stage 3(c), but that since it had been shorn of all beneficial rights it was by that time of no significance to Mrs. O., and had been legitimately disregarded by the trustees in passing legal title to her; whereas the latter saw in the deed of release (stage 3(b)) a consent by Peter to the extinction of his equitable reversionary interest and the enlargement of Mrs. O.'s life interest into an absolute equitable entitlement, such enlargement constituting completion of the oral agreement and taking effect on the occasion of the stage 3(c) transfer then in hand. Both visions are

[75] Accepted explicitly by the minority in the Lords in *Oughtred* who held that Peter retained such bare interest even after stage 3(c). See on under "The Decision" below.

[76] See Lords Cohen and Denning in *Oughtred* at [1960] A.C. 206, 230 and 233 respectively; further discussed in text at note 82 below.

[77] This avoidance device is equally available in the case of legal estates in land as it is in relation to all interests in personalty despite the formal requirement of s.40(1), L.P.A. 1925, since a written contract to sell a legal estate in land is not stampable *ad valorem*. A contract to sell an equitable interest in land, however, which will need to comply with s.40 (*Cooper* v. *Critchley* [1955] Ch. 431) will itself be stampable *ad valorem* under s.59, Stamp Act 1891 if made in writing—the only let out being the doctrine of part performance.

[78] Lords Radcliffe and Cohen at [1960] A.C. 206, 225 and 229 respectively. Lord Cohen is the clearest, Lord Radcliffe entangling himself in failing to distinguish clearly beneficial entitlement and equitable ownership at [1960] A.C. 206, 228.

[79] Lord Jenkins (with whom Lord Keith agreed) and Lord Denning at [1960] A.C. 206, 234 and 232 respectively.

This content downloaded from 31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

defensible. Viewed with detachment and with a passing familiarity with the stamp duty practitioner's fondness for the device of "leaving the matter in contract," one suspects that the minority came closer to fathoming the true intention of Mrs. O.'s advisers.[80]

Only the minority dealt in any detail with the passage of beneficial entitlement behind Peter's equitable reversionary interest from him to his mother by virtue of the specifically enforceable contract between them.[81] For the majority, the question of whether beneficial entitlement had so passed before the stage 3(c) transfer was irrelevant to their construction of the transfer as a completion document on the occasion of execution of which Peter's equitable reversionary interest was extinguished. Lords Cohen and Denning (the latter expressing himself on the assumption that a constructive trust of Peter's equitable interest had arisen between contract and completion) added, however, that in their view a disposition of the bare equitable reversionary interest (which the minority actually decided had been retained by Peter after stage 3(c)) would need to comply with section 53(1)(*c*) despite its having been stripped of all beneficial rights.[82] This is clearly correct: the essential point being that notwithstanding that Peter's equitable interest was valueless by the time stage 3 was reached, it was still outstanding in him in a real sense. The right to specific performance generates a constructive trust for the protection of the interest of the promisee; and constructive trusts, just as any other trust, are founded on property being vested in a trustee. A right to specific performance and the constructive imposition of a bare trust over the contractual subject-matter are not the same things as actually obtaining performance by way of passage or extinction of such interest as remains vested in the promisor in termination of the bare constructive trust.[83] The bare constructive trust is raised without need of writing within section 53(2) of the Law of Property Act 1925. But when it comes to actual performance of the promisor's outstanding obligation to pass the equitable interest which he has contracted to transmit, section 53(1)(*c*) is clearly in point.

Thus there is undoubtedly room for the view, both as a matter of principle and on the authority of *Oughtred,* that had Peter performed his contractual obligations to his mother by assigning his bare equitable reversionary interest to her or, indeed, paralleling *Grey*, by directing the settlement trustees henceforth to hold his bare equitable interest for her, such assignment or direction would be a disposition taking effect within section 53(1)(*c*). But, in the light of

[80] The majority seem to have taken up an unsympathetic stance towards the threefold package of instruments executed on June 26: and one is left to wonder at a tactical level as to why those who devised the scheme advised the adoption of stage 3(c) at all, let alone why they rushed into it without allowing a "decent interval" to elapse so as to distance their manoeuvrings from the ultimate conveyance to Mrs. O.

[81] [1960] A.C. 206, 227–228 and 231–232, *per* Lords Radcliffe and Cohen respectively.

[82] [1960] A.C. 206, 230 and 233 respectively.

[83] See on this Lord Esher M.R. in *I.R.C.* v. *Angus* (1889) 23 Q.B.D. 579, 591.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

the decision of the House of Lords in *Vandervell* v. *I.R.C.*,[84] it would appear that section 53(1)(*c*) could have been avoided on the facts of *Oughtred,* by Peter and his mother, who were between them absolutely entitled to all outstanding equitable interests behind the settlement, together orally directing the settlement trustees to transfer unified legal and equitable title to the shares to Mrs. O. absolutely.[85] Because of the subject matter of the settlement in *Oughtred,* a documentary transfer of the shares by the settlement trustees to Mrs. O. in execution of this oral direction would still have been necessary, and this final transfer would no doubt have been stampable *ad valorem* in the eyes of all members of the House of Lords in *Oughtred.*[86] But if the subject matter of the settlement had been property capable of being passed at law by delivery, a *Vandervell*-type joint direction by Peter and Mrs. O., followed by delivery of the property in question to Mrs. O. by the settlement trustees in fulfilment of their instructions, could have been effected without ever having recourse to writing, and hence without any stamp duty problems.

If, on the other hand, on the true construction of what was occurring, Peter's bare equitable reversionary interest was intended to be left outstanding in him, it would follow that since all beneficial interest behind the settlement was vested in Mrs. O. by virtue of the combination of her life interest and the fact that the remainder interest was held by Peter on bare constructive trust for her, the settlement trustees could, on the authority of *Head* v. *Lord Teynham,*[87] have acted with impunity on her say so in disregard of Peter's wishes. In this respect the minority in *Oughtred* were clearly right as a matter of principle[88] even if, as a matter of practical trust administration, as Lord Denning intimated, trustees being essentially cautious creatures would doubtless be loath to act without Peter's authority as well.[89]

VANDERVELL *v.* I.R.C.[90]

The Facts[91]

(1) Bank holds shares[92] on bare trust for Vandervell ("V.") absolutely.

---

[84] [1967] 2 A.C. 291.

[85] Although not the termination of a nomineeship as was the case in *Vandervell,* a direction by those exhaustively entitled in equity whether they be one or one hundred, and entitled jointly or successively, would appear—in theory at least—to be within the *Vandervell* principle. The point is discussed in detail below: see text at note 118.

[86] There being no room for the minority view if the extinction of Peter's equitable reversionary interest was the object of what had occurred.

