A HIGH COURT OF JUSTICE (CHANCERY DIVISION)—
13TH AND 16TH MARCH 1964

B COURT OF APPEAL—19TH, 20TH, 21ST, 22ND AND 25TH JANUARY
AND 26TH FEBRUARY 1965

C HOUSE OF LORDS—15TH, 16TH, 20TH AND 22ND JUNE AND
24TH NOVEMBER 1966

D

Vandervell *v.* Commissioners of Inland Revenue[1]

Surtax—Settlement—Shares given to charity conditionally on grant to third party of option to purchase—Whether option held in trust for donor—Income Tax
E *Act* 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2, *c.* 10), *ss.* 411 *and* 415.

Surtax—Shares registered in trustee's name—Transfer without consideration to charity on instructions of beneficial owner—Intention to pass beneficial ownership together with legal title—No separate written assignment of equitable interest —Whether beneficial ownership passed—Law of Property Act 1925 (15 & 16 *Geo.* 5, *c.* 20), *s.* 53(1) (*c*).

F *The Appellant was the managing director and controlling shareholder of a trading company, the profits of which could be distributed by way of dividend on ordinary shares of any one of three classes to the exclusion of the others. In* 1952 *he had transferred* 100,000 *non-voting "A" ordinary shares to a bank as security for his making certain annual payments. In* 1958 *he was minded to give* £150,000 *to a charity. Arrangements were made for the shares to be released by the bank in return*
G *for other security and transferred to the charity, for the payment of dividends of* £145,000 *gross on the shares while held by the charity, and for the charity to grant to the trustee company hereinafter mentioned an option to purchase the shares within five years for* £5,000. *The bank having handed to the Appellant's solicitor a transfer of the shares executed in blank, the Appellant sent his accountant, on* 14*th November* 1958, *written instructions that he had decided to give the*
H *shares to the charity and that their transfer to it should be arranged; he made no separate written assignment of his equitable interest in the shares. The option to purchase was designed to avoid possible difficulties on a public flotation if the charity were the registered holder. At the material times the only other functions of the trustee company to which it was granted were as trustee of a settlement made by the Appellant on his children and of a retirement and profit-sharing fund*
I *set up by his trading company. The directors of the trustee company (who also held the share capital) never agreed between them for what purpose the company*

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[1] Reported (Ch. D.) [1966] Ch. 261; [1965] 2 W.L.R. 1085; 108 S.J. 279; (C.A.) [1966] Ch. 261; [1965] 2 W.L.R. 1085; 109 S.J. 235; [1965] 2 All E.R. 37; (H.L.) [1967] 2 A.C. 291; [1967] 2 W.L.R. 87; 110 S.J. 910; [1967] 1 All E.R. 1.

held the option, but they did not consider that it could be used for their personal benefit. When the option was exercised in 1961 *the requisite* £5,000 *was paid out of the funds of the children's settlement.* A

Dividends having been paid to the charity of £162,500 *in* 1958–59 *and* £87,500 *in* 1959–60, *the Appellant was assessed to surtax on those amounts. On appeal, it was contended for the Appellant* (a) *that the letter of* 14*th November* 1958 *operated as an equitable assignment of his equitable interest in the shares and the charity was beneficially entitled to the dividends, and* (b) *that the trustee company took the option as trustee of the children's settlement, so that the shares could not revert to the Appellant. For the Crown it was contended* (inter alia) (i) *that when the dividends were paid the Appellant had not parted with the beneficial interest in the shares; alternatively,* (ii) *that for purposes of s.* 415, *Income Tax Act* 1952, *the arrangement was a "settlement" of which the Appellant was "settlor" and the shares were property of which he had not divested himself absolutely. The Special Commissioners accepted the Crown's second contention.* B C

Following the judgment of Wilberforce J. in Commissioners of Inland Revenue *v.* Hood Barrs (No. 2) (1963) 41 T.C. 339, *which was given after the Commissioners' decision in this case, the Crown relied in the Courts on s.* 53(1)(*c*), *Law of Property Act* 1925, *in support of its first contention.* D

In the Court of Appeal and the House of Lords the Appellant contended that the trustee company took the option beneficially and not subject to any trust.

Held, (1) *that, since the Appellant, being the beneficial owner of the shares, had caused the legal interest therein to be transferred with the intention of simultaneously transferring the beneficial interest, s.* 53(1)(*c*), *Law of Property Act* 1925, *did not apply;* (2) (*Lords Reid and Donovan dissenting*) *that the trustee company held the option for the benefit of the Appellant and s.* 415, *Income Tax Act* 1952, *applied.* E

CASE F

Stated under the Income Tax Act 1952, ss. 229(4) and 64, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 5th, 6th and 7th December 1962 Mr. Guy Anthony Vandervell (hereinafter called "the Appellant") appealed against additional assessments to surtax made upon him for 1958–59 and 1959–60 in the amounts of £162,500 and £87,500, respectively. G

The assessments were made upon the footing that certain dividends paid to the Royal College of Surgeons on 100,000 "A" ordinary shares in Vandervell Products Ltd. were the income of the Appellant or fell to be treated as his income by virtue of either s. 404 or s. 415 of the Income Tax Act 1952. H

2. (1) The following documents were produced and are annexed hereto, forming part of this Case[1]:

A. Memorandum and articles of association of Vandervell Products Ltd.

B. Memorandum and articles of association of Vandervell Trustees Ltd. I

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[1] Not included in the present print.

A C. Deed of settlement dated 30th December 1949, hereinafter called "the 1949 children's settlement".

D. Rules of a retirement profit sharing and savings fund.

E. Deed of covenant and security dated 7th November 1952.

F. Deed of variation dated 5th November 1958.

G. Memorandum concerning estate duty.

B H. A draft of a deed of trust for the benefit of employees of Vandervell Products Ltd.

J. A bundle of correspondence.

K. A transfer of shares in Vandervell Products Ltd.

L. An option deed dated 1st December 1958.

C (2) Certain other documents, not annexed hereto, were shown to us, and we heard evidence from the Appellant and Messrs. W. T. Robins (his accountant), C. Jobson (his solicitor) and W. F. Davis (the appeals secretary of the Royal College of Surgeons).

(3) From the above material we found the facts hereinafter set out.

D 3. The Appellant is an engineer and is chairman and managing director of and principal shareholder in Vandervell Products Ltd. (hereinafter called "the company"). His personal assets are almost entirely tied up in the company.

4. (1) The company is a private company manufacturing engineering products, principally bearings and rockers. Its issued capital at the material times was as under: 600,000 ordinary shares of 5*s*. each, of which the Appellant E held 599,998; 100,000 "A" ordinary shares of 5*s*. each, being the shares with which we were particularly concerned in this appeal; 2,600,000 "B" ordinary shares of 5*s*. each, of which the Appellant held 546,692, the remainder, 2,053,308, being held by Vandervell Trustees Ltd.; 230,500 5 per cent. cumulative preference shares of £1 each, held, as to 100 each by the directors of the company, and as to the remainder by four life offices.

F The "A" ordinary shares and the "B" ordinary shares did not entitle the holder to receive notices of or attend or vote at general meetings of the company, and article 127 of the company's articles (as amended by a special resolution passed on 24th March 1952) provided that the company in general meeting could determine that the whole of the profits to be distributed should be applied in payment of dividends upon any one or two of the three classes of ordinary G shares to the exclusion of the others or other. The preference shares did not entitle the holders to attend or vote at general meetings unless their dividend should be six months in arrear (article 70).

(2) The directors of the company at the material times were: the Appellant; Mr. J. A. Green, chartered accountant; Mr. W. T. Robins, chartered accountant, and partner in Clifford, Towers, Temple & Co., the company's accountants; H Mr. K. F. Brown, chartered accountant, who resigned in March 1959; Mr. L. H. Begg, engineer. Mr. C. Jobson, solicitor and partner in Culross & Co., solicitors to the company, was formerly a director, but resigned in 1956. The Appellant's former wife (from whom he was divorced in 1952) had become a director in 1940 and was removed from office in 1946.

5. (1) Vandervell Trustees Ltd. (formerly called G. A. Vandervell (Lon- I don) Ltd., and hereinafter called "the trustee company") is a private company, and its principal object is to act as trustee of any settlements, deeds or docu-

ments and to undertake the office of executor, administrator, treasurer or registrar. Its capital is 100 £1 shares, held as to 34 by Mr. Robins and as to 33 each by Messrs. Green and Jobson. The first directors of the trustee company were the Appellant and his said former wife, and they respectively resigned from the board in November and December 1949. Its present directors are Mr. Robins, who was appointed in November 1949, and Messrs. Green and Jobson, who were appointed in January 1952. All three took office at the request of the Appellant.

(2) The trustee company, at all times material to this appeal, has had three activities only, as follows. It is the trustee of the 1949 children's settlement, made by the Appellant on 30th December 1949 (exhibit C) in favour of his children, and it holds the 2,053,308 "B" ordinary shares in the company, referred to in para. 4(1) above, upon the trusts of this settlement. It is the trustee of a retirement, profit sharing and savings fund set up by the company in 1952; under the rules of this fund (exhibit D) the trustee company cannot invest any part of the fund in shares of the company. It was the grantee of an option hereinafter mentioned to purchase 100,000 "A" ordinary shares in the company.

6. (1) The 100,000 "A" ordinary shares in the company had been transferred by the Appellant in 1952 to the National Provincial Bank Ltd. (hereinafter called "the bank") as trustees of a deed of covenant and security made 7th November 1952 between the Appellant, his former wife and the bank (exhibit E). Under this deed the bank held the said shares as security for certain payments to be made by the Appellant to his former wife as a result of divorce proceedings, but he was at liberty, with her consent, to substitute for the said shares other security of the like value.

(2) The Appellant had never been happy about shares in the company being held as security under this deed, but he had not (prior to 1957) other assets to offer as security in substitution. One reason why he was not happy about it was that he was advised that considerations of the estate duty payable on his death would make it necessary at some time to turn the company into a public company, and, as his former wife could be difficult and obstructive, he considered that a public flotation would be easier if she had no interest of any sort in the company's shares. In 1957 he was able to offer other security in substitution, and Mr. Jobson undertook negotiations with the bank to this end, as a result of which a deed of variation (exhibit F) was made on 5th November 1958, whereby a sum of £25,000 was substituted for the said shares and the bank stood possessed of the said shares in trust for the Appellant absolutely or as he might direct. At a later date the bank executed the transfer of the shares which is referred to in para. 8(6) below.

7. (1) Mr. Robins has been for many years a personal friend of and financial adviser to the Appellant. For many years he had been very concerned about the effect upon the company of estate duty which would become payable on the Appellant's death; he had had many discussions with the Appellant about this and had recommended various steps which could be taken to reduce the probable liability, but had been unable to persuade the Appellant to act, beyond transferring the 2,053,308 "B" ordinary shares to the children's settlement (para. 5(2) above). Mr. Robins considered that a public flotation would be necessary, but the Appellant was and remains unwilling to lose control of the company.

(2) In May 1958 Mr. Robins drew up a memorandum for the Appellant (exhibit G) concerning the estate duty position, suggesting, *inter alia*, that the

A 100,000 "A" ordinary shares (the release of which Mr. Jobson was negotiating) should be settled on a new trust for the benefit of employees of the company. The Appellant did not want these shares himself, because if they passed on his death further estate duty would be attracted, and he gave instructions for a deed of trust for the benefit of employees to be prepared. A draft deed (exhibit H) was drawn up by Mr. Jobson, in which the trustee company was named as B trustee of the fund thereby to be set up, but nothing further has been done in this matter.

8. (1) In the summer of 1958 the Appellant's attention was drawn to an appeal for funds launched by the Royal College of Surgeons (hereinafter called "the College"); after discussion with his own medical adviser, he decided to found a chair of pharmacology at the College, which he understood would require £150,000.

C (2) On 29th September 1958 the Appellant, with Mr. Robins, saw Mr. Davis, the appeals secretary of the College, and put this proposal to him. At this meeting there was a discussion as to how the £150,000 should be raised, and Mr. Robins suggested that the Appellant should make over to the College the 100,000 "A" ordinary shares of which Mr. Jobson was negotiating the release by the bank (para. 6(2) above) and that the company could then pay dividends D on such shares to provide the College with £150,000. Mr. Davis agreed to this proposal. Mr. Robins then instructed Mr. Jobson (who was the personal friend of and legal adviser to the Appellant) to arrange that the bank should execute a transfer of the "A" ordinary shares with the name of the transferee left blank.

(3) Two of the reasons which prompted Mr. Robins to propose that £150,000 should be found in this way were that the company would, if it paid E larger dividends, be in a better position *vis-à-vis* the Inland Revenue in connection with Chapter III of Part IX of the Income Tax Act 1952, and that the shares would not form part of the Appellant's estate for estate duty purposes.

(4) A few days after this meeting Mr. Robins had second thoughts about his proposal; a lot of trouble having been taken to negotiate the release of the "A" ordinary shares by the bank, and so facilitate a public flotation if it should F be decided to launch one, he considered that it would not be desirable to give the shares outright to the College. He therefore suggested to the Appellant that the College should give an option on the shares to the trustee company, the only other large shareholder apart from the Appellant. The Appellant agreed; having made his decision to found the chair he had little interest in how it was done, and left the details to Mr. Robins.

G (5) On 5th November 1958 the deed of variation releasing the "A" ordinary shares was executed (para. 6(2) above) and on the following day Mr. Robins saw Mr. Davis and Mr. Kennedy Cassels, the secretary of the College, and asked whether the College would be prepared to give an option to the trustee company to purchase the shares within five years for £5,000, explaining that difficulty might arise if the shares were in the hands of a third party in the H event of a public flotation.

(6) On 14th November 1958 Mr. Jobson received the blank transfer of the "A" ordinary shares executed by the bank, together with the share certificate. He informed the Appellant, and the Appellant thereupon at Mr. Jobson's suggestion wrote the following letter to Mr. Robins:

"Dear Robins,

I Following upon my talks with Dr. Jarman and our meeting at The Royal College of Surgeons, I have decided to give to the College the

100,000 'A' shares in Vandervell Products Limited which have been released by the National Provincial Bank Ltd. in exchange for the £25,000 they have received from me. A

Will you therefore see the Secretary of the College and arrange for the transfer of the shares to them. I believe Messrs. Culross & Co. have got a transfer from the Bank.

Yours sincerely, B

Tony Vandervell"

The Appellant wrote this letter because Mr. Jobson had suggested that Mr. Robins should have written authority for what he was arranging. At a later date (31st May 1960) this letter was stamped £500 stamp duty, together with £10 penalty and £37 10*s*. penalty interest. C

(7) On 18th November 1958 the College informed Mr. Robins that it was prepared to grant the option referred to in sub-para. (5) above, and he instructed Mr. Jobson to prepare the option deed. On the following day he handed to Mr. Davis at the College the share transfer executed by the bank and the option deed for sealing by the College. The name of the College as transferee was inserted by the secretary of the College. At the request of Mr. Davis Mr. Robins wrote the letter numbered 2 in the bundle annexed (exhibit J)([1]). This letter was worded as it was because it was important to the College that it should be able to show other interested parties that it had a specified sum of cash available to establish and maintain the said chair. D

(8) (i) The College returned the share transfer and the option deed, both of which had been duly sealed by the College on 25th November 1958, to Mr. Robins on 26th November and the College was duly entered in the register of members of the company. E

(ii) The transfer (exhibit K) bears a 10*s*. stamp and is stated to be in consideration of the sum of 10*s*. It is described (in the certificate on the reverse) as "A release of shares by Trustees under a settlement not being a voluntary disposition, pursuant to a power to substitute security for maintenance." It is dated 26th November 1958, this date having been inserted by Mr. Robins. F

(iii) The deed of option (exhibit L) is dated 1st December 1958, this date having been inserted by Mr. Jobson. It was placed in Mr. Robins's private safe together with papers concerning the 1949 children's settlement and the trustee company.

9. (1) The whole purpose of the option was to avoid the difficulty which might arise, in the event of a public flotation, if the College was the registered holder of shares in the company. The trustee company was considered the suitable person to hold the shares. The Appellant, having decided (on Mr. Robins's advice) that steps should be taken to ensure that the shares should not remain in the hands of the College in the event of a flotation, did not interest himself further in the option but gave Mr. Robins *carte blanche* to make whatever arrangements he thought fit. So far as he was concerned, he considered he had parted with the shares when he wrote his letter of 14th November. So far as the College was concerned it was not particularly interested in the shares. Its only concern was to receive a sum of money. The College had in the past arranged with other benefactors that cash should reach it in the form of dividends on G H

([1]) Not included in the present print.

A shares transferred to it by the benefactor subject to an option to purchase in favour of a third party nominated by the benefactor.

(2) The directors and shareholders of the trustee company never considered that the option or their shares in the trustee company could be turned to account in such a way as to benefit them personally.

(3) Mr. Jobson took no part in the negotiations with the College and gave B no legal advice with regard thereto. He knew nothing of the proposal for the option before 18th November 1958. It was not formally agreed between him and Mr. Robins for what purpose the trustee company held the option; each of them assumed that it was held for the purposes of the 1949 children's settlement, that being the only trust then in existence for the benefit of which the trustee company could have exercised it. Both of them, however, had in mind C that it might be exercised for the purpose of the proposed trust for employees (exhibit H, *vide* para. 7(2) above). The evidence of Mr. Robins on this point (which we accepted) was that if, when the time came to exercise the option, the trustee company should have been trustee of other settlements besides the 1949 children's settlement, the directors of the trustee company would have considered the rights and interests of the beneficiaries of such other settlements D before deciding for what purpose to exercise the option.

