HIGH COURT OF JUSTICE (CHANCERY DIVISION)—1, 2 AND 22 MARCH 1978

COURT OF APPEAL—20 AND 21 MAY AND 15 JULY 1980

HOUSE OF LORDS—8 AND 9 MARCH AND 6 MAY 1982

Berry *v.* Warnett (H.M. Inspector of Taxes)[1]

Capital gains tax—Settled property—Gift in settlement—Part disposal—Connected persons—Assignment of reversion followed by assignment of life interest—Whether the first assignment was only a part disposal—Finance Act 1965 (*c* 25), *ss* 22(2), 22(4), 25(2) *and Sch* 7, *paras* 17 *and* 21; *Income and Corporation Taxes Act* 1970 (*c* 10), *s* 454(3).

On 15 March 1972 B executed transfers of shares and stock, "the fund", owned by him in favour of a Guernsey company "Investors Trustees". On 4 April 1972 a settlement was executed by B (in which he was described as "the vendor"), a Jersey company "First Investors and Savers" (described as "the purchaser") and Investors Trustees (described as "the trustees") by which he assigned the reversionary interest in the fund to First Investors and Savers in consideration of £14,500 retaining for himself a life interest. By a deed dated 6 April 1972 B assigned his life interest to a Bahamas company "First Investors International Holdings" for £130,753.72.

The Special Commissioners upheld an assessment on B to capital gains tax for the year 1972–73 holding, *inter alia,* that on 4 April 1972 he made a disposal of the fund and not merely a part disposal thereof. B appealed.

The Chancery Division, allowing B's appeal, held that even if there was a gift in settlement within the meaning of s 25(2), Finance Act 1965, s 22(4) of that Act was not applicable since (1) on the evidence there was one agreement between all three parties to the settlement and B was at arm's length *vis-à-vis* both the purchasers and the trustees, and (2) paras 17 and 21 of Sch 7 to the Act were not applicable since there was no element of bounty on the part of B; *Bulmer* v. *Commissioners of Inland Revenue* 44 TC 1; [1967] Ch 145 and *Commissioners of Inland Revenue* v. *Plummer* 54 TC 1; [1977] 1 WLR 1227 followed; and, in consequence, there was only a part disposal of the fund within the meaning of s 22(2), Finance Act 1965. The Crown appealed.

The Court of Appeal, dismissing the Crown's appeal (Buckley L.J. dissenting), held (1) that the settlement did not involve a gift in settlement within s 25(2) because it did not, as between B and beneficiaries, involve a voluntary transfer of property; (2) that there was no disposal in the statutory sense of that word because there was only a part disposal under s 22(2)(*b*) (of the reversion) the life interest in income remaining undisposed of. *Commissioners of Inland Revenue* v. *Plummer* [1979] 3 WLR 689 considered. The Crown appealed.

(1) Reported (Ch D) [1978] 1 WLR 957; [1978] 3 All ER 267; [1978] STC 504; 122 SJ 438; (CA) [1981] 1 WLR 1; [1980] 3 All ER 798; [1980] STC 631; 124 SJ 594; (HL) [1982] 1 WLR 698; [1982] 2 All ER 630; [1982] STC 396; 126 SJ 346.

Held, in the House of Lords, allowing the Crown's appeal and restoring the determination of the Special Commissioners, (1) that the disposal in March 1972 of the legal title to the fund became an effective disposal for capital gains tax purposes when on 4 April 1972 trusts were declared other than in favour of the settlor, thus making the fund settled property; (2) that by virtue of s 22(4)(*a*) that disposal was deemed to be for a consideration equal to the market value of the fund because it was acquired by the trustees otherwise than by way of a bargain made at arm's length, the bargain between B and the purchaser being irrelevant in this context; and (3) that the disposal was not a part disposal under s 22(2)(*b*) because nothing remained undisposed of.

Per Lords Wilberforce, Scarman and Bridge of Harwich (*contra* Lord Fraser of Tullybelton and Lord Roskill): the expression "gift in settlement" in s 25(2) relates to beneficial interests created, not to the legal transfer of title.

CASE

Stated under the Taxes Management Act 1970, s 56, 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 8 March 1976 Mr. Norman Charles Berry (hereinafter called "the Appellant") appealed against the following assessment to capital gains tax 1971–72, £150,483.

2. Shortly stated the question for our decision was whether settlements effected by the Appellant and his wife of certain shares and loan stock constituted part disposals of the shares and loan stock settled or disposals of the whole.

3. The following documents were proved or admitted before us:

A. A settlement dated 4 April 1972 between the Appellant (thereinafter called "the vendor") of the first part, First Investors & Savers (Jersey) Ltd. (thereinafter called "the purchaser") of the second part and Investors Trustees Ltd. (thereinafter called "the trustees") of the third part.

B. A settlement of the same date between Mrs. Sonia Henriette Rowan Berry, the wife of the Appellant, of the first part and the same parties of the second and third parts as in the case of the Appellant's settlement identified under A.

C. A deed of assignment dated 6 April 1972 between the Appellant (thereinafter called "the vendor") of the one part and First Investors International Holdings Ltd. of the other part.

D. A deed of assignment of the same date between Mrs. Sonia Henriette Rowan Berry of the one part and the same party of the other part as in the case of the Appellant's assignment identified under C.

Copies of the above are available for inspection by the Court if required.

4. The following facts were admitted between the parties:

(1) At all material times up to 15 March 1972 shares and loan stock in Rothschild Investment Trust Ltd. were beneficially owned by the Appellant

and his wife living with him Mrs. Sonia Henriette Rowan Berry, the shares and loan stock owned by Mrs. Berry being registered in her name, and the shares and loan stock owned by the Appellant being registered as to some in his own name and as to the remainder in the name of Lloyds Bank (Branches) Nominees Ltd. as nominee for him. The following are particulars:

Beneficial owner	*Ordinary shares of £1 each fully paid*	*6½% Convertible Unsecured Loan Stock 1985–90*
		£
	Registered in the respective names of the Appellant and Mrs. Berry	
The Appellant	4,854	22,331
Mrs. Berry	4,854	22,330
	Registered in the name of Lloyds Bank (Branches) Nominees Ltd.	
The Appellant	6,000	27,600.

As at 4 April 1972, the market value of the above-mentioned shares and loan stock was £219,880.

(2) On 15 March 1972 the Appellant and Mrs. Berry executed stock transfer forms transferring to Investors Trustees Ltd. ("Investors Trustees"), of William Deacons Bank Chambers, Commercial Arcade, St. Peter Port, Guernsey, Channel Islands, such of the above-mentioned shares and loan stock as were registered in their respective names. First Investors Financial Services Ltd., acting as agents for Investors Trustees, received these stock transfers on or about 17 March 1972 and they received the relative share and loan stock certificates on or before 28 March 1972. They afterwards forwarded the transfers and certificates to the registrars for Rothschild Investment Trust Ltd. for registration. On 28 April 1972 the said loan stock was registered in the name of Investors Trustees in the register of debentures of Rothschild Investment Trust Ltd., and on 12 May 1972 the said shares were registered in the name of Investors Trustees in the share register of Rothschild Investment Trust Ltd.

(3) On 21 March 1972 Lloyds Bank (Branches) Nominees Ltd., at the request of the Appellant, executed stock transfer forms transferring to Investors Trustees such of the above-mentioned shares and loan stock as were registered in their name. On or shortly after 6 April 1972 First Investors Financial Services Ltd., acting as agent for Investors Trustees, received those stock transfers together with the relative shares and loan stock certificates from Lloyds Bank (Branches) Nominees Ltd. and afterwards forwarded them to the registrars of Rothschild Investment Trust Ltd. for registration. On 28 April 1972 the said loan stock was registered in the name of Investors Trustees in the register of debentures of Rothschild Investment Trust Ltd. and on 12 May 1972 the said shares were registered in the name of Investors Trustees in the share register of Rothschild Investment Trust Ltd.

(4) On 4 April 1972 a settlement, being the settlement identified under A. in para 3 above, was executed by the Appellant, by First Investors and Savers (Jersey) Ltd. and by Investors Trustees. The settlement recited that the vendor, the Appellant, was the beneficial owner of the shares and loan stock of which particulars are contained in sub-para (1) above and that the vendor and the purchaser, First Investors and Savers (Jersey) Ltd., had bargained and

A agreed for the consideration thereinafter mentioned that the same should be settled in manner thereinafter appearing. Clauses 1, 2 and 3 of the settlement were in the following terms:

> "1. 'The Trust Fund' means the said property specified in the Schedule hereto [ie the above mentioned shares and loan stock] and the property for the time being representing the same. 2. In pursuance of the
B said agreement and in consideration of the sum of £14,500 now paid by the Purchaser to the Vendor (the receipt whereof the Vendor hereby acknowledges) the Vendor as Beneficial Owner Hereby Assigns unto the Trustees [ie Investors Trustees] All That the Trust Fund and the income thereof To Hold the same unto the Trustees absolutely and the Vendor hereby directs and declares that the Trust Fund and the income thereof
C shall henceforth be held after the death of the Vendor and Subject in the meantime to the life interest of the Vendor and the powers and provisions hereinafter reserved and contained Upon Trust for the Purchaser absolutely. 3. Provided Always that during the life of the Vendor the Trustees shall pay the income of the Trust Fund to the Vendor for his own use and benefit absolutely."

D (5) On 4 April 1972 a settlement, being the settlement identified under B. in para 3 above, was executed by Mrs. Berry, by First Investors and Savers (Jersey) Ltd. and by Investors Trustees. Mrs. Berry's settlement was in similar terms, *mutatis mutandis,* to the Appellant's (the sum paid to Mrs. Berry was £7,650).

(6) On 6 April 1972 the Appellant and Mrs. Berry each executed a deed of
E assignment being the deeds of assignment identified under C. and D. in para 3 above, reciting the settlements and assigning to First Investors International Holdings Ltd. of Nassau, Bahamas, the interests in the income from the trust fund reserved in the said settlements for the sum of £130,753.72 in the case of the Appellant and £57,344.98 in the case of Mrs. Berry. The deed of assignment executed by the Appellant in terms recited that by the settlement identified
F under A. in para 3 above the Appellant as beneficial owner assigned unto the trustees, Investors Trustees, certain property ("the trust fund") and the income thereof upon trust that after the death of the Appellant and subject in the meantime to his life interest and the powers and provisions thereinafter reserved and contained the trustees should hold the trust fund and the income thereof in trust for the said First Investors and Savers (Jersey) Ltd. absolutely
G and that the Appellant had agreed with the said First Investors International Holdings Ltd. for the sale to it at the price of £130,753.72 of the said life interest of the Appellant in the trust fund. The operative part of the deed then effected the assignment of the Appellant's life interest. Mrs. Berry assigned her life interest for £57,344.98.

(7) At the dates when the transfers of the said shares in Rothschild
H Investment Trust Ltd. were executed and at all relevant times thereafter the articles of association of Rothschild Investment Trust Ltd. contained the following relevant provisions as to transfer of shares:

> "31. All transfers of shares shall be effected by transfer in writing in the usual common form. 32. The instrument of transfer of a share shall be executed both by the transferor and the transferee, and the transferor
I shall be deemed to remain the holder of the share until the name of the transferee is entered in the Register in respect thereof. 33. The Board may in its absolute discretion and without assigning any reason therefor, refuse to register any transfer of shares (not being fully paid up shares).

34. The Board may also refuse to recognise any instrument of transfer, unless: (A) Such fee, not exceeding 2s. 6d., as the Board may from time to time require is paid to the company in respect thereof. (B) The instrument of transfer is accompanied by the certificate of the shares to which it relates and such other evidence as the Board may reasonably require to show the right of the transferor to make the transfer; and (C) The instrument of transfer is in respect of only one class of share." A B

(8) The trust deed constituting the said loan stock contains the following relevant provisions as to transfer of loan stock in the following paragraphs of the second schedule in the conditions:

"4. The Stock is transferable in amounts and multiples of £1 by an instrument in writing in any form authorised by the Stock Transfer Act 1963 (or any statutory modification or re-enactment thereof for the time being in force) or in such other form as the Directors may approve. Every instrument of transfer shall be signed by the transferor and, in the case of a transfer of partly paid Stock, also by the transferee. The transferor shall be deemed to remain the owner of the Stock until the name of the transferee is entered in the Register in respect thereof. 5. Every instrument of transfer must be left at the Transfer Office for registration accompanied by the certificate for the Stock to be transferred and such other evidence as the Directors may require to prove the right of the transferor to transfer the Stock and if the instrument is executed by some other person on his behalf the authority of that person to do so. 6. All instruments of transfer which are registered will be retained by the Company." C D

The directors of Rothschild Investment Trust Ltd. did not approve the transfer of loan stock in any other form than that authorised by the Stock Transfer Act 1963. E

(9) If in the year 1971–72 the Appellant and Mrs. Berry made a part disposal of interests expectant on their respective deaths in the said shares and loan stock, their chargeable gains amounted to £14,839. If on the contrary the Appellant and Mrs. Berry made a total disposal of their said shares and loan stock, their chargeable gains amounted to £150,483. F

5. It was contended on behalf of the Appellant that:

(1) the settlement identified in para 3A. above was ineffective as an assignment to Investors Trustees Ltd., the trustees of the shares and loan stock. At most the settlement created an equitable interest in remainder in favour of First Investors and Savers (Jersey) Ltd., the purchaser; G

(2) the Appellant's sale of an interest in remainder to the purchaser constituted a part disposal since, within the meaning of s 22(2)(*b*), Finance Act 1965, an interest in remainder in the shares and loan stock was created by the settlement and on the making of the settlement the Appellant's life interest in the shares and loan stock remained undisposed of;

(3) section 25(2), Finance Act 1965, was not in point since the creation of an interest in remainder in the shares and loan stock in favour of the purchaser was for full consideration and not by way of gift; H

(4) precisely similar considerations applied to Mrs. Berry's settlement;

(5) the assessment should be reduced to the agreed figure of £14,839.

