GIFT TAXATION AFFECTING TRUSTS

By H. A. J. FORD *

I. *INTRODUCTION*

Whenever a trust is created the impact of taxation law must be considered. Settlors do not usually regard the tax gatherer as an object deserving of bounty.[1] Indeed, the prime motive for many dispositions of property *inter vivos* is a desire to avoid taxation. Avoidance of taxation as distinct from evasion of taxation is lawful but as indicated by the following judicial utterances, one of 1929 and the other of 1943, there may well be differing views on the moral aspects.

> No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores. The Inland Revenue is not slow—and quite rightly—to take every advantage which is open to it under the taxing statutes for the purpose of depleting the taxpayer's pocket. And the taxpayer is, in like manner, entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Inland Revenue.[2]
>
> My Lords, of recent years much ingenuity has been expended in certain quarters to devise methods of disposition of income by which those who were prepared to adopt them might enjoy benefits of residence in this country while receiving the equivalent of such income without sharing in the appropriate burden of British taxation. Judicial dicta may be cited which point out that however elaborate and artificial such methods may be, those who adopt them are 'entitled' to do so. There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise of ingenuity or as a discharge of the duties of good citizenship. On the contrary, one result of such methods, if they succeed, is, of course, to increase *pro tanto* the load of tax on the shoulders of the great body of good citizens who do not desire, or do not know how, to adopt these manoeuvres.[3]

Whether a citizen is 'entitled' to avoid taxation depends on the law governing taxation. Every time a disposition of property is criticized as a scheme for avoidance of taxation there is an implied criti-

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[1] Public-spirited citizens who desire to make gifts to the Treasury directly are assisted by the principle that a gift to the Treasurer is charitable. *Nightingale v. Goulburn* (1848) 2 Ph. 594. ("To the Queen's Chancellor of the Exchequer for the time being and to be by him appropriated for the benefit and advantage of my beloved country, Great Britain.")

[2] *Ayrshire Pullman Motor Services v. Inland Revenue Commissioners* (1929) 14 T.C. 754, 763 *per* Lord Clyde, Lord President of the Court of Session.

[3] *Latilla v. Inland Revenue Commissioners* [1943] A.C. 377, 381, *per* Lord Simon L.C. But see *In the Estate of William Vicars* (1944) 45 S.R. (N.S.W.) 85, 93-94 *per* Jordan C.J.

cism of the law governing taxation. That law is not simply the particular statute under which each particular type of tax is levied: it is a complex of common law and equitable principles and rules on which the tax statute has been superimposed. A legislature which requires courts interpreting taxation law to depart from established common law and equitable principles and rules must make its wishes clear. One summary way of doing this would be to provide that taxation is to be imposed at the will of an administrator. This method would avoid the effect of traditional attitudes of judges and lawyers but its adoption could hardly be politic in a democracy. If the legislature cannot go that far it must reckon with the existing body of common law and equitable principles and rules and with the traditions of the legal profession. Its tax statute must provide expressly for the exclusion or distortion of common law or equitable principles where necessary for carrying its tax policy into effect. If the legislature does not do this any failure of its tax policy cannot be blamed on the courts. Some are wont to talk of 'legalism' when the law fails to effectuate a widely accepted policy. But legalism is often an affirmation of the higher value to be put upon continuity of principle. Without continuity of principle each new human endeavour would be stranger than it needs to be. If the value of continuity of principle be recognized it should follow that those who deplore avoidance of taxation and would prevent it, no less than those who see no wrong in it, cannot ignore the common law and equitable principles and rules which lie behind the tax statutes. The following treatment will be founded on that view.

It is desirable to consider the possible operation of taxation laws on a trust *inter vivos* at several stages.

(i) At the inception of the trust—
Federal Gift Duty and
Victorian Stamp Duty.

(ii) During the continuance of the trust—
Federal Income tax insofar as it affects the settlor and the beneficiaries under the trust.

(iii) At the death of the settlor—
Federal Estate Duty and
Victorian Probate Duty
in relation to the settlor's estate.

(iv) At the death of a beneficiary—
Federal Estate Duty and
Victorian Probate Duty
in relation to the deceased beneficiary's estate.

The space now available does not permit a full treatment of all these types of taxation. In what follows an attempt is made to convey

a general idea of the law governing Federal Gift Duty and Victorian Stamp Duty which may affect a disposition of property by way of trust.

II. *FEDERAL GIFT DUTY*[4]

The fact that governments constantly need money does not wholly explain the *raison d'être* of Federal Gift Duty. High rates of income taxation and the prospect of substantial depletion of an estate by death duties are apt to awaken feelings of generosity in holders of property. Many governments, acting on the basis of something like the equitable doctrine that a donor 'must be just before he is generous', impose a tax on the gift with a view to ensuring that the revenue will be protected against such malevolent benefaction. Federal Gift Duty is a corollary to the other forms of Federal taxation which affect individual property holders, namely, Federal Income Tax and Federal Estate Duty.

Gift Duty has been imposed in New Zealand[5] since 1909 and in Queensland since 1926. Federal Gift Duty in Australia dates from 29 October, 1941, when the Gift Duty Act 1941 and the Gift Duty Assessment Act 1941[6] came into operation. The latter Act, as amended,[7] is hereafter referred to as the Assessment Act.

A. LIABILITY TO FURNISH RETURNS[8]

A return is required when a donor makes a gift (other than an exempted gift)[9] the value of which, together with the value of all other gifts (other than exempted gifts) made by the same donor *to the same or any other donee* whether at the same time or within the immediately preceding eighteen months, exceeds £1,500. The return of a donor must detail the gift in question and all such other gifts. The return of a donee must detail the gift in question and all such other gifts made to him by the donor. The obligation to furnish a return is imposed on both donor and donee, but if the donor furnishes a return the donee is relieved of his obligation to furnish a return.

[4] The assistance of Mr P. D. Ahearne, B.A., LL.B. (of the Commonwealth Crown Solicitor's Office) who read this material on Federal Gift Duty and made a number of suggestions for its improvement is gratefully acknowledged.

[5] The provisions of the New Zealand legislation dealing with gift duty are so similar to those of our Federal legislation that New Zealand cases on the topic are often instructive to Australian lawyers.

[6] For constitutional reasons Federal tax legislation requires at least two Acts. The reason is to be found in Commonwealth of Australia Constitution Act s. 55 which requires that laws imposing taxation shall deal only with the imposition of taxation. The Gift Duty Act is the law imposing taxation in this instance. The Assessment Act contains the provisions governing administration.

[7] Gift Duty Assessment Act 1941-1957.

[8] Assessment Act, s. 19.

[9] The list of exempted gifts is found in the Assessment Act, s. 14. *Infra*, n. 57.

Although a return is required when gifts by a donor within the stipulated period exceed £1,500, duty is not payable unless such gifts exceed £2,000.[10]

On 1 March, 1957. A, who has not previously made gifts, gives £1,000 to B. No return is required. On 1 March, 1958, A gives £1,000 to C. A return including both gifts is required.

B. RATES OF FEDERAL GIFT DUTY

The rates are set forth in the Schedule to the Gift Duty Act 1941-1947 (Cth.). They are to be determined according to the 'value of all gifts'. The enlarged meaning of this shorthand expression is 'the sum of the value of the gift in question and the value of all other gifts made, whether at the same time or within eighteen months previously . . . or eighteen months subsequently, by the same donor *to the same or any other donee*'.

The rates[11] are as follows:—

(a) Where the value of all gifts does not exceed £2,000.	Nil.
(b) Where the value of all gifts exceeds £2,000 but does not exceed £10,000.	£3 *per centum* of the value of the gift.
(c) Where the value of all gifts exceeds £10,000 but does not exceed £20,000.	£3 *per centum* of the value of the gift increasing by £.03 *per centum* for every complete £100 by which the value of all gifts exceeds £10,000.
(d) Where the value of all gifts exceeds £20,000 but does not exceed £120,000.	£6 *per centum* of the value of the gift increasing by £.02 *per centum* for every complete £100 by which the value of all gifts exceeds £20,000.
(e) Where the value of all gifts exceeds £120,000 but is less than £500,000.	£26 *per centum* of the value of the gift increasing by £.005 *per centum* for every complete £1,000 by which the value of all gifts exceeds £120,000.
(f) Where the value of all gifts is £500,000 or more.	£27 18s. *per centum* of the value of the gift.