10. (1) The following dividends were paid to the College in respect of the "A" ordinary shares:

	£	*s.*	*d.*	
on 17th December 1958	125,000	0	0	less tax
E on 16th March 1959	37,500	0	0	less tax
on 16th December 1959	87,500	0	0	less tax
on 2nd October 1961	16,666	13	4	less tax

(2) The first two dividends are the subject of the 1958–59 assessment and the third is the subject of the 1959–60 assessment.

F 11. (1) Following the correspondence with officers of the Inland Revenue (exhibit J) a meeting of directors of the trustee company was held on 28th June 1961, and the following business, under the heading "G. A. Vandervell Settlement", was recorded in the minutes:

> "It was reported that by virtue of an option granted by the Royal College of Surgeons the Trustee Company could elect on or before the G 30th November, 1963, to purchase from the College 100,000 A Ordinary 5/- shares in Vandervell Products Ltd., for the sum of £5,000. In view of certain advice which had been given to the Settlor [*viz.*, the Appellant] by Counsel It Was Resolved that before reaching a decision as to whether the option should be exercised the Opinion of Counsel be obtained as to the position and duties of the Trustees".

H (2) At a further meeting of directors of the trustee company on 2nd October 1961 the following resolution, under the heading "G. A. Vandervell Settlement", was passed:

> "that in view of the advice given by both conveyancing Counsel and tax Counsel . . . the trustees should exercise their option to acquire the shares held by the Royal College of Surgeons."

I (3) The trustee company thereupon exercised the option and the College transferred the shares to the trustee company. The sum of £5,000 payable on the exercise of the option was paid out of funds of the 1949 children's settlement.

12. It was contended on behalf of the Commissioners of Inland Revenue: A

(1) that at the time when the dividends the subject of this appeal were paid the Appellant had not parted with the beneficial interest in the "A" ordinary shares, and that the said dividends accordingly formed part of his income for surtax purposes;

(2) that if the Appellant had parted with the beneficial interest in the said shares, the transfer of the shares and the grant of the option, coupled with the B payment of dividends by the company, was a settlement for the purposes of ss. 404 and 415 of the Income Tax Act 1952, of which the Appellant was the settlor;

(3) that the trustee company had power to revoke or otherwise determine such settlement, and that in the event of the exercise of such power the Appellant might have become beneficially entitled to the property comprised in the settle- C ment or the income therefrom, and that accordingly the said dividends must be treated as the income of the Appellant by virtue of s. 404(2);

(4) (in the alternative) that the said dividends were income from property of which the Appellant had not divested himself absolutely for the purposes of s. 415(1)(*d*), and accordingly they must be treated as his income by virtue of s. 415; D

(5) that the assessments under appeal were correct and should be confirmed.

13. It was contended on behalf of the Appellant:

(1) that the Appellant's letter of 14th November 1958 was a valid equitable assignment by him to the College of his then subsisting equitable interest in the E "A" ordinary shares, and that the College was at all times beneficially entitled to the dividends the subject of the appeal;

(2) that the trustee company took the option in its capacity as trustee of the 1949 children's settlement, and accordingly the Appellant could not become beneficially entitled to the shares in the event of the exercise of the option, and that s. 404(2) had no application; F

(3) that neither the shares nor any income therefrom could become payable to or applicable for the benefit of the Appellant in any circumstances whatsoever (*vide* s. 415(2)), and accordingly s. 415 had no application;

(4) that the assessments under appeal be discharged.

On behalf of the Appellant, the following further contentions were put, but not developed: G

(5) that the transactions in question did not constitute a settlement within s. 404 or s. 415;

(6) that if they did constitute such a settlement, no person had such power to revoke or determine as is referred to in s. 404.

14. We, the Commissioners who heard the appeal, gave our decision as H follows:

(1) Assuming (but without deciding) that apart from Part XVIII of the Income Tax Act 1952 the income arising from the "A" ordinary shares was income of the College and not of the Appellant, we hold that it must be treated for the purposes of surtax as the income of the Appellant under s. 415 of the said Act, for the following reasons. I

A (2) We accept the Crown's contention that the transfer of the shares and the granting of the option, coupled with declaration of dividends, was a "settlement" within s. 415, of which the Appellant was the settlor; although this was not accepted by the Appellant, it was not fully argued on his part.

(3) The question we have to determine under s. 415 is whether the shares, or any income therefrom, might become payable to or applicable for the benefit B of the Appellant in any circumstances whatsoever (s. 415(2)).

(4) The trustee company had an option to purchase the shares for £5,000. In our opinion it was not free to deal with this option, or the shares (if the option should be exercised), in any way it wished, but held the option (and would hold the shares if it should exercise the option) as a trustee.

C (5) We find that the directors of the trustee company were people who could be expected to act generally in accordance with the Appellant's interests and wishes, but that they would not be willing to act in such a way as to involve a breach of trust. In these circumstances, when considering the question posed by s. 415(2), we do not think we are bound to envisage the possibility of the shares being applied for the Appellant's benefit in breach of trust, nor do we D consider that it would be appropriate to do so. Accordingly, in our view, we must determine whether the trusts on which the trustee company held its option rights, and might hold the shares if the option were exercised, were trusts which effectively excluded the Appellant.

(6) The view we have formed on the material before us is that at the time when the trustee company acquired the option it was not finally settled for E what objects it would hold the shares if the option should be exercised. There was a strong possibility that they would be purchased with the funds of, and held on the trusts of, the 1949 children's settlement, but we are unable to say that this was bound to happen; we can find nothing which would have prevented the Appellant (if he had so wished) setting up further and other trusts, with the trustee company as trustee, for any objects he might wish (including himself), F and had he done so we can find nothing which would have prevented the trustee company acquiring and applying the shares for the objects of any such trusts. We are aware that this was not in active contemplation, but in our opinion s. 415(2) requires us to have regard to any circumstances whatsoever that are practicable and possible.

(7) It was contended, with reference to principles conveniently set out in G Underhill's Law of Trusts and Trustees, 11th edn., pages 185–6, that we should presume that the option was intended to be held for the 1949 children's settlement. We do not agree; the trustee company could act as trustee of any trusts which the Appellant might set up, and on the evidence before us we find that the circumstances surrounding the acquisition by that company of the option were not such as to justify us in making the presumption we were asked to H make.

(8) For the foregoing reasons we confirm the surtax assessments under appeal.

15. The Appellant immediately after our determination of the appeal ex- I pressed to us his dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act 1952, ss. 229(4) and 64, which Case we have stated and do sign accordingly.

16. The questions of law for the opinion of the Court are: A

(1) whether there was evidence on which we could arrive at such findings of fact as are mentioned in para. 14 above;

(2) whether our conclusions of law in para. 14 above are correct.

R. A. Furtado } Commissioners for the Special Purposes of the Income Tax Acts. B
G. R. East }

Turnstile House,
94-99 High Holborn,
London, W.C.1.
21st June 1963. C

The case came before Plowman J. in the Chancery Division on 13th March 1964, when judgment was reserved. On 16th March 1964 judgment was given D in favour of the Crown, with costs.

Roy Borneman Q.C. and *W. T. Elverston* for the taxpayer.

R. W. Goff Q.C., *E. Blanshard Stamp* and *J. Raymond Phillips* for the Crown. E

Plowman J.—This is an appeal by Mr. Guy Anthony Vandervell against a decision of the Special Commissioners, who confirmed certain additional F assessments to surtax made upon him for the years 1958–59 and 1959–60 in the sums of £162,500 and £87,500, respectively. Those sums represent the amount of certain dividends which were paid to the Royal College of Surgeons on a block of 100,000 "A" ordinary shares in a company called Vandervell Products Ltd., to which I will refer as "the company". The Crown's contention is that they fall to be treated as Mr. Vandervell's income by virtue of s. 415 of G the Income Tax Act 1952, on the basis that the shares are subject to a settlement, that Mr. Vandervell is the settlor, and that the dividends are income of property of which he did not divest himself absolutely by the settlement. On Mr. Vandervell's behalf it is submitted that he did divest himself of all interest in the shares; alternatively that, if under the settlement there remained any possibility at all that the shares or the income thereof might become payable to or applicable for H his benefit, that possibility was no more than a negligible chance and ought to be disregarded as being *de minimis*.

Now, the relevant parts of s. 415 of the Income Tax Act 1952 are as follows:

"(1) Where, during the life of the settlor, income arising under a settlement made on or after the tenth day of April, nineteen hundred and forty-six, is, under the settlement and in the events that occur, payable to I or applicable for the benefit of any person other than the settlor, then, unless, under the settlement and in the said events, the income either . . . (*d*) is income from property of which the settlor has divested himself absolutely by the settlement . . . the income shall be treated for the purposes

A of surtax as the income of the settlor and not as the income of any other person . . . (2) The settlor shall not be deemed for the purposes of this section to have divested himself absolutely of any property if that property or any income therefrom or any property directly or indirectly representing proceeds of, or of income from, that property or any income therefrom is, or will or may become, payable to him or applicable for his benefit in any B circumstances whatsoever. . . . (3) In this section, 'income arising under a settlement', 'settlement' and 'settlor' have the meanings assigned to them for the purposes of Chapter III of this Part of this Act by subsections (1) and (2) of section four hundred and eleven of this Act".

Then s. 411(2) provides:

"In this Chapter, 'settlement' includes any disposition, trust, covenant, C agreement or arrangement, and 'settlor', in relation to a settlement, means any person by whom the settlement was made; and a person shall be deemed for the purposes of this Chapter to have made a settlement if he has made or entered into the settlement directly or indirectly, and in particular (but without prejudice to the generality of the preceding words) if he has provided or undertaken to provide funds directly or indirectly for the purpose D of the settlement, or has made with any other person a reciprocal arrangement for that other person to make or enter into the settlement."

The matter arises out of Mr. Vandervell's very generous response to an appeal which was made by the Royal College of Surgeons in the summer of 1958. In answer to that appeal he decided to make the College a gift of £150,000 in order to found a chair of pharmacology. Mr. Vandervell is a wealthy man, E and his fortune is largely tied up in the company. The company is a private company manufacturing engineering products. It has an issued capital of £1,055,500, which is divided into four classes of shares. In the first place there are 600,000 ordinary shares of 5*s*. each, all but two of which are owned by Mr. Vandervell, and these are the shares which give control of the company, including dividend control. Then there are the 100,000 "A" ordinary shares of F 5*s*. each, which are the shares with which I am concerned in this case. Thirdly, there are 2,600,000 "B" ordinary shares at 5*s*. each, of which something like 20 per cent. are held by Mr. Vandervell and the remaining 80 per cent. or so are held by a trustee company called Vandervell Trustees Ltd.; I will refer to that company as "the trustee company". Finally, there are 230,500 5 per cent. cumulative preference shares of £1 each: of those each of the directors of the G company holds 100 and the rest are held by four life offices. The directors of the company in the year 1958, which is the year with which I am primarily concerned, were, first of all, Mr. Vandervell; secondly, a Mr. Green, who was a chartered accountant; thirdly, Mr. Robins, who was also a chartered accountant and a partner in the firm of Clifford, Towers, Temple and Co., the company's accountants. Mr. Robins is an old personal friend of Mr. Vandervell and had H for many years acted as his financial adviser. The other two directors were Mr. Brown, a third chartered accountant, and a Mr. Begg.

The trustee company is a private company whose principal object is to act as trustee. It has got a capital of £100, divided into 100 shares of £1 each, 34 of which are held by Mr. Robins, 33 by Mr. Green and 33 by Mr. Jobson, who is a solicitor and a partner in the firm of Culross & Co., the company's solicitors; I Mr. Jobson is another personal friend of Mr. Vandervell and is his legal adviser. Mr. Robins, Mr. Green and Mr. Jobson were also the directors of the trustee company at all material times. The trustee company's principal activity is, and

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always has been, to act as trustee of a settlement which Mr. Vandervell made on his children in the year 1949. That settlement creates a discretionary trust for Mr. Vandervell's children and remoter issue and the husbands and wives of those children and issue, but its provisions are such that it is impossible either for Mr. Vandervell or for any wife of his to benefit under it. The trustee company is also trustee of a retirement, profit-sharing and savings fund set up by the company in the year 1952. Under the rules of this fund, investment in the shares of the company is expressly forbidden. Apart from those trusts and its role as grantee of the option to which I shall have reason to refer shortly, it has never at any material time had any other activity.

On 29th September 1958 there was a meeting between Mr. Vandervell and Mr. Robins and a Mr. Davis, who was the appeals secretary of the Royal College of Surgeons, and that meeting was concerned with Mr. Vandervell's offer to found a chair of pharmacology. At that meeting discussion took place as to how the sum of £150,000, which was understood to be required in order to found that chair, should be provided. Mr. Robins suggested that Mr. Vandervell should make over to the College the 100,000 "A" ordinary shares and that the company could then declare dividends on those shares to provide the College with the £150,000. At that meeting there was no reference to any question of an option. At that time the 100,000 "A" ordinary shares were in fact registered in the name of the National Provincial Bank Ltd., as trustee of a deed securing certain annual payments to Mr. Vandervell's former wife, but under the provisions of that deed he was entitled, with her consent, to substitute other security, and for some time prior to this time Mr. Jobson had been negotiating for the release of the shares and the substitution of other security. Those negotiations were initiated before any question arose of Mr. Vandervell's gift to the Royal College of Surgeons, and the reason why they were undertaken was that on Mr. Vandervell's death the estate duty position would give rise to problems and, in order to resolve the problem of providing the necessary sums for payment of estate duty, it was thought it would be necessary sooner or later to float the company as a public company, and it was thought that it would avoid difficulties in that event if Mr. Vandervell had control of this large block of shares.

To return to the meeting of 29th September, both Mr. Vandervell and Mr. Davis agreed to Mr. Robins's suggestion of how this sum of £150,000 should be provided, and Mr. Vandervell left the whole thing to Mr. Robins to arrange. Mr. Robins then asked Mr. Jobson to arrange for the National Provincial Bank to execute a blank transfer of the shares. Now, two of the reasons which had led Mr. Robins to suggest that the £150,000 should be provided in the way in which he in fact suggested it should be provided were these: first of all, he thought it would help the company to avoid a surtax direction; secondly, he thought it would help the estate duty position in that the shares would not then form part of Mr. Vandervell's estate for estate duty purposes. The question of estate duty had been worrying Mr. Robins for some time, but apparently he found it difficult to persuade Mr. Vandervell to do anything about it, although he had succeeded in persuading him to execute the children's settlement to which I have referred. In May 1958 he had suggested creating a trust of the 100,000 "A" ordinary shares for the benefit of employees of the company, and on Mr. Vandervell's instructions Mr. Jobson had drawn up a draft deed in which the trustee company was named as trustee, but nothing further came of it. A few days after this meeting in September Mr. Robins had

A second thoughts about his proposal. It occurred to him that it would complicate a public flotation if the shares were given to the Royal College of Surgeons outright; and he therefore suggested to Mr. Vandervell that the College should give an option on the shares to the trustee company, which, apart from Mr. Vandervell himself, was the only other large shareholder in the company. Mr. Vandervell agreed with that suggestion of Mr. Robins. His attitude was that B he had decided to found this chair, he had agreed to make the 100,000 shares available for that purpose, and he had not really much interest in how it was done; he left the details of the matter to Mr. Robins.

The chronology of the events which then took place is as follows. On 5th November 1958 a deed was executed whereby the sum of £25,000 cash was substituted for the 100,000 "A" ordinary shares as security for Mr. Vandervell's C former wife's annual payments, and by that deed the bank declared that it henceforth held the shares in trust for Mr. Vandervell absolutely. On the following day, 6th November, Mr. Robins saw the College authorities and asked whether the College would be prepared to give an option to the trustee company to purchase the shares for £5,000 within five years, and they apparently said they would let him know. On 14th November Mr. Jobson received from the D bank a blank transfer of the shares together with the share certificate, and he informed Mr. Vandervell of this and suggested to him that Mr. Robins ought to have some sort of written authority for what he was in process of arranging on Mr. Vandervell's behalf. So on that day, 14th November, Mr. Vandervell wrote this letter to Mr. Robins:

> "Dear Robins, Following upon my talks with Dr. Jarman and our E meeting at the Royal College of Surgeons, I have decided to give to the College the 100,000 'A' shares in Vandervell Products Limited which have been released by the National Provincial Bank Ltd. in exchange for the £25,000 they have received from me. Will you therefore see the Secretary of the College and arrange for the transfer of the shares to them. I believe Messrs. Culross & Co. have got a transfer from the Bank. Yours sincerely, F Tony Vandervell."

It is contended on behalf of Mr. Vandervell that that letter operated as an equitable assignment to the Royal College of Surgeons of his absolute beneficial interest in the shares, and I shall return to that argument later.

On 18th November the Royal College of Surgeons informed Mr. Robins that it was agreeable to the option proposal, and Mr. Robins instructed G Mr. Jobson to prepare an option deed. That was the first time that Mr. Jobson had heard of any proposal for an option. Mr. Jobson prepared that deed with great despatch because on the following day, 19th November, Mr. Robins handed over to Mr. Davis, the appeals secretary, the share transfer executed in blank by the National Provincial Bank and the option deed. On the same day Mr. Robins wrote in the name of his firm to Mr. Davis, at Mr. Davis's H request, a letter which is contained in exhibit J to the Case, saying,

> "Dear Mr. Davis, We have pleasure in advising you that our client Mr. G. A. Vandervell has, in response to your appeal, decided to make available to you the sum of £150,000 (one hundred and fifty thousand pounds) to establish and maintain a Chair in Pharmacology. You will receive between now and 31st March 1959 Dividends totalling £145,000 I Gross on Shares in Vandervell Products Ltd. which our client now owns and will transfer to you. The balance of £5,000 will be paid to you when the option to purchase the Shares is exercised."

