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SUCCESSION DUTY LIABILITY ON TRANSFERS TAKING EFFECT AFTER DEATH

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The Federal Government in the last few years enacted a statute levying succession duty upon the privilege of succeeding to property on the death of any person.[1] In so doing it was by no means breaking new ground. In the Anglo-Saxon world such a scheme for raising revenue can be traced back as far as feudal times. It was customary for a lord, on the death of one of his vassals, to levy a charge of relief or *primer seisin* on the heir, as a condition of his succeeding to the property. This charge was the price paid for the lord's protection of the property transmitted. Today taxes imposed on the transmission of property at death may be justified, if any justification is needed, on similar principles. The deceased has held his property under the protection of the state during his lifetime. He has the privilege of transmitting it by will or intestate succession only through indulgence of the state. The heir or legatee possesses the privilege of receiving the property so transmitted, only by permission of the state. It is reasonable therefore for the state to impose a tax on the occasion of death.

In modern times there have been two main types of death duties. The first, usually called an "estate" or "transfer" tax, is levied on the privilege of transmitting property on death. The amount of duty is determined by the value at the time of death of all the property transmitted. It is payable by the executor before any distribution of the estate can be made. The second, usually called an "inheritance" or "succession" tax, is levied on the privilege of succeeding to property on death. It is payable by the heir or legatee and its amount is determined by the size of his individual bequest and his relationship to the testator. While these two types of duty are levied on different privileges, and are

[1] The Dominion Succession Duty Act, 4–5 Geo. VI, 1940–41, c. 14, as amended by chapters 25 of 1942–43; 37 of 1944–45; 18 of 1945–46; and Bill 373, 2nd. Sess. 1946, assented to August 12th, 1946.

payable in the first instance by different people, their ultimate effect is the same. The net result is to reduce the amount that would otherwise be received by the heir or legatee.

The Dominion Succession Duty Act attempts in some measure to combine these two types of duty. It levies an initial duty[2] on the successor, at rates determined by the aggregate net value of all the property transmitted by the deceased to any person. It also levies an additional duty[3] at rates fixed by reference to the value of the property received by a particular successor and his relationship to the deceased. While the successor is primarily liable for both types of duty, yet the extent of that liability partakes of the quality of both an estate and an inheritance tax.

Quite naturally, the primary purpose of any statute levying a tax is the raising of revenue. Equally substantial however, in the case of a duty such as that now under consideration, is the attempt to discourage excessive concentrations of wealth. Estate taxes implement this latter policy by imposing exorbitant rates. Thus the greater portion of a large estate goes to the government where it is available for social schemes to benefit the nation. The remainder seeps through to the legatees for their own personal use. In the United States, where death duty is in the nature of an estate tax, $2,468,200 in taxes is payable out of a $5,000,000 estate.

Inheritance or succession taxes are better adapted to this social purpose. By graduating the rates according to the amount received by a particular beneficiary and his relationship to the deceased, they encourage wider distribution of estates without imposing confiscatory rates. It is the legislative expectation that a testator confronted with a high tax rate on a large gift to a single beneficiary will prefer to distribute his wealth among a larger group so that the minimum of duty will be levied.

The Dominion Succession Duty Act

The scheme of the Dominion Act is to levy duties upon or in respect of "successions".[4] These are defined by section 2(m) as "every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any deceased person . . . and also includes any disposition of property deemed by this act

[2] S. 10.
[3] S. 11.
[4] S. 6 provides that ". . .there shall be assessed, levied and paid at the rates provided for in the First Schedule to this Act duties upon or in respect of the following successions. . ."

to be included in a succession". Being å tax on a "succession", it is *prima facie* necessary that something pass *from* the deceased *to* the successor on the death of the deceased. Clearly this test is satisfied when the decedent owns the property in question at his death and it passes from his estate to his successor by the terms of his will or the laws of intestate succession. However, were the duty to be levied solely on the privilege of succeeding to property on death, it is obvious that the act would be a dead letter. A person could easily take himself outside its terms while remaining within its spirit. He could avoid rendering his successor liable to duty by the simple expedient of making a gift of all his property immediately prior to his death.

Consequently, to render the act effective by preventing easy avoidance and to distribute equitably the burden of the tax, it is necessary to include within the term "succession" *inter vivos* dispositions of property normally resorted to as a means of avoiding duty. Taxation of such dispositions is justified because they generally accomplish the same purpose as a testamentary disposition. It is a natural desire for a testator to want to save the maximum amount of his property for distribution among the family economic unit. But it is in the public interest that no one should be able to avoid bearing his fair share of the tax burden. The act limits the means to which one may resort to accomplish the former, in an effort to ensure that the tax burden is equitably distributed in accordance with the latter principle.

To that end section 3(1) deems the following to be included within the term "succession": property transferred in general contemplation of death;[5] property taken as a *donatio mortis causa;*[6] gifts within a limited period before death;[7] gifts reserving benefits to the donor;[8] joint property;[9] gifts with a reservation of a life estate or power to revoke in the donor;[10] and annuities, superannuation benefits and insurance purchased by the decedent.[11]

[5] S. 3(1)(a).

[6] S. 3(1)(b).

[7] S. 3(1)(c). This provision in effect creates an irrebutable presumption that the property comprised in the gift was transferred in general contemplation of death.

[8] S. 3(1)(d).

[9] S. 3(1)(e).

[10] S. 3(1)(f).

[11] Ss. 3(1)(g) and 3(1)(h). These are included within the term "succession", doubtless on the ground that they are property "procured through expenditures by the decedent with the purpose, effected at his death, of having. . .[them]. . .pass to another." See *Chase National Bank* v. *U.S.*, 278 U.S. 327 (1929).

Transfers Intended to Take Effect in Possession or Enjoyment after Death

Included in the same section, and apparently for the same purpose, are transfers "made or intended to take effect in possession or enjoyment after such death". It is the purpose of this article to determine the types of transfer intended to be embraced by that phrase. Therefore it is vital that the exact terms of the section covering them be set forth. Section 3(1) of The Dominion Succession Duty Act provides that:

> A 'succession' shall be deemed to include the following dispositions of property and the beneficiary and the deceased shall be deemed to be the 'successor' and 'predecessor' respectively in relation to such property:—
>
> (a) property and income therefrom voluntarily transferred by grant, bargain or gift, or by any form or manner of transfer made in general contemplation of the death of the grantor, bargainor or donor, and with or without regard to the imminence of such death, or made or intended to take effect in possession or enjoyment after such death to any person in trust or otherwise, or the effect of which is that any person becomes beneficially entitled in possession or expectancy to such property or income; . . . . .

In determining the scope of the latter part of that section, we should consider whether the transfer in question in any case is in effect a substitute for a testamentary disposition, and so affords a ready means of succession duty avoidance if not caught within its terms.

(*a*) *Interpretation of the phrase*

Before embarking on a discussion of the types of transfer covered by this phrase it is necessary to examine the interpretation put upon it by the recent decision of the Exchequer Court in *National Trust Co., Ltd.* v. *Minister of National Revenue.* [12] This is the first judicial interpretation of this vital section. It is essential therefore, in the interests of an equitable succession duty system, to examine it in the light of the obvious policy underlying the act.