[10] Gift Duty Act 1941-1947 (Cth.), Schedule, para. (a) *infra*.

[11] These rates of duty on gifts *inter vivos* are the same as those of Federal Estate Duty payable upon the estates of deceased persons. Estate Duty Act 1914-1953 (Cth.) Schedule. This identity in the rates discloses the revenue protection function of Federal Gift Duty.

(1) Aggregation of gifts in determining rate of duty.

The statutory definition of 'value of all gifts' is not happily drafted. A Board of Review[12] has held that the 'value of all gifts' is the aggregate of—(a) the value of the gift in question; (b) the value of all gifts made by the donor within eighteen months previously; *and* (c) the value of all gifts made within the period of eighteen months subsequently.

(i) On 1 March, 1957. A, who has not previously made gifts, gives £1,200 to B. The gift is then exempt from assessment of duty. On 1 March, 1958, A gives £10,000 to C. The gift to B now becomes liable to assessment. For the purpose of determining the rate of duty on each gift, the gifts to B and C are aggregated. Gift Duty will be assessed on the gift to B at the rate appropriate for £11,200 (the 'value of all gifts'). That will be £3.36 *per centum*. Gift duty at the same rate will also be assessed on the gift to C.

(ii) On 1 March, 1957, A, who has not previously made gifts, gives £5,000 to B. Duty is assessed thereon at £3 *per centum*. On 1 March, 1958, A gives £7,000 to C. The two gifts are aggregated and gift duty will be assessed on C's gift at the rate appropriate to £12,000, *i.e.* £3.60 *per centum*. Duty on B's gift will be re-assessed at £3.60 *per* centum and an amended assessment will be issued since the rate of duty thereon has been increased by the making of A's gift to C within eighteen months after his gift to B.

(iii) Suppose that in Case (ii) A on 1 December, 1958, gives £9,000 to D. This transaction has no effect on B's gift which is more than eighteen months old. To determine the amended rate of duty in respect of C's gift, however, add together the gifts to B, C and D. This produces £21,000 as the 'value of all gifts' for determining the rate payable on C's gift, *i.e.* £6.20 *per centum*. An amended assessment in respect of C's gift will be issued. To determine the rate of duty in respect of D's gift add together the gifts to C and D. This produces £16,000 as the 'value of all gifts' and the rate will be £4.80 *per centum*.

Tabulation of Cases (ii) and (iii):

	B	C	D
Value of gift in question.	£5,000	£7,000	£9,000
Value of other gifts made within 18 months previously.	—	5,000	7,000
Amount by reference to which rate in original assessment calculated.	5,000	12,000	16,000
Value of other gifts made within 18 months subsequently.	7,000	9,000	
Amount by reference to which rate in amended assessment calculated.	£12,000	£21,000	

[12] Case No. 7 (1952) 3 Taxation Board of Review Decisions 64.

Rate of duty applied to value of gift in original assessment.	3.00%	3.60%	4.80%
Rate of duty applied to value of gift in amended assessment.	3.60%	6.20%	

(2) Different mode of assessment in certain cases.

When the 'value of all gifts' is just over £2,000 there is a departure from the ordinary mode of assessment.

(i) A, who has not previously made gifts, gives £2,000 to B. The 'value of all gifts' is £2,000. No duty is payable.

(ii) A, who has not previously made gifts, gives £2,005 to B. The 'value of all gifts' is £2,005. If the ordinary rates were applied without any modification, the duty payable would be £60 3s. The Act modifies the mode of assessment in such a case in order to cushion the impact of the rates Schedule on gifts which are just over £2,000. This is done by section 4 (2) which has the effect that the gift duty payable in respect of any gift (not being a gift to which section 4 (3) applies, *i.e.* not being one in which the rate of duty is ascertained by reference to the value of other gifts) shall not exceed one-half of the amount by which the value of that gift exceeds £2,000. The effect of section 4 (2) on assessment of the above gift of £2,005 is that the duty payable is £2 10s. instead of £60 3s.

This modification ceases to operate when the gift exceeds £2,126.

(iii) Case (ii) is one in which the rate is determined solely by reference to the value of the gift to be assessed because there have been no other gifts within the eighteen month period backward or forward to be considered.

When the rate is to be determined by reference to the value of other gifts the modification is provided for by section 4 (3). It provides that 'the gift duty payable in respect of the gift to be assessed shall not exceed an amount which bears the same proportion to one-half of the amount by which the value of all those gifts exceeds Two thousand pounds as the value of that gift bears to the total value of such of those gifts as are made after the commencement of this sub-section'.

A, who has not previously made gifts, gives £600 to B in December, 1957, £800 to C in January, 1958, and £700 to D in March, 1958. The 'value of all gifts' is £2,100. The rate of duty is 3%. Apart from section 4 (3) the amounts of duty payable would be as follows:—

Gift	*Duty*
B's £600	£18
C's £800	£24
D's £700	£21

Section 4 (3) produces the following result:—

$$\text{B's gift: Duty is not to exceed } \frac{600}{2100} \times £50 \left(\tfrac{1}{2} \text{ excess of value of all gifts over } £2{,}000\right) = £14.284$$

C's gift: $\frac{800}{2100} \times £50$ = £19.112

D's gift: $\frac{700}{2100} \times £50$ = £16.666

It will be noted that the upper limits of duty established in respect of each gift total approximately £50. If A, instead of making gifts to B, C and D had made one gift of £2,100 to B the upper limit of duty as the result of section 4 (2) being applied would have been £50. From this it can be seen how section 4 (3) carries the principle in section 4 (2) into effect where the value of more than one gift has to be considered in arriving at the rate of duty.

C. WHAT IS A 'GIFT'?

'Gift' is defined in the Assessment Act[13] as follows:—

'"gift" means any disposition of property which is made otherwise than by will (whether with or without an instrument in writing),[14] without consideration in money or money's worth passing from the disponee to the disponor, or with such consideration so passing if the consideration is not, or, in the opinion of the Commissioner, is not, fully adequate;'

From this one is led to the definition of 'disposition of property':[15]

'"disposition of property" means any conveyance, transfer, assignment, settlement, delivery, payment or other alienation of property and, without limiting the generality of the foregoing, includes—

(a) the allotment of shares in a company;
(b) the creation of a trust in property;
(c) the grant or creation of any lease, mortgage, charge, servitude, licence, power, partnership or interest in property;
(d) the release, discharge, surrender, forfeiture or abandonment, at law or in equity, of any debt, contract or chose in action, or of any interest in property;
(e) the exercise of a general power of appointment of property in favour of any person other than the donee of the power; and
(f) any transaction entered into by any person with intent thereby to diminish, directly or indirectly, the value of his own property and to increase the value of the property of any other person;[16] . . .'

[13] S. 4.

[14] Contrast Victorian Stamp Duty which is imposed on instruments rather than transactions. *Infra*, n. 91.

[15] S. 4.

[16] Of a provision in the New Zealand Gift Duty legislation similar to item (f) it was said on behalf of the Privy Council: 'In their Lordships' view when the Statute brings in as a gift a transaction entered into with intent to diminish the value of one estate and to increase the value of another, what is hit at by the Statute is a transaction which the person entering into it intends to have the effect stated in sub-sec. (f). It is not enough merely to prove that the result which is stated in that subsection accrued.' *Commissioner of Stamp Duties v. Finch* [1929] A.C. 427, 429. See also *Grimwade v. Federal Commissioner* (1949) 78 C.L.R. 199, 215, *per* Latham C.J. and Webb J.; [1949] Argus L.R. 609, 616.

There are also definitions of 'donee', 'interest in property' and 'property':

> '"donee" means any person who acquires any interest in property under a gift, and, where a gift is made to a trustee for the benefit of another person, includes both the trustee and beneficiary;'
>
> '"interest in property" means any estate, interest, right or power whatsoever, whether at law or in equity, in or over any property;'
>
> '"property" includes real property and personal property and every interest in real property or personal property;'

(1) What transactions are 'dispositions of property'?

It is possible to imagine transactions which on all tests would be dispositions of property. There are, however, certain marginal transactions deserving special consideration.