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Mr. Davis replied, by letter dated 21st November: A

"Dear Mr. Robins, Thank you for the official notification of the 19th November containing the great news that Mr. G. A. Vandervell has agreed to make available a sum of £150,000 to establish and maintain a Chair in Pharmacology. I will be returning to you in the course of the next few days the documents you left to be officially signed and sealed by the President. With many thanks for all your help. Yours sincerely". B

On 25th November the Royal College of Surgeons sealed the transfer, the secretary of the College having inserted the College's name as the transferee, and also sealed the option deed; and on the following day, the 26th, they returned these documents to Mr. Robins, both undated. The transfer was ultimately dated 26th November, that date having been inserted by Mr. Robins, and on the back of it is a certificate that the transaction on which the transfer is made falls within the description given below, namely, C

"A release of shares by Trustees under a settlement not being a voluntary disposition, pursuant to a power to substitute security for maintenance."

The option deed, which was ultimately dated 1st December, that date having been filled in by Mr. Jobson, is made between the Royal College of Surgeons, called the owners, of the one part and the trustee company of the other part and it recites: D

"The Owners hold and are the registered proprietors of the shares specified in the schedule hereto"—the shares specified in the schedule are the 100,000 "A" ordinary shares—"and they have agreed with the purchasers to grant the purchasers an option to purchase the said shares for the sum of Five thousand pounds provided such option is exercised within a period of five years from the date hereof", E

and then the operative part of the deed contains covenants to give effect to the agreement so recited.

Mr. Robins, having got the option deed back, put it in his private safe together with papers concerning the 1949 children's settlement and the trustee company. Mr. Borneman, on behalf of Mr. Vandervell, invites me to attach considerable significance to the fact that Mr. Robins, who it will be remembered was one of the directors of the trustee company, put this option agreement in his private safe together with papers concerning the 1949 children's settlement; but I do not myself feel able to attach very great significance to that fact, because the safe contained papers not only concerning the 1949 children's settlement but also concerning the trustee company, and the option had been given to the trustee company. To continue with the chronology, on 17th December 1958 the company paid the Royal College of Surgeons a dividend of £125,000 less tax on the "A" ordinary shares. On 16th March 1959 it paid another dividend of £37,500 less tax on those shares; and those two sums of £125,000 and £37,500 together make the sum of £162,500 to which I referred at the beginning of this judgment. Then on 16th December 1959 the company paid the Royal College of Surgeons a dividend of £87,500 less tax on those shares, and that is the sum of that amount to which I also referred at the beginning of this judgment. In October 1961 the trustee company, on the advice of counsel, exercised its option and paid the Royal College of Surgeons £5,000 for the shares, and it paid that sum out of the funds comprised in the 1949 children's settlement. F G H I

A There is one paragraph in the Case Stated that I propose to read in full, and that is para. 9, because it seems to me that the crux of this case really is to be found in that paragraph:

"(1) The whole purpose of the option was to avoid the difficulty which might arise, in the event of a public flotation, if the College was the registered holder of shares in the company. The trustee company was considered the suitable person to hold the shares. The Appellant, having decided (on Mr. Robins's advice) that steps should be taken to ensure that the shares should not remain in the hands of the College in the event of a flotation, did not interest himself further in the option but gave Mr. Robins *carte blanche* to make whatever arrangements he thought fit. So far as he was concerned, he considered he had parted with the shares when he wrote his letter of 14th November. So far as the College was concerned, it was not particularly interested in the shares. Its only concern was to receive a sum of money. The College had in the past arranged with other benefactors that cash should reach it in the form of dividends on shares transferred to it by the benefactor subject to an option to purchase in favour of a third party nominated by the benefactor. (2) The directors and shareholders of the trustee company never considered that the option or their shares in the trustee company could be turned to account in such a way as to benefit them personally. (3) Mr. Jobson took no part in the negotiations with the College and gave no legal advice with regard thereto. He knew nothing of the proposal for the option before 18th November 1958. It was not formally agreed between him and Mr. Robins for what purpose the trustee company held the option; each of them assumed that it was held for the purposes of the 1949 children's settlement, that being the only trust then in existence for the benefit of which the trustee company could have exercised it. Both of them, however, had in mind that it might be exercised for the purpose of the proposed trust for employees (exhibit H, *vide* para. 7 (2) above). The evidence of Mr. Robins on this point (which we accepted) was that if, when the time came to exercise the option, the trustee company should have been trustee of other settlements besides the 1949 children's settlement, the directors of the trustee company would have considered the rights and interests of the beneficiaries of such other settlements before deciding for what purpose to exercise the option."

Mr. Borneman, on behalf of the Appellant, Mr. Vandervell, does not dispute that there is here a settlement which consists, first of all, of the transfer of these shares to the Royal College of Surgeons, and, secondly, of the grant of an option by the College to the trustee company, coupled with the procurement by Mr. Vandervell of the payment of those dividends to which I have referred to the College: nor, I think, does Mr. Borneman dispute that in relation to that settlement Mr. Vandervell is a settlor. But he submits that Mr. Vandervell divested himself absolutely of all interest in the shares which were comprised in that settlement before the dividends in question were paid, and he puts that submission in two ways. First of all, he says that that letter of 14th November 1958 from Mr. Vandervell to Mr. Robins, which I read, operated as an equitable assignment of Mr. Vandervell's beneficial interest in the shares, which then were registered in the name of the National Provincial Bank Ltd. Alternatively, he submits that Mr. Vandervell parted with all interest by procuring the option to be given to the trustee company in its capacity as trustee of the 1949 children's settlement, and, the argument continues, the trustee

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company having received this option in that capacity, a presumption of advancement in favour of Mr. Vandervell's children arises and as a result of that, he says, Mr. Vandervell effectively parted with all interest in the option. Then Mr. Borneman argues that, if that is wrong, this case falls within s. 415(2), which I will read again:

> "The settlor shall not be deemed for the purposes of this section to have divested himself absolutely of any property if that property or any income therefrom or any property directly or indirectly representing proceeds of, or of income from, that property or any income therefrom is, or will or may become, payable to him or applicable for his benefit in any circumstances whatsoever".

If, argues Mr. Borneman, the present case falls within that, then the possibility of the property or the income becoming so applicable or payable is so negligible as to be *de minimis*. In support of that proposition he relies on a passage from the speech of Lord Reid in *Commissioners of Inland Revenue* v. *Countess of Kenmare*(1) 37 T.C. 383, at page 411:

> "Can it reasonably be said in those circumstances that the trustees may have power during the lifetime of the settlor to release the whole of the trust fund so that the settlor becomes beneficially entitled to the whole of it? I think it can. In my opinion the word 'may' must be construed in accordance with the principle of *de minimis*. There must be a real possibility of there being power to release the whole fund before the death of the settlor. I do not think that 'may' means that there must be a probability in the sense that the event is more likely to happen than not to happen, but there must be more than a negligible possibility. I do not think that the possibility of there being power to release the whole fund before the death of the settlor is in this case negligible."

First of all, as to the letter of 14th November 1958, as Mr. Goff points out, that letter is not addressed to the bank, which was the trustee in whose name the shares at that time still stood; it was not addressed to the Royal College of Surgeons or anybody concerned with that institution, who were the proposed donees of the shares; it was addressed by Mr. Vandervell to his friend and for this purpose agent, Mr. Robins. It is, of course, an informal document, but, as Mr. Borneman points out, the mere fact that a document is an informal document is not of itself an objection to its operation as an equitable assignment. For that proposition he referred me to In re *Wale* [1956] 1 W.L.R. 1346, and in particular to a passage in the judgment of Upjohn J., at page 1350:

> "Another familiar principle is that an assignment of an equitable estate need not be in any particular form. As Lord Macnaghten said in *Brandt's* (*William*) *Sons & Co. Ltd.* v. *Dunlop Rubber Co. Ltd.*(2): 'The language is immaterial if the meaning is plain.' That, in my judgment, applies as much to a voluntary assignment as to one for valuable consideration as in that case. (See also *Lambe* v. *Orton*(3).) An equitable assignment may take many forms. It may in terms purport to operate as an assignment, or it may take the form of a direction to the trustees in whom the legal estate is outstanding to hold the property on trust for the donee or on new trusts."

(1) [1958] A.C. 267. (2) [1905] A.C. 454, at p. 462. (3) (1860) 1 Drew. & Sm. 125.

A As I say, I agree that the informality of the document is no objection provided that the meaning is clear. But then one asks oneself, what meaning? And the answer, it seems to me, is that it must be clear from the document that by it the writer is intending to dispose of the property in question, and to dispose of it not at some unspecified date in the future but to dispose of it by the document itself. Now, this letter of 14th November 1958, which I have B read, is not, in my judgment of its true construction, a disposition at all. What it does is to record a decision in the words: ". . . I have decided to give to the College the 100,000 'A' shares in Vandervell Products Limited . . ." and then to give Mr. Robins authority to carry out that decision: "Will you therefore see the Secretary of the College and arrange for the transfer of the shares to them." The document in my judgment is not an assignment of anything.

C To come to the next point in Mr. Borneman's argument, which is the question about presumption of advancement, as Mr. Goff pointed out, this is not a case where a man has put property in the name of his children where the question arises, did he intend a gift to his children or not? That type of case is of course a well-known type of case, and there is a presumption that applies to it, namely, that a gift was intended. In this case the would-be donor put the D property in the name of a trustee, the trustee company; and the crux of this case, I think, is on what trusts did the trustee company take the option? No one suggests that the trustee company took it otherwise than on trust. The question is simply, on trust for whom? And on the evidence which is set out in the Case Stated it seems to me that the only answer that can be given to that question is that at the time the option was taken it had not been decided for whose benefit E it was to be held. I refer again to para. 9(3) of the Case Stated and to these words:

> "The evidence of Mr. Robins on this point (which we accepted) was that if, when the time came to exercise the option, the trustee company should have been trustee of other settlements besides the 1949 children's settlement, the directors of the trustee company would have considered F the rights and interests of the beneficiaries of such other settlements before deciding for what purpose to exercise the option."

That can only be on the basis that at the time the option was given and at the time when the dividends in question were paid it had not been decided what the ultimate fate of the option was to be. If I may use the expression, it seems to me the option was really in cold storage until a decision was taken as to what was G ultimately to happen to it. Now, if that is right, the result in law must in my judgment be that the option was held by the trustee company on a resulting trust for Mr. Vandervell, whether Mr. Vandervell wanted it for himself or not. As I see it, a man does not cease to own property simply by saying "I don't want it". If he tries to give it away the question must always be, has he succeeded in doing so or not? If he has not succeeded in giving it away, it still belongs to H him even if he does not want it; and that, I think, is really the position here. Mr. Vandervell did not want these 100,000 "A" ordinary shares for himself and he may have tried to give them away, but he did not succeed, in my judgment, in making a complete gift of the entirety of the beneficial interest in those shares.

That then leaves the *de minimis* point. It seems to me there are two answers I to that. The first answer is that it does not arise, because, if Mr. Vandervell, the settlor, has not in fact divested himself absolutely by the settlement from the property comprised in the settlement, then the deeming provisions in s. 415(2)

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do not arise. Here I have held that there was a resulting trust of the option in his favour. That being so, it seems to me that he cannot have divested himself of the property comprised in the settlement absolutely, and therefore one need not look beyond s. 415(1)(*d*). But if that is wrong, and if in fact s. 415(2) has anything to do with the matter, then my view would be that its language distinguishes this case from the *Kenmare* case[1]. In the *Kenmare* case the House of Lords was concerned, not with s. 415, but with the language of s. 404(2)(*a*), which is as follows:

> "If and so long as the terms of any settlement are such that—(*a*) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof",

certain consequences follow. It was the word "may" with which the House of Lords was concerned—"any person has or may have power"—and it was in relation to that word "may" that Lord Reid used the language which I have already read from the report of that case. But in s. 415(2) the language is not simply "may"; the language is "may become, payable to him or applicable for his benefit in any circumstances whatsoever". It seems to me those words "in any circumstances whatsoever" are wide enough to include the negligible possibility which Lord Reid said was excluded from the operation of the word "may" standing by itself in s. 404(2)(*a*). In those circumstances, in my judgment, the decision of the Special Commissioners was right and I must dismiss this appeal.

Goff Q.C.—My Lord, would you dismiss the appeal with costs?

Plowman J.—That follows, Mr. Borneman, I think. Yes, Mr. Goff.

The taxpayer having appealed against the above decision, the case came before the Court of Appeal (Willmer, Harman and Diplock L.JJ.) on 19th, 20th, 21st, 22nd and 25th January 1965, when judgment was reserved. On 26th February 1965 judgment was given unanimously in favour of the Crown, with costs.

B. L. Bathurst Q.C., *Roy Borneman Q.C.* and *W. T. Elverston* for the taxpayer.

R. W. Goff Q.C., *J. Raymond Phillips* and *J. P. Warner* for the Crown.

Willmer L.J.—I have asked Diplock L.J. to deliver the first judgment in this case.

Diplock L.J.—In the late summer of 1958 Mr. Vandervell decided to make a gift of £150,000 to the Royal College of Surgeons to found a chair of pharmacology. He sought to achieve this object by causing 100,000 "A" ordinary shares in Vandervell Products Ltd., a private company which he controlled, to be transferred to the College, subject to an option to repurchase. During the

[1] 37 T.C. 383.

A year 1958–59 dividends on these shares were paid to the College amounting to £162,500 less tax, and in 1959–60 further dividends to the amount of £87,500 less tax.

Mr. Vandervell was assessed to surtax on these dividends on the basis that the transaction amounted to a settlement of property of which he, the settlor, had not absolutely divested himself, so that in pursuance of Part XVIII of the B Income Tax Act 1952 the dividends fell to be treated for surtax purposes as his income, and not that of any other person. On appeal the Special Commissioners confirmed the assessments, and their decision was upheld by Plowman J.

Vandervell Products Ltd., which I will call "the operating company", is a private company whose issued capital is £1,055,500, divided into four classes of shares: 600,000 ordinary 5*s*. shares, all but two held by Mr. Vandervell; 100,000 C "A" ordinary 5*s*. shares, the shares transferred to the Royal College of Surgeons; 2,600,000 "B" ordinary 5*s*. shares, of which Mr. Vandervell held about 20 per cent. and the remainder were held by Vandervell Trustees Ltd., whom I will call "the trustee company"; 230,500 5 per cent. cumulative preference shares, which are not relevant to this appeal. Holders of "A" ordinary, "B" ordinary and preference shares had no voting rights, so that the company was wholly D controlled by Mr. Vandervell himself. The articles of association permitted the distributable profits to be applied in payment of dividends upon any one or two of the three classes of ordinary shares to the exclusion of the others or other. The decision as to the application of dividends as between these three classes of share lay with Mr. Vandervell, as holder of the only shares with voting rights.

In 1949 Mr. Vandervell made a settlement in favour of his three children, E appointing the trustee company as trustee. The "B" ordinary shares held by the trustee company are held by it as trustee for this settlement, which I will call "the children's settlement". I need not refer to the terms of this settlement, except to record that it provided in the clearest possible terms that under no circumstances were Mr. Vandervell or his wife entitled to derive any benefit, direct or indirect, under it.

F The trustee company is a private company whose principal object is to act as trustee to any settlement, but it has wide powers of carrying on business on its own account. The capital consists of 100 £1 shares, held in more or less equal proportions by Mr. Robins, Mr. Green and Mr. Jobson, who also constitute its board of directors. Mr. Robins is a chartered accountant and Mr. Vandervell's financial adviser. Mr. Jobson is a solicitor who acts as solicitor for G both the company and Mr. Vandervell personally, and Mr. Green is another chartered accountant. The trustee company also acted as trustee for a retirement, profit sharing and savings fund established for the benefit of employees of the operating company. It is unnecessary to describe the details of this fund, except to say that by the terms of the instrument constituting the fund the trustee was prohibited from investing in shares of the company, and that Mr. Vandervell H himself could not benefit from the fund.

In 1951 Mr. Vandervell was divorced by his wife and was ordered to make secured provision for her maintenance in the sum of £2,500 a year less tax. Pursuant to this order Mr. Vandervell executed a deed of covenant and security dated 7th November 1952, whereby he covenanted to pay monthly sums to his wife and to transfer his holding of 100,000 "A" ordinary shares in the operating I company to the National Provincial Bank Ltd., which I will call "the bank", as security. The deed provided that, with the consent of the wife, the bank as

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trustees were authorised to accept in substitution for these shares other securities of equal value. A

In 1957 Mr. Vandervell was advised that, having regard to estate duty which would become payable on his death, it would be desirable at some time for him to turn the operating company into a public company. To facilitate this he decided to offer other securities in substitution for the "A" ordinary shares held by the bank as trustee for his former wife, and Mr. Jobson negotiated with the bank on his behalf to this end. Eventually, on 5th November 1958 a deed of variation was executed by Mr. Vandervell, his wife and the bank whereby, on substitution of other securities, the 100,000 "A" ordinary shares were released and thereafter held by the bank in trust for Mr. Vandervell. In anticipation of the release of these shares, and on the advice of Mr. Robins, Mr. Vandervell in May 1958 instructed Mr. Jobson to draft a trust deed for the benefit of the employees of the operating company. This was done with a view to the possibility of the 100,000 "A" shares being settled for the benefit of employees. Mr. Jobson in fact provided such a deed, but it was never executed. B C

In the summer of 1958, when the negotiations for the release of the "A" shares by the bank were coming to fruition, Mr. Vandervell's attention was drawn to an appeal for funds launched by the Royal College of Surgeons, and he decided to give to the College £150,000 to found a chair of pharmacology. At a meeting with representatives of the College in September it was decided, on the advice of Mr. Robins, to achieve this result by transferring the 100,000 "A" shares to the College, so that the £150,000 could be provided by dividends to be paid on these shares. This method was chosen partly to improve the position of the operating company in relation to a possible surtax direction on the company under s. 245 of the Income Tax Act 1952 if the company failed to distribute a higher proportion of its profits in dividends, and partly to reduce the incidence of estate duty on Mr. Vandervell's estate. D E

Some days later Mr. Robins put forward a revised plan, designed to avoid possible difficulties in the event of a public flotation if these shares were held by the Royal College of Surgeons and not by Mr. Vandervell himself or by persons whom he could rely upon to act in accordance with his interests and wishes. Accordingly, Mr. Robins suggested that, upon transfer of the shares to the Royal College of Surgeons, the College should give an option to the trustee company to buy them back. Mr. Vandervell agreed to this plan, for "having made his decision to found the chair he had little interest in how it was done", and left the details to Mr. Robins. This revised plan was put to representatives of the Royal College of Surgeons at a meeting on 6th November 1958 by Mr. Robins, who explained that difficulty might arise if the shares were in the hands of a third party in the event of a public flotation. F G

On 14th November 1958 Mr. Jobson received from the bank on behalf of Mr. Vandervell a transfer of the 100,000 "A" ordinary shares executed by the bank in blank to go with the share certificate. On the same day Mr. Vandervell, on the advice of Mr. Jobson, wrote a letter to Mr. Robins in the following terms: H

> "Dear Robins, Following upon my talks with Dr. Jarman and our meeting at The Royal College of Surgeons, I have decided to give to the College the 100,000 'A' shares in Vandervell Products Limited which have been released by the National Provincial Bank Ltd. in exchange for the £25,000 they have received from me. Will you therefore see the Secretary of the College and arrange for the transfer of the shares to them. I I

(Diplock L.J.)