[87] (1783) 1 Cox 57: discussed in text at notes 55–56 above.

[88] See Lord Cohen at [1960] A.C. 206, 231; and Lord Radcliffe at [1960] A.C. 206, 227–228.

[89] [1960] A.C. 206, 232.

[90] [1967] 2 A.C. 291 (H.L.); [1966] Ch. 261 (Plowman J. and C.A.).

[91] Stated in bare outline in the text, but expanded to provide a more complete picture in the notes below.

[92] 100,000 non-voting "A" Ordinary shares in Vandervell Products Ltd. ("V.P.L."), a

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

(2) V. secures[93] the Royal College of Surgeons' ("R.C.S.") agreement that the R.C.S. will grant an option over the shares to Vandervell Trustees Limited[94] ("V.T.") if V. causes title to the shares to be vested in the R.C.S.

(3) V. instructs[93] Bank to execute a transfer form in respect of the shares with the name of the transferee left blank and the Bank complies with this instruction and delivers the form executed in blank to V.'s advisers who pass it on to the R.C.S.

(4) The R.C.S. completes the share transfer by inserting its own name as transferee, sealing the document and getting itself registered as proprietor of the shares.

(5) The R.C.S. grants an option over the shares to V.T. by deed under seal.[95]

(6) Substantial dividends are declared on the shares and paid to the R.C.S.[96]

The Context

Vandervell v. *I.R.C.* concerned a claim by the Revenue for surtax[97]

private company controlled by Vandervell who owned 599,998 of its 600,000 voting shares, and who was therefore in a position to determine when and in what amounts the "A" Ordinary shares (being the total issued "A" Ordinary share capital of V.P.L.) would bear dividends.

[93] Through the offices of Robins, an accountant and V.'s longstanding personal friend and financial adviser—the engineer of the arrangement.

[94] A private trustee company the principal object of which was to act as trustee of *any* settlements. The directors of V.T. were Robins and two other persons, and the capital of V.T. was divided between them in roughly equal shares. At all material times, V.T. acted as trustee of (i) V.'s children's settlement and (ii) a retirement profit sharing and savings fund for employees of V.P.L. Fund (ii) was prohibited from holding V.P.L. shares. Fund (i) contained some two million non-voting "B" Ordinary shares in V.P.L.

[95] An option exercisable within five years, giving V.T. the right to call for a transfer of the shares on the payment of £5,000 to the R.C.S.

[96] V.'s object in setting in motion stages (2) to (6) was his wish to endow a new chair in pharmacology at the R.C.S. To do so would require at least £150,000 of him. By transferring the shares to the R.C.S. and then using his voting power to get V.P.L. to declare dividends on them, V. might secure three advantages: (i) since his free estate was limited, it was necessary if V. were to make so generous a gift to draw upon the significant slice of his personal wealth which was locked into V.P.L. and the payment of dividends provided the simplest means of achieving the object of extracting monies from that company; (ii) by vesting the shares in the R.C.S. dividend income could be passed directly to it so avoiding such income being taxed in V.'s hands and (iii) by declaring substantial dividends on the "A" shares, V. could reduce undistributed profits in V.P.L. and hence prevent the Inland Revenue invoking an anti-avoidance provision designed to attribute undistributed profits to participators in private companies as though a dividend had been declared on shares, regardless of the fact that no actual dividend had been declared.

On the other hand, once the requisite dividends had been declared it was considered undesirable that the R.C.S. should continue to hold the shares. Quite apart from the fact that they were a valuable means of filtering out V.P.L.'s profits, a public flotation of V.P.L. was in the offing and V.'s advisers wished to avoid any complications which might arise through V.P.L.'s shares being outside family control. Hence the option. The option was to be granted in favour of V.T., rather than in favour of V. himself, with a view to relieving V.'s estate of assets during the course of his lifetime which would have attracted estate duty at his death. V. had no need of the "A" shares. If he wished to extract money from V.P.L. in his own behalf, he need merely vote a dividend payment in respect of the voting shares which he controlled, to all intents and purposes, absolutely.

[97] Surtax: an additional (higher rate) income tax levied progressively where an individual's total income exceeded prescribed thresholds. In 1958, surtax cut in when an individual's total income exceeded £2,000 per annum, and peaked at 50 per cent. at £15,000 and above. Being additional to standard rate tax, which then stood at 42½ per cent., this produced an effective top rate of income tax of 92½ per cent.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

in respect of £155,650 dividends paid on the shares[98] by Vandervell Products Limited ("V.P.L."), assessed on V. by reference to his own personal taxable income. Under the statutory regime then in force,[99] the recipient of a dividend from a United Kingdom resident company would be deemed to receive the sum in question as though standard rate tax had already been deducted therefrom. Whether surtax was payable or not depended on the status and personal circumstances of the person entitled to the dividends. If V. was so entitled, such was his total income for the relevant years of assessment when the dividends were declared, that substantial amounts of surtax would clearly be payable by him. If, on the other hand, the R.C.S. were so entitled, then the receipt of the dividends would not attract surtax in their hands, by virtue of the fiscal exemption from income tax on dividends enjoyed by charities.[100] However, although the case was explicitly concerned with surtax liability, it is clear that more than just surtax hinged on its result, since if the R.C.S. was entitled to the dividends, they would, in accordance with the then abiding Revenue concessionary practice, have been entitled to make a repayment claim in respect of the standard rate tax already notionally deducted from the dividends by V.P.L. before being paid on to them.[101] Thus, if the Revenue won the *Vandervell* case, the Exchequer would receive (i) standard rate tax on the dividends paid, assessed on V.P.L. on the then prevailing fiscal basis that the dividends merely represented taxable corporate profits plus (ii) surtax on the £155,650 remaining after deduction of standard rate tax: an effective rate of taxation of some 85 per cent. on the dividends declared, with V. bearing the surtax on dividends received by the R.C.S. If, on the other hand, V. succeeded in demonstrating that the R.C.S. were entitled to the dividends declared, no income tax would in effect be collected thereon (or on the corporate profits which the dividends represented): the R.C.S. ending up with the £155,650 dividends plus repayment of the £110,516 13s. 4d. standard rate tax notionally previously deducted from the gross dividend by V.P.L.; and V. bearing no liability whatsoever.