(a) POWERS OF APPOINTMENT

(i) *Creation of the power as a 'disposition of property'.*

Ordinarily the creation of a *general* power, even one exercisable by deed or will, would not be considered a disposition of property to the donee of the power. Until exercise of the power in his own favour he is not owner in the full sense as is shown by several principles. *E.g.* If the donee dies intestate without attempting to exercise the power, the property will devolve on the persons entitled in default of appointment, who may not be the same persons as those who succeed to the donee's own property.

A fortiori the ordinary meaning of 'disposition of property' could not comprehend the creation of a *special* power of appointment as a disposition to the donee of the power.

Apart from the special statutory definition of 'disposition of property' the only sense in which the creation of a general or special power could be referred to as a disposition of property would be that where there is a gift in default of appointment, there is a disposition to those entitled in default of appointment. On the creation of the power such persons take a vested interest subject to divestment by exercise of the power.[17]

Whatever might be the position apart from the statute, the Assessment Act's definition of 'disposition of property' as including 'the grant or creation of any . . . power . . .' would extend to the creation of a general or special power. Who is the disponee when a general or special power is created? On one view, if there is a gift in default of appointment, general principle would justify a proposition that the

[17] *Doe dem. Willis v. Martin* (1790) 4 Term Rep. 39. *Commissioner of Succession Duties v. Isbister* (1941) 64 C.L.R. 375, 380, *per* Williams J.; [1941] Argus L.R. 63, 65.

takers in default of appointment are the disponees. Under this view when valuing the gift in default of appointment no allowance would be made in respect of the possibility of the power being exercised so as to defeat the gift in default (s. 18 (1) (a)). Under this view the creation of a power with no gift in default of appointment would not give rise to liability to duty.

> By a voluntary settlement *inter vivos* A transfers property to T on trust for A for life and on his death for A's widow for life and on her death for such person or persons absolutely as A shall by will appoint. Gift Duty would clearly be payable in respect of the life interest given to A's widow but would duty be payable in respect of the power of appointment?

The Commissioner has taken the view (which may or may not be correct) that all property which leaves the donor is the subject of a disposition. It does not matter whether there is a gift in default of appointment or not. This view is based on an assumption that the property subject to the power of appointment will be appointed to the objects of the power. Thus in the example there would be a gift of all but A's life interest. To justify this assumption section 18 (1) (a) is relied on. That measure provides that for the purpose of computing the value of a gift no allowance shall be made in respect of any contingency affecting the interests of the donees. It is arguable that this provision operates only after it has been found that there is a gift; that it cannot be relied on at the earlier stage of helping to determine whether there is a gift. Where there is a power to appoint with a gift in default of appointment the question will generally be academic. But a power to appoint among individuals followed by a gift to a non-profit organization in default of appointment would raise the issue since gifts to non-profit organizations are exempted from duty by section 14.[18]

If the other view, that there can be a disposition only if there is a gift in default of appointment, were correct it would be possible for non-dutiable gifts to be made by creating a special power of appointment and making a gift in default of appointment in such a way that it would be exempted from duty by section 14. Under section 18 (1) (a) the possibility of the gift in default of appointment being defeated by exercise of the power would be ignored. On the assumption that exercise of a special power (which could not be used to benefit the appointor) cannot be a disposition of property[19] the power could be exercised to make the desired gifts without attracting duty.

(ii) *Exercise of the power as a 'disposition of property'.*

Exercise of a general power in favour of any person other than the

[18] *Infra*, n. 58.
[19] *Infra.*

donee is expressly included in the statutory definition of 'disposition of property'.

It has been held in England that if the donee has power to appoint in favour of a limited class, he being a member of that class, he may prima facie appoint to himself, and therefore he has a general power of appointment for the purposes of the death duty statutes.[20]

On the principle *expressio unius est exclusio alterius* the exercise of a special power would not be a 'disposition of property' within the meaning of the Act. This accords with general principles concerning special powers.

(a) By a voluntary settlement *inter vivos* A transfers property worth more than £2,000 to T on trust for B for life and thereafter for such person or persons absolutely as B shall by deed or will appoint. Gift duty will be assessed on the value of the property at the date of the settlement. Later B, by deed, appoints the whole of the property, which is still worth more than £2,000, to C. Gift duty will be assessed on the value of the property as at the date of the appointment. B exercised a general power.

(b) By a voluntary settlement *inter vivos* A transfers property worth more than £2,000 to T on trust for B for life and thereafter for such one or more of B's children absolutely as B shall by deed or will appoint and in default of appointment for B's children absolutely. Gift duty will be assessed on the value of the property as at the date of the settlement. Later B, by deed, appoints the whole of the property, which is still worth more than £2,000, to his son S. No gift duty should be payable in respect of this appointment.

(c) A disposition to T on trust for such person or persons absolutely other than B as B shall appoint, if created by a settlement would probably be a valid special power and B could appoint to his creditors under it. If contained in a will it would probably be invalid as a delegation of will making power not permitted by law.[21]

Where a power of appointment is given to two or more persons jointly there is some authority for the view that it is not a general power.[22]

A power to appoint to any person or persons is still a general power even if the power is one to appoint only with the consent of trustees.[23]

(iii) *Release of the power as a 'disposition of property'.*

Suppose that in case (b) B, instead of making the appointment in favour of S, released his power by deed either in whole or in part.[24] Would this be a 'disposition of property'?

Dicta in *Commissioner of Succession Duties v. Isbister*[25] confirm the principle that release of a power is not ordinarily a disposition of property. The Assessment Act's definition of 'disposition of property'

[20] *In re Penrose* [1933] Ch. 793.
[21] *Re Park* [1932] 1 Ch. 580; *Tatham v. Huxtable* (1950) 81 C.L.R. 639; [1951] Argus L.R. 1.
[22] *A.-G. v. Charlton* (1877) L.R. 2 Ex. D. 398.
[23] *In re Phillips* [1931] 1 Ch. 347.
[24] Property Law Act 1928 (Vic.) s. 155.
[25] (1941) 64 C.L.R. 375; [1941] Argus L.R. 63.

does include a 'release . . . of any interest in property'. A power is not ordinarily an interest. But the statutory definition of 'interest in property' includes 'any . . . power . . . in or over any property'. It would appear that release of a power may be a 'disposition of property' for the purposes of this legislation.

(iv) *Power in the nature of a trust.*

The foregoing assumes that the power is a mere power of appointment and not a power in the nature of a trust. If it is a power in the nature of a trust, the creation of it will clearly be a 'disposition of property' since that phrase expressly includes the 'creation of a trust in property'.

(b) Directions to pay money or transfer property

Sometimes a creditor directs his debtor to pay the amount owing, to another person. There is often a question as to whether a 'disposition of property' has been made when the direction is given or when the payment is made as directed. The issue is whether the person who gave the direction intended thereby to assign his interest or whether he established a mere revocable mandate intended to have no direct dispositive effect before the person receiving the direction acts upon it. Like all enquiries as to intention much depends on the language of the direction and the circumstances in which it is given.[26] The same issue is raised when the owner of property in the possession of another directs that other to transfer the property to a third person. If a mere revocable mandate were intended, it might be said that this is a 'disposition of property' because the definition of that expression includes 'the grant or creation of any . . . power'. But this could be met by arguing that the power there referred to is more likely to be a power of appointment. The extension of the expression 'disposition of property' to cover every creation of an agency under which property could be dealt with should require a very clear direction from the legislature.

It is necessary, of course, to distinguish a mere revocable mandate from a revocable trust which can be a disposition of property in that it can immediately create interests which are none the less interests because they are defeasible on exercise of the power of revocation.

(c) Covenants to pay money

A covenants to pay £5,000 to B. Is this a disposition of property? In *Ashby v. Commissioner of Succession Duties (S.A.)*[27] Starke J.

[26] *Comptroller of Stamps (Vic.) v. Howard-Smith* (1936) 54 C.L.R. 614; [1936] Argus L.R. 198.