A believe Messrs. Culross & Co. have got a transfer from the Bank. Yours sincerely, Tony Vandervell".

Mr. Jobson advised this letter because he suggested that Mr. Robins should have written authority for what he was arranging. This letter has been relied upon as constituting an equitable assignment of the shares, a contention rejected by the Judge, to which I shall have to revert later. On 18th November the B College informed Mr. Robins that it was prepared to fall in with the revised plan and to grant the option to repurchase the shares. Mr. Jobson, on Mr. Robins's instructions, then drafted the necessary deed of option in favour of the trustee company. It provided for the exercise of the option by the trustee company within a period of five years from the date of the deed, the College covenanting in the meantime not to sell, charge, transfer, part with or otherwise C in any way deal with the said shares. The price to be paid on the exercise of the option was £5,000.

On 19th November 1958 the share transfer executed in blank by the bank and the option deed were handed by Mr. Robins to representatives of the College for sealing. Mr. Robins, at the request of the appeal secretary of the College, also wrote a letter in the following terms:

D "Dear Mr. Davis, We have pleasure in advising you that our client Mr. G. A. Vandervell has, in response to your appeal, decided to make available to you the sum of £150,000 . . . to establish and maintain a Chair in Pharmacology. You will receive between now and 31st March 1959 Dividends totalling £145,000 Gross on Shares in Vandervell Products Ltd. which our client now owns and will transfer to you. The balance of E £5,000 will be paid to you when the option to purchase the shares is exercised."

This letter was worded as it was because it was important to the College that it should be able to show other interested parties that it had a specified sum in cash available to maintain the chair of pharmacology. In due course the College returned the share transfer and option deed to Mr. Robins duly signed, and the F College was entered in the register of members of the company in respect of 100,000 "A" ordinary shares.

As already stated, during the tax years 1958–59 and 1959–60 dividends on the shares were in fact paid to the College, amounting to £162,500 and £87,500 gross respectively. Further dividends were paid in subsequent years, with which we are not directly concerned in the present appeal. As a matter of history, in G October 1961, well after the tax years with which we are concerned, the trustee company in fact exercised the option and repurchased the shares, the £5,000 being paid out of the funds of the children's settlement. I do not think the subsequent exercise of the option is relevant for the question to be determined. The appeal turns upon the position as it was in the tax years 1958–59 and 1959–60, when the shares were still held by the Royal College of Surgeons and H the option was outstanding.

The substance of the scheme was this. Mr. Vandervell very generously wished to give the Royal College of Surgeons £150,000, a figure which he later increased to £250,000. He naturally wished to do this at least expense to himself, and it seemed to his advisers that the 100,000 "A" ordinary shares with their somewhat unusual rights afforded him the best means of doing so. If he trans-I ferred these to the College, he himself, as holder of substantially all of the voting shares, could resolve upon the payment of dividends upon the "A" ordinary

(Diplock L.J.)

shares held by the College until the gross dividends amounted to the promised sum, and then pay no further dividends on these shares. This would enable the company to distribute a higher proportion of its income and avoid the risk of a direction being made upon the company under s. 245 of the Income Tax Act 1952 so as to attract surtax on its undistributed income. But to transfer the 100,000 "A" ordinary shares to the College would leave the shares outstanding in the ownership of the College after the promised sum had been paid, and this was calculated to prejudice the position of Mr. Vandervell and of the children's trust in the event of the contemplated public flotation. It was desirable for that purpose that control of the shares should, before any public flotation, revert to Mr. Vandervell or to persons upon whom he could rely to act in accordance with his interests and wishes in carrying through the flotation.

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There may have been ways in which all these objects could have been achieved without attracting surtax on the dividends paid to the College. The question in this case is whether, on the facts as found by the Commissioners, Mr. Vandervell—or rather his advisers, for he gave them *carte blanche*—have achieved them; or have they, as the Crown contends, been hoist by their own petard?

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It is common ground that the arrangement made on Mr. Vandervell's behalf with the College—that is to say, the transfer of the shares to them coupled with the reservation of an option in favour of the trustee company—constituted a "settlement" within the extended meaning given to it by s. 411(2) of the Income Tax Act 1952, and that of this settlement Mr. Vandervell was the "settlor". The dividends paid on the transferred shares constituted income arising under the settlement, and, it is contended by the Crown, did not fall within any of the exceptions set out in paras. (*a*) to (*e*) of s. 415(1) of the Income Tax Act 1952, so that for the purposes of surtax they fell to be treated as the income of the settlor and not of any other person. On behalf of the taxpayer it is contended that the dividends fall within the exception set out in para. (*d*) of that subsection as being "income from property of which the settlor has divested himself absolutely by the settlement", an expression to which an extended meaning is given in most unfelicitous language by subs. (2), which so far as is relevant is in the following terms:

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"The settlor shall not be deemed for the purposes of this section to have divested himself absolutely of any property if that property or any income therefrom or any property directly or indirectly representing proceeds of, or of income from, that property or any income therefrom is, or will or may become, payable to him or applicable for his benefit in any circumstances whatsoever". There then follows a proviso which I need not read.

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Both the Special Commissioners and Plowman J. decided in favour of the Crown, the former on the ground that Mr. Vandervell had not "divested himself absolutely" of the shares within the extended meaning given to that expression by s. 415(2), the latter on the ground that Mr. Vandervell had not "divested himself absolutely" of the shares within the ordinary meaning of those words, without any recourse to the extended meaning. He held that, on the facts as found by the Special Commissioners, neither Mr. Vandervell nor his advisers had made up their minds at the time when the option deed was executed, or at any time during the relevant years of assessment, on what trusts (if any) the trustee company was to hold the option, and that accordingly the trustee

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A company as a "volunteer" held the option on a resulting trust for Mr. Vandervell absolutely.

Although the Special Commissioners and the learned Judge reached their conclusion in favour of the Crown by somewhat different routes, I myself doubt if there is very much difference between them. The "property" from which the income came was the shares. But for the extended meaning of the expression B "divested himself absolutely" it might have been argued that the option granted to the trustee company as part of the arrangement—that is, the "settlement" —gave it no "property" in the shares but only a personal contractual right against the College. Section 415(2), however, makes it clear that, where such a right is reserved as a matter of contract, then if upon its exercise the "property" —that is, the shares—may become applicable for the benefit of the settlor, the C settlor is not to be deemed to have "divested himself absolutely" of the shares, notwithstanding that the contractual right might not as a matter of strict jurisprudence be regarded as creating or reserving a proprietary interest in the shares.

I think that the learned Judge was right, for the reasons expressed with commendable terseness in his judgment; but in view of the far-ranging arguments which have been addressed to us it would be discourteous to emulate D his brevity, though I hope also to be short—at any rate about those arguments which I reject. The first, and singularly unattractive, contention of the Crown is that Mr. Vandervell never divested himself of any beneficial interest in the shares at all. At the relevant time the legal estate in the shares was in the bank as bare trustee for him. The legal estate was all that the bank could transfer to the College, and this they did when the College's name was substituted for E that of the bank on the share register. The beneficial interest could only be transferred by Mr. Vandervell, and this he could only do in writing because s. 53(1)(*c*) of the Law of Property Act 1925 provides that:

> "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."

F There exists, say the Crown, no written disposition of Mr. Vandervell's beneficial interest in the shares within the meaning of this section.

There is no authority binding upon this Court that, in the absence of writing, s. 53 of the Law of Property Act 1925 operates to defeat the intended transfer of an equitable interest in property co-extensive with the legal estate therein to a transferee who is or becomes the transferee of the legal estate; G although there are certain observations by Wilberforce J. in *Commissioners of Inland Revenue* v. *Hood Barrs* (*No.* 2) (1963) 41 T.C. 339, at pages 361–2, which lend some support to this proposition. But with great respect I do not think that this is right. *Prima facie* a transfer of the legal estate carries with it the absolute beneficial interest in the property transferred. No separate transfer of the beneficial interest is necessary. The presumption may be rebutted by H evidence to show that transfer of the beneficial interest to the transferee of the legal estate would constitute a breach of trust by the transferor. In the absence of any evidence to this effect, s. 53 of the Law of Property Act 1925, in my view, does not come into operation at all.

This brings me to the second contention on behalf of the Crown, which is that, since the transfer of the legal estate in the shares was to the College as I volunteers and not as purchasers for value, there is a presumption that they acquired the shares as bare trustees upon a resulting trust for the donor, Mr.

(Diplock L.J.)

Vandervell; this presumption can of course be rebutted, but the Crown contend that in order to rebut it the taxpayer must rely upon the letter of 19th November 1958, which is evidence only of an intention to vest in the College an interest in the income from the shares up to a sum of £145,000 gross. This contention, too, can be disposed of briefly. It would have great force if the only evidence of Mr. Vandervell's intentions were that contained in the written documents. But in fact oral evidence of his intentions was given by Mr. Vandervell himself, and by Mr. Robins, his agent in the transaction, to whom he gave *carte blanche* to make whatever arrangements he thought fit. Mr. Robins's intentions must therefore be treated as being those of Mr. Vandervell himself. It is clear from the findings of the Commissioners that the intention of Mr. Vandervell and Mr. Robins was to transfer to the College the beneficial interest in the shares themselves, not merely in the dividends therefrom, but subject to a contractual right in the holder of the option, granted by the College as part of the same transaction, to require the College to retransfer the shares at a price of £5,000 after dividends amounting to £145,000 gross had been paid upon them.

A B C

The third contention by the Crown, which was successful in the Court below, can be stated thus. (1) The transfer of the shares to the College and the granting of the option thereon by the College to the trustee company were integral parts of the same transaction which constituted the "settlement" of which Mr. Vandervell was the "settlor". (2) The settlor reserved, out of his grant to the College of the legal and beneficial interest in the shares, the benefit of an option over the shares. (3) The settlor granted to the trustee company the benefit of the option so reserved. (4) The trustee company received the benefit of the option as a volunteer. It gave no consideration therefor. It is true that it would have to pay £5,000 to the College if it decided to exercise the option, but this is irrelevant. The option itself is a chose in action relating to the shares which comes into existence at the time at which the option is granted irrespective of whether it is subsequently exercised or not (see *Varty* v. *British South Africa Co.*[1] [1964] 3 W.L.R. 698). If exercised it is converted into a different chose in action—a contract of sale, which upon performance of the contract is converted into a proprietary interest in the shares. (5) The trustee company as a volunteer is presumed to have acquired the benefit of the option upon a resulting trust in favour of the settlor. The presumption of such a resulting trust can be rebutted by proving either (*a*) that the settlor intended the trustee company to hold the option for its own benefit, or (*b*) that the settlor intended the trustee to hold the option upon some other express trusts. (6) The evidence shows that the settlor did not intend to grant the benefit of the option to the trustee company beneficially nor did the trustee company intend to accept it for its own benefit. (7) At no time either when the option was granted or during the relevant years of assessment had either the settlor or the trustee company declared any express trusts upon which the benefit of the option was to be held. (8) The resulting trust of the benefit of the option in favour of the settlor accordingly continued to subsist during the relevant years of assessment. The income from the shares over which the option subsisted was not income from property (that is, the shares) of which the settlor had divested himself absolutely by the settlement. This was the ground upon which Plowman J. decided the case. (9) Alternatively, if upon the true view of the evidence the benefit of the option was granted by the settlor to the trustee company as trustee to be held upon trusts to be subse-

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(1) 42 T.C. 406; [1966] A.C. 381.

A quently declared by the trustee company, it would be open to the trustee company to declare trusts under which the settlor might himself be a beneficiary, and this would be caught by s. 415 (2) of the Income Tax Act 1952. This was the ground upon which the Special Commissioners decided the case.

I agree with Plowman J. that the reasoning summarised in (1) to (8) above is correct. I do not think that it is necessary for the Crown to rely upon s. 415(2),
B except as showing that the reservation by the settlor of a contractual right to recover property which is the subject-matter of a settlement (or any income therefrom), as distinct from the reservation of a strictly proprietorial interest in such property, will prevent it being "property of which the settlor has divested himself absolutely by the settlement", within the meaning of s. 415(1)(*d*).

C Counsel for the taxpayer have valiantly attacked each step in the Crown's chain of reasoning. It has been contended in the first place that the gift of the shares by Mr. Vandervell to the College was an outright gift, that his letter of 14th November 1958 to his agent Mr. Robins operated as an equitable assignment to the College of the whole of his beneficial interest in the shares, and that the grant of the option by the College to the trustee company was an independ-
D ent voluntary act by the College dealing with the shares as its own unencumbered property. These contentions seem to me to fly in the face of the findings of fact by the Special Commissioners. If it was Mr. Vandervell's original intention to transfer the shares to the College without simultaneously obtaining an option in favour of the trustee company, this intention was soon abandoned. It was necessary to Mr. Robins's plans on his behalf for a public flotation of the
E company that control of the shares to be transferred to the College should be recoverable from them by Mr. Vandervell or by the only other large shareholder in the company, the trustee company, whose directors were people who could be expected to act generally in accordance with Mr. Vandervell's "interests and wishes". The letter of 14th November 1958 was not intended by Mr. Vandervell as an equitable assignment of the full beneficial interest in the shares, but as
F authority to his agent to transfer the shares to the College but only in exchange for the option, the need for which Mr. Robins had already explained to the College. The blank transfer of the shares was not handed to the College until it had expressed its willingness to grant the option. The transfer and the draft option deed were handed to the College at the same time and were executed by the College on the same date.

G It is next contended that the trustee company took the option beneficially. This also seems to me to fly in the face of the evidence. The only shareholders and directors of the trustee company were Mr. Robins, Mr. Jobson, who was Mr. Vandervell's solicitor and drafted the option, and Mr. Green, another accountant. If it was ever intended that a company of which Mr. Jobson held one-third of the capital was to hold the option beneficially, it is unlikely that he
H would have drafted the option in favour of that company without suggesting that his client Mr. Vandervell should be separately advised. But the evidence does not rest on inference alone. Mr. Robins, in addition to being a director of the trustee company, was for the purposes of this transaction the *alter ego* of Mr. Vandervell. His intention must, in the circumstances, be regarded as the intention of Mr. Vandervell himself. He gave evidence. Naturally it was
I accepted by the Special Commissioners. They found that :

(Diplock L.J.)

> "The directors and shareholders of the trustee company never considered that the option . . . could be turned to account in such a way as to benefit them personally." A

The word "could" is significant.

Next it is argued that, if it was not intended by the settlor that the trustee company should hold the option beneficially but only as trustee, we are bound as a matter of law to find that it held the option as trustee of the children's B settlement, since that was the only trust of which the trustee company was trustee of which the shares would be an authorised investment. In support of this proposition strong reliance was placed upon In re *Curteis' Trusts* (1872) L.R. 14 Eq. 217; but, with great respect, it does not seem to me that that case lays down any principle of law, except that when a donor is dead and cannot be called as a witness the Court must do its best upon the material available to find C out what his intentions were. In the present case the donor is not dead. Candid evidence of his intention was given by Mr. Robins, to whom the donor had delegated the power of decision. It is clear upon his evidence that the settlor at the relevant time had not determined, nor had the trustee company decided, upon what trusts they would hold the shares if the option were exercised. If at that time the children's settlement was the only trust on behalf of which D the trustee company could exercise the option, they would do so on its behalf, but if by that date there were further settlements of which they were trustee, they would be at liberty to acquire the shares on behalf of any of such other trusts.

The benefit of the option must have been held on behalf of some beneficiary pending its exercise or lapse. Equity abhors a beneficial vacuum. I agree with the learned Judge that, pending a decision as to the trusts upon which the E benefit of the option was to be held, the resulting trust in favour of the settlor continued, and I do not think it matters whether the right to declare such new trusts in the future was retained by the settlor or had been vested in the discretion of the trustee company.