If the transfer of beneficial entitlement in the shares to the R.C.S. was ineffective, V. would have failed actually to have divested himself of the beneficial rights to the dividends, and surtax would have been leviable on him by reference to his personal circumstances without further ado. The fact that V. had never actually received any of the dividends in question would be immaterial, for in so far as he did not attempt to secure repayment of the sums received by the R.C.S., the R.C.S. would simply be taken to have received V.'s dividends at V.'s direction. The argument that V. had never divested himself of beneficial ownership of the shares was the first line of

[98] The dividends paid amounted to £266,166 13s. 4d. "less [standard rate] tax": *i.e.* £155,650 taking account of fluctuations in the standard rate over the dividend period.
[99] ss.184–186, Income Tax Act 1952. Superseded by the Finance Act 1965.
[100] Income Tax Act 1952, s.447. See now Income & Corporation Taxes Act 1970, s.360.
[101] See *Whiteman & Wheatcroft on Income Tax* (2nd ed.), s.21-13.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

assault adopted by the Revenue in the case: and is discussed under the heading "The General Law Argument" below.

If, on the other hand, the transfer of the beneficial entitlement in the shares to the R.C.S. was effective, the R.C.S. would indeed as a matter of general law (the option not having been exercised at the time) have been entitled to receive the dividends. As a matter of revenue law, however, for the purposes of surtax, the general law entitlement was not conclusive. The legislation contained provisions designed to prevent surtax payers avoiding entitlement to, and hence surtax liability in respect of, income arising from an asset, by the simple expedient of temporarily divesting themselves of an income interest in the property without actually giving up the income producing asset itself. The thrust of such legislation, which continues to be addressed to income-tax payers today,[102] was to attempt to remove for fiscal purposes the distinction between S., a surtax payer, receiving income from certain property and paying it on to another, B.; and S. settling the immediate right to receive such income on B., whilst retaining the prospect of future enjoyment of the property to himself. The Revenue's second line of assault in *Vandervell* v. *I.R.C.* was to invoke one such provision, section 415 of the Income Tax Act 1952,[103] so as to secure the result that V. be treated as entitled to the dividends for income tax purposes, regardless of his general law rights to receive such dividends. The property law connotations of this argument on the facts of the case are discussed under "the Revenue Law Argument" below.

The successful invocation of section 415 by the Revenue required them to be able to demonstrate that the dividends constituted ". . . income from property of which the settlor has [not] divested himself absolutely by the settlement." It is vital to understand, however, that the terms "settlor" and "settlement" here employed, and as used in the *Vandervell* case, do not bear their general law signification, but rather bear extended statutory meanings for the purpose of the anti-avoidance legislation: "settlement" including any disposition, trust, covenant, agreement or arrangement, and "settlor," in relation to a settlement so defined, meaning any person by whom the settlement was directly or indirectly made.[104] On the assumption that V. successfully resisted the Revenue on "the General Law Argument," there was no general law settlement of the shares at the time the dividends were declared: the R.C.S. had legal and equitable title to the shares unified in them.[105] The shares were only "settled" in the extended income tax sense of being subjected to an "arrangement" orchestrated for and on behalf of and in the name of

[102] Income and Corporation Taxes Act 1970, Pt. XVI.
[103] Income and Corporation Taxes Act 1970, ss.457 and 458.
[104] Income Tax Act 1952, s.411(2).
[105] The R.C.S. had granted an option over the shares to V.T., but this merely created an *in personam* obligation over them. There would not even be room for an *Oughtred* type constructive trusteeship until V.T. came to exercise the option and pay over £5,000 so as to complete its side of the bargain.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

V. (who thereby became its "settlor" in the same extended sense) whereby the shares were (i) to be used as a vehicle for the declaration of pre-conceived dividends, and were then (ii) to be shifted across to V.T. for other purposes once such dividends had been paid.[106] An arrangement which, it was conceded by the taxpayer in *Vandervell,* clearly constituted an "income tax settlement" and hence brought the case within the potential grasp of the anti-avoidance legislation.[107]

The Decision

(a) *The General Law Argument*

As indicated above, the Revenue's first line of attack in seeking to justify V.'s assessment to surtax was that V. had never successfully divested himself of beneficial ownership of the shares, since he had never effected a disposition in writing of his equitable interest in the shares in compliance with section 53(1)(*c*) at any time before the dividends were declared thereon. This argument was unanimously rejected by the House of Lords[108]: and the proposition of law which emerges from the case (expressing such proposition narrowly for the present by tying it to the facts there in issue) is that where an absolute beneficial owner directs his bare trustee to transfer legal title to another with the express intention that his beneficial entitlement shall be extinguished upon the transfer, and the trustee complies with this direction, the transferee takes the property in question as a unified legal and beneficial estate, without it having been necessary for the original beneficial owner to have complied with section 53(1)(*c*) in order to extinguish his equitable rights.

Lord Upjohn[109] (with whom Lord Pearce agreed[110]) and Lord Donovan[111] each justified this conclusion by identifying a transfer by a bare trustee at the direction of the beneficial owner with the case of a straightforward transfer by one holding unified legal and equitable title. Although an immediate objection can be taken against this approach on the basis that the first method of transfer starts with a subsisting equitable interest split from the legal title and thus blatantly begs the application of section 53(1)(*c*), whereas transfers by persons absolutely beneficially entitled in the eye of the

[106] See Plowman J. at [1966] Ch. 261, 273A

[107] The only trust in the true sense of the term present on the facts of *Vandervell,* was the resulting trust of the benefit of the option upon which V. was ultimately hanged: text at notes 124–133, below. The subject-matter of such trust was the R.C.S.'s undertaking under seal, not the shares; and its trustee V.T., not the R.C.S. That resulting trust was the basis for saying that V. had not absolutely divested himself of all interest in the shares, it was not the basis for treating V. as falling within the catchment of the anti-avoidance legislation in the first place: a logically anterior question turning on the facts on the presence of an "arrangement," not a trust.

[108] [1967] 2 A.C. 291, 307D (*per* Lord Reid in nine words), 309F (*per* Lord Pearce concurring with Lord Upjohn), 310B–312B (Lord Upjohn), 317E–318A (Lord Donovan), 329D–330D (Lord Wilberforce).

[109] [1967] 2 A.C. 291, 311G.

[110] [1967] 2 A.C. 291, 309F.

[111] [1967] 2 A.C. 291, 317F–G.