In that case it was held that the phrase "made or intended to take effect in possession or enjoyment after such death" was not something separate and apart from the preceding phrase "in general contemplation of death". Counsel for the government, not having contended that the transfer there in question had been made in contemplation of death, was therefore unsuccessful in maintaining that it was intended to take effect after death.[13]

[12] [1946] Ex. C.R. 650, November 27th, 1946, O'Connor, J.
[13] [1946] Ex. C.R. 650, at pp. 658-659.

The words "after such death" in the phrase "made or intended to take effect in possession or enjoyment after such death" were held to refer clearly to the "general contemplation of the death of . . . . the donor". The phrase was thus interpreted as if it read, "made or intended to take effect in possession or enjoyment after the death of the donor, generally contemplated at the time of making the transfer".

It is suggested that this interpretation unduly restricts the intended scope of section 3(1)(a) and renders the phrase under discussion of no effect whatsoever. Any transfer that would be caught by its terms would *ipso facto* be caught by the phrase "made in general contemplation of death". Under the court's interpretation, the first question that falls to be decided, in a case where the issue is whether a certain transfer is included within the ambit of section 3(1)(a), is whether the transferor's death was generally contemplated at the time the transfer was made. If the answer is yes, then the transfer was made in contemplation of death. Consideration of whether it was also intended to take effect after death is therefore unnecessary to render the beneficiary liable for duty. If the answer is no, then the transfer was not made in contemplation of death. Further, the beneficiary cannot be rendered liable for duty under the latter part of section 3(1)(a) because a preliminary finding that the transferor's death was generally contemplated at the time the transfer was made is a prerequisite of such a holding.

The court has thus read the phrase in question completely out of the act, in so far as its tax consequences are concerned. It is my contention that this is not supported by authority and, further, that it leaves a tremendous loophole available for succession duty avoidance.

It is clear that the court's interpretation hinges on the word "such" appearing in section 3(1)(a) immediately before the word "death". But "such" could be given full effect by referring it to the words "death of the grantor, bargainor or donor". The phrase then would read "intended to take effect . . . after the death of the grantor, bargainor or donor". This would set up a class of transfers separate and distinct from those made in contemplation of death. In the opinion of the writer this appears to be the purpose of the section, in which the two phrases are separated by the conjunction "or".[14] If the meaning annexed to the phrase

[14] It is interesting to note that when the Dominion Succession Duty Act was in committee, Mr. Ilsley, in referring to what is now s. 3(1)(a), said; "Paragraph (a) is taken from the United States federal revenue act of 1916" (House of Commons Debates, Dom. of Canada, Sess. 1941, Vol. 111, at p.

by the court had been intended, it is submitted that the section would have read "made or intended to take effect . . . . after such *contemplation*".

The court relied on *Cowan* v. *Attorney-General of Alberta*[15] as authority for its interpretation. This case however, far from lending support to such a view, seems to enunciate the interpretation now being urged. Beck J. A. clearly separates transfers "in contemplation of death" from those intended to take effect "after such death".[16] Clarke J. A., at pages 657-658, supports this view when he says: "I concur in the interpretation put upon s. 6(a) by my brother Beck, it does not in my opinion cover the case of a gift not made in contemplation of death *or not made or intended to take effect after death . . .*" (italics added).

If support can be gathered for the court's interpretation from the doctrine, often the subject of lip service, that taxing statutes are to be construed strictly against the government and in favour of the taxpayer,[17] then it is time that the realities of the situation

3234). S. 202(b) of the Revenue Act of 1916 reads as follows: "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated: . . . (b) to the extent of any interest of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death. . .". This section has been carried forward until it is now found in s. 811(c) of the Internal Revenue Code. It may be mentioned that this section has always been interpreted as setting up two distinct and mutually exclusive classes of taxable transfers.

[15] [1925] 2 D.L.R. 647, [1925] 1 W.W.R. 993, 21 A.L.R. 241; reversed on other grounds, [1926] S.C.R. 142, [1926] 1 D. L.R. 29. This case dealt with the interpretation of s. 6(a) of The Succession Duties Act, R.S.A., 1922, c. 28, which reads as follows: "Upon the death of any person, the following, in addition to any other property passing, shall for the purposes of this Act, be deemed to pass on the death of such person, that is to say,—(a) all property of such deceased person or any interest therein or income therefrom, which is voluntarily transferred by transfer, deed, grant, bargain, sale or gift, made in contemplation of the death of the transferor, grantor, bargainor, vendor or donor, or made or intended to take effect in possession or enjoyment after such death, to any person in trust or otherwise, or by reason whereof any person becomes beneficially entitled in possession or expectancy to any property or the income thereof".

[16] Per Beck J.A., at p. 653: "I cannot find under s.-s.(a) anything upon which it can be reasonably contended that the present case comes within its terms. In no proper sense can the declaration of trust be said to have been made 'in contemplation of death' or to have been intended to take effect 'after such death' and the latter words of the subsection 'or by reason whereof' refer quite clearly to a transfer made 'in contemplation of death' or taking effect after death."

[17] See *Partington* v. *Attorney-General* (1869), L.R. 4 H.L. 100, at p. 122: ". . . if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there is admissable, in any statute, what is called an equitable construction, certainly such a construction is not admissable in a taxing statute, where you can simply adhere to the words of the statute". The doctrine has been expressed in Canadian courts in *Foss Lumber Co.* v. *The King and The British Columbia Lumber Co.*, 8 D.L.R. 437, 47 S.C.R. 130, by Brodeur J., in the

were faced. The duty of a court in construing a taxing statute should be no different from its duty in construing any other type of legislative act.[18] In any case, it should give effect to the intention of the legislature, as that intention is to be gathered from the language employed, having regard to the context in connection with which it is used. Abdication of the judicial function of ascertaining the meaning of legislation levying a tax, by means of the doctrine, fails to recognize the statute as an attempt to raise fiscal revenue. A restrictive interpretation, by denying necessary revenue to the government, merely results in the imposition of other taxes. In addition, it is at least doubtful whether the doctrine is beneficial to taxpayers as a whole or not. The construction that is liberal to one may be illiberal to others.[19] The mere fact that in a particular case the taxpayer is held to fall outside the words used in the act does not of necessity mean that such an interpretation will in the end favour taxpayers as a whole.[20] In fact, the freeing of one taxpayer merely results in casting that part of the burden on others. It is contended that courts should be guided in ascertaining the meaning and scope of a section, such as that now under discussion, by considering it as an instrument for raising revenue for the functions of government. They should concentrate on equitably distributing the burden of

following terms: "We should take into consideration also the fact that a statute imposing a tax should always be strictly construed and that, in case of doubt, the tax should not be levied. Maxwell, 'Interpretation of Statutes', 5th ed., p. 461; *Ayer* v. *The Queen*, 1 Can. Ex. R. 276; *Cox* v. *Rabbits*, 3 A.C. 473". For a time also the doctrine prevailed in the United States. The most quoted statement thereof is that in *Gould* v. *Gould*, 245 U.S. 151 (1917), at p. 153: "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favour of the citizen." Recently, however, such an interpretation has been discarded. See *White* v. *United States*, *infra* footnote 21.