This makes it unnecessary to consider the alternative grounds upon which the Special Commissioners reached their decision. The reason for the troubles F in which the taxpayer finds himself is that his adviser's scheme for benefiting the Royal College of Surgeons largely at the expense of the Revenue, ingenious as far as it went, did not go far enough. The final destiny of the shares, once the College had received its promised benefaction from the dividends, was insufficiently thought out, perhaps because his advisers wished to reserve some liberty for manoeuvre in the event of a public flotation of the company. It has proved G in the result a costly liberty. I would dismiss the appeal.

Willmer L.J.—The argument on this appeal ranged over a very wide field, but in my judgment the case falls to be decided on the short ground on which it was decided by the learned Judge. It was an integral part of the transaction— which it is agreed constituted a "settlement" within the meaning of s. 411 of H the Income Tax Act 1952—that when the 100,000 "A" ordinary shares were transferred to the Royal College of Surgeons an option to repurchase them within five years was reserved to the trustee company. This in my judgment represented something subtracted from Mr. Vandervell's gift to the Royal College. I reject as wholly unrealistic the argument founded on the suggestion that it was the Royal College that gave the option to the trustee company. The I true view is that it was Mr. Vandervell who, as an integral part of the transaction,

A caused the benefit of the option to be vested in the trustee company. The trustee company gave no consideration, but took as volunteers. This on well-established principles gave rise to a rebuttable presumption that they held the benefit of the option on a resulting trust in favour of Mr. Vandervell. To my mind the only real question in the case is whether Mr. Vandervell has succeeded in rebutting this presumption, so that he can truly say that he "has divested B himself absolutely" of the property in the shares. Only so can he avoid being caught by s. 415(1)(*d*) of the Act.

The presumption of a resulting trust could have been rebutted by showing an intention on the part of Mr. Vandervell that the trustee company should take beneficially. It could have been rebutted by showing an intention that the trustee company should hold the benefit of the option on some specific C trust, for instance, the trusts of the children's settlement. At one time or another during the hearing of the appeal arguments in support of each of these alternative, but mutually conflicting, possibilities were presented. Before the learned Judge, and when the appeal was first opened in this Court, the argument was that at the material time nothing else was in contemplation except the trusts of the children's settlement to which the trustee company could have applied the D shares if the option were exercised. Accordingly it was contended, on the authority of In re *Curteis* (1872) L.R. 14 Eq. 217, that a presumption of advancement arose, so that the option should be regarded as held on the trusts of the children's settlement. Later—prompted, I suspect, by certain observations made by members of this Court—the argument was developed that the trustee company should be regarded as taking the option beneficially.

E Whatever the attractions of these alternative arguments, neither of them can in my judgment prevail in the face of the findings of the Special Commissioners. One thing which is abundantly clear is that Mr. Vandervell personally never formed any intention at all. His intention must be taken as that of his adviser, Mr. Robins, to whom he had given *carte blanche*, and who was himself a director of the trustee company. As to Mr. Robins's intentions we are, I F think, concluded by the finding of the Special Commissioners as set out in para. 9(3) of the Case Stated, as follows:

> "The evidence of Mr. Robins on this point (which we accepted) was that if, when the time came to exercise the option, the trustee company should have been trustee of other settlements besides the 1949 children's settlement, the directors of the trustee company would have considered G the rights and interests of the beneficiaries of such other settlements before deciding for what purpose to exercise the option."

That this finding was abundantly justified is shown by the letters of 12th January and 20th June 1961, which make it clear that even as late as 1961 no decision had yet been taken as to the trusts on which the shares would be held if the option were exercised. The learned Judge, having quoted the finding of the H Special Commissioners as set out above, went on to say[1]:

> "That can only be on the basis that at the time the option was given and at the time when the dividends in question were paid it had not been decided what the ultimate fate of the option was to be. If I may use the expression, it seems to me the option was really in cold storage until a decision was taken as to what was ultimately to happen to it."

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[1] Page 535 *ante*.

(Willmer L.J.)

This description in my view exactly fits the situation as it existed at the time when the dividends in question were paid. This being so, it is in my judgment quite impossible to contend that the presumption of a resulting trust in favour of Mr. Vandervell was rebutted. Accordingly I agree with the conclusion of the learned Judge that Mr. Vandervell cannot be said to have divested himself absolutely of the property comprised in the settlement, so that he is caught by s. 415(1)(*d*) of the Act.

That is sufficient to dispose of the case, and in the circumstances I do not think it necessary to say anything further with regard to the numerous other points that were canvassed before us, beyond expressing my agreement with the views expressed by Diplock L.J. I agree that the appeal should be dismissed.

Harman L.J.—The claim of the Crown in the present case sounds at first hearing extremely hard. Mr. Vandervell has made a large gift in favour of the Royal College of Surgeons in response to their appeal. It is now claimed that notwithstanding this gift he must pay surtax on the income which was the subject matter of the gift. I suppose, too, that the gift is to some extent defeated because if the income is to be treated as the income of Mr. Vandervell and no other person it cannot be the income of the charity, and therefore the charity will not be able to claim repayment of the income tax borne by the donor.

A further examination of the facts, however, leads me inevitably to the conclusion that the learned Judge was right, and this because the plan was not sufficiently thought out by Mr. Vandervell's advisers, to whom he gave absolute authority and whose acts must be treated as his.

It has apparently been a not uncommon method in recent years for rich men making gifts to bodies like the Royal College of Surgeons to do so by transferring to the body for a temporary period a block of shares the dividends upon which will provide the gift, and to arrange that when this has been accomplished the shares should be transferred to a third person whom the original transferor may wish to be the owner of them. It is, however, essential for the success of such a scheme that this third person must become beneficial owner of the shares without any obligation or even intention to re-vest them in the original donor or benefit him in any way out of them. It would not, I think, be fatal to such a scheme if the third party were, for instance, a son of the donor who happened thereafter to die intestate, so that the donor became re-possessed of the shares as his next-of-kin, but short of some such accident as that, any circumstance which resulted in the shares or some interest in them reverting to the settlor would be fatal to the scheme. Section 415 of the Income Tax Act 1952 was specially designed for this kind of purpose, and under that section the income in order to be treated as not the income of the settlor must be income from property of which he had divested himself absolutely. The only question in this case, I think, is whether that event has here come about.

The key to the situation is, in my judgment, the fact that the bulk of Mr. Vandervell's great fortune was tied up in a private company and would be unrealisable on his death for the payment of estate duty, having no market quotation. It was, therefore, in the view of Mr. Vandervell's advisers, essential to envisage the conversion of the company into a public company and its flotation on the market, and with this in view to maintain control over the various classes of shares. For this purpose the first step was to recover the 100,000 "A" shares vested in the National Provincial Bank Ltd. as collateral security for the alimony of Mr. Vandervell's former wife. This was successfully

(Harman L.J.)

A accomplished, and the bank, declaring itself a bare trustee for Mr. Vandervell, executed a blank transfer of the shares. At about the same time Mr. Vandervell was minded to make this large present to the Royal College, and it seemed to his advisers that these shares might very well be used for this purpose. The structure of the company was such that the value of these shares depended entirely, at any rate while the company was a going concern, on the wishes of B Mr. Vandervell himself. If he chose to withhold dividends they had no rights: he could, on the other hand, divert any portion of the profits, after satisfying preference shareholders, as dividends on this class of shares.

A further consideration was that by paying large dividends on these shares it might be possible to avoid a direction by the Revenue under s. 245 of the Income Tax Act 1952 to treat the company's income as that of its shareholders C for surtax purposes. Mr. Vandervell was himself willing to make over this block of shares to the College absolutely, but he entrusted all the arrangements to his advisers, who were not willing to relinquish all control of a block of shares which might in outside hands be an obstacle or at least an inconvenience in the event of a public flotation. It was therefore, on Mr. Vandervell's behalf, made a condition of the transfer of the shares to the College that it should grant an D option of repurchase. This the College was willing to do upon the footing that it should not be exercised until £145,000 had been paid by way of dividends and that it should then be paid £5,000 on the exercise of the option, this making up the proposed gift of £150,000. There is no room for the suggestion that the grant of the option was the spontaneous gift of the College: it was, as the evidence clearly shows, an integral condition of the transfer of the shares to it.

E The only, or at least the main, question in the case is in whose favour did the option operate? In favour on the face of it of the trustee company, and that body, being the nominee of Mr. Vandervell, who was absolute owner of the shares, must either take beneficially or upon some trust or other. If the trustee company takes beneficially with no conditions attached, then I think the Crown would fail. It was argued for the taxpayer that, even though it was clear on the F evidence that the directors of the trustee company never supposed that that company, of which they were the only shareholders, was beneficially entitled to the shares, that might be the result. I am of opinion this cannot be so unless that were the intention of Mr. Vandervell also, for he was the owner. The trustee company was taking, so far as he was concerned, as a volunteer, and therefore in the absence of an intention of a gift by him there would be no passing G of the beneficial interest. It seems, however, clear on the facts that neither he nor his advisers ever intended anything of the sort, and it follows that the trustee company cannot take beneficially but must hold on some trust or other.

On that footing it was argued that there was a trust for the children's settlement, but that also on the facts is impossible, it being argued that the trustee company was at liberty to hold the benefit of the option either for the H children's settlement or the proposed employees' fund or any other trust the settlor might see fit to set up within the next five years. The trust was therefore in favour of such objects as Mr. Vandervell might decide. Within the years with which we are concerned here no decision was come to, and as there must be a beneficial owner of some sort he will be the donor until replaced. It follows that Mr. Vandervell himself remained the beneficial owner of the benefit of the I option at the relevant time. It follows again that he had not divested himself absolutely of the shares, and in the end I think this is a plain case.

(Harman L.J.)

I ought perhaps to deal with one or two outside points. First, in my judgment the so-called equitable assignment was nothing of the kind. However informal such a document may be, it must show an intention to transfer something to somebody and this letter shows nothing of the sort. A

Secondly, I reject the Crown's first argument, which was that, having regard to s. 53(1)(*c*) of the Law of Property Act 1925, no beneficial interest in the shares ever passed to the College at all in the absence of a writing signed by the donor. In my judgment s. 53(1)(*c*), in dealing with dispositions of an equitable interest, only applies where the disposer is not also the controller of the legal interest. Here the bank had a bare legal interest so long as they were on the register. Mr. Vandervell was the absolute beneficial owner. He could direct the bank to transfer the shares to him and could then pass them to the College without any instrument except a share transfer. I am of opinion that he could pass his equitable interest to the College by directing the bank to fill in a transfer in the name of the College without the intervening step. Any other result would be ridiculous, and I do not believe that s. 53(1)(*c*) has such an effect. B C

The Crown's argument depends, so far as authority goes, on a passing observation of Wilberforce J. in *Commissioners of Inland Revenue* v. *Hood Barrs* (*No*. 2) 41 T.C. 339, at page 361. It does not form the ground of his decision and is not binding on us. It is in these terms: D

> "Now I pass to the point which is based upon Section 53 of the Law of Property Act, 1925. That point is this. Sub-section (1)(*c*) says that, in order that there should be a disposition of an equitable interest, there has to be a document signed either by the owner of the equitable interest or by an agent authorised by him in writing. Now, it has been fully established as a result of further investigation by the Commissioners that no document which would be sufficient to transfer the subsisting equitable interest of Mr. Hood Barrs to any other person existed; there was no document executed by him, and he gave no authority to any other person; nor did any other person on his behalf purport to transfer his equitable interest to any other person. So one has these facts: that, on 16th September, 1953, if one accepts, as I have accepted, the finding by the Special Commissioners, the shares were in the name of Stella but the equitable interest was in Mr. Hood Barrs; and no document has been executed by him or by any agent on his behalf transferring that equitable interest to any other person. So it seems that that effectively precludes any argument that the equitable interest of Mr. Hood Barrs has, after 16th September, 1953, passed to his daughters. However, the Crown say that Section 53 does not prevent Mr. Hood Barrs's equitable interest having passed at any rate to Christine. The argument is this: that the Section applies only to cases where a subsisting equitable interest is sought to be transferred to some other intended equitable owner, and that it does not apply to a case where the equitable owner gives a direction to the legal owner of the property, in this case to Stella as regards the shares, to transfer the whole property in the shares, legal and equitable, to another person—and that that is what we have here. I find myself quite unable to accept that argument. It seems to me that the fallacy in it is this: that transfer of a legal estate which is subject to some equity does not get rid of the equitable interest in the property except in one case—namely, where it is made to a purchaser for value without notice. That, of course, is not what we have here. The concurrence of the equitable owner in the transfer of a legal estate to another person not a E F G H I

A purchaser for value without notice cannot, as I think, affect the position; the equity remains. What is said is that if the equitable owner intends that his equitable interest shall pass to the new legal owner, or shall disappear in favour of the new legal owner when the legal estate is transferred, then his equitable interest either goes with the legal interest or disappears—at any rate, he cannot enforce any equitable interest against the legal owner. B I for my part doubt whether that can possibly be so as a matter of law, unless there is something in writing signed by the equitable owner."

I do not accept this suggestion. It would mean that an owner, for instance, of shares registered in the names of bank nominees could not make a voluntary transfer of the beneficial interest simply by instructing the bank nominee to execute a transfer unless he accompanied it by a written instrument operating C as an equitable assignment. I do not think there is any authority constraining us to this exceedingly inconvenient conclusion.

I agree with my brothers about the result of this appeal.

Goff Q.C.—My Lord, I ask that the appeal be dismissed with costs.

Willmer L.J.—Yes, I think that must follow.

D **Bathurst Q.C.**—My Lord, may I have leave to appeal to the House of Lords? As your Lordship sees, there is a great deal of money involved in this actual case, but there is far more than that. There is this situation, that under the Commissioners' decision all they decided was that this income must be deemed to be the income of Mr. Vandervell. What Plowman J. and your Lordships have decided is that the option itself is still held on a resulting trust for E Mr. Vandervell. It is a far more serious matter for him, and it involves income tax and surtax problems and, indeed, may very well involve estate duty problems; so that the distinction between what your Lordships and Plowman J. have decided—the grounds on which your Lordships have decided—and the Special Commissioners is of great importance. There is a considerable amount of money involved, so on those grounds I ask your Lordships' leave to appeal F to the House of Lords.

Harman L.J.—Mr. Bathurst, do you say that the ground on which the Commissioners decided would be less damaging to you?

Bathurst Q.C.—Yes. As your Lordship sees, all that the Commissioners decided under s. 415, having regard to subs. (2), was that this income was to be G deemed to be treated as Mr. Vandervell's and nothing else. That is all they decided. Plowman J. and your Lordships have decided that the option always belonged to Mr. Vandervell. It involves this problem, of course: what is the position now? There is the option belonging to Mr. Vandervell which is being transferred to the children's trust. If he has that option annulled it makes it far more difficult, particularly over estate duty.

H **Harman L.J.**—You do not get a transfer to the children's trust with his approbation? He could not resile from that.

Bathurst Q.C.—He can no doubt approve it now. Of course, it is all a question of dates. Mr. Vandervell is not a young man and there will be an estate duty problem.

I **Diplock L.J.**—Five years—in 1961 it was in fact exercised. That is another two years, perhaps.

Bathurst Q.C.—Of course, I do not know whether the Crown accept that position, that when the option was exercised there must be an implied agreement on the part of Mr. Vandervell. Of course, what happened actually in 1961 was that the trustees were advised that they had the right to use the money from the children's settlement in exercising the option. But of course it is open to the Crown to say, I suppose, even now, that possibly by Mr. Vandervell providing £5,000 he could get these shares back again. Of course, if the Crown accepts that it was done, that is another matter.

Goff Q.C.—I have no instructions on that matter at the moment, but if it became relevant the Board would have to consider it. I am not in a position to say anything one way or the other.

Bathurst Q.C.—Of course it is a very serious matter. Your Lordships have decided this question—I quite appreciate the view that your Lordships have taken—on the facts found by the Commissioners. Of course, the view one takes of those facts depends very largely on the position of Mr. Robins. Mr. Robins had two functions. He was Mr. Vandervell's adviser and he was also one of the directors of the trustee company, and when he went to the Royal College of Surgeons and asked them to grant this option it is possible that he was acting on behalf of the trustee company. All Mr. Vandervell was saying, as your Lordship remembers, was "My intention is to give these shares to the College. If you want to make some arrangements about an option, by all means make them", but behind that was Mr. Vandervell's idea that he had got rid of the shares altogether. So it does depend to some extent on what view one takes of the capacity in which Mr. Robins was acting. In view of the amount involved and the possible implication of estate duty and income tax and surtax in the future, quite apart from the amounts involved in this case, which are considerable, I would ask your Lordships for leave to appeal to the House of Lords.

Willmer L.J.—Mr. Goff, do you desire to be heard on this?

Goff Q.C.—No. I desire to leave the matter in your Lordships' hands.

Willmer L.J.—We shall grant leave to appeal to the House of Lords.

Bathurst Q.C.—I am much obliged.

The taxpayer having appealed against the above decision, the case came before the House of Lords (Lords Reid, Pearce, Upjohn, Donovan and Wilberforce) on 15th, 16th, 20th and 22nd June 1966, when judgment was reserved. On 24th November 1966 judgment was given in favour of the Crown, with costs (Lords Reid and Donovan dissenting).

The following cases were cited in argument on the resulting trust issue in addition to those referred to in Lord Upjohn's speech: *Cook* v. *Hutchinson* (1836) 1 Ke. 42; *Merchant Taylors' Co.* v. *Attorney General* (1871) 6 Ch. App. 512; *Cook* v. *Fountain* (1676) 3 Swan. 585; *Muggeridge* v. *Stanton* (1859) 1 De G. F. & J. 107; *Grey* v. *Commissioners of Inland Revenue* [1960] A.C.1; *Commissioners of Inland Revenue* v. *Hood Barrs* (No. 2) (1963) 41 T.C. 339; *Shephard* v. *Cartwright* [1955] A.C. 431; In re *Flower's Settlement Trusts* [1957] 1 W.L.R. 401.