[27] (1942) 67 C.L.R. 284, 290; [1943] Argus L.R. 44, 46. Contrast *Fletcher v. Fletcher* (1844) 4 Hare 67 which stands for the proposition that a covenant by A to pay a sum certain to T to be held on trust for B constitutes a completed trust in favour of B. The contrast is between a disposition of property and a creation of property.

spoke of a covenant to pay money in relation to the expression 'disposition of property' appearing in the Succession Duties Act 1929-1940 (S.A.), section 35 (3):—

> The covenant created a liability to pay a sum of money; no property of any description whatsoever passed by force of the covenant; no property accrued to any person or persons by its force, and no charge was created over any property. The covenant did not diminish the property of the covenantor; . . . But it is said that the cases established that a contract for the payment of money amounts in popular language to a disposition of that money, and therefore of property. That may be so in cases in which legislation provides that property shall include 'money payable under any engagement' . . . or that any disposition of property or of any money or the incurring of any debt 'shall be deemed to be a deed of gift' . . . But that is not the ordinary, usual and natural signification of the phrase 'disposition of property'.

Do the statutory definitions set forth above bring covenants to pay money within the expression 'disposition of property' as used in the Gift Duty Assessment Act? Section 12 (1) of the Assessment Act may have a bearing on this. It provides:

> A disposition of property made or taking effect in pursuance of or in performance or satisfaction, whether wholly or in part, of a contract or agreement entered into (whether before or after the commencement of this Act and whether with or without an instrument in writing) without adequate consideration in money or money's worth, shall, for the purposes of this Act, be deemed to be a gift so soon and so far as the disposition has affected the property or any of the property to which the contract or agreement relates.

A voluntary covenant to pay money which remained unperformed at the covenantor's death would not constitute a debt deductible from his estate before assessment of Federal Estate Duty or Victorian Probate Duty.[28]

(d) Disclaimer of a gift

A disposition of property by way of gift, if made in the form appropriate to that property will vest the property in the transferee at once even though the donee has no knowledge of the transaction. When informed of the gift the donee may disclaim it and the property will then revest in the donor.[29] If the disclaimer does not purport to be in favour of any person other than the donor the effect would be to prevent any dutiable 'gift' taking place.

[28] Estate Duty Assessment Act 1914-1957 (Cth.) s. 3. The definition of 'debts' excludes money payable under voluntary covenants. Administration and Probate (Estates) Act 1951 (Vic.) s. 5 (4) excludes covenants not incurred *bona fide* for an adequate consideration for money or money's worth from the category of debts deductible from the gross value of the estate.

[29] 'A man cannot have an estate put into him in spite of his teeth.'—*Thompson v. Leach* (1690) 2 Vent. 198, 208.

(e) *Donatio mortis causa*

A *donatio mortis causa* is a gift for the purposes of this legislation. When the donor dies the property given will be included in the assessable estate of the donor for Federal Estate Duty purposes.[30] This does not mean that duty will be paid twice in respect of the gift. The Estate Duty Assessment Act 1914-1957 (Cth.) section 8 (6) provides for adjustment of duty in a case like this.

(f) INCOMPLETE VOLUNTARY DISPOSITIONS OF PROPERTY

A donor who is concerned to space out gifts to take full advantage of the intervals of time by which the liability to duty may be determined will ordinarily ensure that the steps required to make the gift perfect are taken in due time.

There may be occasions, however, when it is doubtful whether a complete gift[31] has been made by a certain date. It will then be necessary to apply the equitable rule in *Milroy v. Lord*[32] 'that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him.'

In regard to some types of property the common law or statutory requirements for a gift may involve action on the part of the donor only with the result that if the gift is not complete at common law or under statute it can never be complete in equity. This would be so in relation to a gift by deed of goods. In regard to other types of property the common law or statutory requirements for a gift may involve action not only by the donor but also by the donee or third persons. In these cases the donor may have done all that is required of him but the others may not have acted and the question will be whether the attempted gift though incomplete at common law or under statute is nevertheless complete in equity. The equitable rule in *Milroy v. Lord* directs attention to what the donor has done. If the donee is in a position to get in the legal title without possibly requiring further assistance from the donor he is to be treated as owner in equity. A donee who might possibly have to ask a Court of Equity to order the donor to do something in relation to the intended gift cannot surmount the obstacle that equity will not aid a volunteer against an intending donor.

[30] It is regarded as property in which the donor had a beneficial interest at the time of his decease which, on his decease, passed to another. Estate Duty Assessment Act 1914-1957 (Cth.) s. 8 (4) (b). *Mathie v. McDonald* (1916) 16 S.R. (N.S.W.) 446.

[31] *I.e.* gifts in the non-statutory sense, *i.e.* those dispositions for which there is no consideration. If there is some consideration which is inadequate but not illusory equity will treat the incomplete disposition as an enforceable contract to assign.

[32] (1862) 4 DeG. F. & J. 264.

The application of these principles may be tested in relation to a gift of an estate in land under the Torrens system. A, the registered proprietor of an estate in fee simple in Blackacre (land under the Torrens system) executes an instrument of transfer in registrable form whereby he purports to transfer all his estate in Blackacre to his son S in consideration of the natural love and affection borne by A towards S. A delivers the signed instrument of transfer and the relevant duplicate certificate of title to S. The Transfer of Land Act 1954 (Vic.)[33] provides that a registered proprietor may transfer his estate or interest by an instrument in or to the effect of the appropriate form in the sixth schedule to the Act. It also provides[34] that no instrument until registered shall be effectual to pass any estate or interest. *Dicta* of Dixon J. in *Brunker v. Perpetual Trustee Co. Ltd.*[35] and the decision of the High Court in *Phillis v. The King*[36] indicate that the donee under a voluntary instrument of transfer has no interest, either legal or equitable, in the land dealt with by the instrument before registration.[37] The donee who has been given an instrument of transfer in registrable form together with the relevant duplicate certificate of title is said to have a right to get himself registered free from obstruction by the donor. This right is probably equally well described as a power. The donee, viewed as having a power, is in some ways like the donee of a power of appointment or of a power of attorney. He has the ability to affect the donor's relation to Blackacre but until he exercises that power the donor has not lost his interest and the donee has not acquired an interest in Blackacre. It may be said that since he has this power to get himself registered the equitable test of completeness of a gift is satisfied since he can get in the legal title without requiring further assistance from the donor. But the test is not satisfied; there is still some possibility of the donee not being able to get in the legal title without the assistance of the donor. If the particular instrument of transfer delivered to the donee were destroyed before it could be lodged for registration the donee would not be able to get in the legal title without the assistance of the donor.[38] Before the Registrar

[33] S. 45. [34] S. 40. [35] (1937) 57 C.L.R. 555, 599-605; [1937] Argus L.R. 349, 359-361.
[36] (1941) 15 *Australian Law Journal* 191.
[37] It is assumed that the intending donor has manifested no intention to constitute himself a trustee for the donee. It is also assumed that the case is not one to which the doctrine of *Strong v. Bird* (1874) L.R. 18 Eq. 315 can be applied.
[38] See, however, *In re Donnelly* [1946] Q.W.N. 13 in which a donor executed a voluntary instrument of transfer which was delivered with the relevant certificate of title to the donee's solicitor. Subsequently the instrument of transfer and certificate of title were lost. Meanwhile the donor had died. In uncontested proceedings Matthews A-J. made a vesting order under the Trustees and Executors Act of 1897, s. 27(vii) (c), vesting the estate intended to be given in the donee. It seems to have been accepted that there had been a complete gift and that there was a trust in favour of the donee. There may have been some express declaration of trust by the donor in favour of the donee which would support the decision. This, however, is not made clear by the report. In the absence of such an express declaration of trust the view that the gift was complete may be open to question.

of Titles can be required to change the register an instrument of transfer in registrable form must be produced. Secondary evidence of the contents of a destroyed instrument would not supply that. Equity would not act at the behest of the donee to force the intending donor to execute another instrument of transfer. In connection with Federal Gift Duty, it is understood that the Commissioner has regarded a gift of an estate in land under the Torrens system as being complete when the instrument of transfer is registered. This seems to be in accordance with principle. Although the statutory definition of 'disposition of property' includes 'the . . . creation of any . . . power' this could hardly embrace the power conferred upon the donee before registration. If it did every agency to deal with property would be a disposition of property for this purpose.