A 6. It was contended on behalf of the Inspector of Taxes that:

(1) in all the circumstances it was not open to the Appellant to question the effectiveness of the settlement which he himself had executed;

(2) the settlement was effective as an assignment of the shares and loan stock since when he executed the settlement, the Appellant had done all in his power to divest himself of the shares and loan stock and to transfer the legal
B ownership to Investors Trustees Ltd., the trustees;

(3) the Appellant could only create an interest in remainder in the shares and loan stock by first disposing of the shares and loan stock to the trustee of the settlement;

(4) the disposal involved in setting up the settlement under which an interest in remainder was created which could then be sold to the purchaser,
C was not a part disposal within the meaning of s 22(2)(*b*), Finance Act 1965;

(5) there was a "gift in settlement" within the meaning of s 25(2), Finance Act 1965, since the price paid by the purchaser was the price of an interest under the settlement and not a price paid for the shares and loan stock by the trustee of the settlement;

(6) the expression "gift in settlement" in s 25(2), Finance Act 1965, is apt
D to describe any transfer of property to a trustee by way of setting up or adding to a settlement otherwise than for a consideration moving from the trustee;

(7) precisely similar considerations applied to Mrs. Berry's settlement;

(8) the assessment should be confirmed in the agreed figure of £150,483.

7. In the course of the argument we were referred to the following cases: *Milroy* v. *Lord* (1862) 4 De G F & J 264; In re *Rose* [1952] Ch 499.

E 8. We, the Commissioners who heard the appeal, took time to consider our decision and gave it in writing on 6 April 1976 as follows:

On 4 April 1972 the Appellant, Mr. Norman Charles Berry, executed a settlement expressed to be made between himself as vendor, a Jersey company as purchaser and a Guernsey company as trustee. The settlement recited that Mr. Berry was the beneficial owner of certain shares and loan stock and that he
F and the purchaser had bargained and agreed for the consideration thereinafter mentioned that the shares and loan stock should be settled in manner thereinafter appearing. In pursuance of this agreement and in consideration of £14,500 paid by the purchaser, Mr. Berry purported to assign the shares and loan stock to the trustee and directed that they, and the property for the time being representing them, should be held after Mr. Berry's death, and subject in the
G meantime to his life interest, upon trust for the purchaser absolutely. The settlement further provided that during Mr. Berry's life the trustee should pay the income of the trust fund to Mr. Berry for his own use and benefit absolutely. Some of the shares and loan stock which were to constitute the trust fund were registered in Mr. Berry's own name and some in the name of Lloyds Bank (Branches) Nominees Ltd. as nominee for Mr. Berry. On 15 March 1972
H Mr. Berry had executed stock transfer forms transferring the shares and loan stock registered in his name to the trustee. These transfers and the relevant certificates were received by the trustee's agent during March but the transfers were not registered until several weeks later. On 21 March 1972 Lloyds Bank (Branches) Nominees Ltd., at Mr. Berry's request, had executed stock transfer

forms transferring the shares and loan stock registered in its name to the trustee. These transfers with the relevant certificates were despatched to the trustee's agent on 5 April 1972 but not received until 6 April or later. The transfers were not registered until several weeks later.

Mr. Beattie, for the Appellant,argued that the settlement was no more effective as a transfer of the shares and loan stock to the trustee than the deed discussed in *Milroy* v. *Lord* (1862) 4 De G F & J 264. Since, however, Mr. Berry received £14,500 from the purchaser pursuant to the bargain made between them, the effect of the transaction was to constitute Mr. Berry a trustee of the shares and loan stock, holding them upon trust for himself for life and subject to his life interest, for the purchaser. Mr. Alexander, for the Inspector, relying upon In re *Rose* [1952] Ch 499, argued that Mr. Berry had done all in his power according to the nature of what he had, a legal and equitable interest in the shares and loan stock registered in his own name and an equitable interest in the shares registered in the nominee company's name, to vest the legal interest in the property to be settled in the trustee and had thereby effectively transferred the shares and loan stock to the trustee. We did not find it necessary finally to resolve this particular dispute between the parties since both were agreed that on 4 April 1972 the shares and loan stock became subject to a trust, Mr. Berry having a life interest and the purchaser an absolute interest in remainder. The principal issue between the parties was whether for capital gains tax purposes what was done constituted a part disposal of the shares and loan stock or a disposal of the whole. Mr. Beattie argued that if a taxpayer settles property upon trust for himself for life, remainder to X, there is a part disposal since the terms of s 22(2)(*b*), Finance Act 1965, are precisely satisfied: an interest in the property, X's interest in remainder, is created by the disposal and on the taxpayer making the disposal, an interest derived from the property, the taxpayer's life interest, remains undisposed of. Here the whole transaction amounted to the sale by Mr. Berry of an interest in remainder in the shares and loan stock to the purchaser and the retention by him of his life interest: this was a part disposal. Section 25(2), Finance Act 1965, was not in point. For that provision to be in point there would have to have been a gift in settlement; here the interest in remainder was created for full consideration and the life interest was retained.

Mr. Alexander argued that before any interest in remainder could be sold to the purchaser, the settlement had to be created and the trusts constituted. That involved the disposal of the whole of the property settled. It was unnecessary to invoke s 25(2), Finance Act 1965: there was a disposal of the whole of the shares and loan stock by Mr. Berry on 4 April 1972 without reference to that provision. In any event, s 25(2) does no more than clear up a possible doubt: if an owner of property settles property retaining a life interest or himself acting as trustee, he is none the less to be regarded as making a disposal of the whole of the property which he has transferred to the trustees or made subject to the trusts of the settlement. When no consideration moves from the trustees, the term "gift in settlement" is apt to describe the creation of a settlement by a transfer of property to trustees.

The issue then in this case is whether a taxpayer who transfers assets to trustees to hold upon trust for himself for life, remainder to another, thereby disposes of the whole of the assets or makes a part disposal for capital gains tax purposes. This question has to be answered in the context of the scheme of the

tax taken as a whole. The occasion of charge is the accrual of gain on the disposal of assets: s 19(1), Finance Act 1965. A person's acquisition of an asset and the disposal of it to him is to be deemed to be for a consideration equal to the market value of the asset when he acquires the asset otherwise than by way of a bargain made at arm's length: s 22(4)(*a*). The trustees of settled property are to be treated as being a single and continuing body of persons distinct from the persons who may from time to time be the trustees, and therefore distinct from the settlor: s 25(1). Settled property means any property held in trust other than property held as trustee for another person absolutely entitled as against the trustee: s 45(1). A person, in his capacity as trustee of a settlement, is connected with any individual who in relation to the settlement is a settlor: para 21(3), Sch 7. Where a person acquires an asset and the person making the disposal is connected with him, the person acquiring the asset and the person making the disposal are to be treated as parties to a transaction otherwise than by way of bargain made at arm's length: para 17(2), Sch 7. No chargeable gain is to accrue on the disposal of an interest created by or arising under a settlement by the person for whose benefit the interest was created by the terms of the settlement: para 13(1), Sch 7.

Thus the scheme of the tax appears to be that a taxpayer who declares himself to be a trustee of property, or transfers property to a trustee other than a bare trustee for himself, makes a disposal for a consideration equal to the market value of the property in respect of which trusts are declared or which is transferred to the trustees. Assets which previously belonged to the taxpayer cease so to belong: *prima facie* there is a disposal of the whole of the assets. Does it affect this conclusion that the transaction here in question appears to fall within the description of a part disposal in s 22(2)(*b*), Finance Act 1965? We think not: what matters is that in relation to the shares and loan stock there was a disposal. Whether that disposal was a "gift in settlement" within the meaning of s 25(2) is similarly not the decisive question: as between Mr. Berry and the trustee there was a disposal of the shares and loan stock. Sale of an asset to the trustee of a settlement would be a disposal of the asset notwithstanding that the seller was interested under the settlement. It seems possible that s 25(2) is intended to do no more than make clear that a gratuitous transfer to the trustee of a settlement is in no different category.

The transaction effected by Mrs. Berry was in all essential respects similar to that effected by Mr. Berry except that all the shares and loan stock settled by Mrs. Berry were registered in her name. It must follow that the gain which is to be taken to have accrued on the disposal of her shares and loan stock falls to be aggregated with the gain on Mr. Berry's shares and loan stock.

The parties are agreed that the aggregate gains on the disposal of Mr. and Mrs. Berry's shares and loan stock must be taken to be £150,483. Accordingly we confirm the assessment made in that amount and formally dismiss the appeal.

9. The Appellant, immediately after the determination of the appeal, declared to us his dissatisfaction therewith as being erroneous in point of law and on 7 April 1976 required us to state a Case for the opinion of the High Court pursuant to the Taxes Management Act 1970, s 56, which Case we have stated and do sign accordingly.

10. The question of law for the opinion of the Court is whether our decision is correct. A

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A. K. Tavaré
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12 January 1977

The case was heard in the Chancery Division before Goulding J. on 1 and 2 March 1978 when judgment was reserved. On 22 March 1978, judgment was given against the Crown, with costs.

D. C. Potter Q.C. and *D. G. H. Braham Q.C.* for the taxpayer. C

C. H. McCall for the Crown.

Aberdeen Construction Group Ltd. v. *Commissioners of Inland Revenue* 52 TC 281; [1978] 2 WLR 648 was cited in argument in addition to the cases referred to in the judgment.

Goulding J.—This is an appeal from a decision of the Special Commissioners whereby they dismissed an appeal by Norman Charles Berry against an assessment to capital gains tax for the year 1971–72 in the sum of £150,483. Capital gains tax was introduced and is chiefly regulated by the Finance Act 1965. All references which I shall make to numbered sections or Schedules relate to that Act (as from time to time amended) unless otherwise stated. D

The assessment under appeal includes not only alleged chargeable gains of the Appellant himself, but also alleged chargeable gains of his wife. The Appellant is assessable to tax on the latter, if exigible, under para 3 of Sch 10. The figures are different but in other respects Mrs. Berry's transactions were closely similar to the Appellant's own and raise exactly the same points of law. I may therefore simplify my judgment by speaking only of the Appellant's own acts and circumstances. E F

The questions arising on the appeal are concerned with the taxation of what the Finance Act 1965 calls "settled property", and it will be convenient to explain that expression at the outset. The relationship of trustee and *cestui que trust,* like that of company and shareholder, raises a problem for a legislator imposing a tax on capital gains. He has to decide how far it is desirable to levy double taxation on the same substrata of economic appreciation (or monetary depreciation) and what means (if any) he will use to avoid or mitigate such double taxation. The authors of the Finance Act 1965 divided property held upon trust into three classes for this purpose. The first is dealt with by s 22(5). It comprises assets held by a trustee for a person absolutely entitled, or for two or more persons jointly so entitled, as against the trustee. What is meant by being absolutely entitled as against the trustee is now explained by para 9 G H

A of Sch 19 to the Finance Act 1969. In such cases s 22(5) seeks to ignore the existence of the trustee for tax purposes, somewhat in the manner of the old Statute of Uses. It says:

> ". . . this Part of this Act shall apply as if the property were vested in, and the acts of the nominee or trustee in relation to the assets were the acts of, the person or persons for whom he is the nominee or trustee
B (acquisitions from or disposals to him by that person or persons being disregarded accordingly)."

A second class of trust property is that comprised in unit trust schemes as defined by the Prevention of Fraud (Investments) Act 1958. In such cases s 45(8) provides in effect that tax is to be levied as if the scheme were a company and the rights of unit holders were shares in the company. I need not pursue
C the consequences of that direction. Having set aside the two classes I have mentioned, the Finance Act 1965 describes all other trust property as "settled property". The definition is found in s 45(1). It declares that, unless the context otherwise requires, "settled property" means, subject to s 45(8), any property held in trust other than property to which s 22(5) applies.

Section 25 contains the main code relating to capital gains tax on settled
D property. The primary scheme (in sharp contrast to s 22(5)) is to make the trustee the party chargeable with tax on appropriate occasions. It will be enough for me to read part of the section. Subsection (1) begins as follows:

> "In relation to settled property, the trustees of the settlement shall for the purposes of this Part of this Act be treated as being a single and continuing body of persons (distinct from the persons who may from time
E to time be the trustees) . . ."

The rest of subs (1) directs how the notional residence of the trustees is to be ascertained. I will read the next three subsections:

> "(2) A gift in settlement, whether revocable or irrevocable, is a disposal of the entire property thereby becoming settled property notwithstanding that the donor has some interest as a beneficiary under
F the settlement and notwithstanding that he is a trustee, or the sole trustee, of the settlement. (3) On the occasion when a person becomes absolutely entitled to any settled property as against the trustee all the assets forming part of the settled property to which he becomes so entitled shall be deemed to have been disposed of by the trustee, and immediately reacquired by him in his capacity as a trustee within section 22(5) of
G this Act, for a consideration equal to their market value. (4) On the termination at any time after 6th April 1965 of a life interest in possession in all or any part of settled property, the whole or a corresponding part of each of the assets forming part of the settled property and not ceasing at that time to be settled property, shall be deemed for the purposes of this Part of this Act at that time to be disposed of and immediately reacquired
H by the trustee for a consideration equal to the whole or a corresponding part of the market value of the asset. For the purposes of this subsection a life interest which is a right to part of the income of settled property shall be treated as a life interest in a corresponding part of the settled property."

I need not go further with s 25. It will have been observed that the section
I more than once uses the word "settlement". It is not explicitly defined, but this case has been argued on the footing that it is correlated with the term "settled property". As part of the same general scheme, disposals of equitable

interests in settled property by a *cestui que trust* receive a considerable measure of exemption from tax. For that the student has to refer to para 13 of Sch 7, which is as follows:

> "(1) No chargeable gain shall accrue on the disposal of an interest created by or arising under a settlement (including, in particular, an annuity or life interest, and the reversion to an annuity or life interest) by the person for whose benefit the interest was created by the terms of the settlement or by any other person except one who acquired, or derives his title from one who acquired, the interest for a consideration in money or money's worth, other than consideration consisting of another interest under the settlement. (2) Subject to sub-paragraph (1) of this paragraph, where a person who has acquired an interest in settled property (including in particular the reversion to an annuity or life interest) becomes, as the holder of that interest, absolutely entitled as against the trustee to any settled property, he shall be treated as disposing of the interest in consideration of obtaining that settled property (but without prejudice to any gain accruing to the trustee on the disposal of that property deemed be effected by him under section 25(3) of this Act)."