This content downloaded from 31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

law (as well as equity) involve no dealing with a separately subsisting equitable interest whatsoever; the point repays deeper consideration. Where an absolute beneficial owner ("B") wishes to terminate a bare trust in his own favour, all he need do is call upon his bare trustee ("T") to convey the outstanding legal estate to him: a request which (trustee's liens apart) T cannot legitimately resist. The conveyance by T to B, being a transfer of a legal estate, is clearly outside section 53(1)(*c*). If, then, having received the legal estate in perfection of his absolute entitlement, B proceeds to pass the property in question to another ("X"), that conveyance by him will, in its turn, be outside section 53(1)(*c*). All that Lords Upjohn, Pearce and Donovan[112] were saying in *Vandervell* v. *I.R.C.*, it is suggested, was that where instead of adopting the two-stage route, B elects, as is perfectly within his power, to take a short-cut and terminate the bare trust and secure the vesting of the property in X in a single step by directing T to transfer such property to X on his behalf, B's conduct should no more attract section 53(1)(*c*) than it would if he had adopted the more ponderous route equally available to him. Thus expressed, the result has an intuitive attraction to it, but can it really be right? If, as is generally accepted, a surrender by B of his interest to T so as to enlarge T's proprietorship into absolute ownership is within section 53(1)(*c*),[113] what can be the justification for holding that a direction by B that T pass a unified absolute title to X is outside it? Do we demand formal verification of the simple transaction and happily countenance a complete absence of writing in the more complex one? Is there present a somewhat naive assumption that written evidence of B's intent is necessary in the former case to protect B from a self-interested fraud propounded by his trustee, whilst in the latter case the prospects of T profiting from a manufacturing of B's dispositive intent can be discounted?[114]

A certain practical difference is discernible between the two-stage and one-stage routes which makes one slightly less confident that they necessarily call for identical application of a statutory provision designed to suppress sharp dealing. The obvious irrelevance of section 53(1)(*c*) to the two-stage route is less likely to be a potential source of prejudice to B since he will have taken an active role in passing legal and beneficial ownership to X, either by complying with forms requisite to the particular property in question (*e.g.* land or shares) or, alternatively, (though less satisfactorily from an evidential point of view) by delivery. On the other hand, if one holds section 53(1)(*c*) irrelevant to the one-stage route, one permits the extinction of B's interest without his taking a visible part in the transfer of title to X, T adopting the active transferor's role, with B disappearing on the faith of an alleged verbal consent—and it is to

[112] Lord Wilberforce founded himself on a different ground (text at note 116 below) and Lord Reid gave no reasons and so may have fallen in either camp (note 108 above).

[113] See *I.R.C.* v. *Buchanan* [1958] Ch. 289, and text at note 43 above.

[114] *Cf.* the same naivety in relation to half-secret and fully-secret trusts at the time when "fraud" was understood in the narrow sense of achieving actual personal advantage.

This content downloaded from 31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

the disposition of subsisting equitable rights by word of mouth alone that section 53(1)(*c*) is addressed.[115] Viewed at this level, Lord Wilberforce's[116] justification for holding X (the R.C.S.) beneficially entitled on the facts of *Vandervell* might give less cause for concern than the majority view, since he emphasised that B (V.) had (by his solicitor agent) conspicuously involved himself in the passage of title to X by delivering a stock transfer form executed in blank by T (the Bank) to X, so enabling X to fill in its name and obtain legal title perfecting registration of its shareholding.

Under Lord Wilberforce's scheme one is placed in a half-way house between the two-stage and one-stage routes: a half-way house derivative of the peculiarities of ordinary share transfer which prevented legal title being passed by T to B and by B to X by simple delivery of the transfer (executed in blank or not); but permitted B—according to Lord Wilberforce following Jenkins J. in *Re Rose*[117] on the point—to pass equitable title in the shares to X "by doing all he could to vest title in X". This reliance on *Re Rose* is not, however, without its own difficulties, for *Re Rose* was a case where B was *both* legally and equitably entitled to the shares before executing his transfer and delivering it to X. To say of V., relying on *Re Rose,* that he—at the material time a mere equitable owner of the shares—had done *all he could* to vest them in the R.C.S. is to beg the section 53(1)(*c*) question of what was required of an owner of a subsisting equitable interest in order to work a disposition of that right in the first place. Section 53(1)(*c*) remains an issue in the face of *Re Rose* rather than disappearing before that case.

Although the decision of the House of Lords on the General Law Argument can be factually confined to the termination of bare trusts (nomineeships, ultimate express trusts or resulting trusts), it is difficult to find any justification for such a restriction in the language used by their Lordships in the case, nor is it possible analytically to separate the bare trust case from any other case where *sui juris* equitable owners whose interests together exhaust the beneficial interest behind a trust come together and move to terminate their trust. What if trust property is held for A for life remainder to B, and A and B together direct T to pass the property to X absolutely freed and discharged from the trusts? If A and B elect to follow the two-stage route described above, they could first obtain legal proprietorship of the trust property themselves in reliance on the *Saunders* v. *Vautier* principle,[118] and then pass on legal title to X, without at either stage concerning themselves with section 53(1)(*c*). But, by parity of reasoning, it would appear that nothing in *Vander-*

[115] Too much can be made of this point—delivery may or may not be conjoined with an intention to pass property, and may or may not have occurred at all for all X's assurances that it did so: and even where a formal transfer has been necessary to pass legal ownership one is, of course, left with the question of whether equitable title was intended to follow it or not.

[116] [1967] 2 A.C. 291, 329D–330D.

[117] [1949] Ch. 78.

[118] (1841) Cr. & Ph. 240.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

vell would prevent their short-cutting instead to giving an oral direction to T, which when acted upon by him could effectively vest unified legal and equitable title in X, without need to comply with section 53(1)(*c*).

What is perhaps even more significant to note is that nothing in the language used by the House of Lords in *Vandervell* prevents B orally directing T to pass legal and beneficial property to another, T_2, on trust for X. B is in such a case giving directions as to what is to be done with the legal and equitable estate and not purporting to deal with a subsisting equitable interest alone; and this is all that Lords Upjohn, Pearce and Donovan required to side-step section 53(1)(*c*).[119] As for Lord Wilberforce, his rationale is even less concerned with the subsequent devolution of the property than is that of his brethren, he looking merely to whether B has "done all that he can" to pass title.[120] Can it really be that, as was held in *Grey*,[121] if B directs T to hold for X in equity, such direction is within section 53(1)(*c*): but if B directs T to pass property to T_2 on trust for X such a direction is outside section 53(1)(*c*)? And if one takes the point made above,[122] that although not perceived as such by those deciding it, *Grey* properly characterised is the latter type of case, then the contrast between it and *Vandervell* approaches flat contradiction.

The spectre emerges that *Vandervell* justifies permitting A and B, *sui juris* and absolutely entitled beneficiaries, to direct their trustee T to transfer property to another trustee, T_2, on trust for X, Y and Z, without needing to comply with section 53(1)(*c*) at all—not a conclusion which one can easily envisage an English court with *Grey* v. *I.R.C.* cited to it willingly adopting. And the likelihood must be that if it ever comes to the test, *Vandervell* v. *I.R.C.* will be restrictively confined to its facts.[123]

(b) *The Revenue Law Argument*

The Revenue's second line of approach turned on whether V. could, despite his having successfully vested beneficial entitlement to the shares in the R.C.S., additionally be said to have divested himself absolutely of all interest in them so as to avoid the statutory deeming of dividend income as his for surtax purposes. The answer to this question depended on the status in which V.T. took as grantee of the option executed by the R.C.S. in its favour at stage

[119] [1967] 2 A.C. 291, 310B–312B; 309F and 317E–318A

[120] [1967] 2 A.C. 291, 329D–330D.