It might have been expected that a similar result would follow where A, a shareholder in a company, executes an instrument of transfer in registrable form whereby he transfers his shares to his son S in consideration of the natural love and affection borne by A towards S and A delivers the signed instrument of transfer together with the relevant share certificates to S. On the foregoing reasoning the possibility of S losing the instrument of transfer before lodging it for registration would make the intended gift incomplete in equity although S while possessing the instrument of transfer would have a power to get registered free from obstruction by A. In England the Court of Appeal[39] has held that there would in these circumstances be a complete gift in equity before registration because the donor has done all in his power, according to the nature of the property given, to vest the legal interest in the property in the donee. This formulation of the test of completeness overlooks the possibility that the donee may need further assistance from the donor. If the instrument of transfer were destroyed before being lodged for registration it is difficult to see on what general equitable principle the donor could be forced to act for the benefit of the donee.

The same principles may be tested in relation to an attempted assignment of a legal chose in action. A, the creditor to whom B owes a debt, executes an unsealed writing by which he expresses his intention to assign the debt to his son, S, in consideration of the natural love and affection borne by A towards S. A delivers the writing to S. Written notice of the assignment is not given to B until two more months have elapsed. When was the gift complete? When A executed the writing and delivered it to S or when written notice was given to B? Under the Property Law Act 1928 (Vic.)[40] the statutory assignment would not be complete until notice was given. But would there have been a complete equitable assignment before notice was given?

[39] *In re Rose* [1952] Ch. 499.

[40] S. 134.

This has been a vexed question.[41] It is settled that the notice can be given by either donor or donee. At the point where the donee holds a writing expressing the donor's intention to assign the donee has the power to get statutory title to the chose in action without further assistance from the donor. The case differs from those discussed earlier in that the donee cannot possibly need the assistance of the donor. The writing had effect without requiring registration and if the donee loses the writing it could be proved by secondary evidence. It is thus arguable that a gift of a legal chose in action may be complete before the notice required by the statute is given to the debtor.

(2) Can there be a 'disposition of property' without an ascertained donee?

The definition of 'gift' does not require the donee to be ascertained at the time of the disposition.

When a settlor sets up a trust for no consideration or an inadequate consideration in favour of unascertained beneficiaries, does he make a gift within the meaning of the Assessment Act? A Board of Review has held that he does. A number of sections might at first glance suggest that an existing donee is required for a gift. The donee is made a joint and several debtor for the amount of the duty.[42] The donee is required to render a return unless the donor renders a return.[43] On the other hand the emphasis of the Assessment Act is not on the receipt of property by anybody but on the disposition of property by a donor; 'the act of dispossession by the giver with a consequential diminution of his property'.[44] Furthermore, the word 'donee' is not used in the section imposing the liability to pay the duty.[45] The primary concern of the Act is with the donor's acts. The word 'donee' appears only in machinery provisions for better securing the primary liability of the donor. Thus the mere absence of an existing donee cannot alter the fact that a donor has made a disposition of property.

> By an ante-nuptial settlement A conveys property to T on trust as from the marriage for A for life, then for his intended wife B for life if she shall survive A; subject to these trusts for the issue of the marriage absolutely and in default of issue on trust for A absolutely. Clearly a gift of a contingent reversionary life interest has been made to B.[46] The debatable point is whether a gift has been made to the unborn issue of the marriage. A Board of Review decision holds that a gift has been made.[47] If no gift had been made to the unborn issue duty

[41] *Anning v. Anning* (1907) 4 C.L.R. 1049; (1907) 13 Argus L.R. 709. [42] S. 25.
[43] S. 19. [44] Case No. 48 (1951) 2 Taxation Board of Review Decisions 207, 209.
[45] S. 11.
[46] In valuing B's life interest the contingency that she must survive A in order to take will be ignored, s. 18. In valuing the interest intended for the unborn issue the contingency that they must come into being will be similarly ignored.
[47] Case No. 48 (1951) 2 Taxation Board of Review Decisions 207.

would have been payable only on the value of B's life interest. But as a gift has been made to the unborn issue, duty is payable on the value of an absolute interest in remainder after A's life interest.[48] If A after the settlement sought to dispose of his interest in the property settled, a prospective purchaser in deciding what to pay for it would have to take into account not only the value of B's contingent life interest but also the value of the contingent interests of the unborn issue. Viewed in this light it is apparent that A disposed of more than B's life interest.

A direction for valuing life interests and reversionary interests is provided by Gift Duty Regulations.[49] The regulation provides that the value shall be calculated in accordance with the appropriate value of £1 *per annum* shown in any standard set of tables for calculation of values on a 4½ *per centum* basis. In so calculating, the periods of rest between payments of income specified in the instrument shall be used. If the instrument does not specify any period of rest, the value based upon annual payments shall be employed.

To value a life interest an actuarial calculation is required. It is necessary to ascertain the average life expectancy of the life tenant and the prevailing rate of interest appropriate to the investments concerned.[50] The value of the life interest is the total amount which could accrue to the life tenant during his life expectancy assuming the interest at the appropriate rate on the *corpus* is compounded.

To value a reversionary interest an actuarial calculation is made to ascertain the amount which, if invested at the appropriate rate of interest for the period of the life tenant's life expectancy, would produce the value of the *corpus* settled.

To ascertain the value of the gift in the above case, which is deemed to be the value of an absolute remainder interest expectant upon the death of A, we need to know the average life expectancy of A. The value of the remainder interest is the amount which if invested at 4½ *per centum*[51] for the period of A's life expectancy would produce the capital sum now settled.

(3) The disposition must be of 'property'.

To be dutiable as a gift the transaction must be a disposition of property. The definition of 'property'[52] is such as to exclude a mere expectancy or *spes successionis*.

(i) T holds Blackacre on trust for A for life and on A's death for such of A's sons as shall be living at A's death. While A is still alive one of his sons, S, assigns his interest by way of gift to B. Although S's

[48] *Ibid.*

[49] Statutory Rules 1941, No. 312, regulation 42. A similar regulation in Estate Duty regulations was held to be *ultra vires* in *Chesterman v. Federal Commissioner* (1923) 32 C.L.R. 362; [1923] Argus L.R. 224. *Quaere* as to the status of Gift Duty Regulations regulation 42 now?

[50] Regulation 42 makes an arbitrary selection of 4½ *per centum* as the rate.

[51] The rate may well be different if regulation 42 is invalid.

[52] S. 4.

interest at the time of the assignment was contingent, the assignment was a disposition of property.

(ii) T holds Blackacre on trust for A for life and on A's death for such one or more of A's sons as A shall by deed or will appoint. A has made a will in which he appoints Blackacre to his son S. While A is still alive S purports to assign his interest 'in any property which A may hereafter appoint to me'. The assignment is for a consideration of £1,000. At the time of the assignment Blackacre is worth £6,000. A dies without having altered his will. At the time of A's death Blackacre is worth £10,000. Has any 'gift' been made? A gift is made when A dies and the value of the gift is £10,000 less £1,000.[53]

(4) The disposition must be made without consideration 'in money or money's worth' or for such a consideration which is not, or, in the opinion of the Commissioner, is not fully, adequate.

A disposition which is made for a consideration other than money's worth may be caught.

(a) MARRIAGE CONSIDERATION

Although marriage is a valuable consideration, it is not 'money or money's worth'. Thus an ante-nuptial settlement if supported by no other consideration than the marriage would be a gift.[54]

(b) PROMISE TO PAY

A promise to pay money if *bona fide* is a consideration in money or money's worth.

A executes an instrument by which he tranfers shares in D Company Ltd. to his son S in consideration of a sum of money stated in the instrument as paid by S. In fact no money has been paid by S. If the sum stated is the full value of the shares as at the date of the instrument, the consideration is not inadequate merely because it is not executed. The document implies a promise by S to pay and if this promise is immediately enforceable there is no 'gift'. No distinction should be drawn between promises to pay by reference to the financial capacity of the promisor to pay. This assumes that there is no evidence upon which the Commissioner could prove that the transaction is not *bona fide*.[55] If the promise to pay were not immediately enforceable the absence of provision for the payment of interest might have made the consideration inadequate.

Consider the effect of this type of transaction in relation to other taxes. It would remove the income on the transferred property from the transferor's hands. Thus it would reduce his liability for income tax without rendering the transaction subject to Federal Gift Duty.