A The Court of Appeal having found against the Crown on the issue concerning s. 53(1)(*c*) of the Law of Property Act 1925, argument on that issue was opened before the House of Lords by Counsel for the Crown.

([1]) *E. I. Goulding Q.C.*, *J. Raymond Phillips* and *J. P. Warner* for the Crown. Section 53(1)(*c*) of the Law of Property Act 1925 operates where there is a subsisting division of the legal ownership and the equitable ownership of B property. That situation is to be found here from a perusal of the deed of 5th November 1958. The Appellant has an equitable interest subsisting in his favour. If the Appellant subsequently divested himself of this equitable interest, it must have been by his own act or through that of his agent.

Where a person to whom a known trustee offers property for sale has notice of the trust, the prospective purchaser must ascertain whether the trustee C has power to overreach the interests of the beneficiaries. If there is such power, then no consents are necessary, but if there is not then the consent of the beneficiaries must be obtained. In no sense do trustees when they exercise a power of sale and repurchase dispose of equitable interests.

The following are examples of dispositions of equitable interests where one person owns the legal estate and another the equitable interest. There are D three different sets of circumstances to consider: (*a*) if without disturbing the legal ownership the equitable owner causes the equitable interest to pass to a third party (i) by executing a paper to the intended beneficiary in the form "I hereby make over to you . . ." or (ii) by writing to the trustee directing him to hold for a named party. *Grey* v. *Commissioners of Inland Revenue*([2]) is authority for the proposition that it matters not which method is adopted. (*b*) A release. E If the equitable owner says to the legal owner "I will give you my interest in the property," that also is a disposition of the equitable interest. (*c*) The present case and *Commissioners of Inland Revenue* v. *Hood Barrs* (*No.* 2)([3]). If the equitable owner causes the legal owner to transfer the legal interest to a third party at the same time authorising the third party to hold the property for his own benefit. Here also there is a disposition and s. 53 requires a writing. The F writing may be addressed to the legal owner or to the new owner. The writing on its true construction must be a making over of the equitable interest.

As to the relevant authorities, *Grey* v. *Commissioners of Inland Revenue* decided that in s. 53(1)(*c*) the word "disposition" must be given the wide meaning which it bears in ordinary usage. It follows that if the Appellant caused his equitable interest to cease to exist he did "dispose" of it. It is conceded that in G *Oughtred* v. *Commissioners of Inland Revenue*([4]) it was not necessary for the House of Lords to come to a final view of s. 53(1)(*c*), but there was in that case, as in *Grey*, the recognition that any act whereby the equitable owner gets rid of his equitable interest so that it is no longer in him is a "disposition" thereof.

The observations of Wilberforce J. in *Commissioners of Inland Revenue* v. *Hood Barrs* (No. 2)([5]) are not obiter but are an alternative ground of decision. H As to Diplock L.J.'s observations([6]) thereon, his statement that *prima facie* a transfer of the legal estate carries with it the absolute beneficial interest in the property transferred, this only applies where there is a transfer for value or where there is a gratuitous transfer to the donor's wife or child, in which case the presumption of advancement applies. Where, however, as here, the bank has the legal interest and the Appellant has a separate equitable interest, the Appel- I lant cannot dispose of his interest without a writing.

([1]) Argument reported by J. A. Griffiths, Esq., Barrister-at-law. ([2]) [1960] A.C.1.
([3]) (1963) 41 T.C. 339. ([4]) [1960] A.C. 206. ([5]) 41 T.C. 339, 361-2. ([6]) Page 541 *ante*.

If the above contention be rejected, then there would be a distinction difficult to justify between the following two examples. A, the equitable owner of shares, says to his trustee: "transfer these shares to B." That, in Diplock L.J.'s view, would transfer the legal and equitable ownership in the shares to B. But if A says to his trustee: "hold these shares on trust for B", there is no transfer without a writing: *Grey's* case(1). A

As to Harman L.J.'s judgment (2), if the object of the Legislature is to prevent disputes arising over consents relating to important transfers of property, there is nothing ridiculous in enacting that such transfers should be evidenced in writing. B

Sir Lionel Heald Q.C., *B. L. Bathurst Q.C.* (*Viscount Bledisloe*) and *W. T. Elverston* for the Appellant. The Appellant was the absolute owner of the 100,000 "A" ordinary shares in Vandervell Products Ltd. The bank as a bare trustee held these shares for him as he should direct. In the circumstances no separate transfer of the equitable interest in the shares was necessary. If a gift is made with a clear intention of gift, then the equitable interest goes with the legal interest, and therefore, as the Court of Appeal has held, the question of the applicability of s. 53(1)(*c*) of the Act of 1925 never arises at all. The view of Diplock L.J.(3) that "*Prima facie* a transfer of the legal estate carries with it the absolute beneficial interest in the property transferred," is adopted. Reliance is also placed on the observations of Harman L.J. There was here no place for the separate transfer of the beneficial interest in the shares. C D

Reference was also made to *Drury* v. *Rickard*(4).

Lord Reid—My Lords, this case provides yet another illustration of the folly of entering into an important transaction of an unusual character without first obtaining expert advice regarding tax liabilities which it may create. In 1958 the Appellant decided to give £150,000 to the Royal College of Surgeons to found a chair of pharmacology. But by reason of the method by which this gift was made additional assessments to surtax amounting to £250,000 have been made on the Appellant for the years 1958–59 and 1959–60, and if this appeal fails there is a possibility of further additional assessments. E F

The Appellant is chairman, managing director and principal shareholder of a very successful engineering company. The capital structure of the company is unusual. Besides certain preference shares there were three classes of ordinary shares: first, there were 500,000 ordinary shares, substantially all of which were owned by the Appellant; secondly, there were 100,000 "A" ordinary shares, held by a bank as trustee for the Appellant when this gift was made, and thirdly, there were 2,600,000 "B" ordinary shares, of which over 2,000,000 were held by Vandervell Trustees Ltd. as trustees of a family settlement. Only the first of these three classes of shares carried any voting rights, but the articles permitted the company (which was controlled by the Appellant) to resolve that the whole of the profit to be distributed in any year might be paid as dividends on any one of these three classes of shares to the exclusion of the other two. G H

The Appellant decided to make this gift to the Royal College of Surgeons by causing the bank to transfer to them the 100,000 "A" ordinary shares and then causing the company to declare dividends on these shares amounting to £150,000. But then it occurred to his financial adviser, Mr. Robins, that if the

(1) [1960] A.C. 1. (2) *See* page 548 *ante*. (3) *See* page 541 *ante*. (4) (1899) 63 J.P. 374, 376.

A Appellant's company were to be floated as a public company there might be difficulties if these shares remained registered in the name of the College, so he advised that there should be an option to acquire these shares from the College after they had received the £150,000 in dividends. The Appellant agreed to this and gave Mr. Robins *carte blanche* to make whatever arrangements he thought B fit. The Appellant did not want to have these "A" ordinary shares because of possible estate duty questions on his death, and he wished to make the gift by causing the company to pay it in dividends because of the possibility of surtax directions if the company did not distribute enough of its profits. It is clear that both he and Mr. Robins intended that he should have no further rights to or in respect of the shares or the dividends.

C Many of the arrangements were made orally. The only relevant documents are (1) a letter of 14th November 1958 from the Appellant to Mr. Robins, in which he said:

> "I have decided to give to the College the 100,000 'A' shares in Vandervell Products Ltd.";

(2) a letter of 19th November from Mr. Robins's firm to the College in these D terms:

> "We have pleasure in advising you that our client Mr. G. A. Vandervell has, in response to your Appeal, decided to make available to you the sum of £150,000 (one hundred and fifty thousand pounds) to establish and maintain a Chair in Pharmacology. You will receive between now and 31st March 1959 Dividends totalling £145,000 Gross on Shares in Vander- E vell Products Ltd. which our client now owns and will transfer to you. The balance of £5,000 will be paid to you when the option to purchase the Shares is exercised";

(3) a transfer of the shares by the bank to the College dated 26th November; (4) an option deed of 1st December granted by the College, giving to Vandervell Trustees Ltd. an option to purchase the shares for £5,000, and (5) a letter of F 11th October 1961 from their agent to the College, exercising the option and enclosing £5,000.

The assessment was made under s. 415 of the Income Tax Act 1952. That section provides that, where income arising under a settlement is payable to a person other than the settlor, then, unless it is income from property of which the settlor has divested himself absolutely by the settlement, the income shall G be treated for the purposes of surtax as the income of the settlor. Section 411 provides that "settlement" includes any agreement or arrangement. It is not disputed that there was a settlement within the meaning of this section. It is found in the Case Stated that it consisted of the transfer of the shares, the granting of the option and the declaration of the dividends received by the College. The question at issue is whether the Appellant by the settlement divested himself H absolutely of the shares which were transferred to the College. The Crown maintain that he did not, for two reasons: in the first place, they found on s. 53 of the Law of Property Act 1925; and secondly, they maintain that, when Vandervell Trustees Ltd. received the option from the College, they held it on a resulting trust for the Appellant. The Court of Appeal rejected the first of these grounds, but held that there was a resulting trust and therefore the assess- I ment was validly made under s. 415.

I agree that the Crown's first argument is unsound. But their second argument raises questions of difficulty. It is clear that the Appellant did not

(Lord Reid)

wish to retain any right of any kind with regard to these shares, but he gave full authority to Mr. Robins to make the necessary arrangements. It is, I think, equally clear that Mr. Robins, in making the arrangements, did not intend that any right in respect of the shares should be reserved to the Appellant. But the argument is that, whatever he intended, the result of what he did in law caused Vandervell Trustees Ltd. to hold the option given to them on a resulting trust for the Appellant. So it is necessary to determine precisely what was the nature of this company's right to the option.

The law with regard to resulting trusts is not in doubt. It is stated conveniently in Underhill on Trusts, 11th edn., at page 172, and in Lewin on Trusts, 16th edn., at page 115. Underhill says:

> "When it appears to have been the intention of a donor that the donee should not take beneficially there will be a resulting trust in favour of the donor".

Lewin says that the general rule is that whenever

> "it appears to have been the intention of a donor that the grantee, devisee or legatee was not to take beneficially"

there will be a resulting trust. The basis of the rule is, I think, that the beneficial interest must belong to or be held for somebody: so if it was not to belong to the donee or be held by him in trust for somebody it must remain with the donor. The only difficulty is with regard to the word "beneficially". The argument for the Crown is that there was no intention that the trust company or any of its three directors and shareholders should gain financially from the option and therefore the company was not intended to take beneficially. But it is, I think, quite common for a testator to give to a legatee an absolute and unfettered right to property, although his hope and belief is that the legatee will not retain it for his own benefit but will use it in a manner which he thinks is in accordance with the wishes of the testator. In such a case the legatee takes the property beneficially. There is no resulting trust. If the legatee chooses to disregard any moral obligation there may be and put the property in his own pocket he is free to do so, and the testator's representatives have no legal remedy. In a popular sense the testator may be said to trust the legatee, but there is no trust in law. The same can apply to a donation *inter vivos*, and I think that that is what happened in this case.

It is true that the Appellant's case has hitherto been based on other and to my mind unsound arguments. But I do not see anything to prevent this point from being taken now, and it would be rather surprising if the Crown sought to take a technical objection to its being considered. On the face of the documents the trustee company took an absolute and unfettered right to the option, and therefore the existence of a resulting trust must depend on inference from the facts. As the option was part of the settlement or arrangement, I shall assume that it was provided by the Appellant. Then the question is—can it be inferred that he, or Mr. Robins as his agent, did not intend that the trustee company should take it "beneficially" in the sense which I have explained: or is the correct inference that he, or Mr. Robins, intended that the trustee company, or its three directors, should have the right to decide how to use it and what to do with the shares if the option was exercised? I find no difficulty in holding that the latter is the correct inference from the facts set out in the Case Stated. The Crown found on para. 9(2) of the Case:

(Lord Reid)

A "The directors and shareholders of the trustee company never considered that the option . . . could be turned to account in such a way as to benefit them personally."

They emphasise the word "could" in this finding as meaning that the directors and shareholders recognised that they had no legal right to do this. If the word had been "would" there would be no difficulty, and the next sub-paragraph B shews that the directors thought that they and not the Appellant had the right to decide on what trusts they should hold the shares if the option was exercised. The directors were not lawyers and clearly knew nothing about the legal position. But in any event it is the intention of the donor and not the belief of the donee that matters.

There is nothing in the facts found to suggest that Mr. Robins intended C that the Appellant should have any legal control over the option or the way in which it was exercised. And I see nothing surprising in Mr. Robins being content to rely on his belief that the directors of the trust company would act in the best interests of the Appellant and his company. As trustees of the family settlement they already held over 2,000,000 shares in the Appellant's company over which he had no control. But clearly it was in the interests of the beneficiaries D of this settlement that the trustees should co-operate in everything which would be beneficial to the Appellant's company. So it was reasonable to expect that the trust company would co-operate as regards these shares, and, that being so, it was equally reasonable to expect that that company would co-operate in regard to the shares to be acquired by the exercise of the option. There would have been no point in the Appellant retaining legal control of these 100,000 E shares when he had no control over the other 2,000,000, and I can find no ground for holding that there was any intention to limit the legal right of the trust company to deal with the option or the shares acquired by its exercise in whatever way they might think fit. If that is right, then there can be no resulting trust.

I would allow this appeal.

F **Lord Pearce**—My Lords, I agree with the opinion of my noble and learned friend Lord Upjohn, and would dismiss the appeal.

Lord Upjohn—My Lords, the facts are fully set out in the Case Stated and in the judgments in the Courts below, and I shall be brief in my reference to them. The claim by the Crown against the Appellant is founded upon the provisions of ss. 404 and 415 of the Income Tax Act 1952, but in argument has G turned upon s. 415(1). If and so far as the Commissioners determined the matter under s. 415(2) by giving an impossibly wide construction to the concluding words thereof—"payable to him or applicable for his benefit in any circumstances whatever"—the Crown do not seek to support it. The whole question, as Counsel for the Appellant submitted, depends upon the application of principles of equity to the facts and inferences from the primary facts which H should properly be drawn in this case.

There are two points to be considered, completely different, each in a watertight compartment. On the first point it is not necessary to do more than state that at the beginning of the relevant history the Appellant was beneficially entitled to 100,000 "A" ordinary shares in Vandervell Products Ltd. (a company owned and controlled by him through a holding of other ordinary shares) I which stood in the name of the National Provincial Bank Ltd. as bare trustee for him. In September 1958 the Appellant directed the bank to transfer those shares

(Lord Upjohn)

to the Royal College of Surgeons with the intention of passing to the College not only the legal but also the beneficial interest in them. I can ignore for the moment the fact that contemporaneously the College gave an option to a third party to acquire these shares for £5,000. In the court of first instance it was contended that such direction was given in writing by the Appellant, but this has now rightly been abandoned. The transfer to the College was effected by the bank on a common form transfer (pursuant to article 91 of the company's articles of association) in consideration of 10*s*. and the College were duly registered as holders in the books of the company. A B

The question is whether, notwithstanding the plainly expressed intention of the Appellant by himself or his agents, the absence of writing prevented any equitable or beneficial interest in the shares passing to the College, so that, contrary to his wishes and understanding, they remained bare trustees for him. This depends entirely upon the true construction of s. 53(1)(*c*) of the Law of Property Act 1925, which the Crown maintain makes writing necessary to pass the beneficial interest. This section was generally thought to re-enact s. 9 of the Statute of Frauds and that section had never been applied to a trust of an equitable interest of pure personalty. Before the cases of *Grey* v. *Commissioners of Inland Revenue* [1960] A.C. 1 and *Oughtred* v. *Commissioners of Inland Revenue* [1960] A.C.206, both in your Lordships' House, this argument would have been quite untenable. It was shown in those cases that the Law of Property Act 1925 was not re-enacting s. 9 but that it had been amended by the Law of Property Act 1924. The relevant words of s. 53 are: C D

> " . . . 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 . . ." E

Those words were applied in *Grey* and *Oughtred* to cases where the legal estate remained outstanding in a trustee and the beneficial owner was dealing and dealing only with the equitable estate. That is understandable; the object of the section, as was the object of the old Statute of Frauds, is to prevent hidden oral transactions in equitable interests in fraud of those truly entitled, and making it difficult, if not impossible, for the trustee to ascertain who are in truth his beneficiaries. But when the beneficial owner owns the whole beneficial estate and is in a position to give directions to his bare trustee with regard to the legal as well as the equitable estate, there can be no possible ground for invoking the section where the beneficial owner wants to deal with the legal estate as well as the equitable estate. F G

I cannot agree with Diplock L.J. that *prima facie* a transfer of the legal estate carries with it the absolute beneficial interest in the property transferred: this plainly is not so, e.g., the transfer may be on a change of trustee; it is a matter of intention in each case. But if the intention of the beneficial owner in directing the trustee to transfer the legal estate to X is that X should be the beneficial owner, I can see no reason for any further document or further words in the document assigning the legal estate also expressly transferring the beneficial interest; the greater includes the less. X may be wise to secure some evidence that the beneficial owner intended him to take the beneficial interest in case his beneficial title is challenged at a later date, but it certainly cannot, in my opinion, be a statutory requirement that to effect its passing there must be some writing under s. 53(1)(*c*). Counsel for the Crown admitted that, where the legal and beneficial estate was vested in the legal owner and he desired to transfer the whole H I

A legal and beneficial estate to another, he did not have to do more than transfer the legal estate and he did not have to comply with s. 53(1)(*c*); and I can see no difference between that case and this.