[121] [1960] A.C. 1.

[122] See the two preliminary "Positioning *Grey*" paragraphs in the text culminating at note 15 above.

[123] The tension between *Grey* and *Vandervell* is perhaps unsurprising given the common identity of the overruled first instance judge in the former and the principal mover in the latter. Lord Upjohn clearly had not got over the treatment meted out to his judgments in *Grey* and *Oughtred*: see his smarting observations at [1967] 2 A.C. 291, 310G. Nor indeed, when viewed in this light, is Lord Wilberforce's need to be found himself on the alternative ground of *Re Rose* surprising given that he was the Revenue silk in *Grey* who overturned the Upjohn conception of the workings of s.53(1)(*c*) in that case.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

(5). If V.T. took beneficially, V. would have been successfully shut out from all interest in the shares. If, on the other hand, V.T. took as trustee, then in the absence of any evidence as to the trusts upon which V.T. was to hold, it would follow that the benefit of the option would, so long as it were exercisable and pending its exercise, be held by V.T. at law[124] on resulting trust for its original beneficial provider. And although as a matter of form the creator of the option was its grantor, the R.C.S., it was accepted that, as a matter of substance, the courts were concerned with an option in effect reserved by V. himself,[125] with the R.C.S. simply acting at his direction in accordance with the pre-existing stage (2) agreement at a time when, in partial completion of that agreement, they had been placed in the position of being the only ones capable of formally constituting the option, having had legal and (as the House of Lords found[126]) beneficial title to the shares vested in them by the time stage (5) arrived.

It was on the answer to be given to this question that the majority and minority in the House of Lords parted company: not really on a question of law at all, but on the inference that they were prepared to draw on such primary facts[127] as were revealed by the Stated Case—facts which had been collected without the present point in view, since the issue of whether V.T. had taken the option beneficially or as trustee had never been argued before the Special Commissioners.

In spite of this problem, it is somewhat difficult to see how the minority[128] could have reached their conclusion that V.T., a company without business, function or assets save as a trustee,[129] had nonetheless received the option beneficially: with V. being content to rely on V.T. acting in the best interests of himself and V.P.L. in deciding what to do with it; and trusting that V.T.'s directors/members would not exercise the option, take future dividends and then liquidate the company to their own personal advantage. In essence, the distinction between the majority and the minority is as follows. The majority considered that the vesting of rights in a trustee company raised an inference that that fiduciary entity was intended to take as trustee, which inference stood in the absence of any coherent evidence rebutting it.[130] The minority, by contrast, seemed to consider a trust construction an over-sophisticated model to impose on persons who never addressed their minds to the finer legal consequences of their actions, and who, in so far as they had

124 The option, granted by deed under seal, created a legal chose in action.
125 See, *e.g.* Lord Upjohn at [1967] 2 A.C. 291, 314E–F.
126 The "General Law" Argument.
127 See Lord Upjohn at [1967] 2 A.C. 291, 316A–C and 316G–317A
128 Lords Reid and Donovan at [1967] 2 A.C. 291, 307E–309F and 320E–323E respectively.
129 *Per* Lord Wilberforce at [1967] 2 A.C. 291, 328D.
130 Lords Upjohn (and Pearce) and (in particular) Wilberforce at [1967] 2 A.C. 291, 316D–317A and 328D–F respectively. To say that V.T.'s fiduciary status raised a presumption of trusteeship is *not* to be confused with there being a "presumed resulting trust" of the option as was rejected by the House of Lords in *Vandervell* v. *I.R.C.*

This content downloaded from 31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

formed an intent, would have intended to divest V. of the shares for both general law and fiscal purposes. The majority took the view that where the primary evidence ran out, the court was forced back on drawing inferences from the status of the recipient of the option alone; whilst the minority leniently leapt from assumed intention to a secondary finding of fact that the parties' conduct successfully effected such intention as they inferred.[131]

According to the majority, V.T. held on automatic resulting trust for V. Resulting trusts being, of their essence, bare trusts, it duly follows that V. had complete power for the future either to terminate the trust or to direct V.T. to hold the benefit of the option on other trusts. Lord Upjohn,[132] remarkably, inclined to the view, albeit without purporting actually to decide the point, that by virtue of the arrangement, V.T. too had power to declare new trusts of the benefit of the option; and furthermore that this power was revocable at V.'s election. One is bound to inquire how it is that V.'s conduct could have been thought sufficiently inexplicit to require the court to infer a resulting trust in his favour and yet sufficiently explicit to enable Lord Upjohn to deduce from it an apparently revocable and apparently general power exercisable in favour of the whole world subject to and in default of exercise of which V.'s interest had been retained. Lord Upjohn's judgment certainly provides no clue to the answer to this question. He thus occupies a middle ground between Lord Wilberforce, who expressed an orthodox resulting trust conclusion with no suggestion of any dispositive powers vested in anyone but V. on the one side,[133] and the minority on the other, since his Lordship's finding of a general power was (apart from its vulnerability to revocation by V.) tantamount to a finding that V.T. were beneficially entitled to the shares in their control—they being potential objects of the power as much as any other person. In this writer's view, Lord Upjohn's remarks in this connection are completely unjustifiable, and would best be discounted but for their having seeded the Court of Appeal's decision in *Re Vandervell's Trusts* (*No. 2*).

RE VANDERVELL'S TRUSTS (NO. 2)[134]

The Facts[135]

(7) In response to Revenue claims that V. had not absolutely divested himself of the shares, V.T. in October 1961, on the advice

[131] It is doubtful that Lord Reid's analogy with the precatory words cases at [1967] 2 A.C. 291, 308B–D, can lend the credibility to the minority view that he sought of them. Such cases invariably concern dispositions to natural persons whom the disponor has not previously seen fit to appoint as trustees of other property belonging to him, and what is more to persons (usually surviving spouses) with whom the disponor can sensibly be supposed to share a community of desire founding a rational expectation that wishes binding morally alone will be loyally adhered to, and in respect of whom the disponor's (usually family) relationship is unlikely ever to have given rise to a wish to elevate arrangements to a legal status.

[132] [1967] 2 A.C. 291, 317B–D. Despite Lord Upjohn's remark at 317B, there is no evidence of either the Court of Appeal or Plowman J. actually deciding, or even speculating upon, this point.

[133] [1967] 2 A.C. 291, 329B

[134] [1974] Ch. 269 (Court of Appeal and Megarry J.). See also on this case J. W. Harris (1975) 39 M.L.R. 557.