[18] See Lord Russell C.J. in *Attorney-General* v. *Carlton Bank*, [1899] 2 Q.B. 158, at p. 164: "I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority saying that a Taxing Act is to be construed any differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed." For an instructive note dealing with this problem, see, "An Argument against the Doctrine that Deductions Should be Narrowly Construed as a Matter of Legislative Grace" (1943), 56 Harv. L.R. 1142.

[19] See Cardozo J. in *Burnet* v. *Guggenheim* 288 U.S.280 (1933), at p. 286: "The construction that is liberal to one taxpayer may be illiberal to others".

[20] See *Commissioner* v. *Morris*, 90 Fed. 2d. 962, at p. 964 (C.C.A. 2d. 1937), where Learned Hand J. said: "I cannot see that the canon of interpretation which bears against the Treasury in tax statutes should influence us; it so happens that Mr. Morris will have a deficiency to pay in this case, but it is impossible to say that either interpretation will in the end favour taxpayers; sometimes they will gain, sometimes they will not".

the tax thus imposed among those subject to it, rather than restricting its application by resort to the doctrine.[21]

This somewhat extended preliminary discussion ended, it will be assumed that the phrase "made or intended to take effect in possession or enjoyment after such death" denotes a class of transfers, grants or gifts, quite separate and distinct from the class indicated by the phrase "made in general contemplation of death". It is the purpose of this article to consider what types of transfer should be deemed to fall within the scope of that phrase and, in particular, whether the type of transfer involved in the *National Trust* case should be covered thereby, so as to be the subject of succession duty.

The criteria to be applied in determining whether a given transfer is intended to take effect after death is apt to cause considerable difficulty. The words "made or intended" naturally imply a subjective test dependent on the transferor's state of mind. Intent however furnishes an elusive, impractical and uncertain criterion. We learned early that the devil himself knoweth not the mind of man. Furthermore, subjective intent is usually inferred from its objective manifestations.[22] Hence we can avoid a circuitous route by adopting from the outset an objective rather than a subjective test. This would be accomplished by examining the interests created under the transfer. If the transferor has any right to or interest in the property comprised in the transfer,[23] or any control over its ultimate

[21] An example of the modern realistic trend may be found in the following quotation from Stone J. in *White* v. *United States*, 305 U.S. 281 (1938), at p. 292: "We are not impressed by the argument that, as the question here decided is doubtful, all doubts should be resolved in favour of the taxpayer. It is the function and duty of courts to resolve doubts. We know of no reason why that function should be abdicated in a tax case more than in any other where the rights of suitors turn on the construction of a statute and it is our duty to decide what that construction fairly should be."

[22] The best example of this is found in the interpretation of wills. ". . . whatever wavering from the strict rule of construction may have taken place in the past, it is now recognized that the only safe method of determining what was the real intention of a testator is to give the fair and literal meaning to the actual language of the will. Human motives are too uncertain to render it wise or safe to leave the firm guide of the words used for the uncertain direction of what it must be assumed that a reasonable man would mean", per Lord Buckmaster in *Auger* v. *Beaudry*, [1920] A.C. 1010, [1919] 3 W.W.R. 559, 89 L.J.P.C. 251, 48 D.L.R. 356, on appeal from 27 Que. K.B. 461, 43 D.L.R. 65.

[23] The right of the transferor to the property referred to here is usually in the nature of a reversion, a remainder, or a possibility of reverter, either vested or contingent. The effect of this will be discussed later. The interest of the transfer in the property usually takes the form of a reserved right to the income. This clearly renders the beneficiary of the remainder interest liable to duty on the death of the transferor under s. 3(1)(f); see footnote 25 *infra*.

disposition,[24] then clearly the beneficiary's interest, if subject thereto, is incomplete until the transferor's death. Consequently, it could not have been intended to take effect until after the event.

(b) *Transfers intended to take effect after death but specifically covered by other provisions of the Act*

Applying this objective test, let us consider what types of transfer may be said to fall naturally within the phrase under discussion. The most obvious type, and one which need not concern us unduly because of its specific coverage elsewhere in the act,[25] is that under which the transferor reserves to himself a life interest in the property, with remainder over.[26] If there are no conditions attached to the possession and enjoyment of the remainder interest other than the termination of the prior estate, then that interest is no doubt vested at the time the transfer is executed. This however should not be determinative. Succession duty is eminently a practical matter. The refinements of property law should not therefore be carried into it. Rather should it be concerned with the present enjoyment of the interests created under the transfer. The possession and enjoyment of the remainder interest is postponed until the transferor's death. Manifestly then, that interest does not take effect in possession or enjoyment until that time.

A second type, also specifically covered by the act,[27] is that where the settlor of a trust reserves to himself the power of revocation. In such a case, as the disposition of the property is under the complete control of the settlor at the time of his death, any prior transfer of it may be said to take effect only at that

[24] A transferor may retain control over the ultimate disposition of the property comprised in the transfer, by reserving power to alter, amend or revoke the trust deed by which the transfer is consummated.

[25] S. 3(1)(f) provides as follows: "A 'succession' shall be deemed to include the following dispositions of property. . . (f) property passing to a beneficiary upon or in consequence of the death of the deceased, where such property passes under any past or future settlement made by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property. The expression 'settlement' is to include any trust, whether expressed in writing or otherwise, in favour of any person, and if contained in a deed or other instrument effecting the settlement, whether such deed, or other instrument was made for valuable consideration or not as between the settlor and any other person;".

[26] A transfers property to T in trust, to pay the income therefrom to A for life, and on his death to pay the corpus to B.

[27] See footnote 25 *supra*.

time. His dominion over the corpus for practical purposes is as complete as if the trust had never been set up. The chance that the present beneficiary may lose his interest by the exercise of the power renders his economic benefit incomplete until the settlor's death extinguishes that power.

Further consideration of the application of the act to these types of transfer is unfortunately beyond the range of this article. Suffice it to say that the reservation of a power to encroach on the corpus of a trust should have the same consequences as a reserved power of revocation. To the extent of the power the settlor's dominion over the corpus is as complete in the one case as the other. In addition, each encroachment is in effect a revocation of the trust *pro tanto,* so that the power to encroach is equivalent to the power to revoke, at least to the extent thereof. Where the power to encroach is limited to a certain definite amount, of course the transfer of that amount only is what takes effect at the settlor's death. The transfer of the part of the corpus which is not subject to the power, being irrevocable and absolute, takes effect immediately on the execution of the trust.

The maximum extent of the power to encroach as of the date of death should be all that is considered in determining the amount of duty. Hence, if a settlor who had reserved a power to encroach to the extent of $10,000 had exercised the power before his death so as to draw out $4,500, the transfer of only $5,500 would be effective at death. If he had reserved power to encroach to the extent of $5,000 per year, the maximum encroachment possible at the time of his death would be $5,000 multiplied by his life expectancy immediately before death.

Where a settlor reserves such a power, each beneficiary under the trust should be liable for duty, unless it can be established that his interest is derived from that part of the corpus which is not subject to the power. He should be liable for duty on that part of his interest which bears the same relation to the value of his whole interest at that time, as the maximum possible encroachment at the date of death bears to the value of the whole trust corpus.