The transaction which led to the assessment under appeal was the second step in a scheme whereby the Appellant hoped to sell his holding of shares and loan stock in Rothschild Investment Trust Ltd. (which holding I will call "the fund") without incurring any large liability to capital gains tax. The first step was the execution of transfers of the fund, as to part by the Appellant and as to the rest by a nominee company on his behalf, in favour of a Guernsey company named Investors Trustees Ltd., which I will call "the trustees". Then came the vital second step, the sale by the Appellant to a Jersey company (which I shall call "the purchaser") of a reversionary interest in the fund. It was carried out by a deed dated 4 April 1972 much of which I must read. It begins:

> "This Settlement is made the fourth day of April 1972 between Norman Charles Berry of 69 Iverna Court London W.8 (hereinafter called 'the Vendor') of the first part First Investors & Savers (Jersey) Limited whose registered office is at La Motte Chambers St. Helier Jersey Channel Islands (hereinafter called 'the Purchaser') of the second part and Investors Trustees Limited whose registered office is at Williams Deacons Bank Chambers Commercial Arcade St. Peter Port Guernsey Channel Islands (hereinafter together called 'the Trustees' which expression where the context so admits shall include the trustees or trustee for the time being hereof) of the third part. Whereas the Vendor is the beneficial owner of the property specified in the Schedule hereto And Whereas the Vendor and the Purchaser have bargained and agreed for the consideration hereinafter mentioned that the same shall be settled in manner hereinafter appearing Now this Deed witnesseth as follows: 1. 'The Trust Fund' means the said property specified in the Schedule hereto and the property for the time being representing the same. 2. In pursuance of the said agreement and in consideration of the sum of £14,500 now paid by the Purchaser to the Vendor (the receipt whereof the Vendor hereby acknowledges) the Vendor as Beneficial Owner hereby assigns unto the Trustees all that the Trust Fund and the income thereof to hold the same unto the Trustees absolutely and the Vendor hereby directs and declares that the Trust Fund and the income thereof shall henceforth be held after the death of the Vendor and subject in the meantime to the life interest of the Vendor and the powers and provisions hereinafter reserved and contained upon trust for the Purchaser absolutely. 3. Provided always that during the life of the Vendor the Trustee shall pay the income of the Trust Fund to the Vendor for his own use and benefit absolutely."

A The rest of the deed empowers the trustees to vary the investment of the fund at their discretion and to charge for their services, and also provides for the appointment of new trustees. Particulars of the fund are duly set out in a schedule. The Crown has been willing to assume that £14,500 was the full market value of the interest in remainder sold to the purchaser, although the Special Commissioners made no express finding of that fact. The scheme was B completed, so far as the Appellant was concerned, by the sale of his reserved life interest to a company called First Investors International Holdings Ltd., with an address in the Bahama Islands, for more than £130,000. Such sale was effected two days later, on 6 April 1972—that is, in a new year of assessment for tax purposes—and I am in no way concerned with it. It is obvious, however, that the Appellant claims it is within the exemption conferred by para 13 of C Sch 7, which I have read.

What are the tax consequences of the earlier sale of a reversionary interest? The Crown says that the transfer of the fund to the trustees and the execution of the deed of settlement constituted a gift in settlement within s 25(2), which I have already read. It says that on that footing the fund must be deemed to have been disposed of for its market value pursuant to s 22(4)(*a*), which I will D read now.

> "Subject to the provisions of this Part of this Act, a person's acquisition of an asset and the disposal of it to him shall for the purposes of this Part of this Act be deemed to be for a consideration equal to the market value of the asset (*a*) where he acquires the asset otherwise than by way of a bargain made at arm's length and in particular where he acquires it by way E of gift or by way of distribution from a company in respect of shares in a company."

It is common ground that, if the foregoing argument is correct in law, the assessment in the sum of £150,483 is justified. The Appellant contends that neither s 25(2) nor s 22(4) is applicable. There was no gift, he says, and no acquisition of the fund otherwise than by way of a bargain made at arm's length, F but rather a part disposal of the fund by the Appellant within s 22(2), which is in these terms:

> "For the purposes of this Part of this Act (*a*) references to a disposal of an asset include, except where the context otherwise requires, references to a part disposal of an asset, and (*b*) there is a part disposal of an asset where an interest or right in or over the asset is created by the G disposal, as well as where it subsists before the disposal, and generally, there is a part disposal of an asset where, on a person making a disposal, any description of property derived from the asset remains undisposed of."

It is agreed that on that view the assessment ought to be reduced to £14,839.

The Special Commissioners felt it possible to decide the matter on a very H general ground. They said:

> ". . . the scheme of the tax appears to be that a taxpayer who declares himself to be a trustee of property, or transfers property to a trustee other than a bare trustee for himself, makes a disposal for a consideration equal to the market value of the property in respect of which trusts are declared or which is transferred to the trustees. Assets which previously belonged I to the taxpayer cease so to belong: *prima facie* there is a disposal of the whole of the assets. Does it affect this conclusion that the transaction here in question appears to fall within the description of a part disposal in

s 22(2)(*b*), Finance Act 1965? We think not: what matters is that in relation to the shares and loan stock there was a disposal. Whether that disposal was a 'gift in settlement' within the meaning of s 25(2) is similarly not the decisive question: as between Mr. Berry and the trustee there was a disposal of the shares and loan stock. Sale of an asset to the trustee of a settlement would be a disposal of the asset notwithstanding that the seller was interested under the settlement. It seems possible that s 25(2) is intended to do no more than make clear that a gratuitous transfer to the trustee of a settlement is in no different category."

I am not able to affirm that reasoning as it stands. It seems to me that if the Appellant is to be taken to have made a disposal of the fund for a consideration equal to market value (which he did not do in fact, at any rate in the relevant year of assessment) a specific deeming provision must be found, either in s 22(4) or elsewhere, to produce that result.

The contentions both of the Crown and of the Appellant lead to formidable difficulties. Let me take the Appellant's first. On applying s 22(2) to the deed of 4 April 1972 one finds a part disposal of the fund by the Appellant for £14,500 and an acquisition of the reversionary interest by the purchaser also for £14,500. Concurrently, by appropriate transfers, there was a disposal of the fund itself by the Appellant and an acquisition thereof by the trustees, no cash consideration passing between them. If the purchaser subsequently disposes of the reversionary interest, no chargeable gain or allowable loss will accrue, because the purchaser is the person for whose benefit the interest was created by the terms of the settlement and para 13 of Sch 7 will apply. So the £14,500 on that occasion is irrelevant. And when the trustees dispose or are deemed to dispose of the fund, a chargeable gain will be computed by reference to the consideration or notional consideration receivable by them, without any deduction for the £14,500, since that sum was not given by the trustees or on their behalf for the acquisition of the fund: see para 4(1) of Sch 6. These are strange and unsatisfactory results. They cannot, in my judgment, have been intended by Parliament. It may be that they will not matter in the artificially contrived circumstances of the present case, where, after the second sale, neither the trustees nor any *cestui que trust* under the settlement remained resident in the United Kingdom. They are none the less so anomalous, and potentially unfair, that the Court should seek a construction of the Finance Act 1965 that will avoid them, even if it has to strain the particular words that Parliament has used.

So I turn hopefully and willingly to the arguments for the Crown. I am not greatly troubled by s 25(2). "Gift" and "donor" are words capable of more than one meaning. There is a well-known passage in Sheppard's Touchstone, 7th edn., page 227, which says that "gift" is a word importing no more than the transferring of the property of a thing from one to another. It was cited and argued in In re *Earl Fitzwilliam's Agreement* [1950] Ch 448. If it would really make the legislative scheme consistent, I would be willing to give that wide interpretation to "gift" in s 25(2) and for good cause I might do it even though the word has to bear a narrower meaning elsewhere in the same Act. However, s 25(2) alone is not enough for the Crown. If the Appellant is merely taken to have disposed of the entire fund, there is still no consideration on which his alleged gain can be computed except that paid by the purchaser. Here the Crown turns to s 22(4). In my judgment it is beyond the resources of judicial construction to read "gift" simply as "transfer" in that subsection. Let me read s 22(4)(*a*) again. It says: ". . . where he acquires the asset otherwise than by way of a bargain made at arm's length and in particular where he acquires it by

A way of gift or by way of distribution from a company in respect of shares in the company." In the plainest possible way, acquisition by way of gift is given as an example, a species, of the wider genus, acquisition otherwise than by way of a bargain made at arm's length. Mr. McCall, for the Crown, has to contend that, although the Appellant made a bargain with the purchaser at arm's length, the transfer of the fund to the trustees was not by way of a bargain made at arm's
B length. He did not hesitate to say that the settlement as a whole was voluntary in the truest sense. However, I have to take the deed of 4 April 1972 as showing the true situation. It recites a preliminary agreement between two parties, the Appellant and the purchaser, and goes on to effect a single and indivisible transaction between three persons. The Appellant assigns the fund to the trustees, grants a beneficial remainder to the purchaser, receives £14,500 and
C retains a beneficial life interest. The purchaser pays £14,500 and receives the beneficial remainder. The trustees accept the fund, undertake the duty of holding it as trustees and receive a right to remuneration. On the evidence there was one arrangement between all three parties, and the Appellant was at arm's length *vis-à-vis* both the purchaser and the trustees. In my judgment s 22(4) clearly does not catch the present case even if, as Mr. McCall asked me
D to do, I alter the expression "a bargain made at arm's length" to read "a bargain made by him at arm's length". In relation to s 22(4), it seems to me that I am invited, not so much to strain the language of the Act as to distort the facts of the case. Therefore, I reject the Crown's main argument.

Mr. McCall tried to find an alternative path to a reasonable result, in case I should be willing to accept his submissions as regards s 25(2) but not as
E regards s 22(4). Under para 17 of Sch 7 certain special provisions apply to transactions between connected persons as defined by para 21 of the same Schedule. The first two sub-paragraphs of para 17 are as follows:

> "(1) This paragraph shall apply where a person acquires an asset and the person making the disposal is connected with him. (2) Without prejudice to the generality of section 22(4) of this Act the person acquiring
F the asset and the person making the disposal shall be treated as parties to a transaction otherwise than by way of a bargain made at arm's length."

Paragraph 21(3) begins: "A person, in his capacity as trustee of a settlement, is connected with any individual who in relation to the settlement is a settlor." So in the present case, it is argued, the Appellant and the trustees are connected as settlor and trustees and therefore s 22(4) is made to apply to the
G transfer of the fund by the former to the latter. Two objections are taken to that reasoning. First of all, "settlement" and "settlor" do not have the same meaning in para 21(3) of Sch 7 as in the other provisions I have been considering. Let me read the whole of the sub-paragraph:

> "A person, in his capacity as trustee of a settlement, is connected with any individual who in relation to the settlement is a settlor, with any person
H who is connected with such an individual and with a body corporate which, under section 454 of the Income and Corporation Taxes Act 1970 is deemed to be connected with that settlement ('settlement' and 'settlor' having for the purposes of this sub-paragraph the meanings assigned to them by subsection (3) of the said section 454)."

The references were originally to corresponding provisions of the Income Tax
I Act 1952. Under either Income Tax Act "settlement" includes any disposition, trust, covenant, agreement or arrangement and "settlor", putting it shortly, means any person who has directly or indirectly made, or provided funds for, the settlement. Those very wide words have, however, been subjected to

judicial interpretation. The earlier cases have recently been reviewed by Walton J. in *Commissioners of Inland Revenue* v. *Plummer* [1977] 1 WLR 1227. After discussing alternative formulations of the principle to be derived from them, the learned Judge expressed his conclusion, at page 1241, in these emphatic words(1):

> "If there is any distinction between the two tests, the idea behind *Bulmer*(2) and the cases which it followed is surely this: that, however wide the statutory language in which the term 'settlement' is defined, the overriding idea is that of bounty of some description. If there is no bounty, then there is nothing which can even remotely be classed as a settlement with a settlor."

Walton J. rejected a submission that the principle so expressed does not apply to transactions undertaken for the purpose of tax avoidance. Mr. Potter, for the Appellant, says that accordingly the settlement in the present case, which involved no element of bounty, cannot be invoked to connect his client with the trustees within the meaning of para 21 of Sch 7. Mr. McCall is really driven back to the position he occupied in the main contest, of saying that there was a voluntary transfer—only now it is even harder, because he has to say a bountiful transfer—as between the Appellant and the trustees. For reasons that I have already given, I take the view that he cannot establish that proposition and accordingly in this Court the principle of *Plummer's* case excludes the application of para 17 of Sch 7. I deliberately say "in this Court", for Mr. McCall has made a formal submission, to keep the matter open, that *Plummer's* case and its predecessor, *Bulmer* v. *Commissioners of Inland Revenue* [1967] Ch 145, were wrongly decided. Here, however, they should in my opinion be followed.

The second objection to invoking para 17 of Sch 7 is founded on the words of that paragraph itself. By sub-para (1) the paragraph is to apply where a person acquires an asset and the person making the disposal is connected with him. It is argued that, on a natural reading of the language, that postulates a connection already existing immediately before the disposal; it is not enough that the parties become connected persons only, as here, by reason of the disposal and acquisition. It is not necessary for me to decide this point since I have accepted the argument based on *Plummer's* case. Through no fault of Counsel, it has not been very fully argued and it could arise in a number of different situations. I prefer to say nothing about it at all.

It is possible that, somewhere among the convoluted enactments contained in the Finance Act 1965 there are provisions that might lead to a more attractive solution of the problem raised by the present case than I, with Counsel's help, have been able to find. I think it is unlikely, in view of the industry and ability deployed on both sides of the argument. I have to regard the case as one of that intractable residuum of which Lord Reid spoke in *Commissioners of Inland Revenue* v. *Luke*(3) 40 TC 630, at page 646, where he said: "It is only where the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result that the words of the enactment must prevail."

In final summary, I am of opinion that the assessment under appeal is incorrect in law, because s 22(4) does not cover the facts of this case without the aid of para 17 of Sch 7; and on the like facts para 17 is not available. Subject

(1) 54 TC 1, at p 20. (2) 44 TC 1; [1967] Ch 145. (3) [1963] AC 557.

A to any submissions of Counsel on the form of my Order I shall allow the appeal and vary the assessment by reducing it to the agreed figure of £14,839.

Appeal allowed, with costs.

The Crown's appeal was heard in the Court of Appeal (Buckley, Ackner, and Oliver L.JJ.) on 20 and 21 May 1980 when judgment was reserved. On
B 15 July 1980 judgment was given against the Crown (Buckley L.J. dissenting).