[53] Case No. 48 (1951) 2 Taxation Board of Review Decisions 207.
[54] *Public Trustee v. Commissioner of Stamps* (1912) 31 N.Z.L.R. 1116; *Re Heaslop* [1912] St. R. Qd. 277.
[55] *Fadden v. Federal Commissioner of Taxation* (1945) 70 C.L.R. 555.

Victorian Stamp Duty would be payable on the transfer of shares.[56] The transaction would not have any effect in relation to Federal Estate Duty or Victorian Probate Duty if the transferee did not pay anything before death and the value of the shares remained unchanged at the time the transferor died. Although the shares would not be part of the transferor's estate the debt due from the transferee would be an asset to be included in his assessable estate.

(c) COMPROMISE OF PROCEEDINGS OR THREATENED PROCEEDINGS

A promise not to proceed with a claim may be consideration in money's worth for the transfer of property if there be either liability or the promisor *bona fide* believes there is liability. Whether a *bona fide* compromise of a claim constitutes a 'gift' will depend upon whether the Commissioner considers that there was a reasonable ground to suppose that the claim could have succeeded, if pressed. This would seem to follow from his power to come to an opinion that the consideration for a disposition of property is not fully adequate. The problem will be likely to arise more frequently in connection with claims in respect of estates of deceased persons. *E.g.* (i) Compromise of a will contest case in which the next of kin or beneficiaries under an earlier will oppose the granting of probate of a purported will. (ii) More frequently, compromise of a claim under the Testator's Family Maintenance legislation.[57] In many of these cases where there is a real claim and the amount of the property involved is large it will be preferable to have the compromise take the form of a consent order of the court.

D. EXEMPTED GIFTS

Certain dispositions of property which would ordinarily fall within the statutory definition of 'gift' are excluded[58] from the category of dutiable gifts.

The exempted gifts are:—

(a) Contributions by an employer to certain types of superannuation funds.
(b) Certain payments by an employer to his employee or the dependants of his employee.
(c) Certain payments by an employer to an employee who is in the armed forces.
(d) Gifts to non-profit organizations. This is wider than exemption of gifts to charitable organizations.
(e) Gifts to the Commonwealth or a State.

[56] *Infra*, n. 39.
[57] Administration and Probate Act 1928 (Vic.) Part V as amended. Case No. 7 (1951) 2 Taxation Board of Review Decisions 40. See also Marriage (Property) Act 1956 s. 5(3).
[58] S. 14.

(f) Gifts made in the course of carrying on a business for the purpose of obtaining any commercial benefit by way of writing off an irrecoverable debt. Where the donor is a private company, firm or individual the gift is not exempt if the donee is connected by ties of blood or marriage with any director of the company, or with any member of the firm or with the individual as the case may be.

(g) Premiums not exceeding £100 *per annum,* paid on a policy effected by the payor on his own life and expressed to be for the benefit of his wife or any of his children.

(h) A special exemption made necessary during war conditions.

(i) Any 'gift concerning which the Commissioner is satisfied—

(i) that the gift, together with all other gifts made by the same donor *to the same donee,* whether at the same time or within eighteen months previously . . . or eighteen months subsequently does not exceed in the aggregate £50 in value and that the gift is made in good faith as part of the normal expenditure of the donor; or

(ii) that the gift is made for or towards the maintenance, education or apprenticeship of any person, and is not excessive in amount, having regard to the legal and moral obligations of the donor to afford the maintenance, education or apprenticeship.'

Under a deed of trust A transferred shares to T_1, T_2 and himself as trustees on trust to apply portion of the income therefrom for or towards the maintenance, education or apprenticeship of his son S. The deed contained the following proviso, 'Nothing herein contained shall authorize the trustees to apply for the maintenance, education or apprenticeship of the said S an amount which is excessive, having regard to the legal and moral obligations of the settlor to afford the maintenance, education and apprenticeship of the said S.' The inclusion of this proviso does not mean that the gift could never be excessive in amount and thus make the gift of income exempt under section 14 (i) (ii). It is not a question of whether the amount is excessive according to the trustees' view or even some objective standard. If it were, the proviso would fulfil the purpose intended. The exemption is given to gifts 'concerning which the Commissioner is satisfied . . . that the gift . . . is not excessive'. The Commissioner may well consider an amount excessive which the trustees or even a court of equity would not consider excessive. Unless it could be shown that the Commissioner acted capriciously or arbitrarily, the Commissioner's view would stand.[59] Because of this the proviso in the deed does not conclude the question of exemption.[60]

By an ante-nuptial settlement A assigned the income of certain shares to T_1 and T_2 on trust to hold the income for him until his

[59] *Moreau v. Federal Commissioner of Taxation* (1926) 39 C.L.R. 65, 68, *per* Isaacs J.
[60] Case No. 94 (1951) 1 Taxation Board of Review Decisions 383.

marriage and after his marriage on trust to apply it for or towards the maintenance of his intended wife during her life. The settlement contained a proviso broadly similar to that in the case above. By a second ante-nuptial settlement executed some days later A covenanted to assign the shares to T_1 and T_2 upon his marriage to be held on trust for himself until marriage and after marriage for his wife for life subject to the trusts of the first settlement. Here again the proviso was ineffective to carry out the purpose for which it was intended.[61]

The expression in section 14 (i) (ii) 'having regard to the legal and moral obligations of the donor to afford the maintenance, education or apprenticeship' does not limit the provision for maintenance and education to a period during which the donor is under a legal obligation to maintain and educate. The effect of the expression is that the legal and moral obligations of the donor to maintain and educate are among the factors to be regarded when considering whether the gift is excessive.[62]

Dispositions of Commonwealth stock and bonds are not exempted from gift duty.[63]

E. VALUATION

Duty is assessed according to the value of the gift. Where there is consideration in money or money's worth but it is inadequate the extent of the inadequacy is the value of the 'gift'.[64]

Where there is a contingency affecting the interests of donees no allowance is to be made in respect of any such contingency.[65]

(i) A conveys property worth £10,000 to T upon trust for B for life remainder to his children absolutely. A reserves power to revoke the trust. Gift duty computed on the full value of £10,000 would be payable.

(ii) A gives P an option to purchase Blackacre at any time within the next two years for £8,000. One year later A conveys Blackacre to B by way of gift. At the date of the conveyance to B, Blackacre is worth £10,000. Gift duty computed on the full value of £10,000 would be payable.

Where the property given is subject to an encumbrance no deduction is to be allowed in respect of any mortgage, charge, *etc.*, if and so far as the donee is entitled as against the donor or any other person or against any other property to any right of indemnity or contribution in respect thereof.[66]

The Assessment Act contains special provisions governing the valuation of shares or stock.[67]

[61] Case No. 97 (1951) 1 Taxation Board of Review Decisions 395.
[62] Case No. 94 (1951) 1 Taxation Board of Review Decisions 383.
[63] S. 40 excludes the provisions of the Commonwealth Inscribed Stock Act 1911-1946 (Cth.) s. 52A. *Infra*, n. 51. [64] S. 17. [65] S. 18 (a). [66] *Ibid.* [67] S. 18 (d).

Where the gift consists of an annual premium paid on a life policy for the benefit of another person and it is not a gift exempted by section 14 (g)[68] the value of the gift is the difference between the surrender value of the policy immediately before payment of that premium and the surrender value of the policy immediately after payment of that premium.