[135] Numbering continuing from *Vandervell* v. *I.R.C.*

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

of counsel and with V.'s full approval, exercises the option using £5,000 extracted for the purpose from V.'s children's settlement, and the R.C.S. duly transfers the shares to V.T. who are registered as proprietors of them.

(8) On November 2, 1961, V.'s solicitors inform the Revenue of the exercise of the option writing that "consequently such shares will henceforth be held by [V.T.] upon the trusts of the [children's] settlement."

(9) Between 1962 and 1964, V. procures his company ("V.P.L.") to declare dividends on the shares amounting to £770,000 net, which sums are paid over to V.T. and added by it to the funds of the children's settlement.

(10) On January 19, 1965,[136] V. executes a deed assigning and releasing to V.T. all right title or interest (if any) which he has retained in the shares and dividends[137] so that the same should be held by V.T. upon the trusts of the children's settlement.

(11) On March 10, 1967, V. dies making no provision for his children in his will, having assumed that he had adequately provided for them during his lifetime, and leaving the bulk of his estate to the children's stepmother, his second wife.

The Context

In common with their stance over the dividends declared during the period when the option was merely exercisable by V.T. ("the first phase"[138]), the Revenue took the view that on and after the exercise of the option the shares became the subject-matter of the resulting trust in favour of V., and that therefore he was assessable to surtax of £628,229 on the net sum of £769,580 received by V.T. after V.P.L.'s deduction of standard rate income tax at source ("the second phase"[139]). V. having died, the liability for this substantial sum would have fallen on his estate if the Revenue contention were made out, whilst the sums upon which surtax was being raised were held by V.T. avowedly on the trusts of the children's settlement. V.'s executors had little choice, therefore, but (a) to contest their assessment to surtax in respect of the second phase whilst at the same time, aware of the result in *Vandervell* v. *I.R.C.* in the House of Lords,[140] (b) to issue a writ in 1968 seeking an account of the net dividends from the children's settlement in order to meet what must have then seemed an almost inevitable tax liability. The Inland Revenue, seeing in (b) the prospect of a judicial decision as to beneficial entitlement to the shares during the second phase which would, by implication, also determine whether £628,229

[136] The first day of the hearing of *Vandervell* v. *I.R.C.* before the Court of Appeal. Plowman J. had given judgment for the Revenue on March 16, 1964.

[137] V. also purported to release the option by this deed—despite its having been extinguished 3½ years earlier.

[138] Stages 1–6.

[139] Stages 7–10.

[140] Decided November 24, 1966.

This content downloaded from 31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

surtax was exigible, attempted to be joined as parties. Judgment against the executors would not bind the Revenue in its absence, but would clearly render more difficult their task of persuading a court to find for the Crown in the future. The House of Lords in *Vandervell Trustees Ltd.* v. *White*[141] refused the Revenue's application. Without the presence of the Revenue *Vandervell* (*No. 2*), when it finally came to court, looked less like a contest over the incidence of surtax and more like a family squabble—a stepmother unconcernedly seeking to undermine the secure financial structure which her lately deceased husband had carefully constructed for his children—the perfect setting for a court to determine to achieve justice *inter partes*.

The Decision

The majority in the Court of Appeal denied the executors' claim for broadly the same two reasons; (1) because new trusts over the shares had been declared by the time they came to be registered in V.T.'s name, so as to displace V.'s resulting equitable interest and (2) because even if this were not so, V. would, by the time his executors had issued their writ, have become estopped or otherwise equitably prevented from asserting his interest.

(a) *New trusts*

There are undoubtedly differences of substance and not merely emphasis in the majority judgments. For Lord Denning, the use of the children's settlement money is evidence of there having been an operative express declaration of trust[142]; for Lawton L.J., the use of such money automatically constituted an equitable interest in the beneficiaries of the children's settlement,[143] although he was prepared to infer an actual declaration of trust as well.[144] For Lord Denning, the express declaration of trust automatically extinguished V.'s interest behind the resulting trust.[145] For Lawton L.J. it was the exercise of the option which worked this result: the resulting trust terminated when its subject-matter was extinguished through the option having been exercised,[146] while the employment of children's settlement monies prevented there then arising a resulting trust inducing beneficial vacuum over the acquired shares from that time.[147] As to one thing, however, the majority were apparently *ad idem*: that whatever declaration of trust had taken place had been

[141] Or *Re Vandervell's Trusts* (*No. 1*) [1971] A.C. 912.
[142] [1974] Ch. 269, 319F.
[143] [1974] Ch. 269, 325D.
[144] [1974] Ch. 269, 325E–G.
[145] [1974] Ch. 269, 320C–D.
[146] [1974] Ch. 269, 325H, 326C.
[147] [1974] Ch. 269, 326A–C.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

by V.T. in exercise of the fiduciary power conjured by Lord Upjohn[148] out of the first phase transactions.[149]

Critics have tended to observe ever since that it is difficult to infer that V. or V.T. could have intended in October 1961 to work a disposition of an interest which they were not to determinatively discover had been retained by V. until the end of the final appeal in *Vandervell* v. *I.R.C.* some five years later. But the majority view is more subtle than the criticism suggests.

It will be recalled that V. was to argue in *Vandervell* v. *I.R.C.* that V.T. held the option during the first phase beneficially, but subject to a "gentleman's agreement" to use it and the shares acquired by exercising it for the benefit of all interested parties.[150] In *Vandervell* v. *I.R.C.*, on the facts before the House of Lords, this argument was rejected as a description of the true legal position; but it arguably remained open whether such was an accurate subjective description of V.T's beliefs.[151] Just as nobody determinatively knew in October 1961 that as a matter of law V. had retained an interest behind a resulting trust of the benefit of the option, so no doubt V.T. did not know until it was informed by Lord Upjohn in 1966 that it had in October 1961 enjoyed a fiduciary power to declare new trusts supplanting V.'s outstanding interest.[152] But this does not hamper the notion of V.T., by virtue of its subjective perception of itself being beneficial owner of the option, considering itself capable of declaring that it henceforth held the option, or the shares acquired in exercise of it, on the trusts of the children's settlement in fulfilment of its "gentleman's agreement." In short, V.T. was quite capable of declaring trusts whether it perceived the true origin of its declaratory power or not.[153] And the only form of declaration which is not entirely counterfactual is one by which V.T. purported to declare trusts on an incorrect assumption as to the basis of its capacity to do

[148] See text at notes 132–133 above.

[149] One says "apparently . . . *ad idem*" because Lord Denning never expressly stated which of V. and V.T. made the declaration, but Stephenson L.J. clearly attributed the view that V.T. had been responsible to him [1974] Ch. 269, 323A

[150] See text at notes 129–131 above.