R. A. Morritt Q.C. and *C. H. McCall* for the Crown.

D. C. Potter Q.C. and *D. G. H. Braham Q.C.* for the taxpayer.

Aberdeen Construction Group Ltd. v. *Commissioners of Inland Revenue* 52 TC 281; [1978] AC 885 was cited in argument in addition to the cases referred to in the judgments.

C

Buckley L.J.—I have asked Oliver L.J. to read the first judgment in this appeal.

Oliver L.J.—This is an appeal by the Crown from a judgment of Goulding J. delivered on 22 March 1978, in which he reversed the decision of the Special Commissioners.

D The facts fall within a fairly short compass. The Appellants from the Special Commissioners, Mr. Berry and his wife, were the beneficial owners of certain shares and units of convertible unsecured loan stock of Rothschild Investment Trust Ltd. which were either registered in their respective names or were held on their behalf by Lloyds Bank (Branches) Nominees Ltd. The question on this appeal arises out of settlements made by Mr. Berry and his
E wife respectively of their holdings. The settlements are identical except for the settlors and the amounts of their respective holdings and there is no question but that the same legal consequences attend the transactions carried out by Mrs. Berry as attend those carried out by her husband. Nor is there any question but that, if a liability to tax arises from her dealings, he as her husband is responsible for discharging it. The total market value of the shares and stock
F at the date of the settlements was £219,880.

Since the question in each case is the same, I can confine myself to the transactions carried out by Mr. Berry himself. On 15 March 1972 he transferred, or caused to be transferred, the whole of his holdings of shares and stock (consisting of 10,854 shares and a sum of £49,931 stock) to a Guernsey company, Investors Trustees Ltd. That company was not, as a matter of
G machinery, actually registered as the holder of the stock transferred until 28 April 1972, and did not become the registered holder of the shares until 12 May 1972, but nothing turns on the date of registration save this, so far as it is material, that at the end of the financial year 1971–72 Mr. Berry or his nominee was still the registered holder. In the meantime two documents were executed. On 4 April 1972 (that is, in the financial year 1971–72) a settlement
H was executed to which the parties were Mr. Berry (described as "the vendor"), First Investors and Savers (Jersey) Ltd., (a Jersey company described as "the

purchaser") and Investors Trustees Ltd. (described as "the trustees"). It recited the beneficial ownership of the stock and shares to which I have referred as being in the vendor, and continued as follows:

> "And Whereas the Vendor and the Purchaser have bargained and agreed for the consideration hereinafter mentioned that the same shall be settled in manner hereinafter appearing Now This Deed Witnesseth as follows:—1. 'The Trust Fund' means the said property specified in the Schedule hereto and the property for the time being representing the same. 2. In pursuance of the said agreement and in consideration of the sum of £14,500 now paid by the Purchaser to the Vendor (the receipt whereof the Vendor hereby acknowledges) the Vendor as Beneficial Owner Hereby Assigns unto the Trustees All That the Trust Fund and the income thereof To Hold the same unto the Trustees absolutely and the Vendor hereby directs and declares that the Trust Fund and the income thereof shall henceforth be held after the death of the Vendor and subject in the meantime to the life interest of the Vendor and the powers and provisions hereinafter reserved and contained Upon Trust for the Purchaser absolutely. 3. Provided Always that during the life of the Vendor the Trustees shall pay the income of the Trust Fund to the Vendor for his own use and benefit absolutely."

There followed a trust for sale or retention at the discretion of the trustees, which I do not think I need read, an unrestricted investment clause, a power in the vendor to appoint new trustees (but excluding the vendor himself) and a charging clause enabling trustees to charge for work done in the execution of the trusts and entitling a trust corporation to remuneration in accordance with its scale of fees in force at the date of appointment. Finally, the shares and stock were described in the schedule.

On 6 April 1972 (that is, in the financial year 1972–73) a further document was executed. That was an assignment made between Mr. Berry of the one part and First Investors International Ltd. (a Bahamas company) of the second part. It recited the settlement and the composition of the trust fund and it continued, in recital (C), as follows: "The Vendor has agreed with the Purchaser for the sale to it at the price of £130,753.72 of the said life interest of the Vendor in the Trust Fund", and the operative part was in these terms:

> "Now This Deed Witnesseth that in pursuance of the said Agreement and in consideration of the sum of £130,753.72 paid by the Purchaser to the Vendor (who acknowledges the receipt thereof) the Vendor as beneficial owner assigns to the Purchaser all the dividends interest and income to become payable or accrue henceforth during the remainder of the life of the Vendor from or in respect of the Trust Fund and the investments and property from time to time and for the time being representing the same To Hold the same unto the Purchaser absolutely."

As I have said, Mrs. Berry executed identical documents relating to her holdings, so the effect was that between 3 April and 7 April 1972 Mr. and Mrs. Berry had effectively divested themselves of their entire beneficial interests in the shares and stock concerned in favour of companies which, being resident abroad, would not be liable for any capital gains tax upon the distribution of the trust funds or on any subsequent disposals. It is accepted, of course, that there was a disposal by Mr. Berry and Mrs. Berry of their reversionary interests in favour of the Jersey company and that capital gains tax is payable on the gain made out of the consideration received from that disposal, calculated on the basis that this was a partial disposal only. It is agreed that on this basis the chargeable gains amount to £14,839.

A It is not in issue that there is no chargeable gain in respect of the subsequent assignment of the life interest reserved to the vendor, having regard to the provisions of para 13 of Sch 7 to the Finance Act 1965, but the Crown contend that there was, on the execution of the settlement, a complete disposition of the shares which results in a chargeable gain of £150,483. The Special Commissioners upheld that contention. They said:

B "... the scheme of the tax appears to be that a taxpayer who declares himself to be a trustee of property, or transfers property to a trustee other than a bare trustee for himself, makes a disposal for a consideration equal to the market value of the property in respect of which trusts are declared or which is transferred to the trustees. Assets which previously belonged to the taxpayer cease so to belong: *prima facie* there is a disposal of the C whole of the assets. Does it affect this conclusion that the transaction here in question appears to fall within the description of a part disposal in s 22(2)(*b*), Finance Act 1965? We think not: what matters is that in relation to the shares and loan stock there was a disposal. Whether that disposal was a 'gift in settlement' within the meaning of s 25(2) is similarly not the decisive question: as between Mr. Berry and the trustee there was a D disposal of the shares and loan stock. Sale of an asset to the trustee of a settlement would be a disposal of the asset notwithstanding that the seller was interested under the settlement. It seems possible that s 25(2) is intended to do no more than make clear that a gratuitous transfer to the trustee of a settlement is in no different category."

Goulding J. felt unable to accept the reasoning of the Commissioners and he E allowed the Appellant's appeal. From that decision the Crown now appeals. The point is ultimately a fairly narrow one and it turns on the provisions of ss 22 and 25 of the Finance Act 1965 which are not altogether easy to follow.

There is no doubt that, upon the execution of the settlement, the shares and stock settled became settled property as defined in s 45(1) of the Act. That is not in dispute. That subsection defines "settled property" as follows: F "'settled property' means, subject to subsection (8) below", which does not matter for present purposes, "any property held in trust other than property to which section 22(5) of this Act applies". Settled property is regulated by s 25 of the Act, subs (1) of which provides that in relation to such property the trustees of the settlement shall be treated as a single and continuing body of persons (distinct from the persons who may from time to time be the trustees) and that G body is to be treated as being resident and ordinarily resident in the United Kingdom except in certain circumstances which do not matter for present purposes. It is pointed out by the Crown that the section goes on to recognise that the interest arising under the settlement is something quite different from the settled property. Thus when the beneficiary becomes absolutely entitled to the settled property as against the trustee, s 25(3) provides that the assets to H which he becomes entitled are deemed to have been disposed of by the trustee and immediately reacquired by him in his capacity as trustee for a consideration equal to their market value. So it is the trustee who makes the notional gain, if any. A similar result ensues on the termination of a life interest in the settled property under s 25(4). These provisions are prayed in aid in support of what is the mainspring of the Crown's case, namely the contention that whenever I property becomes settled property the entire property in settlement is disposed of, with the result that any increase which has at that point arisen over the

appropriate base value of the settled property becomes a chargeable gain. That contention is based on the provisions of s 25(2), which is in the following terms:

> "A gift in settlement, whether revocable or irrevocable, is a disposal of the entire property thereby becoming settled property notwithstanding that the donor has some interest as a beneficiary under the settlement and notwithstanding that he is a trustee, or the sole trustee, of the settlement."

The submission, then, may be summarised thus: (1) The expression "a gift in settlement" is not referring simply to a voluntary settlement. It is looking, not at the position as between the settlor and the beneficiaries, but at the position as between the settlor and the trustees and it means merely the transfer of the settled property to the trustees, for which the trustees give no consideration and which can therefore properly be described as "a gift". In the instant case, therefore, there was a transfer of the entirety of the settled property, notwithstanding that Mr. Berry retained an interest, and the fact that he received consideration from the purchaser for making the settlement which created the purchased reversion does not prevent the transfer to the trustees from being a "gift in settlement". (2) The second stage, it is submitted, is then to find out what is the consideration deemed to be paid by the trustees on this acquisition by them, because unless one can do that there is no machinery for ascertaining what is the chargeable gain. That, it is submitted, is found in s 22(4), which is in these terms:

> "Subject to the provisions of this Part of this Act, a person's acquisition of an asset and the disposal of it to him shall for the purposes of this Part of this Act be deemed to be for a consideration equal to the market value of the asset—(*a*) where he acquires the asset otherwise than by way of a bargain made at arm's length and in particular where he acquires it by way of gift or by way of distribution from a company in respect of shares in the company, or"

and (*b*) and (*c*) are immaterial. Hence the Crown's contention that the chargeable gain here is the sum of £150,483, the difference between the market value of the settled property and the amount for which it was acquired by the Appellant and his wife.

Goulding J. indicated that he would have felt himself able to accept the first of these submissions, but he did not feel able to accept the second. He said(1):

> ". . . I have to take the deed of 4 April 1972 as showing the true situation. It recites a preliminary agreement between two parties, the Appellant and the purchaser, and goes on to effect a single and indivisible transaction between three persons. The Appellant assigns the fund to the trustees, grants a beneficial remainder to the purchaser, receives £14,500 and retains a beneficial life interest. The purchaser pays £14,500 and receives the beneficial remainder. The trustees accept the fund, undertake the duty of holding it as trustees and receive a right to remuneration. On the evidence there was one arrangement between all three parties, and the Appellant was at arm's length *vis-à-vis* both the purchaser and the trustees. In my judgment s 22(4) clearly does not catch the present case even if, as Mr. McCall asked me to do, I alter the expression 'a bargain made at arm's length' to read 'a bargain made by him at arm's length'. In

(1) Page 105 *ante*.

relation to s 22(4), it seems to me that I am invited, not so much to strain the language of the Act as to distort the facts of the case. Therefore, I reject the Crown's main argument."

For the taxpayer, it is submitted in the first place that, since there is no equity about a taxing statute, the Special Commissioners were wrong to seek to find the intendment of the Act. They should, it is submitted, have been looking to see whether there were clear words which resulted in the instant case in tax becoming payable. It is not disputed for one moment that the taxpayer's purpose in making the elaborate arrangements which I have described was to make a non-taxable profit on his holding of the stock and shares. That, it is submitted, is his privilege. He is not obliged to arrange his affairs for the benefit of the fisc and equally he is entitled so to arrange them as to benefit himself if the words which the legislative draftsmen have chosen to employ fairly enable him to do so.

That leads, then, to the attack on the Crown's central proposition. Section 25(2), upon which the Crown's case rests is, it is submitted, expressed in terms which make it applicable only to a settlement by way of gift and not one executed for consideration in money or money's worth. The appropriate section to apply to the instant transaction is therefore, it is submitted, s 22(2), and that is in the following terms:

> "For the purposes of this Part of this Act—(*a*) references to a disposal of an asset include, except where the context otherwise requires, references to a part disposal of an asset, and (*b*) there is a part disposal of an asset where an interest or right in or over the asset is created by the disposal, as well as where it subsists before the disposal, and generally, there is a part disposal of an asset where, on a person making a disposal, any description of property derived from the asset remains undisposed of."

The very wide words "any description of property derived from the asset" are clearly, it is submitted, apt to refer to the equitable life interest retained under the settlement and therefore, it is argued, all that was disposed of here was the reversionary interest sold to the purchaser under the deed and it was on that disposition that the real gain arose in the year in question. If there is to be superimposed some notional gain, that can only be done by finding clear words in the statute imposing such a charge and the submission is that s 25(2) which, it is conceded, overrides s 22(2) in cases to which it applies, does not contain such clear words. It applies in terms only to a "gift in settlement", which this is not. Attention is drawn to other provisions in the Act in which references to "gifts" appear: (see, for instance, ss 22(4)(*a*), 27(2), 31(1) and (7), 32(1) and 34(1)). Particular attention is directed to s 31(3)(*a*), where there is a significant reference to the concession which is to be allowed in certain circumstances on a disposal of an object of national, scientific, historical or artistic interest "by way of gift, including a gift in settlement". Mr. Morritt has argued that this express reference supports the construction for which he contends, because it demonstrates that "gift in settlement" means something more than merely a voluntary settlement. I find that difficult to accept. It seems to me that what the draftsman was seeking to do was to ensure that the concession was available whether the disposal was by way of outright gift or of a settled gift, but that in either case what the subsection is referring to is a gift, "a gift in settlement" being merely a particular type of gift. I find it difficult here to give any secondary meaning to the expression and there is no readily explicable reason why the same expression should have different meanings in separate sections of the same Act.

The other provision to which Mr. Potter draws attention is in para 19 of Sch 7. The paragraph is concerned with the recovery of tax from the donee in cases of gifts. Sub-para (4) is in these terms:

> "In this paragraph references to a gift include references to any transaction otherwise than by way of a bargain made at arm's length so far as money or money's worth passes under the transaction without full consideration in money or money's worth, and 'donor' and 'donee' shall be construed accordingly . . ."

The only significance of this is that it can be said to demonstrate that, where the Legislature wishes to bring under the umbrella of gifts transactions which are not in fact gratuitous, it does so in express terms.