As I have said, that section is, in my opinion, directed to cases where dealings with the equitable estate are divorced from the legal estate, and I do not think any of their Lordships in *Grey*(1) and *Oughtred*(2) had in mind the case B before your Lordships. To hold the contrary would make assignments unnecessarily complicated; if there had to be assignments in express terms of both legal and equitable interests that would make the section more productive of injustice than the supposed evils it was intended to prevent. I think the Court of Appeal reached a correct conclusion on this point, which was not raised before Plowman J.

C I turn, then, to the second point.

My Lords, we have had much argument on the law of resulting trusts. I do not think that the principles of law to be applied give rise to any difficulty or are in doubt (except possibly as to their application to an option to purchase). I believe all your Lordships and the Judges in the court below are at one upon the general principles. The difficulty, and it is very great, lies in the application D of those well-settled principles to the facts of the case.

So I will be as brief as I can upon the principles. Where A transfers, or directs a trustee for him to transfer, the legal estate in property to B otherwise than for valuable consideration, it is a question of the intention of A in making the transfer whether B was to take beneficially or on trust and, if the latter, on what trusts. If, as a matter of construction of the document transferring the legal E estate, it is possible to discern A's intentions, that is an end of the matter and no extraneous evidence is admissible to correct and qualify his intentions so ascertained. But if, as in this case (a common form share transfer), the document is silent, then there is said to arise a resulting trust in favour of A. But this is only a presumption and is easily rebutted. All the relevant facts and circumstances can be considered in order to ascertain A's intentions with a view to F rebutting this presumption. As Lindley L.J. said in *Standing* v. *Bowring* (1885) 31 Ch.D. 282, at page 289:

> "Trusts are neither created nor implied by law to defeat the intentions of donors or settlors; they are created or implied or are held to result in favour of donors or settlors in order to carry out and give effect to their true intentions, expressed or implied."

G The law was well stated by Mellish L.J. in *Fowkes* v. *Pascoe* (1875) 10 Ch. App. 343, at page 352:

> "Now, the Master of the Rolls appears to have thought that because the presumption that it was a trust and not a gift must prevail if there were no evidence to rebut the presumption, therefore when there was evidence to rebut the presumption he ought not to consider the probability or im- H probability of the circumstances of the case, and whether the presumption was really true or not, but ought to decide the case on the ground that the evidence of Pascoe and his wife taken alone was not satisfactory. But, in my opinion, when there is once evidence to rebut the presumption, the Court is put in the same position as a jury would be, and then we cannot give such influence to the presumption in point of law as to disregard the

(1) [1960] A.C. 1. (2) [1960] A.C. 206.

(Lord Upjohn)

> circumstances of the investment, and to say that neither the circumstances nor the evidence are sufficient to rebut the presumption." A

James L.J. in the same case, at page 349, also pointed out in effect that it was really a jury matter, on the basis, I may add, of weighing the evidence on the balance of probabilities. A very good example of this is to be found in In re *Curteis' Trusts* (1872) L.R. 14 Eq. 217, where Bacon V.C., without any direct evidence as to the intention of the settlor, drew a commonsense deduction as to B what he must have intended. In reality, the so-called presumption of a resulting trust is no more than a long stop to provide the answer when the relevant facts and circumstances fail to yield a solution.

But the doctrine of resulting trusts plays another very important part in our law and, in my opinion, is decisive of this case. If A intends to give away all his beneficial interest in a piece of property and thinks he has done so, but C by some mistake or accident or failure to comply with the requirements of the law he has failed to do so, either wholly or partially, there will, by operation of law, be a resulting trust for him of the beneficial interest which he has failed effectually to dispose of. If the beneficial interest was in A, and he fails to give it away effectively to another or others or on charitable trusts, it must remain in him. Early references to equity, like nature, abhorring a vacuum are delightful D but unnecessary. Let me give an example close to this case. A, the beneficial owner, informs his trustees that he wants forthwith to get rid of his interest in the property and instructs them to hold the property forthwith upon such trusts as he will hereafter direct: that beneficial interest, notwithstanding the expressed intention and belief of A that he has thereby parted with his whole beneficial interest in the property, will inevitably remain in him, for he has not given the E property away effectively to or for the benefit of others. As Plowman J. said([1]):

> "As I see it a man does not cease to own property simply by saying, 'I don't want it'. If he tries to give it away the question must always be, has he succeeded in doing so or not?"

I must now apply these really elementary principles to the facts of this case. The College were in terms the grantors of the option dated 1st December 1958 F to Vandervell Trustees Ltd. (the trustee company) enabling them to exercise an option within five years to acquire these 100,000 "A" shares in Vandervell Products Ltd. for £5,000, but I for my part cannot doubt that the real grantor was the Appellant. True, he himself wanted to give the whole beneficial interest in the shares to the College, and indeed thought he had done so. It was Mr. Robins who, for the reasons set out in para. 9(1) of the Case Stated, introduced G the idea of an option. So on 5th November 1958 Mr. Robins asked the secretary of the College whether the College would be prepared to give this option to the trustee company. But this question was a matter of courtesy; at this time the College had no legal or beneficial interest in the shares and they could only comply with it. They did so in due course, and in fact were not in the least degree interested in the ultimate fate of the shares after they had received the promised H dividends. But in law I cannot doubt that it was the Appellant, acting by his agent, Mr. Robins, who procured the College to grant the option to the trustee company.

In the courts below it seems to have been assumed that in these circumstances the trustee company, unless they took beneficially, held the option to

([1]) *See* page 535 *ante*.

A acquire the shares upon a resulting trust for the Appellant. We are, of course, only concerned with the option and not with its ultimate exercise. My Lords, I am by no means convinced that any such presumption arises in the case of an option to purchase. I asked in vain for any authority upon the point. The grant of an option to purchase is very different from a grant of a legal estate in some real or personal property without consideration to a person nominated by the B beneficial owner. The grantee of an option has not, in reality, an estate in the property. Of course, he has an interest in it which can be measured by saying that he can obtain an injunction preventing the grantor from parting with the property except subject to the option—and in this case, having regard to the express terms of clause 2, from parting with the property at all—and that he can enforce the option against all subsequent owners except purchasers for C value without notice. Essentially, however, an option confers no more than a contractual right to acquire property on payment of a consideration, and that seems to me a very different thing from the ordinary case where the doctrine of a resulting trust has been applied. However, it is a question of intention whether the Appellant and the trustee company intended that the option should be held by the trustee company beneficially or as a trustee, and if the latter upon D what trusts. As the option deed is itself quite silent upon this point, all the relevant facts and circumstances must be looked at to solve this question. As I think the facts and circumstances are sufficient for this purpose without resort to this long stop presumption, it is unnecessary finally to decide whether the doctrine of resulting trust does apply to an option.

Upon this vital question whether the trustee company held the option bene- E ficially or as trustee, and if the latter upon what trusts, my mind has fluctuated: it is a very difficult matter to decide what is the proper inference to draw from the known facts. There are, as I see it, three possibilities: (1) that the trustee company was intended to take as trustee for the children's settlement of 30th December 1949; (2) that the trustee company should take beneficially, the Appellant relying on his three friends and advisers, Messrs. Robins, Green F and Jobson, the directors and holders of all the shares in the trustee company, to carry out his wishes, which from time to time should be intimated to them in the way of a gentlemen's agreement, but having no power at law to enforce them; or (3) the trustee company should hold as trustee upon such trusts as he or the trustee company should from time to time declare. With regard to the first possibility it was but faintly argued that there was a trust for the children's G settlement, but, like all your Lordships, I can see no ground for it; clause 11 of the settlement was relied on, but it does not seem to me to have anything to do with it, so I dismiss this possibility. It is the choice between possibilities (2) and (3) that has caused me so much difficulty.

Part of the difficulty has been caused by the fact that Mr. Jobson, the solicitor, does not seem to have been brought into the picture at any relevant H date, and the other advisers of the Appellant do not seem to have appreciated the vital distinction in the legal result between possibilities (2) and (3). Indeed, the matter does not seem to have been canvassed to any great extent before the Special Commissioners: certainly no direct finding was made upon these points, and no contention to the effect that the trustee company took beneficially appears in the Appellant's contentions set out in para. 13 of the Case Stated. I Neither party asked this House to remit this matter to the Commissioners to make a finding upon the vital facts, and so your Lordships have to draw your own conclusions as to the proper inference to be drawn from the primary facts.

(Lord Upjohn)

On the one hand, there are some findings of the Commissioners which might lead to the inference that the transfer to the trustee company was beneficial—see, for example, para. 14(5); but then the concluding words of para. 14(4) were to the contrary, and so, on the whole, was para. 14(6). What has influenced me in the end is that throughout the correspondence in 1961 the Appellant's advisers were contending that the trustee company took the shares as trustees and that before Plowman J. this was conceded. He said[1]: A B

> "No one suggests that the trustee company took it otherwise than on trust."

While the Court of Appeal assumed that there was a resulting trust of the option for the Appellant, they did not decide it upon that ground alone. Diplock L.J. said[2]:

> "It is next contended that the trustee company took the option beneficially. This also seems to me to fly in the face of the evidence"—which he then examined in some detail. Willmer L.J., in the next judgment, said[3]: "Later—prompted, I suspect, by certain observations made by members of this Court—the argument was developed that the trustee company should be regarded as taking the option beneficially." C

He also examined the evidence and came to the conclusion that there was no intention to give any beneficial interest to the trustee company. Harman L.J. came to the same conclusion. D

My Lords, this question is really one of inference from primary facts, but having regard to the way in which the matter has developed I should be reluctant to differ from the courts below, and I do not think that the question whether the doctrine of resulting trust applies to options, on the facts of this case, in the least degree invalidates the reasoning of the Court of Appeal or its conclusions upon this point. I agree with the conclusions of the Court of Appeal and Plowman J. that the intention was that the trustee company should hold on such trusts as might thereafter be declared. E

That is sufficient to dispose of the appeal, but one question was debated in the Court of Appeal, though not before your Lordships, and that is whether the option was held by the trustee company upon such trusts as the trustee company in its discretion should declare or as the Appellant should declare. Once it is established that the trustee company held solely as trustee, that, as the Court of Appeal held, matters not. The Appellant could at any time revoke that discretion if he had vested it in the trustee company. F

Then, for the reasons I have given earlier, it follows that until these trusts should be declared there was a resulting trust for the Appellant. This is fatal to his case, and I would dismiss the appeal. G

Lord Donovan—My Lords, section 53(1)(*c*) of the Law of Property Act 1925 enacts that the disposition of an equitable interest must be in writing signed by the person disposing of it, or by his agent thereunto lawfully authorised in writing or by will. This clearly refers to the disposition of an equitable interest as such. If, owning the entire estate, legal and beneficial, in a piece of property, and desiring to transfer that entire estate to another, I do so by means of a disposition which *ex facie* deals only with the legal estate, it would be ridiculous to argue that s. 53(1)(*c*) has not been complied with and that therefore the legal H

(1) *See* page 535, *ante*. (2) *See* page 543, *ante*. (3) *See* page 545, *ante*.

A estate alone has passed. The present case, it is true, is different in its facts in that the legal and equitable estates in the shares were in separate ownership: but when Mr. Vandervell, being competent to do so, instructed the bank to transfer the shares to the College, and made it abundantly clear that he wanted to pass, by means of that transfer, his own beneficial or equitable interest plus the bank's legal interest, he achieved the same result as if there had been no B separation of the interests. The transfer thus made pursuant to his intentions and instructions was a disposition, not of the equitable interest alone, but of the entire estate in the shares. In such a case I see no room for the operation of s. 53(1)(*c*).

The Special Commissioners decided the case against the Appellant upon a construction of s. 415 (2) of the Income Tax Act 1952 which the Crown did C not seek to support. The Commissioners construed the words "in any circumstances whatsoever" appearing in that subsection to mean "in any circumstances whatsoever that are practicable and possible". This qualification hardly restricts the relevant words at all, and would indeed embrace acts which were unlawful—a construction which must be rejected. But proceeding upon it the Special Commissioners found that the Appellant could have set up further trusts, with D the trustee company as trustee, for any objects he might wish, including himself. Accordingly, he had not divested himself absolutely of the shares within the meaning of s. 415. The Crown, before your Lordships, agreed that the words in s. 415(2), "in any circumstances whatsoever", must receive some limitation of meaning, and submitted that they connoted only such circumstances as, upon a reasonable construction of the settlement or arrangements, were within its E contemplated scope. With this I would agree. But applying that test the result is, I think, adverse to the Crown. I do not think that any such benefit as the Commissioners specify was within the contemplated scope of the arrangement.

That leaves the question of a resulting trust in the option, and this indeed is not easy. The courts below have held that such a trust existed (*a*) because the Appellant caused the option right to be transferred to the trust company F without consideration and without declaring express trusts in respect of it; (*b*) because he has not rebutted the presumption of a resulting trust to himself which thus arises. Both these propositions need to be carefully considered, not only because of the heavy fiscal consequences to the Appellant himself, but also because the result follows, if the propositions are sound, that there was a complete breach of trust when the shares were ultimately acquired for £5,000 G taken out of the children's settlement and settled on the terms of that disposition. Whatever Mr. Vandervell may have done since, there is no evidence that he consented at the time.

First, then, who provided the option? If one looks at the option deed itself it was the College and nobody else. But it is said that Mr. Vandervell through his agent stipulated for the option as a condition of the gift, and so must be H regarded as the grantor *vis-à-vis* the trust company. The Special Commissioners (before whom this contention of a resulting trust was not advanced by the Crown) found the following facts. (1) On 29th September 1958, through his adviser, Mr. Robins, the Appellant suggested a gift to the College of 100,000 "A" shares, the dividend on which would provide the intended sum of £150,000. (2) A few days later Mr. Robins suggested to the Appellant that the College I should give an option on the shares to the trustee company, and the Appellant agreed. (3) On 6th November 1958 the College was asked by Mr. Robins whether the College would agree to give the option to the trustee company. (4) On 14th

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November 1958 the Appellant wrote to Mr. Robins saying, "... I have decided to give to the College the 100,000 'A' shares ..." (5) On 18th November 1958 the College informed Mr. Robins that it was prepared to grant the option. (6) On 19th November 1958 Mr. Robins handed to the College an executed transfer of the shares and the option deed for sealing by the College. (7) The College returned the transfer duly sealed by itself to Mr. Robins on 25th November 1958 for registration, and also the option deed likewise sealed by the College. (8) The whole purpose of the option was to avoid the difficulty which might otherwise arise on a public flotation if the College remained the registered holder of shares in the company. The Appellant, having decided that the shares should not in that event remain in the hands of the College, did not interest himself further in the option. A B

The Special Commissioners, no doubt because the question of a resulting trust was not raised before them, make no express finding on whether the Appellant provided the option. Both the courts below, however, state it as a fact. I agree that it is an easy conclusion to draw. My doubt is whether it is not too easy. If Mr. Vandervell had said or represented to the College by himself or through his agent that, if there were no option granted, then there would be no gift, the conclusion would be clearly right. But supposing the College were left free to decide, and that Mr. Vandervell's attitude was: "I have already decided to give you the shares and that will still be done. But without making it a condition of the gift, I would like you to give the option. Will you do so?" Who in that case would be the donor of the option to the trustee company, the College having decided of its own free will to give it? Clearly, I should have thought, the College. C D E

As between these two alternatives, how does the evidence stand? There is nothing, I venture to think, to enable anyone to come down firmly on one side or the other; yet the Crown must show that the Appellant was the donor of the option if they are to succeed in the contention of a resulting trust to him. The facts which occasion my doubt are that originally the Appellant had no thought of an option; that when the idea was put into his mind he did not ask for the option to be granted to himself; that after the College was first asked for the option, but before it had decided to grant it, the Appellant wrote to Mr. Robins saying that he had decided to give the shares to the College and making no mention of any condition; and that from start to finish there is no hint in the evidence of "No option—no gift". This has been simply inferred, and the inference is, in my opinion, to say the least doubtful. Unless, however, the Appellant is shown, despite the language of the option deed, to be the donor of it, the contention of a resulting trust to him fails *in limine*. Indeed, if the College were the donor of the option, there would be no resulting trust to anybody, for the transaction would not make sense except upon the view that the trustee company was to be the absolute owner. F G

I proceed to consider that question, however, upon the footing that I am mistaken in my doubts as to whether Mr. Vandervell granted the option, and that in fact he did so. It was argued on his behalf that the onus is upon the Crown to establish a resulting trust in Mr. Vandervell's favour. It is the Crown who are asserting it, in the face of a deed which uses the language of an absolute grant. In this particular case, where pure personalty was transferred under seal to a stranger alone and there is no hint on the face of the deed of any trust, I think the proposition is correct. But I doubt in the end whether here it makes any difference to the ultimate result. Evidence bearing upon the matter is in the H I

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A Case Stated and its accompanying documents, and the problem now is to say whether that evidence, fairly considered, established a resulting trust with that reasonable certainty which is required if fiscal burdens are to follow.

The purpose of the option was to enable the 100,000 shares given to the College to be recovered so as to facilitate a possible future flotation of the shares in Vandervell Products Ltd. This purpose would be achieved whether Mr. B Vandervell himself was entitled to the option or whether it were in the hands of some other person whose co-operation, in the event of such a flotation, could be relied upon. This would certainly be true of the trustee company. Leaving aside the fact that its directors were friends and advisers of Mr. Vandervell, it itself held over 2,000,000 ordinary shares in Vandervell Products Ltd. on the trusts of the children's settlement; and a smooth public flotation would therefore C be of advantage to it as well as to Mr. Vandervell. (It is perhaps as well to recall that the 100,000 shares, the subject-matter of the option, had no voting rights, and no dividend rights save such as Mr. Vandervell, in his capacity as controlling shareholder, chose to accord.)