[151] But see Lord Upjohn at [1967] 2 A.C. 291, 316F–G.

[152] The assumption that V. could not have formed a dispositive intent to dispose of an interest that he did not learn that he had retained until at least Plowman J.'s decision in *Vandervell* v. *I.R.C.* at first instance (see Stephenson L.J. at [1974] Ch. 269, 322H) is misconceived. V. and his legal advisers knew for what the Revenue were contending in August–September 1961 when the first phase surtax assessments were raised on him, and although they did not then share the Revenue view, it would have been a simple enough expedient for V. to have executed a deed in October 1961 directing V.T. to hold "such interest *if any*" as he retained under the option on the trusts of the children's settlement. It is not possible to apply quite the same reasoning to V.T. since, although V.T. would have known of the Revenue contention, the extraordinary fiduciary power enjoyed by them literally only would have materialised when Lord Upjohn invented it in 1966: it is thus impossible to suppose that V.T. was exercising such power as it might or might not have enjoyed as resulting trustee in making its declaration.

[153] When a trustee exercises a fiduciary power it is commonplace for him to state that he exercises the specific power which he has in mind and "all or any other powers or power enabling [him] in the same behalf." So long as V.T. had taken into account all considerations relevant to the exercise of the fiduciary power in purporting to exercise its beneficial power, the declaration would be potentially valid: *cf. Turner* v. *Turner* [1983] 2 All E.R. 745.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

so, but in so acting actually declared substitutional trusts in exercise of its latent fiduciary power which equally enabled it in that behalf. The absence of a record of V.T.'s declaration in its board minutes might have been irregular, but V.T.'s appropriation of the option to the children's settlement was manifestly supported by its conduct in using children's settlement money to exercise the option and in accounting to the children's settlement for the dividends declared on the shares thereafter. The real problem lies not so much in finding a purported declaration in V.T.'s conduct, but in seeing how such a declaration could have taken valid effect without complying with section 53(1)(*c*). Had V.T. actually been exercising an absolute legal and beneficial owner's inherent power to declare trusts over its property, section 53(1)(*c*) would indeed have been irrelevant. But since the best that can be said is that V.T. was unwittingly exercising a latent fiduciary power to substitute new equitable rights for those actually subsisting in V., section 53(1)(*c*) was clearly in point. The majority in *Vandervell* (*No. 2*) confronted this problem each in his own way.

Lord Denning's view[154] that the declaration fell outside section 53(1)(*c*) since the equitable interest terminated by it subsisted behind a resulting trust is, whilst imaginative, somewhat difficult to justify. It is true that section 53(2) of the Law of Property Act exempts not merely the "creation" but also the "operation" of resulting trusts from section 53(1)(*c*). It is also true that Lord Denning's proposition is not strictly inconsistent with *Grey* v. *I.R.C.*, since *Grey* is not a resulting trust case.[155] But equitable interests behind resulting trusts are as much subsisting equitable interests as are equitable interests behind express trusts. Both enjoy the same qualities; the terms "express" and "resulting" merely disclose their different origins. Resulting trusts arise without compliance with section 53(1)(*c*) because such is necessary if they are to play their essential role of filling the beneficial vacuum—it is this distinctive function alone which provokes the need for their formal exemption. But the disposition of equitable interests behind such trusts is another matter, and there is nothing to demand the continued suspension of formal requirements when it comes to the termination of resulting beneficial rights. It is submitted that the word "operation" in section 53(2) does not include "termination"—which is, if anything, the antithesis of "operation." What the word "operation" signifies is that section 53(2) enables not merely the initial raising of a resulting trust without need for writing, but also the subsistence and continuing effect of such resulting trust without writing for so long as it continues to exist. Resulting trusts "operate" within section 53(2); but "operations with" resulting equitable interests (*i.e.* dispositions) are outside it.

As to Lawton L.J.,[156] it is one thing to give rein to the presumed resulting trust principle (that where A uses B's money to purchase

[154] [1974] Ch. 269, 320C–D.
[155] See text at notes 13–14 above.
[156] [1974] Ch. 269, 325D.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

property then, in the absence of any evidence to show otherwise, A holds for B[157]) in the case of a consensual transaction whereby one empowered to do so voluntarily conveys or assigns to A so as to indisputably pass title to him, and the only issue is how A holds the property as between himself and the financier of the acquisition. It is quite another to suggest that by using B's money to acquire legal title to personalty from a trustee ("T") who holds the property on bare trust for another ("O"), and is selling without that other's consent, A successfully causes B's equitable interest in the money so applied to latch on to the property so acquired so as to supplant the pre-existing equitable entitlement of O. Indeed, whether A has used B's money or his own, the point is the same—one is in such a case concerned with equitable priorities, territory presumptively regulated in the case of personalty by the "doctrine of notice." And if A and T are the same person, the opportunities for B's overriding of O's pre-existing equitable interest are under that doctrine somewhat curtailed.

Vandervell (*No. 2*) is more complex. It is not a case where it could be said that A (V.T.) was involved in an exercise of purchasing property for B (the beneficiaries of the children's settlement) from T (V.T. again) holding for O (V.). It is a case where A was purchasing from an entirely separate absolutely entitled third party (the R.C.S.), and the rights of O in the purchased property (the shares) only arose, if at all, at the instant that the third party's obligation to transfer to A became specifically enforceable. It is more akin to a constructive trust case where T uses property belonging to O (the option) to obtain an advantage for B (the shares). In such a case, orthodox learning is that T will hold the property acquired for O, not for B; though B will be entitled to credit for any of his own property expended by T in making the acquisition (the £5,000). Lawton L.J.'s error is to muddle resulting trust principles into a case more clearly viewed as an example of fiduciary intermeddling.

(b) *Estoppel*

Lord Denning isolated estoppel as a basis for his decision quite separate to the declaration of new trusts ground upon which he primarily founded himself: but then complicated the picture by (i) intertwining his "estoppel" reasoning with the "perfect gift" approach of Turner L.J. in relation to the Louisiana Bank shares' dividends in *Milroy* v. *Lord*[158] and (ii) citing as his "estoppel" authority *Hughes*

[157] As appears from the judgment of Megarry J. at first instance, the executors cited *Gissing* v. *Gissing* [1971] A.C. 886 in this context: [1974] Ch. 269, 299D.

[158] (1862) 2 De G. F. & J. 264. The shares could only be transferred by complying with all due forms, but there was no such obstacle to a gift of the money dividends arising on the shares where the donor was *not* merely entitled to those dividends in equity. Had Thomas Medley only been entitled to the dividends in equity, s.9 of the Statute of Frauds 1677 would have been just as great a problem to him as was s.53(1)(*c*) to V. Lord Denning's use of *Milroy* v. *Lord* in the present connection begs precisely the same question as does Lord Wilberforce in *Vandervell* v. *I.R.C.* where he adopts Jenkins J. in *Re Rose*: see text at note 117 above.