I confess that, for my part, I find considerable difficulty in giving to the expression "gift in settlement" the meaning sought to be attached to it by the Crown. It is true that, as mentioned by Goulding J., a citation from Sheppard's Touchstone might indicate that "gift" has the rather wide connotation simply of a transfer of property, but I entertain some little doubt whether that work (which originated in 1641 and the last edition of which was in 1820) formed part of the staple reading of our parliamentary draftsmen in 1965 and, furthermore, if it did, they must presumably also have had in mind that the extended meaning there suggested was decisively rejected by Danckwerts J. in In re *Earl Fitzwilliam's Agreement* [1950] Ch 448, as the touchstone for the construction, in previous fiscal legislation, of the words "immediate gift inter vivos". Not only does the construction urged by the Crown put a strained meaning upon the word "gift", but if, as Mr. Morritt suggests, it is really looking at the position *vis-à-vis* the settlor and the trustees alone and means simply a transfer to trustees, it is impossible to fit that concept with the case which the section itself envisages, of the settlor being the sole trustee of the settlement. Here there is clearly contemplated the case where there never was a transfer but merely a unilateral declaration of trust, and in that context "gift in settlement" can only be referring to the creation, as against the trustee, of the beneficial interests under the settlement.

To give effect to the scheme and intendment of the Act Mr. Morritt must therefore read the expression simply as meaning "a settlement" or "the making of a settlement". That, I agree, would make much more sense if one has regard to what the legislation was trying to achieve, but it is not what the Act says, and unless the Court is entitled to put a gloss on the term in order to bring within the subsection a transaction of a type which the draftsman almost certainly did not contemplate, I do not think either that the reference to a gift can be simply ignored or that the word can be given a meaning which it does not naturally bear. That approach to construction is not, as I understand the authorities, permissible in the case of a taxing statute (see *Canadian Eagle Oil Co. Ltd.* v. *The King*[1] [1946] AC 119, at page 140; and *Ransom* v. *Higgs*[2] [1974] 1 WLR 1594, at page 1616). Thus, to take a simple example, if A, the tenant under a 99-year lease, grants a sub-lease to B for 20 years at a premium equal to the value of the sub-lease, he has clearly made a part disposal of the lease as defined in s 22(2). If he achieves the same result, in consideration of the same premium and of a covenant by B to observe the covenants in the lease, by declaring himself a trustee of the lease for B for a term of 20 years and thereafter for himself, he has equally clearly converted the lease into settled property within s 45(1) of the Act, since it is now property held in trust, but property to which s 22(5) does not apply. But to describe that transaction as

(1) 27 TC 205, at p 248. (2) 50 TC 1, at p 92.

A a "gift in settlement" seems to me at any rate to strain the meaning of that expression beyond the limits both of possible construction and of common sense. The judicial conscience may sometimes be required to display a certain flexibility in questions of construction where the context is clear, but I do not think that it should be, or can be, stretched beyond the point of credibility simply because of an uneasy suspicion that the Legislature, if it had given more
B thought to the matter, would have done more effectively what it seems to have set out to do.

As Mr. Potter submits, it is a dangerous guide to seek to construe a taxing statute by looking for logic. To read the section as he would read it, that is to say, as meaning no more than it says in terms and as confined to cases of gift does, it is true, lead to the strange result that, unless s 22(4)(*a*) applies, there
C is no ascertainable base value upon which to assess the gain on any subsequent disposition by the trustees of the settled property, a result which might be highly disadvantageous to the taxpayer on any initial change of investment by the trustees. That subsection is in the following terms, so far as material for present purposes:

> "Subject to the provisions of this Part of this Act, a person's acquisition
D of an asset and the disposal of it to him shall for the purposes of this Part of this Act be deemed to be for a consideration equal to the market value of the asset—(*a*) where he acquires the asset otherwise than by way of a bargain made at arm's length"

and so on; I have already read that subsection. But if that result follows it indicates, in my judgment, no more than that there is a *casus omissus* for which
E the Legislature has failed to provide. It does not fit comfortably with the logic of the scheme and intendment of the Act, but for my part I do not feel justified, as a result, in giving to the words "gift in settlement" in s 25(2) a meaning which they do not naturally bear. I would therefore reject the Crown's primary contention based on that subsection.

That, however, is not necessarily the end of the matter. Merely because a
F disposal to, and an acquisition by, trustees does not fall within s 25(2), it does not follow that there is no disposal and acquisition. The only consequence is, so far as I can see, that such a disposal and acquisition does not oust the provisions of s 22(2) where those provisions apply. Under s 22(9) the amount of gain accruing on the disposal of assets is to be computed in accordance with the provisions of Schs 6, 7 and 8 and s 22(4)(*a*) contains the important
G "deeming provision" in relation to acquisitions otherwise than by way of arm's length bargain, to which I have already referred. One has, therefore, as it seems to me, still got to look to see whether there has been a disposal and acquisition and to compute by reference to the statutory formulae whether there has been a chargeable gain.

A transfer to the trustees of a settlement, whether voluntary or not, is
H clearly a disposal by the settlor of the legal interest in the property which is transferred to the trustees and an acquisition by the trustees of that legal interest. Whether and to what extent it gives rise to a chargeable gain depends upon whether apt words can be found in the Act to produce that result. The Crown's contention is that, looked at realistically, the settlement constituted a transfer to the trustees of the stock and shares and that that transfer, being a
I disposal which, *vis-à-vis* the trustees, was not the result of an arm's length bargain, is deemed by s 22(4)(*a*) to be a transfer for a consideration equal to the value of the stock and shares. This seems to me unanswerable if, but only if, (i) the disposal can be said to have been otherwise than by way of a bargain at

arm's length; and (ii) it does not fall to be treated only as a part disposal under s 22(2)(*b*). Goulding J. felt himself unable to accept the Crown's contention that condition (i) was satisfied and I shall return to that point a little later; but the first and anterior question seems to me to be whether the disposal falls within the statutory definition of a part disposal only and thus subject only to the limited charge on a gain calculated in accordance with the statutory provisions relating to such a disposal.

Mr. Morritt contends that it cannot fairly fall within the definition of a part disposal. The property disposed of consisted of the stock and shares. What was created in Mr. Berry and in the purchaser consisted of interests in "the trust fund" which simply happened, perhaps even momentarily, to be represented by the stock and shares but which might equally well have been a fund of gilt-edged stock if the trustees had sold under their trust for sale and reinvested. There was thus, he argues, no interest or right created in or over "the asset" within s 22(2)(*b*) because "the asset" was the stock and shares and the right or interest created was in "the trust fund". Equally there was no species of property remaining "undisposed of", but the creation of some quite different property—an equitable interest in a trust fund. This argument has an attraction, particularly if, as the Special Commissioners held, one is to look at the scheme and intendment of the Act. But I do not feel able to accept it, having regard to the actual terms of the settlement and the proprietary interests which existed prior to it and were created by it. At the date of the settlement Mr. Berry had already set in train the necessary steps to transfer the legal title in the shares and stock to the trustees, although those steps had not been completed. He retained the beneficial interest and this is reflected in the form of the settlement. It begins by reciting Mr. Berry's beneficial ownership of the property described in the schedule which (in clause 1) is included in the definition of the trust fund; it then recites a bargain between Mr. Berry and the purchaser for the settlement for the consideration stated below, and then, in clause 2 Mr. Berry, as beneficial owner, assigns "the Trust Fund and the income thereof" to the trustees absolutely and directs that the trustees hold it after the vendor's death and meanwhile subject to his life interest on trust for the purchaser. There follows, in clause 3, the proviso that the trustees shall pay the income of the trust fund to the vendor for his own use and benefit absolutely.

When I look at this in the light of the express provisions of s 22(2), I am bound to say that I find it very difficult to escape from the conclusion that it amounts to a part disposal. All that could be transferred to the trustees by this document was the vendor's beneficial interest in the trust fund. Quite apart from the fact that transfers to the trustees had already been executed, the document itself was inappropriate to transfer the shares and stock which, under the articles and terms of issue, require instruments of transfer in the usual common form or, in the case of the stock, in the form authorised by the Stock Transfer Act of 1963. What the settlement did was to create out of the beneficial interest assigned a right in the purchaser in reversion and to reserve from the beneficial interest the absolute right to payment of income during the vendor's life. That life interest clearly, in my view, remained undisposed of. Equally clearly, it seems to me that it was property derived from the asset which was assigned, namely the beneficial interest in the stock and shares.

Mr. Morritt argues that the proper analysis is that Mr. Berry disposed of his whole interest in the shares and then got something different back, and that therefore his life interest, albeit derived from the asset, did not "remain undisposed of". This seems to me to be unreal, if I may say so respectfully. There was no moment of time under this document when the vendor did not

A have the absolute right to receive the income from the trust fund. The effect of the settlement was to cut that right down to a life interest only by creating a reversionary interest in the capital in favour of the purchaser. The income arising during the vendor's life therefore seems to me to be properly and literally described as "undisposed of" by the settlement. Now if this is right, then the Crown's claim must, as I see it, fail, for there cannot be, by the same
B instrument, both a total disposition and a partial disposition, nor is it argued that there can be. One cannot, as Mr. Potter submits, overcome the effect of s 22(2) by praying in aid the provisions of s 22(4), for that subsection applies only "subject to the provisions of this Part of this Act", which includes s 22(2) itself and the related s 22(9) and Sch 6 which lays down (in para 7) how gains on part disposals are to be computed.

C That would be sufficient to dispose of the case, but I turn to consider the ground upon which Goulding J. decided the case in the taxpayer's favour. He would, as I read his judgment, have felt disposed to read the expression "gift in settlement" in s 25(2) in the sense for which the Crown contends, notwithstanding the difficulties which he saw in reconciling the word "gift" in that section with the context in which, in other parts of the Act, the word is
D clearly used. The difficulty, however, which he found, and which he felt was insurmountable, was in ascertaining, on the assumption that s 25(2) applied, any provision for ascertaining the amount of the gain upon which tax could be charged. The deeming provisions of s 22(4) apply only where the acquirer of the asset acquires it "otherwise than by way of a bargain made at arm's length", and this was, as he held, indeed such a bargain as between the vendor and the
E purchaser. For my part, I do not feel the same difficulty as that felt by the learned Judge. Granted that this was one document and that the trustee was party to it, there was not in any real sense any bargain between the trustee and the vendor for the acquisition of the property. I cannot regard the inclusion in the document of a charging clause, as seems to be suggested in the learned Judge's judgment, as part of a bargain made at arm's length for the acquisition
F of the trust property. The trustees were parties merely as a piece of necessary machinery and I find some difficulty in reading "by way of a bargain made at arm's length" as comprehending an acquisition resulting from a bargain made between two other persons. On that analysis if A transfers property to trustees for B's children in consideration of B transferring property of equivalent value to trustees for A's children, the subsection would apply to neither set of trustees
G because each would acquire the property by way of the bargain made between A and B. It does not seem to me to be necessary, even allowing for the strict construction of taxing statutes, to construe the subsection so as to produce so bizarre a result and I do not myself feel inhibited from accepting Mr. Morritt's submission that the section is referring to a bargain for the acquisition of the property made at arm's length between disponor and acquirer.

H It is, on the view which I take, strictly unnecessary to consider the alternative route which the Crown sought to take by way of paras 17 and 21 of Sch 7, but put shortly the submission is that the settlement here is a settlement as defined in para 21 (which incorporates the definition of "settlement" in s 454 of the Income and Corporation Taxes Act of 1970). The result of that is, it is submitted, that the settlor and the trustees then became
I "connected persons" as defined in para 21(3) and, accordingly, para 17(1) and (2) applies. Referring briefly to these, para 21(3) provides as follows, so far as is material: "A person, in his capacity as trustee of a settlement, is connected with any individual who in relation to the settlement is a settlor, . . ." and para 17(1) and (2) is as follows: "This paragraph shall apply where a person acquires an asset and the person making the disposal is connected with him" and

"Without prejudice to the generality of section 22(4) of this Act the person acquiring the asset and the person making the disposal shall be treated as parties to a transaction otherwise than by way of a bargain made at arm's length."

The difficulty here is that in *Commissioners of Inland Revenue* v. *Plummer*(1) [1979] 3 WLR 689, the House of Lords has clearly stated the limitations on the definition of "a settlement" in s 454. That definition clearly involves the concept of bounty, which is not present in the instant case, and I feel the same difficulty as that felt by Goulding J. in accepting the submission that the definition, having been expressly incorporated into the 1965 Act, can nevertheless be treated as modified by its application in this different context. It seems to me that if a definition from one statute is incorporated in another, it must be subject to the same limitations in both, in the absence of some clear contrary intention or express modification. However, for the reasons which I have given, I would not feel the same difficulty about the application of s 22(4)(*a*) if I could once accept either that the settlement constitutes a "gift in settlement" within s 25(2) or if I could accept the Crown's submission that the transaction was not, apart from that provision, a part disposal under s 22(2)(*b*).

For the reasons which I have endeavoured to state, therefore, I feel unable to accept that submission and I would, although for reasons rather different from those given by the learned Judge, dismiss the appeal.

Ackner L.J.—The dispute in this case, although narrow, is one I have found difficult to resolve. It is accepted that upon the execution of the settlement made on 4 April 1972 the shares and stock referred to in the schedule, and which had previously belonged to Mr. Berry, became "settled property" as defined by s 45(1) of the Finance Act 1965. The contest is whether s 25(2) or s 22(2) applies to the circumstances of this case. Section 25(2) provides:

> "A gift in settlement, whether revocable or irrevocable, is a disposal of the entire property thereby becoming settled property notwithstanding that the donor has some interest as a beneficiary under the settlement and notwithstanding that he is a trustee, or the sole trustee, of the settlement."

Section 22(2) provides:

> "For the purposes of this Part of this Act—(*a*) references to a disposal of an asset include, except where the context otherwise requires, references to a part disposal of an asset, and (*b*) there is a part disposal of an asset where an interest or right in or over the asset is created by the disposal, as well as where it subsists before the disposal, and generally, there is a part disposal of an asset where, on a person making a disposal, any description of property derived from the asset remains undisposed of."

It is common ground that if s 25(2) applies, then it must exclude s 22(2), because it expressly provides that a settlement to which it applies is "a disposal of the entire property thereby becoming settled property". Again it is common ground that the crucial words in s 25(2) are, "gift in settlement", and in s 22(2), "there is a part disposal of an asset where, on a person making a disposal, any description of property derived from the asset remains undisposed of".