The above types of transfer are intended to take effect in possession or enjoyment after the death of the transferor or settlor. Were express provision for them not made elsewhere in the act, they would fall within the terms of section 3(1)(a).[28]

[28] Prior to 1924 the United States Revenue Act contained no provision such as that now found in s. 811(d) of the Internal Revenue Code, including within a decedent's gross estate the corpus of trusts set up by him during his lifetime, with a reserved power to "alter, amend or revoke". However

Their specific coverage, however, makes that section unnecessary so far as they are concerned. On what types of transfer then is it designated to operate?

(c) *Non-beneficial power to alter or amend reserved by the settlor of a trust*

A common provision in trust deeds reserves to the settlor the power to alter or amend its terms in any manner except to benefit himself or his estate.[29] In such a case the enjoyment by the present beneficiary of any interest in the trust is subject to so wide a power in the settlor prior to his death that the transfer of such interest, if subject to the power, may be said to take effect only after that power is extinguished by death. Only then does the beneficiary know for certain that any interest will enure to his benefit thereafter.

The power so reserved is similar in effect to a general power to appoint by will, where there is a gift over in default of appointment. The interest of the beneficiary in each case is vested, subject to being divested by the exercise of the power. This interest is secure only when the possibility of its being divested is destroyed by the death of the holder of the power without having exercised it. The policy of levying succession duty on a beneficiary who acquires property on the death of the donee of a general power to appoint by will, by reason of his failure to exercise the power, is clearly indicated by section 3(4).[30] It is inconceivable that it was the legislative purpose so to tax one beneficiary, but to allow another with an almost identical interest to go free. Indeed,

in *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339 (1929), cited in the *National Trust* case at p. 667, it was held that the corpus of a trust with a reserved power to revoke, set up during his lifetime by a decedent dying before 1924, fell within the provisions of s. 302(c) (now 811(c)) of the Revenue Act of 1921, taxing transfers "made or intended to take effect in possession or enjoyment at or after death". It would appear therefore, on analogical reasoning, that, even apart from s. 3(1)(f) of our act, such trusts would be caught within the terms of s.3(1)(a).

[29] Language such as the following illustrates the type of power herein contemplated. "The settlor at any time during the continuance of the trust herein provided for may, by instrument in writing delivered to the trustee, modify or alter in any manner this indenture and any or all trusts then existing and the limitations and estates and interest in property hereby created and provided for subsequent to such trusts; but this power to modify or alter is not intended and shall not be construed to include the right of the settlor to make such modification or alteration in his own favour or in favour of his estate, but shall apply only so far as the interest of third parties may be concerned."

[30] S. 3(4) provides as follows: "Where, upon the death of a person having a general power to appoint or dispose of property a person takes a beneficial interest in the property as a result of the failure of the deceased to exercise the power, the taking of the interest in the property shall be deemed to be a succession and the beneficiary and the deceased shall be deemed to be the 'successor' and 'predecessor' respectively in relation to the property".

there is even greater reason for taxing the beneficiary when the settlor himself has reserved the power. With the option of putting the disposition of the property beyond his control, he has chosen to retain the power and hence the control until his death. The holding that such a transfer is intended to take effect in possession or enjoyment after the settlor's death avoids such an incongruous result. In addition it is submitted that such a result is quite reasonable. When a person owns property, all that he has at the time of his death is a power to dispose of it. If he can retain this power, even where he has technically disposed of the property *inter vivos*, he is in the same position at his death as if he had never transferred the property. If the policy of section 3(1) is to catch substitutes for testamentary disposition, then it is not inequitable to require the beneficiary to pay duty when the settlor's power of disposal ceases.

Where the settlor reserves a power in narrower terms than those indicated above, we are no longer assisted by the analogy to a general power to appoint by will. The act does not attempt to tax a beneficiary on property received on the death of a donee of a special power to appoint, as a result of the exercise or non-exercise of the power. Two reasons probably lie behind this policy. In the first place, at least in so far as the rule against perpetuities is concerned, the exercise of a special power by the donee is read back into the instrument creating the power.[31] Thus the succession is from the donor of the power to the appointee, rather than from the donee to the appointee. In the second place, the legislature may have considered that flexible settlements were desirable and to be encouraged. Resort to them would doubtless have been discouraged if this common means of rendering them flexible had succession duty consequences.

This limited reserved power occurs most often in family settlements. A father sets up a trust with members of the family group as the beneficiaries. Since the circumstances of any member are liable to change drastically in the course of time, he sees fit to reserve power to shift the beneficial enjoyment of the property among the family group, but reserves no power to take it out of that group or to benefit himself or his estate. Here, equally as much as where the reserved power is unlimited, the full enjoyment of any interest by the present beneficiary is clearly conditional on the death of the settlor without having exercised the power to divest him of his interest. Thus the transfer is effective,

[31] *In re Fane; Fane* v. *Fane*, [1913] 1 Ch. 404, 82 L.J. Ch. 225, 29 T.L.R. 306; *In re Thompson; Thompson* v. *Thompson*, [1906] 2 Ch. 199, 75 L.J. Ch. 599.

so far as he is concerned, only on the death of the settlor. Consequently he should be liable for duty at that time, under section 3(1)(a).

(d) *Cases where the transferor may be considered "owner" of the property transferred until his death*

We have seen that the reservation of power to reclaim the absolute interest in the property comprised in a trust makes the settlor in substance the owner of the property, and renders the beneficiaries of the trust liable for succession duty on his death, under section 3(1)(f). In other cases, even where the trust is nominally irrevocable, there would seem to be good ground for holding that the transfer did not take effect until the transferor's death. Ownership after all is merely a bundle of rights. Where some of these rights have been conveyed to another, the transferor may nonetheless still be considered "owner" if those retained are sufficiently substantial. Section 32(3) of the Income War Tax Act[32] provides that " . . . where a trust provides that during the lifetime of the donor no disposition or other dealing with the trust property shall be made without the consent, written or otherwise, of the donor, such person shall nevertheless be liable to be taxed on the income derived from the property transferred in trust or from property substituted therefor as if such transfer had not been made". Apparently in that situation the donor has reserved to himself sufficient of the elements of ownership to be considered "owner" of the property comprised in the trust, at least in so far as being taxed on the income therefrom is concerned. It is arguable in such a case that he has also retained sufficient of the indicia of ownership to render the transfer of the interests created under the trust ineffective and incomplete until his death. In that event the beneficiary should be liable for duty under section 3(1)(a) on the value of the interest so transferred by death.

(e) *Cases where the transferor retains the possiblity of re-acquiring the property transferred*

This brings us to a consideration of the type of transfer involved in the *National Trust* case.[33] Here it is necessary to decide whether dispositions of property which provide for its return to the transferor in the event that he survives the transferee are within the scope of section 3(1)(a). It is of the utmost importance in this connection not to be confused by the form of

[32] R.S.C., 1927, c. 97, as amended; added by s. 13 of Statutes of Canada 1936, c. 38.

[33] *National Trust Co., Ltd.* v. *M.N.R.*, [1946] Ex. C.R. 650.

the transfer. The substance rather than the form should determine succession duty liability.

This distinction between form and substance may be illustrated by comparing two types of transfer. In the first, A transfers property to B for life and, if B shall survive A, then to him in fee. Immediately prior to A's death B has a life estate and a contingent remainder and A has a reversionary interest.[34] Possession and enjoyment of the remainder interest can be had only if B fulfils the condition precedent of surviving A. Hence it is a simple matter to say that the transfer of the remainder interest was intended to take effect in possession and enjoyment after A's death. That event is necessary to enlarge B's otherwise contingent remainder into an absolute interest. At that time, rather than on the execution of the transfer, the larger interest is effectively transferred.