The value of a gift shall be taken to be the value thereof at the time of the making of the gift.[69]

(i) A gives P an enforceable option to purchase Blackacre at any time within the next two years for £7,000. At the time of giving the option Blackacre is worth £10,000. Eighteen months later, owing to building development in the neighbourhood, Blackacre is worth £15,000. P then exercises the option. A gift of a value of £3,000 was made when the option was given.[70]

(ii) Under a deed of trust A transferred shares to T_1, T_2 and himself as trustees on trust to apply portion of the income therefrom for or towards the maintenance, education or apprenticeship of his son S. Four days later by another deed of trust made between the same parties it was declared that the trustees should, subject to the trusts of the first deed, hold the shares on trust for S when he attained 25. Though the Commissioner is required[71] to make an assessment of duty from the returns and from any other information in his possession the value of the gift is under section 18 (1) (b), to be taken to be the value at the time the gift is made. Thus the value of the gift in the first deed of trust is to be ascertained without regard to the provisions of the later deed of trust.[72]

F. WHO IS LIABLE TO PAY FEDERAL GIFT DUTY ?

The donor and the donee are jointly and severally liable[73] but where there is more than one donee under the same gift, each of them shall be liable only for the same proportion of the gift duty as the value of his interest bears to the total value of the gift.[74]

Where the donee's interest is a future interest, he does not become personally liable until his interest becomes an interest in possesssion.[75] His interest may be prejudiced, however, before that time because gift duty constitutes a first charge on all property (other than money or negotiable instruments) comprised in the gift.[76]

Where the donee is a trustee he is not personally liable for the payment of any gift duty in respect of any trust property until advised by the Commissioner in writing that duty is due and then only to the extent of the trust property held by him when the notice is served.[77] A trustee is given power to raise mortgage money for payment of duty.[78] The definition of 'donee'[79] includes both the trustee

[68] *Supra*, n. 58. [69] S. 18 (a).
[70] *Morland v. Hales and Somerville* (1911) 30 N.Z.L.R. 201; *Re Busby* (1930) 30 S.R. (N.S.W.) 399. [71] S. 21.
[72] Case No. 94 (1951) 1 Taxation Board of Review Decisions 383. [73] S. 25 (2).
[74] S. 25 (4). [75] S. 25 (5). [76] S. 25 (3). [77] S. 25 (7). [78] S. 25 (6). [79] S. 4.

and beneficiary where a gift is made to a trustee for the benefit of another person. Accordingly when a trust is involved there may be recourse against not only the beneficiary but also against the trust property through the trustee.

G. CREDIT FOR FEDERAL GIFT DUTY PAID WHEN COMPUTING FEDERAL ESTATE DUTY ON ESTATE OF DONOR

Under the Estate Duty Assessment Act 1914-1957 (Cth.)[80] property disposed of *inter vivos* by a donor is in certain cases notionally included in his estate when he dies so as to be assessable to estate duty, *e.g.* property which passed from the deceased by a gift *inter vivos* made within three years before his death.

Federal Gift Duty may have been paid on the gift and there could thus be a double taxation situation. Relief against such double taxation is given by section 8 (6) of the Estate Duty Assessment Act. It provides for a deduction from the total estate duty to which the estate is liable, of the lesser of the following sums:—

(a) the amount of the gift duty paid or payable in respect of the gift; or
(b) the amount by which the estate duty payable apart from section 8 (6) is increased by reason of the inclusion of the property given *inter vivos* in the deceased's estate.

III. *VICTORIAN STAMP DUTY*

Victorian Stamp Duty on settlements and gifts in some measure protects State revenue in a manner broadly similar to the protective function performed for federal revenue by Federal Gift Duty. In this State tax the protective function is not so prominent because the rates of Stamp Duty are much lower than the rates of Victorian Probate Duty.

The enacted law governing Victorian Stamp Duty is to be found in the Stamps Act 1946 (Vic.)[81] and the Stamps Regulations made thereunder.

Under this legislation, duty is charged[82] upon many types of instruments from bills of exchange to betting tickets. Thus Heading VI[83] of the Third Schedule to the Act imposes stamp duty at a flat rate on conveyances or transfers on sale of any real property for full value. Heading IV imposes stamp duty at a flat rate on transfers of marketable securities on sale of such securities for full value. These two headings deal with sales and under them duty is assessed according to the amount of the consideration. The creation of a trust will often involve the making of an instrument which deals with property otherwise than by way of sale. When this is so Heading IX dealing with gifts

[80] S. 8 (4). [81] As amended. [82] S. 17.
[83] As amended by Acts 5245, 5325, 5390, 5581, and 6104.

and settlements may be relevant. Unlike the flat rate of duty applicable to sales for full value the rate of duty under Heading IX increases according as the value of the property settled or given increases. Under Heading IX duty is assessed according to the value of the property dealt with.

Heading IX[84] is as follows:—

'IX. Settlement or Gift, Deed of—

(1) Any instrument, other than a will or codicil, whether voluntary or upon any good or valuable consideration other than a *bona fide* adequate pecuniary consideration and whether revocable or not whereby any property is settled or agreed to be settled in any manner whatsoever or is given or agreed to be given or directed to be given in any manner whatsoever;

(2) Any instrument declaring that the property vested in the person executing the same shall be held in trust for the person or persons mentioned therein;

(3) Any instrument whereby an existing trust created verbally is acknowledged evidenced or recorded either by the creator of the trust or by the trustee in any case where, if the trust had originally been created by an instrument, stamp duty would have been chargeable upon such instrument under either paragraph (1) or paragraph (2) under this heading—

	Per cent. £ s. d.
Where the value of the property does not exceed £1,000	1 0 0
Where the value of the property exceeds £1,000 and does not exceed £5,000	1 10 0
Where the value of the property exceeds £5,000 and does not exceed £10,000	2 0 0
Where the value of the property exceeds £10,000 and does not exceed £25,000	2 10 0
Where the value of the property exceeds £25,000 and does not exceed £50,000	3 0 0
Where the value of the property exceeds £50,000 and does not exceed £100,000	4 0 0
Where the value of the property exceeds £100,000	5 0 0

Exemptions

(1) Any deed of settlement or deed of gift so far as it relates to any property situate beyond the limits of Victoria.

(2) Any deed of settlement or deed of gift made before and in consideration of marriage where the parties to the marriage and their issue or any of them are the sole beneficiaries or where if there are other beneficiaries the Comptroller of Stamps is satisfied that the marriage is the sole and real consideration for the benefits conferred.

(3) Any instrument whereby any property is settled or agreed to be settled or is given or agreed to be given for any religious charitable or educational purpose or in trust for or to any corporation or body of persons associated for any such purpose so far as the

[84] As substituted by Stamps Act 1957 (No. 6104) s. 28.

instrument relates to property so settled agreed to be settled or given or agreed to be given.

(4) Any instrument whereby any money or property is given or agreed to be given to or which establishes or regulates or relates to the establishment or regulation of any fund or scheme established for the principal purpose of making provision by way of superannuation payments, annuities, pensions, gratuities, allowances, lump sum payments, benefits, assistance or the like for the directors officers servants or employés of any employer or employers on the termination of their office or service whether by death or otherwise or on their withdrawal from membership of such fund or scheme or during their incapacity for work attributable to illness or accident or for the widows or children or dependants or legal personal representatives of any such directors officers servants or employés or for any persons duly selected or nominated for that purpose pursuant to the provisions of such fund or scheme.

(5) Any instrument whereby any shares or rights in respect of shares in any registered co-operative housing society are settled on or given to any person.'[85]

In the case of a transfer of a marketable security[86] or right[87] in respect of shares Heading IV (A)[88] is relevant. It provides, *inter alia*, that a transfer which is not made for a consideration in money or money's worth shall be assessed in the same manner and with the same exemptions as on a deed of settlement or gift of property.[89]

An assignment of a lease by way of gift is charged under Heading VIII[90] with duty assessed in the same manner and with the same exemptions as on a deed of settlement or gift of property.

Legislation passed in 1957 provides specially for the charging of duty on a deed of gift of real property for which there is some pecuniary consideration which is inadequate and for the charging of duty on a transfer of a marketable security or right made partly for a consideration in money or money's worth of less than the unencumbered value of the marketable security or right. The operation of these provisions will be considered later.

A. STAMP DUTY IS A TAX ON INSTRUMENTS

In contrast to Federal Gift Duty, Stamp Duty is primarily upon instruments rather than transactions. Accordingly if a transaction can be effected by other means than an instrument, it is outside the

[85] With Heading IX there should be read ss. 83-90.
[86] As defined by Stamps Act 1946, s. 3.
[87] As defined by Stamps Act 1946, s. 3.
[88] As amended by Stamps Act 1957.
[89] It is noteworthy at this point that whereas Heading IX refers to 'a *bona fide* adequate pecuniary consideration' Heading IV (A) refers to a 'consideration in money or money's worth'. The meaning of 'pecuniary' will be considered later.
[90] As substituted by Stamps Act 1957.