It is well established that in a taxing Act clear words are necessary in order to tax the subject. This means that in a taxing Act one has to look merely at

(1) 54 TC 1.

A what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. (*Cape Brandy Syndicate* v. *Commissioners of Inland Revenue* [1921] 1 KB 64, *per* Rowlatt J.([1]); approved in *Canadian Eagle Oil Co. Ltd.* v. *The King*([2]) [1946] AC 119, at page 140). Therefore if the Crown claims duty under a statute it B must show that their duty is imposed by clear and unambiguous words (see *Tennant* v. *Smith*([3]) [1892] AC 150, at page 154; *Attorney-General* v. *Beech* [1899] AC 53, at page 59; *Commissioners of Inland Revenue* v. *Gribble* [1913] 3 KB 212, at page 219, and *Attorney-General* v. *Milne* [1914] AC 765, at page 781, to quote but a few of the cases). Although it may now be questionable whether this strict rule of construction still applies where the legislation is C specifically designed to prevent varying forms of tax avoidance devices (see *Greenberg* v. *Commissioners of Inland Revenue, Tunnicliffe* v. *Commissioners of Inland Revenue*([4]) [1972] AC 109, at page 137, *per* Lord Reid, and *Commissioners of Inland Revenue* v. *Joiner*([5]) [1975] 3 All ER 1050, at page 1055, *per* Lord Wilberforce) the legislation with which we are here concerned is not of such a character.

D I agree with Buckley L.J., whose judgment I have had the much appreciated advantage of reading in advance, that the ordinary primary meaning of "gift" is a voluntary transfer of property made without consideration. It cannot thus, on the ordinary use of language, be made to cover a transaction for full consideration in money or money's worth. It is not contended that the sum of £14,500 paid for the reversionary interest was other than its market value. Mr. E Berry himself retained the rest of the beneficial interest, so that there was no act of bounty involved. Since Parliament has chosen, in s 25(2), by express words, to limit the transaction to one in which a gift is made, how then, applying the proper approach to the construction of the words "gift in settlement", can s 25(2) be said to apply here?

The Crown contends that in relation to any disposal of assets the Act F looks primarily at the relations between the disponor and the disponee of the trust property. It is therefore contended that as in the present case the trustees gave no consideration for the transfers of the shares and stock, then as between Mr. Berry and the trustees the transfers were voluntary. But, as Oliver L.J. in his judgment, which I have also had the benefit of studying prior to writing this judgment, points out, the final words in s 25(2) ". . . notwithstanding that he G is . . . sole trustee of the settlement" must contemplate the creation of a settlement by an owner merely declaring that he holds the property on trust. Since the section applies to this method of creating a settlement, it must do so on the footing that the words "gift in settlement" are directed at the relationship between the disponor and the *beneficiaries* and *not* the trustees. Thus when the draftsman speaks of "gift in settlement" he is in fact, as one would normally H expect, looking not at the transfer of the legal estate to the trustee (which he recognised may not occur at all because the trustee may have it already) but to the creation of beneficial interests. If this was not the case then "gift in settlement" would have two different meanings in the same Act.

I accept that, if the facts of this case do not come within s 25(2), then there is no method provided by the Act for fixing the base value of the trust securities I in the hands of the trustees, since there has not been a disposition of the shares as such, and therefore there is no value at which they can be disposed of.

([1]) 12 TC 358, at p 366. ([2]) 27 TC 205, at p 248. ([3]) 3 TC 158, at p 163.
([4]) 47 TC 240, at p 272. ([5]) 50 TC 449, at p 480; [1975] 1 WLR 1701.

Accordingly the consequences of adopting the natural and ordinary meaning of the word "gift" may well produce an unforeseen result. However, as Mr. Potter for the taxpayer submitted, it is rarely profitable to look for logic in a taxing statute, and in particular one where the Legislature takes upon itself the burden of taxing not only real gains, but deemed gains on deemed disposals. That the draftsman has left a lacuna in the Act is to me more acceptable than that, when he used the word "gift" to qualify "settlement", he intended to mean a settlement whether by way of gift or for full consideration or valuable consideration. I therefore take the view that the Crown's contention based upon the meaning of the words "gift in settlement" fails.

However, the Crown further contends that when a settlor disposes of property to trustees so as to become settled property there is for the purpose of the Act a complete disposal of that property. It is contended that since the trustees had power to vary the investment of the fund interests created by or arising under the settlement are not to be regarded as interests in the specific assets held for the time being by the trustees on the trusts of the settlement, but only as interests in the trust fund. Thus, the Crown contends, there was no interest or right created in or over "the asset" within s 22(2)(*b*) because "the asset" was the stock and shares and the right or interest created was in, and only in, "the trust fund".

I accept that there were two quite distinct disposals in this case: first, the transfer of the shares and the stock to the trustees. By that transfer Mr. Berry transferred the legal ownership of those assets to the trustees. However, he retained the beneficial ownership as distinct from the legal ownership. Accordingly the second transfer was the disposal in favour of the purchaser of the settlor's beneficial interest subject to his retaining a life interest in the same property. Section 22(2)(*b*) provides that there is a part disposal of an asset where an interest or right in or over the asset is created by the disposal. I can find no justification in confining the interest or right to a legal interest or right. To my mind the life interest comes within the words "any description of property". Further, it was "derived" from the settlor's beneficial interests and it remained under the settlement "undisposed of". Accordingly there was a "part disposal" of the asset, namely the beneficial interest in the stock and shares.

I too would, accordingly, dismiss this appeal.

Buckley L.J.—This case raises, in my view, difficult questions upon the construction and effect of certain sections contained in Part III of the Finance Act 1965, which created the capital gains tax. With regret, I have reached a different conclusion from that of my brethren upon these questions. Like Oliver L.J. I shall confine my observations to the settlement made by Mr. Berry. Precisely the same considerations apply to the settlement made by his wife and exactly the same conclusions must follow. It is common ground that by virtue of the settlement executed by Mr. Berry on 4 April 1972 the ordinary shares and loan stock of Rothschild Investment Trust Ltd. referred to in the schedule to that settlement (which I shall call "the shares and stock") became "settled property" as defined by s 45(1) of the Act. The section of the Act which relates to settled property is s 25. The crucial question in the present case is, in my view, whether s 25(2) applies in the circumstances of the case. If it does, the claim of the Crown in this appeal must succeed, but if it does not, the Crown's claim must fail.

In the case of an ordinary voluntary settlement, where a settlor transfers property of his to trustees to be held on the trusts of the settlement, he makes a disposal to the trustees of the settled property which for the purposes of the Act is a disposal of the entire property, notwithstanding that the settlor may have some beneficial interest under the settlement (s 25(2)). Since the trustees acquire the settled property otherwise than by way of a bargain at arm's length, (*a*) the disposal by the settlor and (*b*) the acquisition by the trustees are to be deemed to be for a consideration equal to the market value of the settled property (s 22(4)(*a*)). The price so deemed to have been paid by the trustees applies for the purposes of (*a*) calculating what capital gain or allowable loss is to be treated as having accrued to the settlor on the disposal; and (*b*) ascertaining the amount or value of the consideration which the trustees are to be treated as having given for the acquisition of the settled property for the purposes of calculating any capital gain or allowable loss which the trustees may later realise upon a subsequent actual or notional disposal by them of the settled property or any part of it. For this latter purpose the trustees of the settlement are given what can appropriately be called a quasi-corporate character by s 25(1), so that changes in the personal identities of the trustees shall not complicate the ascertainment of capital gains liabilities in respect of dealings with the corpus of the trust property. If during the continuance of the trust the trustees sell a trust asset which was part of the property initially settled by the settlor, the trustees will realise a chargeable gain or an allowable loss by reference to a notional cost of acquisition (or "base value") equal to the market value of that asset at the date of the settlement, and the base value to the trustees for capital gains tax purposes of the newly acquired asset will be the price paid for it by the trustees. When anybody becomes absolutely entitled to the settled property or any part of it as against the trustees, the trustees are to be deemed to have disposed of that property under s 25(3). Under s 22(4) this deemed disposal is to be deemed to be for a consideration equal to the then market value of the property. So the trustees must be treated as having made a capital gain or sustained an allowable loss by reference to whatever may then be historically the notional or actual base value of that property to the trustees. A similar situation will arise under s 25(4) on the termination of a life interest in possession in all or any part of the settled property. In this way, so long as the settled property remains in settlement and on the occasion of its ceasing to be settled by reason of some person becoming absolutely entitled to the property as against the trustees, the trustees are the persons chargeable to capital gains tax in respect of all disposals, whether actual or notional, of the settled property or any part of it. They are, of course, entitled under the general law to pay the tax out of the settled property, so that the burden falls on the beneficiaries in accordance with their several interests under the settlement.

No chargeable gain arises on the disposal by a beneficiary of any beneficial interest created by or arising under a settlement, whether it is made for a consideration or voluntarily, but, if the disposal is for a consideration in money or money's worth, the acquirer will be liable to capital gains tax on any subsequent disposal of that interest by him in just the same way as anyone else who realises an investment which he has made (Sch 7, para 13(1)) or on his becoming absolutely entitled to the property as against the trustees (Sch 7, para 13(2)).

I have thus set out the effect of the sections in relation to an ordinary voluntary settlement at some length because it seems to me that it affords a helpful background to the consideration of the contentions in this case.

The Crown contends that when a settlor disposes of property to trustees so as to become settled property, there is for the purposes of the Act a complete disposal of that property; and that, where the trustees have power to vary the investment of the fund, interests created by or arising under the settlement are not to be regarded as interests in the specific assets held for the time being by the trustees on the trusts of the settlement, but as interests in the trust fund of whatever assets it may consist from time to time. The Crown contends that interests arising under the settlement are not, for the purposes of s 22(2)(*b*), property "derived from" specific assets. The Crown further submits that in relation to any disposal of assets the Act looks primarily at the relations between the disponor and the disponee, any bargain made between them and any consideration moving from one of them to the other. In the present case the trustees gave no consideration for the transfers of the shares and stock. As between Mr. Berry and the trustees the transfers were voluntary. In any event, the Crown says, the expression "a gift in settlement" used in s 25(2) means no more than a transfer whereby property becomes settled property. In the further alternative the Crown contends that Mr. Berry as settlor and the trustees were, when the settlement was made, "connected persons" within Sch 7, para 21, so that under para 17 of that Schedule the settlement must be treated as a transaction otherwise than by way of a bargain at arm's length, with the consequence that under s 22(4) the disposal of the shares and stock must be deemed to have been made for a full market value consideration.

Mr. Morritt, for the Crown, submits that the assets comprised in the trust and the interests under the trust should be regarded as distinct items of property. He says that there are two quite distinct disposals in this case, viz., first, the transfers of the shares and stock to the trustees and, secondly, a sale by Mr. Berry, as settlor, of a reversionary beneficial interest in the trust fund to First Investors and Savers (Jersey) Ltd. (whom I shall call "the purchasers"). The first of these is a disposal of the whole property in the shares and stock. The fact that the second does not extend to the whole beneficial interest in the trust fund but only to a reversionary interest does not, Mr. Morritt submits, mean that the disposal of the shares and stock left any property in the shares and stock undisposed of. Moreover, the price paid for the reversion was not given for the acquisition of the shares and stock by the trustees.

Mr. Potter for the taxpayer, on the other hand, submits that Mr. Berry made an actual capital gain of £14,839 in the year of assessment by reason of the sale of the reversionary interest, but that no disposal of the corpus of the trust fund for a notional consideration equal to its market value should be treated as having taken place. According to this argument there was no "gift in settlement" (s 25(2)) because the transaction was not a gratuitous one: there was no more than a "part disposal" of the shares and stock, because a life interest in the fund remained undisposed of (s 22(2)(*b*)). The true nature of the transaction, it is said, was the sale of a reversionary interest in the settled property, not a "gift in settlement" of anything, since that expression imports an act of bounty and there was no bounty involved here.

The contest is between s 22(2) and s 25(2). The latter, if it applies to the facts of the present case, must exclude the former because it expressly provides that a settlement to which it applies is a disposal of the entire settled property and so excludes the possibility of its being a part disposal only of that property. The answer must depend, I think, upon the meaning in s 25(2) of the expression "gift in settlement". This is not defined in the Statute. The word "gift" is used in a number of other places in the Act in contexts which do not suggest that it

is there used in any but its ordinary primary sense. Notwithstanding the passage to which we were referred in Sheppard's "Touchstone", I think that the ordinary primary meaning of "gift" is now a voluntary transfer of property made without consideration. There is, so far as I am aware, only one other place in the Act where the expression "gift in settlement" is used; that is s 31(3)(*a*). That subsection provides for a concession to be made, as specified in that section, in respect of a disposal of a work of art or other object of national, scientific, historic or artistic interest in circumstances prescribed in the subsection. I do not gain much help from this. The inclusive words may, it is true, have been inserted because the draftsman considered that without them the word "gift" would not have covered a "gift in settlement"; but they may, as it seems to me, equally well have been inserted *ex majori cautela* to make clear that the word "gift" is apt to cover not only an immediate out and out voluntary transfer to a single individual or a group of individuals, but also whatever is meant by a "gift in settlement". The expression "gift in settlement" sounds somewhat strangely in a lawyer's ear, at any rate in the ear of a conveyancer. One thing is, I think, clear, that the expression does not mean a disposition in consequence of which the disponer ceases to have any beneficial interest in the subject-matter, for s 25(2) makes clear that the settlor may retain some beneficial interest under the settlement. It also makes clear that the settlor may be the sole trustee of the settlement; so a settlor may, by declaring himself a trustee of property for beneficiaries, who may include himself, effect a "gift in settlement" without disposing of any part of the legal ownership in the property.

One wonders why the draftsman selected the expression "gift in settlement". Two possible explanations suggest themselves to me and no more: first, that he used the expression to describe a purely voluntary settlement, made without any consideration being given for it, or at any rate without any consideration in money or money's worth, and secondly, that he used the expression to distinguish a disposal of an asset to trustees of a settlement by a settlor, for which the trustees gave no consideration, from a disposal of an asset to trustees of a settlement by a vendor upon a purchase by the trustees out of their trust fund. Property may become settled property in either of two ways: (*a*) by the settlor transferring it to trustees upon trust, or (*b*) by the trustees investing their settled fund or some part of it in the purchase of that property. In either case the property equally becomes settled property held upon the trusts of the settlement. In the former case the transaction can, in my view, not inappropriately be described as "a gift in settlement", and I think that it would not be an abuse of language so to describe it even in a case in which the settlor receives some personal advantage from making the settlement or some consideration for doing so, so long as the transaction does not amount in substance to a sale of the subject-matter to the trustees.