The second type of transfer is phrased in somewhat different terms. A transfers property to B absolutely, but if B shall predecease A the property is to revert to A. The effect of this transfer is to give B a determinable fee simple and leave A with a possibility of reverter.[35] Here there is no condition precedent to be fulfilled by B before he obtains possession or enjoyment of the property. However he stands to lose it in the event that he fails to survive A — a condition subsequent. When A predeceases B the latter's interest is not enlarged in any way. This event merely destroys the possibility of it being cut down. Purely as a matter of form therefore it is not so simple to say that possession and enjoyment of that interest is intended to take effect after A's death. It would seem that B gets his whole interest at the time of the execution of the transfer and not on A's death.

However, in determining whether such transfers are "made or intended to take effect in possession or enjoyment after [A's] death", the form of the transfer should not be determinative. It cannot be urged too strongly that technical doctrines of property law as to the distinction between conditions precedent and conditions subsequent[36] should not be imported into the practical

[34] S. 154 of the American Law Institute, Restatement of Property, defines a "reversionary interest" as "any future interest left in a transferor or his successor in interest".

[35] S. 154 supra defines "possibility of reverter" as any reversionary interest which is subject to a condition precedent".

[36] Black's Law Dictionary (3rd. ed.), p. 390, distinguishes a condition precedent from a condition subsequent in the following language: "A condition precedent is one which must happen before the estate to which it is annexed can vest or be enlarged; . . . a condition subsequent is one annexed to an estate already vested, by the performance of which such estate is kept and continued, and by the failure or non-performance of which it is defeated".

realms of taxation. Whether A's death operates to vest an otherwise contingent interest, as in the first case, or to prevent the possible divesting of an otherwise vested interest, as in the second case, should make no difference so far as succession duty liability is concerned. Were it otherwise a change merely in the phrasing of the terms of the transfer would serve to create a judicially cognizable difference in the scope of section 3(1)(a). Such a result could not have been intended where the transferor can retain the possibility of regaining the property on the happening of exactly the same contingency. In either case he will reacquire the property if he survives B. The plain purpose of the modern fiscal enactment now under consideration is to catch within its terms all transfers which may be resorted to as substitutes for testamentary disposition. This purpose should not be emasculated by resort to subtle distinctions originating in the dim and distant past, when the courts were concerned with the defeasibility and alienability of remainder interests, rather than the proper effectuation of a taxing measure.[37]

Taxation is a practical rather than a formal matter. If form rather than substance is determinative of succession duty liability, then "essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes. These unwitty diversities of the law of property derive from medieval concepts as to the necessity of a continuous seisin. Distinctions which originated under a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth".[38]

The transfer in the *National Trust* case[39] was of the second type indicated above. There, securities were transferred to a trustee in trust, to pay the income therefrom to the beneficiary during the life of the settlor and, on the latter's death, to transfer the securities to the beneficiary absolutely; provided that if the beneficiary should predecease the settlor the trustee should return the securities to him. The transfer was held not to have been made or intended to take effect after death. As indicated above this was based on the conclusion that the phrase "made or intended to take effect in possession or enjoyment after such death" was not something separate and apart from the preceding

[37] At common law a contingent remainder was inalienable and destructible. A determinable fee was alienable and indestructible.
[38] Frankfurter J., at p. 118 of *Helvering* v. *Hallock*, 309 U.S. 106 (1940).
[39] See footnote 33 *supra*.

phrase "in general contemplation of death".[40] Certain language in the case and the decision with regard to section 3(1)(d), to be discussed hereafter, indicates however an inclination on the part of the court to import into the act legalistic distinctions based on the form of the transfer.

Relying on certain New Zealand decisions, the court characterized the beneficiary's interest as vested, subject to being divested in the event of her death before the settlor.[41] It regarded the division of her interest into a life estate and a remainder, as postponing merely the possession of the remainder interest and not its vesting.[42] This conclusion in itself should have brought section 3(1)(a) into immediate operation were it not for the interpretation put upon the section by the court. If possession of the remainder interest was postponed until the death of the settlor, then the transfer of that interest was "intended to take effect in possession or enjoyment" only after that event.

On the argument now being presented, the technical nature of the interests created under the transfer is not conclusive, if even relevant. The practical consequences of the transfer should be the controlling consideration. The emphasis put upon the vested nature of the beneficiary's interest, however, indicates that form rather than substance is to be the controlling test.[43] Thus is forecast a period of legal gymnastics in the phrasing of trust instruments and other types of transfer. If such is the case, the result is to lend judicial countenance to succession duty avoidance.

Lacking Canadian authority on the issue, it is submitted that the experience of the United States with respect to transfers "made or intended to take effect in possession or enjoyment at or after death" would have furnished a more satisfactory guide.[44] The test of liability under that phrase was at first based on form. In *Klein* v. *U.S.*[45] property was settled by means of a trust on B

[40] [1946] Ex. C.R. 650, at pp. 658-659.

[41] [1946] Ex. C.R. 650, at p. 662, "There was no condition precedent to vesting, but if she died before the death of the settlor, the interest would be taken away. The condition then was a condition subsequent and her conditional interest was, therefore, vested subject to be divested."

[42] [1946] Ex. C.R. 650, at p. 662; "There was a gift of the income until the death of the settlor so that the gift of the corpus does not stand alone. The gift amounts, in substance, to a vested interest divided into two portions for the purpose of protracting, not the vesting, but the possession only."

[43] [1946] Ex. C.R. 650, at pp. 662-664.

[44] S. 811(c) of The United States Internal Revenue Code provides that there shall be included in the gross estate of any decedent the value at the time of his death of all property "to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise . . intended to take effect in possession or enjoyment at or after his death . . ."

[45] 283 U.S. 231 (1931).

for life. In the event that B survived the settlor, he was to acquire a fee simple, but otherwise the fee was to remain vested in the settlor. The Supreme Court found that the settlor's interest in the corpus was vested subject to being divested in the event that he predeceased B. It held that the property was to be included in the settlor's gross estate for estate tax purposes on the ground that his death was the indispensable and intended event which brought the larger estate into being for B, and effected its transmission from the settlor to him. Survivorship of the settlor was a condition precedent to B's acquisition of the fee. The *St. Louis Trust* cases[46] involved a transfer in trust to B in fee, but if B should die during the settlor's lifetime; the property was to revert to the settlor. The transfer was thus the same in substance as that involved in the *Klein* case save that it was expressed in terms of a condition subsequent. In a five to four decision the Supreme Court distinguished the *Klein* case and held that the property was not to be included in the settlor's gross estate. Nothing passed on his death from him to the beneficiary. His possibility of reverter, which was purely contingent on his surviving B, merely ceased on his death before B.