At the outset, therefore, it is difficult to discern any compelling reason why Mr. Vandervell should *not* let the trustee company own the option absolutely. D On the contrary, there are some compelling reasons why he should not own the option himself, whether pursuant to a resulting trust or otherwise. It is obvious that the College was to get its £150,000, not by a straightforward cash payment of that sum by Mr. Vandervell, but by substantial contributions from the public purse. (I say this, not in criticism, but because it is relevant to the case.) Thus the dividends which were to amount to £145,000 were to be gross E dividends from which tax would be deducted at source. The tax would be recovered from the Revenue by the College as a charity. Then the declaration of such dividends was to be a protection for Mr. Vandervell against a heavy liability for surtax which might otherwise fall upon him under the provisions of ss. 245 *et seq.* of the Income Tax Act 1952. These advantages would never accrue if Mr. Vandervell retained the right to recover the shares back for himself F by means of the option right. The College would not be entitled to repayment of tax, and the dividends of £145,000 gross would be liable to surtax as Mr. Vandervell's own income. The persons acting for Mr. Vandervell were not children in these matters; and while accountants are not lawyers (and should not try to be) there is one thing that is part of the general knowledge of every experienced accountant today, namely, that if you give property away expecting G to save tax thereby, you must reserve no right to get it back. When this consideration is added to the fact that it would seem to suit Mr. Vandervell's purpose to give the option to the trust company outright, it is clear that one must walk a little warily upon the path leading to a resulting trust.

But it is said by the Crown (in effect) that the accountant advising Mr. Vandervell, while no doubt astute enough to avoid a direct grant of the option H to his client, nevertheless, through an imperfect knowledge of the law of trusts, unwittingly saddled him with the beneficial ownership. This, of course, is the issue. The Crown relies upon these circumstances. (1) Before the Special Commissioners there was no contention that there had been an outright gift of the option to the trustee company. (2) It is found in the Case Stated that the directors and shareholders in the trustee company never considered that the option I could be turned to account so as to benefit them personally. (3) It had not been agreed between Mr. Vandervell's accountant and his solicitor (both directors of the trustee company) for what purpose the trustee company held

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the option. The accountant considered that if, when the option was exercised, the trustee company were trustee of more than one settlement, the directors would consider the interests of the beneficiaries thereunder before deciding for what purpose to exercise the option. In the meantime it was assumed that the trustee company held the option for the purposes of the 1949 children's settlement. A

The point that the Appellant never contended for an outright gift of the option to the trustee company when the case was before the Special Commissioners is a legitimate one to make, and has to be borne in mind. But it is certainly not conclusive, any more than is the circumstance that before the Special Commissioners the Crown never contended for a resulting trust. The circumstance that the directors and shareholders of the trustee company never considered that the option right could be turned to account for their benefit is also a factor to be taken into account. If the true situation were that the option was granted to the company as a trustee upon trusts to be decided hereafter, that would be an end of the matter. But why no mention of this in any document connected with the transaction, or in any of the domestic records of the company? The company would have to agree to such an arrangement, and there is no evidence, so far as I can see, that it ever did. Moreover, there was no real reason why it should. From a practical point of view, absolute ownership of the option by the trustee company would be no obstacle in the event of a public flotation of the Vandervell shares. On the question of the purpose for which the trustee company held the option, the accountant seems to have laboured for some time under a basic misconception. Writing to the Revenue in 1961, his firm said that the trustee company could only hold shares which came to them on trust; and when the Revenue corrected this view by referring to the company's memorandum of association, the accountant lamely replied, "Your view is probably correct". The misconception may, however, have coloured other observations by the accountant which induced the view that the option itself was held on trust. B C D E

In all the circumstances I should not feel safe in relying upon the accountant's various statements, whether favourable or unfavourable to the Appellant. Looking at the situation objectively, I find an outright grant of the option to the trustee company. For the purpose which the parties had in mind this was, in the circumstances, both rational and acceptable. There was no reason why the option should be held in trust for the Appellant either expressly or by implication. On the contrary, there were weighty reasons why it should not. The Appellant himself clearly considered that he had parted with the shares for good and had no residual hold upon them. Upon these facts, wherever the onus of proof may lie, I should feel no confidence in drawing the conclusion of a resulting trust. I incline, indeed, more to the view that the trustee company owned the option absolutely. F G

During the course of the argument I suggested that the option might be caught by clause 1 of the children's settlement so as to be held upon the trusts thereof. As a result of the examination of this possibility which followed, I am, like your Lordships, satisfied that it is not so. H

The assessments upon the Appellant were made under the provisions of s. 404(2) of the Income Tax Act 1952, as well as under s. 415, though the argument has proceeded throughout mainly upon the latter section. This is under- I

A standable. I see no ground upon which the assessments could be confirmed under s. 404(2) if they had to be discharged under s. 415.

I would allow the appeal.

Lord Wilberforce—My Lords, this appeal, apart from the point which arises under s. 53(1)(*c*) of the Law of Property Act 1925, involves, in my opinion, no question of principle or of law. It depends upon the interpretation one places B on the facts as found. The Special Commissioners, Plowman J. and the Court of Appeal have all taken a view of those facts adverse to the Appellant, which though they may somewhat differ in expression coincide in substance. This is that he failed to divest himself of all interest in the option, which in turn controlled the shares in Vandervell Products Ltd., the subject of the gift. If it were not that there is a division of opinion in this House, I should think it sufficient C to state my concurrence with the judgments of the Court of Appeal, since I can find no basis upon which to arrive at a different factual conclusion, which is that, while the Appellant desired to make a certain amount of income available to the Royal College of Surgeons through a gift of shares, he has failed to bring about that total divestiture of the source of that income which is required if he is to escape taxation on it. The strict requirements of s. 415 of the Income D Tax Act 1952 have thus not been satisfied. I must now endeavour to indicate my reasons for this opinion.

Mr. Vandervell's plans first began to take shape in the summer of 1958. Having formed the wish to give £150,000 to found a chair at the Royal College of Surgeons and having consulted his experts, he had decided by September to make over to the College the 100,000 "A" shares in his manufacturing company, E Vandervell Products Ltd. The advantages of so doing were threefold: first, Mr. Vandervell, as the controlling shareholder in the company, could vote the necessary £150,000, or whatever sum he ultimately decided to give by way of dividend on the "A" shares, as and when he pleased; secondly, the distribution of these dividends might help him to avoid a surtax assessment in respect of non-distributed profits of the company; thirdly, there might be a saving of F estate duty.

The idea of the option came to Mr. Robins, Mr. Vandervell's personal friend and financial adviser, as second thoughts. He was concerned about a possible public flotation of the manufacturing company, and so as to avoid possible difficulties he thought "that it would not be desirable to give the shares outright to the College"—one may note at once some inherent hazards in the G idea, or at least in the words in which he expressed it. So in November 1958 he put to the College (and they accepted) the proposal that the College should grant an option to resell the shares to a company called Vandervell Trustees Ltd. for £5,000. It was explained, in a letter of 19th November 1958, that Mr. Vandervell had decided to make £150,000 available to the College and that £145,000 (gross) would be paid by way of dividend on the shares in Vandervell H Products Ltd., the balance of £5,000 to be paid when the option should be exercised. The transaction was completed by transfer of the shares and the grant of the option on or about 25th November 1958.

The critical question is whether the grant of the option prevented Mr. Vandervell from having divested himself absolutely of the shares. Obviously this depends on ascertaining to whom the option beneficially belonged, and I this was the issue which was enquired into by the Special Commissioners, to which evidence was directed, and on which findings were made. The effect of

(**Lord Wilberforce**)

this evidence and the Special Commissioners' conclusions upon it appear in the Case Stated and may be summarised as follows. The option was to be granted (and was granted) to Vandervell Trustees Ltd., "the only large shareholder apart from the Appellant". This company is a private company, with a capital of £100 held by Mr. Robins, Mr. Jobson (Mr. Vandervell's solicitor) and Mr. Green (Mr. Robins' partner), which three gentlemen were also the directors of the company, having taken office at Mr. Vandervell's request. The trustee company has power by its memorandum to carry on a wide range of business activity, but its principal object is to act as trustee. At all material times it had only three activities: (i) as trustee of a settlement of 30th December 1949, of which Mr. Vandervell's children were the main beneficiaries, in which capacity it held 2,053,308 "B" shares in the manufacturing company; (ii) as trustee of a savings fund set up by the manufacturing company; (iii) as grantee of the option.

The deed by which the option was granted merely states that it was granted by the College to the trustee company. In what capacity did the trustee company receive it? It has never been suggested that it received the option as trustee of the savings fund, because no part of that fund could, under the rules, be invested in shares of the manufacturing company. So there are left three alternatives: (i) that the option was held on the trusts of the 1949 settlement; (ii) that the option was held on trusts not at the time determined, but to be decided on at a later date; (iii) that the option was held by the trustee company free from any trust and (at most) subject to an understanding that it or the shares when it was exercised would be disposed of in a suitable manner.

The Special Commissioners held an oral hearing in order to decide upon this question. Before they did so, there was some correspondence which was of some significance because it gave shape to the issues as the Special Commissioners had to decide them. On 29th December 1960 the Inspector of Taxes asked on what trusts Vandervell Trustees Ltd. intended to hold the shares on exercise of the option (it was not exercised till 1961). The reply, from Mr. Vandervell's accountants, was:

> ". . . it will be for Vandervell Trustees Ltd. to elect *on what trusts* they shall hold the shares if the option be exercised."

On 6th April 1961 the Inspector asked why Vandervell Trustees Ltd. would, in the event of the option being exercised, have to hold the shares on trust. The answer to this was:

> "Vandervell Trustees Ltd. are a Trustee Company with no business of their own. Therefore, any shares coming to them could only be held *on trust*. If this option is exercised it is probable that they would be held on the Trusts [of the children's settlement of 1949]".

So the expressed contention at this stage was that the option was held on trust: indeed no alternative was in contemplation, and the issue was whether the trust was such that Mr. Vandervell benefited or could benefit under it.

With this preliminary statement of position, the hearing before the Special Commissioners took place. Both the Appellant and Mr. Robins gave evidence, and it seems clear that in their evidence they adhered to what they had maintained in the letters. The Special Commissioners, in their statement of facts, fully reviewed the history of the matter; they brought out the following salient points. (1) The whole purpose of the option was to avoid difficulties in the event of a public flotation which might arise if the College was the holder of shares in the company. The trustee company was considered the suitable person to

A hold the shares. Mr. Vandervell considered he had parted with the shares and gave Mr. Robins *carte blanche* to make what arrangements he thought fit. (2) The directors and shareholders of the trustee company never considered that the option or their shares in the trustee company could be turned to account in such a way as to benefit them personally. (3) It was not formally agreed between Mr. Jobson (the solicitor) and Mr. Robins for what purpose the trustee B company held the option: each of them assumed that it was held for the purposes of the 1949 settlement. Both of them, however, had in mind that it might be exercised for the purpose of a proposed new trust for employees. Then—I quote:

> "The evidence of Mr. Robins on this point (which we accepted) was that if, when the time came to exercise the option, the trustee company should have been trustee of other settlements beside the 1949 children's C settlement, the directors of the trustee company would have considered the rights and interests of the beneficiaries before deciding for what purpose to exercise the option."

The Special Commissioners then stated (as is usual) the contentions of the parties. The only positive contention formulated by the Appellant as to the ownership of the option was that the trustee company took the option as D trustee of the 1949 settlement. The findings of the Special Commissioners were: (i) that the trustee company was not free to deal with the option, or the shares, in any way it wished, but held the option and would hold the shares as a trustee; (ii) that when the trustee company acquired the option it was not finally settled for what objects it would hold the shares if the option should be exercised. There was a strong possibility that they would be held on the trusts of the 1949 E settlement but this was not bound to happen; other trusts might be set up, under which the Appellant might be a beneficiary, and there was nothing to prevent the trustee company from applying the shares for the purposes of those trusts.

On these findings it was, in my opinion, at once clear that the Appellant's contention that the option became subject to the trusts of the children's settlement of 1949 must fail, for the reason that it was not the intention of the settlor F or of his plenipotentiary, Mr. Robins, at the time the option was exercised that this should be so. I need not elaborate this point, since I understand that there is no disagreement about it. This was the Appellant's main (if not the sole) contention before the Special Commissioners and Plowman J., and it remained his first contention on this appeal. The alternative which I have numbered (iii) above, and which is expressed in the printed Case as being that the option was G held by the trustee company in equity as well as in law as the absolute owner thereof for the purposes of its business, is, of course, one which the Appellant is entitled to put forward as a contention of law at any stage, provided that it is consistent with the facts as found by the Special Commissioners. It is on that contention that the Appellant ultimately fell back. For my part, I cannot find that it is so consistent.

H I would be disposed to agree that it might be wrong to put too much weight on the Special Commissioners' findings which I have quoted above under (2), or at least on its literal wording—and possibly the Court of Appeal did so; but it still cannot be disregarded altogether. I might accept that the Appellant should not be bound by the opinions held by Mr. Robins and Mr. Jobson—they may have misapprehended the legal situation; but it still remains the case I that there was evidence, from Mr. Robins himself, of his contemporary intentions. And making all allowances, the evidence fairly read to my mind admits of one interpretation only, put upon it by all who have so far considered it,

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that the option was vested in the trustee company as a trustee, and that this was the intention of Mr. Robins at the time it was granted. Correspondingly, the evidence points clearly away from any conclusion that the trustee company held beneficially, or for the purpose of its business. It had no business, no function, except as a trustee; no assets, except as a trustee. The £5,000 to be paid if the option was to be exercised was, as a term of the arrangement between Mr. Vandervell and the College, part of the £150,000 benefaction; how could that come from the company's own resources? To extract from the findings a conclusion that the trustee company was to hold free from any trust but possibly subject to some understanding or gentlemen's agreement seems to me, rather than even a benevolent interpretation of the evidence, a reconstruction of it. I may add that, had this contention been put forward at the hearing before the Special Commissioners, the Crown might well have been tempted to explore by cross-examination the real control of the trustee company and to argue that the case came within s. 415(2) of the Income Tax Act 1952.

If, then, as I think, both the first two alternatives fail, there remains only the third, which, to my mind, corresponds exactly with Mr. Robins' intentions, namely, that the option was held by the trustee company on trusts which were undefined, or in the air. As to the consequences, there has been some difference and possibly lack of clarity below. The Special Commissioners held that the initially undefined trusts could be defined later in a way which might benefit the Appellant, and they found the benefit to the Appellant in this circumstance. The Court of Appeal, starting from the fact that the trustee company took the option as a volunteer, thought that this was a case where the presumption of a resulting trust arose and was not displaced. For my part, I prefer a slightly different and simpler approach. The transaction has been investigated on the evidence of the settlor and his agent and the facts have been found. There is no need or room, as I see it, to invoke a presumption. The conclusion, on the facts found, is simply that the option was vested in the trustee company as a trustee on trusts, not defined at the time, possibly to be defined later. But the equitable or beneficial interest cannot remain in the air: the consequence in law must be that it remains in the settlor. There is no need to consider some of the more refined intellectualities of the doctrine of resulting trusts, nor to speculate whether, in possible circumstances, the shares might be applicable for Mr. Vandervell's benefit: he had, as the direct result of the option and of the failure to place the beneficial interest in it securely away from him, not divested himself absolutely of the shares which it controlled.

There remains the alternative point taken by the Crown that in any event, by virtue of s. 53(1)(*c*) of the Law of Property Act 1925, the Appellant never effectively disposed of the beneficial interest in the shares to the Royal College of Surgeons. This argument I cannot accept. Section 53(1)(*c*), a successor to the dormant s. 9 of the Statute of Frauds, has recently received a new lease of life as an instrument in the hands of the Revenue. The subsection, which has twice recently brought litigants to this House (*Grey* v. *Commissioners of Inland Revenue* [1960] A.C.1; *Oughtred* v. *Commissioners of Inland Revenue* [1960] A.C.206), is certainly not easy to apply to the varied transactions in equitable interests which now occur. However, in this case no problem arises. The shares in question, the 100,000 "A" shares in Vandervell Products Ltd., were prior to 14th November 1958 registered in the name of the National Provincial Bank Ltd. upon trust for the Appellant absolutely. On 14th November 1958, the Appellant's solicitor received from the bank a blank transfer of the shares, executed by the bank, and the share certificate. So at this stage the Appellant

A was the absolute master of the shares and only needed to insert his name as transferee in the transfer and to register it to become the full legal owner. He was also the owner in equity. On 19th November 1958 the solicitor (or Mr. Robins—the Case is ambiguous) on behalf of Mr. Vandervell, who intended to make a gift, handed the transfer to the College, which in due course sealed it and obtained registration of the shares in the College's name. The case should B then be regarded as one in which the Appellant himself has, with the intention to make a gift, put the College in a position to become the legal owner of the shares, which the College in fact became. If the Appellant had died before the College had obtained registration, it is clear on the principle of In re *Rose* [1949] Ch. 78 that the gift would have been complete, on the basis that he had done everything in his power to transfer the legal interest, with an intention to give, C to the College. No separate transfer, therefore, of the equitable interest ever came to or needed to be made, and there is no room for the operation of the subsection. What the position would have been had there simply been an oral direction to the legal owner (viz., the bank) to transfer the shares to the College, followed by such a transfer, but without any document in writing signed by Mr. Vandervell as equitable owner, is not a matter which calls for consideration D here. The Crown's argument on this point fails, but for the reasons earlier given I would dismiss the appeal.

Questions put:

That the Order appealed from be reversed.

E *The Not Contents have it*

That the Order appealed from be affirmed and the appeal dismissed with costs.

The Contents have it.

[Solicitors:—Culross & Co.; Solicitor of Inland Revenue.]