Counsel for Mr. Berry have contended that the settlement of the shares and stock contained no element of gift: the party who became entitled to the reversionary interest paid £14,500 for it (which I will assume to have been its market value) and Mr. Berry himself retained the rest of the beneficial interest, so that there was no act of bounty involved. There was, according to the taxpayer's argument, merely a part disposal of the shares and stock, the life interest therein remaining undisposed of in the taxpayer. This argument looks exclusively at the beneficial interests in the subject-matter and ignores the transfer of the legal ownership to the trustees, for, if there was a part disposal, it was not a part disposal of the legal ownership, but a disposal of part of the beneficial interest. This appears to me to fit very awkwardly, if it can be said to fit at all, with the scheme of the Act as a whole. As I hope I have

demonstrated, normally in the case of settled property, so long as the property remains vested in the trustees of the settlement, they are treated as the owners of the capital assets comprised in the settlement and it is upon actual or notional disposal by them of any of those assets that chargeable gains or allowable losses arise. The liability to the tax follows the legal ownership of the corpus of the trust fund. For the purpose of calculating such gains or losses, it is necessary to discover what it notionally or actually cost the trustees to acquire each asset of the trust. This is achieved initially by the trustees being treated as if they had bought the original assets of the trust fund from the settlor at their market value. Dealings by beneficiaries with their beneficial interests may render those beneficiaries liable to tax at some stage, but such dealings have no effect upon the liability of the trustees.

If in the present case there was no "gift in settlement" within s 25(2), no disposition by Mr. Berry of the entire ownership of the shares and stock to the trustees, and no acquisition of that entire ownership by the trustees for a deemed consideration equal to the market value, there would be no way, so far as I can see, of fixing any notional cost of acquisition which the trustees would be entitled to deduct in computing what gain or loss, if any, had accrued to them on a subsequent sale by them of any of the settled shares or stock, or upon any notional disposal by them of the corpus of the settled property. The price paid by the purchasers for the reversionary interest would be irrelevant in this respect because it was not paid by the trustees and, moreover, was not a price paid, or to be deemed to have been paid, by anyone for the shares and stock, but a price paid for something else, viz., a limited equitable interest in the settled fund, which would not be the asset of which the trustees would be disposing. It would follow that, if the trustees were to sell any part of the settled shares and stock, they would only be entitled to deduct incidental expenses for the purposes of calculating the notional capital gain upon which they would be taxable. They would be taxable on the entire net proceeds of sale, notwithstanding that the sale might in fact be at a loss in relation to Mr. Berry's expenditure in acquiring it or to its market value at the date of the settlement. This surely could not be a consequence which Parliament intended. On the other hand, if there was in the present case a "gift in settlement" within s 25(2), the liability to tax would follow the ownership of the corpus of the settled property in the manner I have indicated, accompanied by a right for the trustees to deduct appropriate actual or notional base values whenever liability to tax should arise during the subsistence of the settlement. This would be a result which would conform to the apparent design and policy of the Statute.

Mr. Potter has submitted that we should not concern ourselves with what the apparent design or policy of the Statute is. He has reminded us of Rowlatt J.'s *dictum* in *Cape Brandy Syndicate* v. *Commissioners of Inland Revenue*[1] [1921] 1 KB 64, at page 71, that in construing a taxing statute one has to look merely at what is clearly said without regard to intendment. When what is said is clearly said, this is no doubt so; but I do not think that the expression "a gift in settlement" is a clear one. One must first construe the Act in order to discover what it says in this respect, and for that exercise the context of the enactment as a whole is, in my opinion, clearly not only a legitimate aid but one to which the Court is bound to have regard. These considerations dispose me strongly to construe "gift in settlement" in the second of the two senses which I have indicated earlier; but let me test the position further by a consideration of s 22(2). It cannot, in my view, be disputed that when Mr. Berry transferred the shares and stock to the trustees he transferred the whole legal

(1) 12 TC 358, at p 366.

A ownership in the shares and stock. Indeed I did not understand Counsel for Mr. Berry to suggest otherwise. What is said is that for the purposes of the Statute he must be treated as having made only a part disposal of the subject-matter.

It must be borne in mind that the tax is a tax on capital gains (s 19(1)), that is to say, gains accruing on the disposal of assets (*ibid*). The expression B "assets" comprises in this context all forms of property (s 22(1)). The shares and stock were, immediately before the settlement, undoubtedly assets of Mr. Berry. After the settlement the reversionary interest in the settled fund then represented by the shares and stock was undoubtedly an asset of the purchasers. The shares and stock were equally undoubtedly assets held by the trustees upon the trusts of the settlement. There was no direct disposal of any C asset by Mr. Berry to the purchasers. In law Mr. Berry disposed of his entire ownership in the shares and stock to the trustees. He did so upon terms which resulted in the purchasers' becoming entitled to a reversionary interest in the property so transferred, expectant on his own death, and in himself becoming entitled to an immediate life interest in the same property. Mr. Berry had, however, no proprietorial rights or interests specifically in the shares and stock D once the settlement took effect. He could neither require nor forbid the sale of any part of them. He could not control the trustees in the exercise of their powers as holders of the shares and stock in any way. He became entitled to a life interest in the income of the settled property, however it might be invested from time to time.

It is contended that in these circumstances Mr. Berry made a part disposal E of the shares and stock within s 22(2). The words relied on are "there is a part disposal of an asset where, on a person making a disposal, any description of property derived from the asset remains undisposed of". These words might well be held to fit the present case if it had taken the form of a grant by Mr. Berry to the purchasers of a reversionary interest expectant on his own death specifically in the shares and stock, Mr. Berry reserving to himself a life interest F in them, thus constituting himself a trustee of the shares and stock. In such circumstances the only disposal would have been of the reversionary interest and the life interest might be accurately described as having "remained undisposed of". But that was not the form of the transaction. The property disposed of was the shares and stock. The property in which the purchasers acquired a reversionary interest was not specifically the shares and stock, but G a fund which, for the time being only, was represented by the shares and stock. Strictly speaking, nothing, in my view, remained undisposed of. Mr. Berry acquired a new asset consisting of a life interest under the settlement, not specifically in the shares and stock, but in the fund for the time being represented by the shares and stock. Mr. Potter contends that the life interest was "property derived from" the shares and stock. I see the force of that H argument, but I find difficulty in regarding Mr. Berry's life interest as being accurately described as "derived from" specific investments which might only transiently represent the fund in which the life interest existed. What principally weighs with me is that the assets of which Mr. Berry disposed were, as it seems to me, indisputably the shares and stock. He must either have made an entire disposal of them or a part disposal. The disponees were the trustees. I In ordinary terms it cannot be denied that the disposal of them was entire, nothing remaining undisposed of. One can only discover possible grounds for the view that there was no more than a part disposal by considering the beneficial ownership distinct from the legal ownership. As I have endeavoured to show, in this Act capital gains tax on property held in trust, except in the case of property held in the name of a nominee or vested in a bare trustee (s 22(5)),

is exacted from the trustees as the legal owners of the corpus of the settled property and disregards beneficial interests except in the case of a beneficiary who has bought his interest. In these circumstances, reading s 22(2) and s 25(2) together, I reach the conclusion that on the true construction of the Act there was not merely a part disposal of the shares and stock in the present case, but an entire disposal of them to the trustees.

Mr. Potter submits that the trustees acquired the shares and stock by way of a bargain made at arm's length for the purposes of s 22(4), for he says that the shares and stock were transferred to the trustees as the result of the bargain between Mr. Berry and the purchasers, which was a bargain made at arm's length. That the purchasers acquired the reversionary interest by way of a bargain at arm's length cannot, I think, be doubted. The reversionary interest did not exist as such before the settlement took effect. It seems to me reasonable to regard the settlement as a consequence of that bargain. But can it sensibly and accurately be said that the trustees acquired the shares and stock by way of that bargain? It seems to me that the language of s 22(4)(*a*) poses the question whether the acquisition of the asset (in this case the shares and stock) was the subject-matter of a bargain between the disponor and the disponee (in this case Mr. Berry and the trustees) which was at arm's length. The object of this provision is surely to ensure that market value is treated as the consideration actually given for the disposal of the asset where the circumstances are not such as to demonstrate that a full and fair price was paid for it. The fact that someone other than the disponee can be taken to have paid a full and fair price for something other than the subject-matter of the disposal under consideration has no bearing on this. Goulding J. regarded Mr. Berry's settlement of 4 April 1972 as a tripartite bargain in respect of which the settlor was at arm's length with both the purchasers of the reversionary interest and the trustees. With deference to Goulding J. I feel unable to regard Mr. Berry as having made a bargain at arm's length with the trustees, although I accept that he did so with the purchasers. Accordingly, in my judgment, s 22(4)(*a*) applies to the present case upon the footing that the acquisition of the shares and stock by the trustees was otherwise than by way of a bargain made at arm's length, so that the trustees must be deemed to have paid market value for the shares and stock, unless the words "subject to the provisions of this Part of this Act" produce a contrary result. It is said that they do so because, by reason of s 22(2), there was only a part disposal of the shares and stock. I have already given my reasons for thinking that this was not the case.

For these reasons I have, with diffidence, reached a different conclusion from that reached by Goulding J. in his exceptionally clear and careful judgment. This makes it strictly unnecessary for me to consider the "connected persons" argument, but I should perhaps state my opinion about this. This argument depends on para 21(3) of Sch 7 of the Act. As Goulding J. pointed out, the word "settlement" does not have the same meaning in that sub-paragraph as it has elsewhere in the Act, because the definition of "settlement" which is to be found in s 454 of the Income and Corporation Taxes Act 1970 is imported into para 21(3) of the Schedule, but does not apply elsewhere in the Act. The House of Lords has held that bounty is an essential element of a settlement within that definition (*Commissioners of Inland Revenue* v. *Plummer*(1) [1979] 3 WLR 689), with the consequence that Mr. Berry's settlement would not, as it seems to me, fall within the terms of the sub-paragraph. For this reason I agree with the learned Judge that the sub-paragraph cannot apply to the present case.

(1) 54 TC 1.

I have not so far found it necessary to mention the fact that the transfers of the shares and stock were not registered until 12 May 1972 and 28 April 1972 respectively. It is true that until that occurred the trustees were not, *vis-à-vis* Rothschild Investment Trusts Ltd., the holders of the shares and stock, but at 4 April 1972 the trustees had in their possession executed transfers of all the shares and stock registered in the names of Mr. and Mrs. Berry as well as the relative certificates. As regards the shares and stock owned by Mr. Berry but registered in the name of Lloyds Bank (Branches) Nominees Ltd., the transfers were signed on 21 March 1972. They and the relative certificates were received by the trustees' agents "on or shortly after 6 April 1972". There is no finding about precisely when they were despatched by the nominee company to the trustees' agents, nor is there any finding that Mr. Berry was in any way responsible for any delay there may have been between 21 March and 6 April or that he was even aware of it. I should be very unwilling to hold that the fiscal consequences of the transaction depended upon the degree of diligence with which the nominee company or the trustees carried out the purely ministerial steps of transmitting or registering the transfers or handing over the certificates. On the findings of the Commissioners I for my part think that Mr. and Mrs. Berry should be regarded as having done all that lay in their power to transfer the shares and stock to the trustees before the date of the settlements and that the ownership of the shares and stock must be treated as having passed to the trustees at the latest when Mr. and Mrs. Berry executed the settlements. From time to time, as it seems to me, neither Mr. nor Mrs. Berry could have asserted an equitable interest in any of the shares and stock otherwise than under and by virtue of the settlements. See in this connection the decision of Jenkins J. in In re *Rose, Midland Bank Executor & Trustee Co. Ltd.* v. *Rose* [1949] Ch 78, at pages 88–90.

For these reasons I for my part would allow this appeal. The Crown does not seek to levy tax upon both the £14,500 paid for the reversionary interest and the market value of the shares and stock, but on the latter only. I would restore the decision of the Commissioners and the assessment to tax on a capital gain of £150,483. Goulding J. thought that no chargeable gain or allowable loss would have accrued if the purchasers had subsequently disposed of the reversionary interest, because that interest was created by the settlement for the benefit of the purchasers. I should not be taken as agreeing with this view, for it seems to me that the purchasers (if otherwise amenable to a charge to tax) would not have been entitled to exemption under Sch VII, para 13. The purchasers would, it seems to me, have been a beneficiary who acquired his interest under the settlement for a consideration in money and so would have been disentitled to exemption.

Appeal dismissed. Leave to appeal to the House of Lords granted.

The Crown's appeal was heard in the House of Lords (Lords Wilberforce, Fraser of Tullybelton, Russell of Killowen, Scarman and Bridge of Harwich) on 8 and 9 March 1982 when judgment was reserved. On 6 May 1982 judgment was given unanimously in favour of the Crown, with costs.

D. C. Potter Q.C., D. G. H. Braham Q.C. and *T. Ivory* for the taxpayer.

R. A. Morritt Q.C. and *C. H. McCall* for the Crown.

The following cases were cited in argument:—In re *Rose* [1949] Ch 78; *W. T. Ramsay Ltd.* v. *Commissioners of Inland Revenue* 54 TC 101; [1981] 2 WLR 449; *Aberdeen Construction Group Ltd.* v. *Commissioners of Inland Revenue* 52 TC 281; [1978] AC 885; *Roome and Denne* v. *Edwards* 54 TC 359; [1981] 2 WLR 268; Re *Cochrane* [1905] 2 IR 626; *Commissioner for Stamp Duties of New South Wales* v. *Perpetual Trustee Co., Ltd.* [1943] AC 425; *St. Aubyn* v. *Attorney-General* [1952] AC 15; *Sargaison* v. *Roberts* 45 TC 612; [1969] 1 WLR 951.

Lord Wilberforce—My Lords, this is an appeal by the Crown from a majority decision of the Court of Appeal in a matter of capital gains tax.