Administrative experience proved that it was impossible to apply this formal test to the innumerable differences in phrasing resorted to in trust instruments, and still have a coherent body of law. In addition it was considered inequitable to render the settlor of a *Klein* type of trust liable to estate tax, when another settlor who achieved precisely the same results escaped tax liability by the use of a *St. Louis* form of transfer. Consequently in 1940, in the now famous case of *Helvering* v. *Hallock*,[47] the Supreme Court refused to base estate tax law on the "nicities of the art of conveyancing" and overruled the *St. Louis Trust* cases. The principle enunciated in the *Klein* case was adopted. *Inter vivos* transfers were to be taxed, not merely when interests were deemed to pass on death according to the refined technicalities of the law of property, but also when they were too much akin to testamentary dispositions not to be subject to the same excise.

The substance of the matter is that, whatever form is adopted, the transferor has retained a string on the property which suspends its ultimate disposition until his death. By his voluntary act he has elected to postpone until his death the ascertainment of the person who will ultimately take possession and enjoyment

[46] *Helvering* v. *St. Louis Trust Co.*, 296 U.S. 39 (1935); *Becker* v. *St. Louis Trust Co.*, 296 U.S. 48 (1935).
[47] 309 U.S. 106 (1940), cited in the *National Trust* case at p. 664.

of the property. The transferee must survive the transferor before he is assured of any continuing interest. Hence, whether the transferor's death enlarges that interest or merely destroys the possibility of its being cut down should be of no consequence in determining succession duty liability. The transferor loses any chance of regaining the property only when he dies. On that event, for the first time, the transfer of the property becomes absolute. Death being the driving force behind the transfer, it is submitted that the transfer was intended to take effect in possession or enjoyment only thereafter.

The characteristics of this type of transfer which render the transferee liable for duty are two in number. First, until the transferor's death, it is impossible to tell who will obtain possession and enjoyment of the property thereafter. Transferees must survive the transferor to be assured of their interest in the property, in the same way as legatees under a will. Second, the transferor possesses an interest in the property by virtue of the fact that it will return to him or his estate[48] upon the transferee's failure to fulfil the condition of survivorship.[49] Obviously these characteristics were both present in the *National Trust* case, in so far as the corpus interest was concerned. The beneficiary's life estate, being wholly independent of any necessity of survivorship, was of course outside the scope of the present doctrine.

Where the ultimate disposition of property depends upon a condition wholly unrelated to the transferor's death, then section

[48] It is necessary to cover the case where the property will revert to the transferor's estate, as well as the transferor personally, in the event of the beneficiary failing to survive the transferor, to prevent easy evasion. A trust for A for life and if A shall be living five days after the transferor's death, then to A in fee, otherwise to the transferor or his estate, would fall outside the test here formulated were the words "or his estate" omitted. However, everything said about trusts where the vital date is the death of the transferor applies equally here. The beneficiary can secure the larger estate only by surviving the transferor. If he fails to do so, the property reverts to the transferor or, if the beneficiary dies in the period shortly after his death, then to his estate. The transferor has thus failed to dispose of the right to control the disposition of the property until his death and a short time thereafter. The transfer of the beneficiary's interest in the corpus takes effect five days after the transferor's death. Clearly then the transfer is caught by s. 3(1)(a) where the word pointing to the vital date of the transfer is "*after*" the death.

[49] S. 81.17 of Regulations 105 under the United States Internal Revenue Code, as amended by T.D. 5512, May 1, 1946, provides as follows: "A transfer of an interest in property by the decedent during his life . . . is 'intended to take effect in possession or enjoyment at or after his death', and hence the value of such property interest is includible in his gross estate, if . . .(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and (2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise)". This regulation was formulated after the lower courts had found difficulty in discerning the bounds of the Supreme Court's decision in *Helvering* v. *Hallock, supra.*

3(1)(a) has no application. Thus, suppose A transfers property to B for life with remainder to C if he survives B, otherwise to A or his estate. Here the transfer of the property to C, or its return to A or his estate, depends on whether or not C survives B. Since this may be determined either before or after A's death, clearly that event in no way affects the disposition of the property. The fact that the property may return to A or his estate sometime after the transfer is executed is not sufficient when standing alone to bring section 3(1)(a) into operation.

The ultimate disposition of the property is not rendered uncertain until A's death, simply because that event in no way dispels the uncertainty. The transfer is not a substitute for a testamentary disposition. A's interest in the property passes to another on his death, not by virtue of the original transfer, but by virtue of the terms of his will. C is thus free from duty under section 3(1)(a). The person who succeeds to A's interest in expectancy[50] is liable for duty however under section 2(m)[51] in the same way as if he had succeeded to any other interest in property.[52]

(f) *Extent of the transferee's liability for duty on transfers falling within section 3(1)(a)*

The interest of any transferee which remains unaffected by the transferor's death is not to be taken into consideration in determining liability under the latter part of section 3(1)(a). The interest of a beneficiary under a trust reserving to the settlor the power to alter or amend is of this nature when that interest is not liable to be divested by the exercise of the power. In the same manner an outstanding life estate under a trust, where the settlor is to reacquire the property in the event that

[50] S. 2(g) defines "interest in expectancy" as including "an estate, income or interest in remainder or reversion and any other future interest whether vested or contingent . . ."

[51] S. 2(m) defines "succession" to include " . . . every past or future disposition of property . . to any other person in possession or expectancy . . ."

[52] The beneficiary of such an interest has three choices open to him as to the time he will pay the duty. (1) Under s. 24(1), as in the case of all other duties imposed by the act, he may pay it within six months of the deceased's death. In this case, his interest is valued as of the date of the deceased's death (s. 5(1)). (2) Under sec. 28(4), if he has not paid the duty under option (1), it is due when his interest in expectancy falls into possession and must be paid within three months thereafter. The basis of the duty is the fair market value, as of the date the interest falls into possession, of the property in respect of which such interest in expectancy existed. (3) If he has failed to take advantage of option (1) and wishes to pay the duty before the interest falls into possession, he may do so under s. 28(5) with the consent of the Minister. The basis of the duty in this case is the fair market value of the interest in expectancy as of the date the minister's consent is obtained.

he survives the beneficiary, is of this nature, since it is not affected by the settlor's death.

Where however the transfer of an interest is ineffective until the transferor's death, the fair market value of the interest as of that date determines the extent of the transferee's liability for duty.[53] The fair market value of a life beneficiary's interest under a trust reserving power in the settlor to alter or amend would be determined by multiplying the annual value of that interest by his life expectancy, estimated by reference to standard mortality tables, as of the date of the settlor's death.[54] The fair market value of the remainder interest under such a trust would be the present value of a remainder interest to take effect in possession after a life estate in a person having a life expectancy the same as the life tenant.