This content downloaded from 31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

v. *Metropolitan Railway.*[159] Lawton L.J., on the other hand, concertinaed the declaration of new trusts and estoppel arguments; and it is not clear whether in his judgment it was V.'s procurement of the payment of the second phase dividends or his wilful agreement to V.T.'s exercise of the option using children's settlement monies, or both factors, which achieved the estoppel result. Both judgments ignored the question of whether V. (and hence his executors) were merely estopped in respect of recovery of the second phase dividends or whether estoppel extended to recovery of the shares on which the dividends had been declared as well, no doubt since that question had become otiose since V.'s execution of his stage (10) assignment and release upon which the second phase had terminated.

The estoppel raised by the majority was, despite the misleading citation of *Hughes,* "estoppel by encouragement"[160]: a genus of what is today increasingly referred to, along with the related doctrine of "estoppel by acquiescence," by the blanket term "proprietary estoppel." The difficulty here is not so much seeing how an "estoppel by encouragement" might be made out on the facts of *Vandervell* (*No. 2*), but rather as to how it could be said that the "minimum equity" necessary to satisfy the objects of the children's settlement involved the retention of the £770,000 dividends appropriated on their behalf by V.T. It is clear that proprietary estoppels can be raised in respect of personalty just as in respect of realty.[161] Furthermore, even though it may not have been generally perceived in 1974,[162] it has now been convincingly established[163] that (whatever may be the position in regard to "acquiescence"[164]) neither principle nor previous authority requires the person estopped in an "encouragement" case to have known of his legal right inconsistent to that on the faith of which the person seeking to raise an equity against him acted to his detriment. And the children's settlement had incurred a certain detriment in reliance on V.'s encouragement, since on such facts as were emergent V.T. had considered itself honour bound to follow

[159] (1877) 2 App.Cas. 439. The root authority on the waiver of contractual rights doctrine of promissory estoppel: generally seen as unconnected with the present subject-matter. (Although see the wicked treatment of this area by Robert Goff J. in *Amalgamated Investment & Property Co. Ltd.* v. *Texas Commerce International Bank Ltd.* [1981] 1 All E.R. 923, which was too much even for Lord Denning's wholesale adoption when that case reached the Court of Appeal: [1981] 3 All E.R. 577.)

[160] The majority cast V. in an active role: he is not alleged to have simply acquiesced but positively to have encouraged: see [1974] Ch. 269, 321A–B and 325G; *per* Denning and Lawton L.JJ. respectively.

[161] See, *e.g.* *Falcke* v. *Scottish Imperial Insurance Co.* (1886) 34 Ch.D. 234.

[162] See Megarry J. in *Vandervell* (*No. 2*) at first instance [1974] Ch. 269, 301B espousing the conventional assumption in this regard.

[163] By Oliver J. in *Taylor Fashions Ltd.* v. *Liverpool Victoria Trustees Co. Ltd.* [1981] 1 All E.R. 897 pointing up the divergences between Cranworth L.C. and Lord Westbury in *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129: a distinction obscured by the accessible "five probanda" of Fry J. in *Wilmot* v. *Barber* (1880) 15 Ch.D. 96, 105–106, too easily cited as a substitute for analysis for too long.

[164] Where arguably *Wilmot* v. *Barber* (1880) 15 Ch.D. 96 stands. Had V. merely "acquiesced," probandum number 4 would have prevented an estoppel being raised against him as one mistaken as to his legal rights. A mistake of secondary fact, not law: *cf.* *Cooper* v. *Phibbs* (1867) L.R. 2 H.L. 149.

This content downloaded from 31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

V.'s wishes and it was V.'s wish (on the advice of his legal advisers) that the children's settlement should exercise the option with its own monies. But even if V.'s encouragement of V.T.'s actions for and on behalf of the children's settlement was theoretically capable of grounding an estoppel despite V.'s lack of knowledge of his true rights at all material times, it is impossible to see how the comparatively trivial estoppel thereby entailed could conceivably justify the children's settlement's retention of over £¾ million. Under normal conditions it would require deeply unconscientious behaviour by a representor, which had induced an extremely substantial (if not wholly proportionate) irreversible act of detriment on the part of a representee to raise an equity of that extent.

Yet when one searches for the villain in V., one finds an innocent. As for substantial detriment, there was no evidence whatsoever that the children's settlement had changed its position at all in the face of V.'s encouragement, beyond expending £5,000 in exercise of the option in the first place. The £770,000 dividends had simply been credited to the children's settlement's account, none of it had been distributed, let alone dissipated, on an assumption that V.T. was entitled to deal with it as part of the children's fund.[165] Nor does it even appear that the mechanism of estoppel was, on the facts, necessary to do justice to the objects of the children's settlement at all. The £5,000 could easily have been ordered to be repaid (with interest) by V.'s executors as a condition of the payment over of the dividends (with interest) to them.[166]

The only party to the second phase transactions who had actually acted to his detriment in reliance on the propriety and future legal defensibility of V.T. holding the £770,000 as an accretion to the children's settlement trust fund, was V. himself. He had assumed that he had adequately provided for his children *inter vivos,* and thence cut them out of his will: an act of detrimental reliance rendered irreversible by his death. One is left with the impression that it was V.'s reliance on his own mistaken belief that he had successfully vested beneficial entitlement to the dividends in the children's settlement which was the real and substantial basis for raising an equity against his executors: which makes V. the only person in English law ever to have stood in the shoes of both "estopped" and "estopper" at one and the same time.

Keeping Vandervell (No. 2) *in Perspective*

More than any other case discussed in this article, *Vandervell (No. 2)* is a decision addressed to, and hence likely to be confined to, its particular facts. It is improbable that the result reached by the majority of the Court of Appeal would have survived the crueller

[165] *Per* Megarry J. in *Vandervell (No. 2)* at first instance: [1974] Ch. 269, 301F–G.

[166] Which is to cast *Vandervell (No. 2)* as the "trust unravelling" case it essentially should have been; with the children's settlement obtaining restitution of its £5,000 as money paid under a mistake of fact as to what it would be getting for it: *cf. Cooper* v. *Phibbs* (1867) L.R. 2 H.L. 149 again.

This content downloaded from 31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms

scrutiny of the House of Lords; and, indeed, V.'s executors having obtained leave to appeal the Court of Appeal's decision, the case was settled without troubling their Lordships.

BRIAN GREEN*

* Lecturer in Law, London School of Economics and Political Science.

This content downloaded from
31.205.76.157 on Sat, 26 Oct 2024 12:01:04 UTC
All use subject to https://about.jstor.org/terms