The Respondent, Mr. Berry, was the beneficial owner, in 1972, of certain shares and stock in Rothschild Investment Trust Ltd. registered partly in his name, partly in the name of nominees. His wife was also the beneficial owner of other shares and stock in the same company. It is accepted that the same result as to the incidence of capital gains tax follows as regards the Respondent's holdings and those of his wife, and irrespective of the details of registration. I shall, therefore, deal with the case as if all relevant holdings were those of the Respondent and registered in his name.

In March 1972 the Respondent and his nominees executed transfers of the shares and stock in favour of a trustee in Guernsey and forwarded the transfers and certificates to the trustee or its agent. On 4 April 1972 the Respondent entered into a deed expressed to be a settlement made between himself, described as "the vendor", and a Jersey company, described as "the purchaser". It is necessary to set out the relevant part verbatim. After reciting that the Respondent was the beneficial owner of the stocks and shares specified in the schedule, the deed continued:

> "And whereas the vendor and the purchaser have bargained and agreed for the consideration hereinafter mentioned that the same shall be settled in manner hereinafter appearing Now this deed witnesseth as follows: 1. 'The trust fund' means the said property specified in the schedule hereto and the property for the time being representing the same. 2. In pursuance of the said agreement and in consideration of the sum of £14,500 now paid by the purchaser to the vendor (the receipt whereof the vendor hereby acknowledges) the vendor as beneficial owner hereby assigns unto the trustees all that the trust fund and the income thereof to hold the same unto the trustees absolutely and the vendor hereby directs and declares that the trust fund and the income thereof shall henceforth be held after the death of the vendor and subject in the meantime to the life interest of the vendor and the powers and provisions hereinafter reserved and contained upon trust for the purchaser absolutely. 3. Provided always that during the life of the vendor the trustees shall pay the income of the trust fund to the vendor for his own use and benefit absolutely."

The deed then set out various administrative powers including a trust for sale or retention, an investment clause and a trustees' charging clause. The schedule specified shares and loan stock in Rothschild Investment Trust Ltd. The essence of this document was that the Respondent assigned the specified shares and stocks, and the income thereof, to the trustees to hold upon declared trusts, which included a power of sale and reinvestment, and which, beneficially, gave the income of the "Trust Fund" to the Respondent and the reversion to the purchaser. On 6 April 1972 (i.e. in the next financial year, 1972–73), the

A Respondent executed an assignment on sale of his life interest under the settlement of 4 April 1972 to a Bahamas company for £130,753.72. This was expressed as assigning all the dividends interest and income to become payable or accrue during the remainder of the life of the Respondent from or in respect of "the trust fund and the investments and property from time to time . . . representing the same".

B On these documents the Respondent admits liability for capital gains tax in respect of the disposal of his reversionary interest for £14,500. He is in a position to claim (this is not before us) that no capital gains tax is payable in respect of the assignment of his life interest—this is by virtue of Sch 7, para 13 of the Finance Act 1965. But the Revenue claims capital gains tax in respect of the total value of the shares and stock on the basis that they were disposed of C on 4 April 1972. The Respondent contends that on that date there was a partial disposal only, viz. of his reversionary interest. The Revenue's contention results in a claim for capital gains tax on the Respondent and his wife of £150,483: the Respondents' of £14,839.

The capital gains tax, introduced in 1965, is by now reasonably familiar and understood. [I refer throughout to the Act of 1965 which applied to the D transactions in question rather than to the consolidation of 1979.] But it is desirable to outline its main provisions. The tax is levied on chargeable gains accruing on the disposal of assets (s 19). All forms of property, unless specifically exempted, rank as assets (s 22). There is no limitation on the generality of the word "disposal", which must be taken to bear its normal meaning. On the other hand, there are cases where certain transactions, which E would not normally qualify as disposals, are deemed to be disposals. The Act dealt specifically with trusts and settlements—settled property being defined (with exceptions) as any property held in trust. In general, the scheme of the Act was to deal separately with property placed in, or coming out of trust, on the one hand, and with beneficial interests under trusts on the other. There was no charge on disposals of the latter, unless by persons who have themselves F acquired the interest for consideration (Sch 7, para 13). But tax was charged when property was placed in trust (unless the trustee held it merely as nominee for the transferor) on the basis of a disposal, or when property came out of trust: more accurately, when a person became absolutely entitled as against the trustees (recent changes in the law do not apply to this case). In that case there was a deemed disposal (s 25(3)). There was also a deemed disposal, when a life G interest terminated, on the basis of a deemed disposal of all the trust assets (s 25(4)). An acquisition and disposal was deemed to be for a consideration equal to the market value of the asset if acquired otherwise than by way of a bargain at arm's length or by way of gift. The Act also introduced the, by now familiar, concept of the trustees of a settlement as a body of persons distinct from the persons who are actually trustees.

H On the basis of this scheme, which is clear and logical, one would expect that the settlement of 4 April 1972 would constitute a disposal of the assets comprised in it, and that no charge would be leviable upon the immediate assignments of the life interest or the reversionary interest arising after it—though a charge might arise on a subsequent assignment. I must now, however, consider certain specific provisions on which reliance is placed. 1. Much I argument revolved round s 25(2) which I quote:

> "A gift in settlement, whether revocable or irrevocable, is a disposal of the entire property thereby becoming settled property notwithstanding that the donor has some interest as a beneficiary under the settlement and notwithstanding that he is a trustee, or the sole trustee, of the settlement."

The Respondent's argument is that there was no gift in settlement: a "gift in settlement" is what it says—a gift. But there was no element of gift in the settlement of 4 April 1972, since the settlor took full value for all that he parted with, viz. the reversionary interest. Against this, the Revenue says that when the subsection refers to "gift" it is fastening upon the transaction as between the settlor and the trustees, so that the subsection applies so long as there is no consideration passing between these parties. The word "gift", they contend, is used so as to exclude the case where the trustees purchase property for consideration.

Although Buckley L.J., with whose judgment I generally agree, felt able to accept this argument, I have difficulty with it. The natural meaning of gift in settlement seems to me to be related to beneficial interests created, not to the legal transfer of title. I find the same words used in s 31(3) together with "gift" where the latter is clearly directed towards the donee, suggesting that the former are similarly directed. So, however much I may suspect (as I do) that "gift" is a draftsman's error for "transfer", I am reluctant, in a taxing Act, to depart from the natural meaning of the words. However, I do not regard this subsection (25(2)) as decisive of the issue for another reason. It does not appear to me that this is the basic provision upon which settlements are taxed. Rather I read it as a special provision dealing with the cases where a donor, i.e. a person who gives some interest beneficially under a settlement, has himself a beneficial interest and where the donor is himself a trustee. Neither is this case, and the Revenue does not need to rely on the subsection. There is here simply a disposal: a disposal in March 1972 of the legal title to the shares and loan stock—itself liable to be disregarded, under s 22(5), as conferring only a nominee interest, but becoming an effective disposal when, on 4 April 1972, trusts were declared other than in favour of the settlor, thus making the shares and loan stock settled property. I think that the whole of s 25, particularly s 25(1), proceeds on the assumption that the tax attaches to disposals in favour of trustees, and that subss (2), (3) and (4) are special cases. In my opinion there was a disposal on 4 April 1972 of the shares and stock by the Respondent which attracts a charge for capital gains tax.

2. There is no difficulty that I can see in fixing the amount on which tax is charged. This is dealt with by s 22(4). I agree with Oliver and Buckley L.JJ. (who though differing in the ultimate conclusion agreed on this) that the asset (i.e. the shares and stock) were acquired (sc. by the trustee) otherwise than by way of a bargain made at arm's length. The existence of a bargain between the Respondent and a third party—the purchaser of the reversion—is, in my opinion, irrelevant in this context. 3. The final provision relied upon, this time by the taxpayer, is s 22(2)(*b*). Section 22(2) is as follows:

> "(*a*) references to a disposal of an asset include, except where the context otherwise requires, references to a part disposal of an asset, and (*b*) there is a part disposal of an asset where an interest or right in or over the asset is created by the disposal, as well as where it subsists before the disposal, and generally, there is a part disposal of an asset where, on a person making a disposal, any description of property derived from the asset remains undisposed of."

The technical argument revolves round the latter words of para (*b*) "any description of property derived from the asset remains undisposed of". The taxpayer argues that the life interest satisfied these words—it was an interest in the asset and so an interest derived from the asset. The Crown, on the other hand, contends that there was nothing undisposed of: the wording and

A intention of the settlement was such that the whole interest in the shares and stock passed to the trustees, and the settlor became entitled to a new interest, namely, an interest in the trust fund.

It is to be noticed first, that s 22(2) is not, on its face, a relieving section: it is not a section directed at cutting down what might otherwise be a total disposal to a partial disposal. It seems rather, as para (*a*) makes clear, to be a B provision of extension, enabling something which might not be regarded as a disposal to be taxed as a part disposal. Where there is a clear total disposal, the subsection does not attach. However, if the taxpayer can bring himself within its wording, he is entitled to do so, even if the result may seem unexpected. But I have no doubt that the Crown's argument is correct. The whole tenor and purpose of the document of 4 April 1972 was to put the shares and stock into C settlement or trust—to do so was essential in order to enable the taxpayer to obtain exemption on the sale of his life interest. This was only obtainable if he could be shown to have "an interest created by or arising under a settlement" (Sch 7, para 13). He cannot (though Mr. Potter bravely so contended), at one and the same time assert this, and also maintain that he retained or reserved something undisposed of. I cannot, therefore, on any view accept that here D there was only a part disposal.

Since, on these grounds, I am of opinion that the Crown's appeal must succeed, it is not necessary to consider a further argument based on the existence of "connected persons".

I would uphold the judgment of Buckley L.J., allow the appeal and restore the decision of the Special Commissioners.

E **Lord Fraser of Tullybelton**—My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Wilberforce and Lord Roskill. I agree with Lord Roskill that the appeal should be allowed for both the reasons mentioned by him. I agree with Lord Wilberforce except on the question of a "gift in settlement".

I would allow the appeal.

F **Lord Scarman**—My Lords, for the reasons given by my noble and learned friend, Lord Wilberforce, a draft of whose speech I have had the opportunity of studying, I would allow the appeal. Like my Lord, I do not accept the Crown's submission as to the meaning of "a gift in settlement" in s 25(2): but the point is no longer of importance in view of the recent amendment of the subsection.

G **Lord Roskill**—My Lords, in common with all your Lordships I agree that this appeal should be allowed and the determination by the Special Commissioners restored. But there has been a wide difference of opinion in this case and therefore in deference to the judgments of Goulding J. and of Oliver and Ackner L.JJ. in the Court of Appeal I add some observations of my own. My noble and learned friend, Lord Wilberforce, has recited the relevant facts and H set out the relevant statutory provisions and I do not repeat them.

The first question is whether the settlement of 4 April 1972 was a disposal for the purposes of s 19 or whether the Respondent can claim that there was no more than a part disposal within s 22(2)(*b*). The majority in the Court of Appeal took the latter view, holding that the settlement "reserved from the beneficial interest the absolute right to payment of income during the vendor's

life"—that quotation is from the judgment of Oliver L.J. in [1981] 1 WLR 1 at page 11([1]). Therefore, so the reasoning ran, the life interest remained undisposed of. The absolute right to receive the income was, again to quote the learned Lord Justice, "cut down to a life interest only". Ackner L.J. at page 15([2]) spoke of the Respondent "retaining a life interest in the same property". A

My Lords, the correctness or otherwise of this conclusion must, I think, depend upon the true construction of the settlement. The settlement recited that the vendor—that is the Respondent—was the beneficial owner of the securities listed in the Schedule and that he had agreed that those securities should be settled on the terms of the settlement as thereinafter provided. Then in clause 1 the trust fund is defined as representing the securities listed in the Schedule and property from time to time representing those securities. It is clauses 2 and 3 and only those clauses which, to my mind, created the Respondent's life interest in the income of the trust fund and from 4 April 1972 onwards the Respondent had no right of disposal of those securities or of any securities substituted for them. His only other right was to appoint a trustee—see clause 6. For my part I cannot construe this settlement as bringing about the retention of a life interest by the Respondent. I think he parted with everything for the stated consideration and independently acquired the life interest created by clauses 2 and 3. I am unable to regard the life interest as falling within the phrase in s 22(2)(*b*) "any description of property derived from the asset [remaining] undisposed of". B C D

My Lords, on this question I find the reasoning of Buckley L.J., at pages 20 and 21 of the report([3]), compelling. I agree with him and with my noble and learned friend Lord Wilberforce that there was on 4 April 1972 an entire disposal of the scheduled securities to the trustees of the settlement. E

My Lords, I think the Crown are also entitled to succeed on the other principal question which was argued: whether or not there was a "gift in settlement" within s 25(2). My noble and learned friend, Lord Wilberforce, has rehearsed the rival arguments and I do not repeat them. The phrase is indeed a strange one and the draftsman has refrained from giving it a definition. It is, of course, irrelevant that, as Counsel informed your Lordships, this subsection has recently been amended([4]) so that at least for the future its obscurities have been removed. At first sight the word "gift" would seem to be used in its ordinary meaning and it is forcibly argued that there was no element of gift in the settlement of 4 April 1972. But to my mind the reasoning of Buckley L.J. at pages 18 to 22([5]) of his judgment is once again compelling and I do not repeat it. I would respectfully adopt it as my own. F G

My Lords, it is for both these reasons that I would allow this appeal by the Crown. On the only remaining point, I respectfully agree with my noble and learned friend, Lord Wilberforce, as well as with both Buckley and Oliver L.JJ. in the Court of Appeal, that the scheduled securities were acquired by the trustees otherwise than by way of a bargain made at arm's length. H

([1]) Page 114 *ante*. ([2]) Page 118 *ante*. ([3]) Pages 123–4 *ante*.
([4]) By Finance Act 1981, s 86 with effect from 10 March 1981. ([5]) Pages 120–5 *ante*.

A **Lord Bridge of Harwich**—My Lords, I have had the advantage of reading in advance the speech of my noble and learned friend, Lord Wilberforce. I agree with it and for the reasons he gives I too would allow the appeal.

Appeal allowed, with costs.

[Solicitors:—Messrs. Norton, Rose, Botterell & Roche; Solicitor of Inland Revenue.]

B

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CORRECTION

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"1972-73" should read "1971-72".

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