Where the transferee is rendered liable for duty because of the possibility that the transferor will reacquire the property, the extent of that liability would be determined by calculating the present value of the transferee's interest as of the date of the transferor's death. The reasons for refusing to measure that liability by the value of the transferor's retained interest are two-fold. First, the liability arises from the fact that the ultimate disposition of the transferee's interest is rendered uncertain until the transferor's death and not from the fact that there is deemed to be a disposition of the retained interest at that time. Second, the probability or improbability that the transferor will ever reacquire the property (and hence the value of his retained interest) is of no consequence. The crucial matter is that he has seen fit to retain the possibility that he may reacquire the property should

[53] This conclusion, stated so shortly, is arrived at only by the most circuitous of routes. S. 6 levies duties "upon or in respect of . . successions". According to s. 2(m) a "succession" includes "any disposition of property deemed by this Act to be included in a succession". The transfer of an interest "intended to take effect in possession or enjoyment" after the transferor's death is "deemed to be a succession" by s. 3(1)(a) and the beneficiary of such interest is "deemed to be the successor" in relation to such interest by the same section. S. 2(k) includes within the term "property", any right or benefit mentioned in section three. According to s. 5(1) "property included in a succession . . . [is] . . . valued as of the date of death". This is the dutiable value which is defined by s. 2(e) as "the fair market value as of the date of death". By virtue of s. 12(1) "every successor" is liable for duty "levied upon or in respect of the succession to him". Therefore the beneficiary (successor) of an interest (property) under a transfer intended to take effect after death (succession) is liable for duty (s. 12(1)) measured by the fair market value (s. 2(e)) of his interest as of the date of the transferor's death (s. 5(1)).

[54] S. 34 provides that "the value of every . . . life estate . . . and of every interest in expectancy in respect of the succession to which duty is payable under this Act shall . . . be determined by such rule, method and standard of mortality and of value, and at such rate of interest as from time to time the Minister may decide".

he survive the transferee and so has rendered its disposition uncertain until his death.

The beneficiary's interest in the corpus in the *National Trust* case is all that concerns us here. The life estate, being wholly unaffected by the settlor's death, should not be considered in determining the extent of her liability for duty. Since that estate ended immediately on the settlor's death, the remainder interest took effect immediately. The fair market value of that interest, then, would be the same as the fair market value of the property at that time. The beneficiary should have been liable for duty calculated on that value.

Gifts with Reservation of Benefits

It is not intended to go into an exhaustive discussion of the subject of gifts with reservation of benefits. However, inasmuch as the *National Trust* case, which has been considered in various other places in this article, dealt with the problem it is not out of place to consider it briefly. The transfer there in question was also held to fall outside the terms of section 3(1)(d), which provides that a "succession" shall be deemed to include:

> property taken under a gift whenever made of which actual and *bona fide* possession and enjoyment has not been assumed by the donee or by a trustee for the donee at least three years before the death of the deceased and thenceforward retained to the entire exclusion of the donor or of any benefit to him, whether voluntary or by contract or otherwise . . .

So far as the beneficiary's interest in the income was concerned, this holding was manifestly correct. Possession and enjoyment of that interest was assumed by a trustee for her immediately the trust was executed. The settlor was thenceforward excluded from any benefit therein. The result with respect to the corpus interest was not so obvious however.

The court concluded that the contingent reversion in the settlor was not reserved out of the gift of the corpus so as to render the beneficiary's possession or enjoyment non-exclusive. Rather was it simply not comprised in the gift in the first place.[55] While

[55] This decision was based on the authority of *Re Cochrane*, [1905] I.R. 626; affirmed [1906] I.R. 200, which held that an express provision for reversion did not render a gift one in which the donor was not excluded from possession and enjoyment or of any benefit within the meaning of clause (a) of the Customs and Inland Revenue Act 1881; section 38(2) as amended by section 11 of the Customs and Inland Revenue Act, 1899, and the Finance Act, 1894 — clause (c)(2). (See the *National Trust* case at p. 663). In that case A transferred certain monies in trust for B for life with remainder among her children in such shares as she would appoint and, in default of appointment, among them equally. If B died childless the trustees were to hold the property in trust for A absolutely. It is at least arguable that

that is admittedly supported by authority, it is difficult to see how it is determinative of the issue. It will be remembered that the court also decided that the division of the beneficiary's interest into a life estate and a remainder protracted possession of the remainder interest. Therefore it would seem to follow that possession of that interest was not even assumed, let alone "assumed . . . . and thenceforward retained to the entire exclusion of the [settlor]" as is required by section 3(1)(d). In addition it has been expressly held that it is not necessary for the benefit to the settlor to be by way of reservation out of the original gift. Any benefit to him, by contract or otherwise, suffices to bring the transfer within the section.[56]

The emphasis on the technical results of the transfer here illustrated is the type of thing criticized earlier in this article. Practical rather than formal results should govern liability for duty. Inasmuch as the property would revert to the settlor in

this decision is not controlling so far as the transfer in the *National Trust* case is concerned. It will be noticed that the contingency upon the happening of which the property was to revert to the settlor was one in no way connected with the settlor's death. His death did not serve to enlarge the beneficiary's interest by cutting out the possibility that the property would revert to him, as was the situation in the *National Trust* case. His death merely shut off the chance of his reacquiring the property personally. If thereafter the contingency occurred which would cause the property to revert, it would revert not to him but to his estate. In the *National Trust* case the contingency which would bring the property back was dependent on survivorship of the settlor. The property would revert to him personally or not at all. His death eliminated the possibility that it would so revert. The survivorship contingency then, during the joint lives of the settlor and the beneficiary, was in the nature of a rubber band embracing the settlor's contingent reversion on the one hand and the beneficiary's fee simple subject to condition subsequent on the other. Upon the death of either one, this rubber band would cause the property to snap in the direction of the survivor and give him, as a consequence, a fee simple absolute in the property. It is thus easier to think of a contingent reversion as reserved out of the gift in a case where the contingency is one of survivorship, and must occur during the lifetime of the settlor. We have seen that there is a vast difference between conditions dependent on survivorship and conditions independent thereof. Consequently, a decision holding that a contingent reversion is something not comprised in the gift rather than as reserved thereout, made with reference to a contingency other than survivorship, is not necessarily binding where the contingency is one of survivorship.

[56] In *Attorney-General* v. *Worrall*, [1895] 1 Q.B. 99, Lopes L.J. at pp. 106-107 says: "There was a defect in the provisions of s. 38, sub-s. 2(c) of the earlier Act [Customs and Inland Revenue Act, 1881, 44-45 Vict. c.12], viz., that, in order to bring a case within it, there must be a reservation out of the subject matter of the gift. It appears to me clear that s. 11, sub-s. 1 of the subsequent Act [Customs and Inland Revenue Act, 1889, 52-53 Vict. c. 12] was worded as it is with the express purpose of avoiding that defect. It provides that the description of property marked (a) in the former enactment shall 'include property taken under any gift, whenever made, of which bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise'. As I read that provision it is not necessary that the benefit to the donor should be by way of reservation, but any benefit to him by contract or otherwise will suffice to bring the case within the enactment."

the event that he survived the beneficiary, it is obvious that the corpus was not "assumed . . . and thenceforward retained to the entire exclusion . . . of any benefit to [the settlor]". Leaving aside the relative chances of survivorship of the beneficiary and the settlor,it would seem that the settlor had at least as great an interest in the corpus as the beneficiary. Each would succeed thereto absolutely if he survived the other. The holding that "the possibility that the securities might revert to [the settlor] in the event the [beneficiary] predeceased him, is not an interest in property",[57] seems immaterial for our purposes. However we may style the settlor's interest in the corpus, it was still an interest which would result in the return of the absolute ownership to him, if he survived the beneficiary. The latter's interest in the income clearly fell outside the terms of section 3(1)(d), but his corpus interest just as clearly fell within.

As ancillary to its holding with respect to section 3(1)(d), the court concluded that the beneficiary was exempt from duty on the property comprised in the transfer by virtue of section 7(1)(g).[58] This section in substance exempts from duty gifts made before a certain date, where possession has been assumed and retained to the exclusion of the donor, immediately on the making of the gift. It is difficult to see how the section could have any bearing on the case. Its opening words are "From the dutiable value *of any property included in a succession* the following exemptions shall be deducted . . .". By concluding that the transfer was not within section 3(1)(a) or section 3(1)(d), and hence not included within a "succession", the court automatically made section 7(1)(g) inapplicable.

While it is contended that the court's handling of section 3(1)(d) was erroneous, this is a subsidiary matter. The emasculation of section 3(1)(a) is the vital part of the case. The wall thrown around succession duty avoidance by section 3 has been so badly breached by the interpretation put upon this latter sub-section that the patching up of cracks, created in the structure by the holding with respect to section 3(1)(d), is a futile gesture. There is no point in locking the stable door after the horse has been stolen.

[57] [1946] Ex. C.R. 650, at p. 657.

[58] S. 7(1)(g) provides that: "From the dutiable value of any property included in a succession the following exemptions shall be deducted and no duty shall be leviable in respect thereof:— . . . (g) in respect of any gift made by the deceased prior to the twenty-ninth day of April, one thousand nine hundred and forty-one, where actual and *bona fide* possession and enjoyment of the property, the subject matter of the gift, has been assumed by the donee or by a trustee for the donee immediately upon the making of the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him, whether voluntary or by contract or otherwise;".

Conclusions

Criticism of the views expressed in this article will doubtless take many forms. The type of transfer that will most often fall within the principles here suggested will be that involving the trust instrument. It is the best available means of providing flexibility in family settlements. By the careful use of powers a settlor can be reasonably certain that adjustments to meet unexpected changes in the circumstances of the beneficiaries will be possible. If section 3(1)(a) is applied as proposed, it may be argued that settlors will revert to the rigid life estate and remainder settlements. There is no duty levied on the cessation of a life estate and the coming into possession and enjoyment of the remainder interest.[59] Settlors may prefer rigid settlements to those which, while flexible, will be eaten up to some extent at least by succession duty. Admittedly this would be an undesirable result.

However it must be remembered that the reason such transfers are included within the scope of section 3(1)(a) is because the settlor has himself reserved the power. If he gives the power to a third party, he has completely divested himself of all interest in the property or control over its disposition. Thus there is no ground for holding the beneficiary liable for duty on his death. The transfer is not within section 3(1)(a) because the beneficiary's interest is in no way affected by the settlor's death. The beneficiary is also free from duty on the death of the donee of the power. Since the donee has not himself made the transfer, section 3(1)(a) has no application. It covers only transfers intended to take effect after the death of the "grantor, bargainor, or donor". Further, if the power given the donee is sufficiently limited so as to take it outside the category of a general power to appoint, its non-exercise does not render the beneficiary liable for duty under section 3(4).[60] It can thus be seen that the interpretation of section 3(1)(a) suggested in this article does not render flexible settlements impractical.

[59] Unless the life estate is reserved by the settlor himself, in which case duty is levied on his death under s. 3(1)(f), footnote 25 *supra*.

[60] S.3 (h), footnote 30 *supra*, deems the taking of property in default of the exercise of a general power of appointment to be a "succession". A general power of appointment according to s. 4(1) "includes every power or authority enabling the donee or other holder thereof to appoint or dispose of the property as he thinks fit, whether exercisable by instrument *inter vivos* or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself . . ." Clearly then, if the power is given to a third person and is narrowly confined, or is given to a trustee in broad terms to be exercised in a fiduciary capacity, its non-exercise does not render the beneficiary liable for duty on the donee's death.

A person should be able to avoid the levying of succession duty on his death only where he loses, during his lifetime, all control over and all interest in the ultimate disposition of his property. The judicial sanctioning of the trust instrument as a means of avoiding duty cannot be supported where these are retained. The average person subject to the act is of moderate means. For him, the use of the trust instrument is not feasible. Consequently he has only two available alternatives. He may retain his property and thus control its disposition until his death. In this event duty is levied on its succession. Alternatively, he may give it away during his lifetime, thus completely losing any form of control over its disposition. If he does so, and avoids the tentacles of "general contemplation of death", no duty is assessed when he dies. It is difficult for him both to retain control over, or an interest in, the ultimate disposition of his property and avoid rendering the beneficiary thereof liable to duty on his death. When others, with larger resources, receive the judicial blessing for their attempt to do so by means of the trust instrument, he has just ground for complaint.

It is not suggested that all *inter vivos* transfers should be taxed under a system imposing duty on successions at death. Nor is it suggested that the act be broadened to cover the types of transfer discussed in this article. Rather it is maintained that the act as it now stands clearly embraces such transfers, as indeed any system of estate taxation or succession duty must if it entertains any hope of being effective. The legislature in enacting section 3 of the act appreciated that it was anomalous as well as inequitable to impose a heavy duty on property passing by testamentary disposition, with the double aspect of raising revenue and reducing gratuitous inequality of wealth, if the obvious alternative method by which the same inequality could be perpetuated was not also checked. Consequently it attempted to close the gap by rendering liable for duty what have generally been called "substitutes for testamentary disposition". The underlying theory of this section, and in particular of section 3(1)(a), would appear to be that a testamentary disposition does not become non-testamentary solely because it is looked at through *inter vivos* coloured glasses. A person should not be able to secure the succession duty advantages of an *inter vivos* gift without being subject to the disadvantages inherent in loss of control over the property transferred.

As a general rule the energies of all decedents are directed toward avoiding, so far as possible, the imposition of duty on the succession to their property when they die. The *National*

Trust decision, which permits many substitutes for testamentary disposition to go free of duty, conceivably may result in all of them escaping, because it is probable that they will be resorted to in ever increasing numbers now that the rates have doubled.[61]

Taxes in any form are the price an individual must pay for a civilized society. As the government projects itself into an ever-increasing number of social activities the need of revenue increases. Whatever may be a person's view of the function of government, it is his duty to bear his share of the mounting burden of taxes. The courts should not judically support attempts to circumvent the clear mandate and spirit of a taxing statute, as they appear to have done in the *National Trust* case.

THE PROPOSED INTERNATIONAL TRADE ORGANIZATION

The purposes of the Organization shall be:

1. To promote the solution of problems in the field of international commercial policies and relations through consultation and collaboration among Members.

2. To enable Members to avoid recourse to measures destructive of world commerce by providing, on a reciprocal and mutually advantageous basis, expanding opportunities for their trade and economic development.

3. To encourage and assist the industrial and general economic development of Member countries, particularly of those still in the early stages of industrial development.

4. In general, to promote national and international action for the expansion of the production, exchange and consumption of goods, for the reduction of tariffs and other trade barriers, and for the elimination of all forms of discriminatory treatment in international commerce; thus contributing to an expanding world economy, to the establishment and maintenance in all countries of high levels of employment and real income, and to the creation of economic conditions conducive to the maintenance of world peace.

5. To provide a centralized agency for the coordination of the work of Members to the above ends.

(Article 1 of the Suggested Charter for an International Trade Organization of the United Nations)

[61] Bill 373, Second Session, 10 Geo. VI, 1946, as passed by the House of Commons, August 12th, 1946, exactly doubled the rates existing before that time.