Act.[90a] This seeming pre-occupation with instruments suggests the query as to whether duty could be avoided by carrying out the transaction in more than one stage. The legislation contains provisions designed to cope with any such manœuvre.[91]

(i) A wishes to settle property on trust for his son S. A transfers property of nominal value to T on trust for S. The terms of the trust are contained in an instrument. By one term T undertakes to hold any further property which he may later acquire from A on the same trust. Duty is paid on the instrument according to the value of the small amount of property then in the trust. Later A gives property of substantial value to T in a manner not requiring an instrument under Heading IX (*e.g.* payment of cash). Although not embodied in an instrument the later transaction will be dutiable as an 'addition'. The rate of duty will be calculated by aggregating the value of the property in the original instrument and the value of the addition but from the duty so calculated there shall be deducted the duty previously paid. This result is achieved by section 87, which deals with 'additions' and 'further instruments'. 'Addition' and 'further instrument' are defined in section 83. Consistent application of the notion that Stamp Duty is a tax on instruments is maintained by charging the statutory declaration of the addition which declaration is required by section 87.[92]

(ii) B, who is A's wife, transfers property of nominal value to T for their son S. The terms of the trust are contained in an instrument. By one term T undertakes to hold on the same trust any further property which he may later acquire *from any person* wishing to add to the trust property. Duty is paid on the instrument according to the value of the small amount of property then in the trust. Later A gives property of substantial value to T in a manner not requiring an instrument under Heading IX (*e.g.* payment of cash) with a direction that it is to be added to B's trust. The later transaction will be dutiable as an 'addition' in the same way as in (i) above even though carried out by some one other than the original settlor and even though that other person is not the settlor's agent. An entry in the trustee's accounts will need to be made and under section 83 (a) (iii) this will make the transaction an 'addition'.

(iii) A executes a deed of trust whereby he gives £10 to three trustees of whom A is one on trust for his son S. By a term of the deed the trustees agree that they will hold on the same trusts any other property which A may afterwards vest in them. Under the terms

[90a] A note in (1957) *British Tax Review* 383 suggests that in England stamp duty on sales is sometimes saved by dispensing with conveyances, most commonly on a sale by an individual to a company under his control. The basis of this practice is that where the purchaser takes possession under a contract of sale having paid the full purchase price, time under the Limitation Act 1939 starts to run against the vendor in respect of the legal estate. The recent decision of Harman J. in *Bridges v. Mees* [1957] 3 W.L.R. 215; [1957] 2 All E.R. 577, holds that the vendor in this situation being only a bare trustee, it is possible for the beneficiary to hold land 'adversely' to such a trustee. In local conditions it is difficult to see how the reduced certainty of title (which would hamper the financing of the transaction in most cases) and the inconvenience and cost to the purchaser involved in eventually obtaining a registered title by adverse possession would be outweighed by the saving of duty.

[91] S. 87.

[92] *Cf.* Stamps Act 1946, s. 59.

of the trust the income of the trust property is to be accumulated until A ceases to be a trustee and thereafter to be paid to S.

On the same day A executes an agreement whereby he agrees to sell to the trustees 10,000 shares in Y Company Pty. Ltd. for the price of £1 per share. The agreement provides that the price is to be paid by consecutive yearly payments of not less than £250 the first payment to be made at or before the expiration of twelve months from the date of the agreement. There is a provision that the shares may be transferred to the trustees forthwith and that no interest shall be chargeable in respect of the purchase money. A further provision absolves the trustees from personal liability to A except insofar as any of the purchase moneys for the shares shall come to the hands of the trustees and not be duly paid to A.

A is governing director of Y Company Pty. Ltd. Under the company's articles of association A has the right, subject to profits being available, to declare whatever dividends he thinks fit on its shares. Under the articles A's consent is necessary to any proposed transfer of shares.

The unexpressed intention of the transaction is that the purchase price for the shares shall be paid out of the dividends which the trustees will receive from Y Company Pty. Ltd.

In relation to Victorian stamp duty the deed of trust is clearly a settlement. But is the agreement for the sale of shares dutiable under Heading IX? In a similar case it was held that in all the circumstances there was an element of benefaction and that the consideration was not *bona fide*; therefore it was dutiable as a gift. Martin J. was inclined also to view it as an addition to the deed of trust since it incorporated the deed of trust.[93] In a later almost similar case[94] Lowe A-C.J. held an agreement of this kind to be an addition although the trustees were under a personal obligation to pay for the shares.

The instrument need not be contemporaneous with the transaction. A gives money to his wife B to enable her to open an account in a bank and later gives her other sums which are paid into the account. There is a verbal understanding that B's rights against the bank shall be held by her on behalf of their son S. Some years after this arrangement B signs a written acknowledgement that she is trustee of her rights against the bank on trust for S. The acknowledgment is dutiable under clause 3 of Heading IX. Clause 3 was inserted in the Third Schedule in 1938 to overcome the effect of a High Court decision that such an instrument was not dutiable.[95] The value of the property comprised in the instrument at the time of its execution would determine the duty payable because this tax is primarily on instruments.

B. 'GIFT'—'SETTLEMENT'

An instrument may be a 'settlement' within Heading IX without

[93] *Phillips v. Comptroller of Stamps* [1941] V.L.R. 164, 170; [1941] Argus L.R. 207, 210.
[94] *Matter of Baxter* (unreported).
[95] *Perpetual Executors and Trustees Association v. Wright* (1917) 23 C.L.R. 185; (1917) 23 Argus L.R. 177.

being a 'gift'. This distinction is now required by section 84 (1) which was first enacted in 1938 but it also owes something to the efforts of courts to reconcile the introductory words of Heading IX, 'Settlement or Gift, Deed of—', with the terms of clause 1. If the expression 'Settlement or Gift, Deed of—' stood alone without the clauses which follow it, an instrument disposing of property[96] for some consideration would not be an instrument of gift. This would be so whether the consideration were adequate or inadequate, whether pecuniary or non-pecuniary. But clause 1 includes in the category of instruments of gift instruments executed on consideration except those executed on a *bona fide* adequate pecuniary consideration.[97]

(1) Deed of Gift

(a) For an instrument to be a deed[98] of gift an element of benefaction is needed

In the following treatment it will be assumed that the instrument does not deal with real property, a marketable security or a right in respect of shares; instruments dealing with such property for some inadequate consideration attract special rules which will be examined later.

To give some force to the expressions 'gift' and 'given or agreed to be given' in the face of the seemingly self-contradictory idea of a gift for consideration the courts now say that those expressions refer to transactions in which there is an element of benefaction.[99] At one time there could be no gift unless there was an act of benevolence on the part of the transferor.[1] Subsequently the High Court said there may be a good gift although no feeling of benevolence exists between the donor and the donee.[2] But the High Court has not gone to the other extreme of saying that every transaction for inadequate consideration is a gift transaction.[3] It has said that before any transaction

[96] Other than a transfer of a marketable security or a right in respect of shares. Heading IV (A) would still require the consideration in such a transfer to be adequate and to be in money or money's worth before the transfer would escape Heading IX rates of duty.

[97] *Collector of Imposts (Vic.) v. Peers* (1921) 29 C.L.R. 115, 122.

[98] Although the legislation refers to deeds it includes instruments not under seal. *Howard-Smith v. Comptroller of Stamps* [1935] V.L.R. 387, 395; [1935] Argus L.R. 467, 469.

[99] *Buzza v. Comptroller of Stamps* (1951) 83 C.L.R. 286, 297, *per* Dixon J.; [1951] Argus L.R. 353, 358.

[1] *Thompson v. Collector of Imposts* (1899) 25 V.L.R. 529; *sub nom. Re Barwise* (1899) 6 Argus L.R. 1; *Atkinson v. Collector of Imposts* [1919] V.L.R. 105; (1918) 25 Argus L.R. 23.

[2] *Collector of Imposts (Vic.) v. Peers* (1921) 29 C.L.R. 115, 121; (1921) 27 Argus L.R. 63, 64.

[3] This could not be true in respect of a transfer of any marketable security or right in respect of shares for inadequate consideration under the Stamps Act as it stood before amendments made in 1957. Under Heading IV (A) such a transfer made on a consideration in money or money's worth of less than the unencumbered value of the marketable security or right was dutiable as a deed of gift.

can be a gift the element of benefaction must be present.[4] The difference between benevolence and benefaction may be apparent by considering an instrument by which A disposes of property to B, a volunteer, when A has received consideration from C for so doing. It has been judicially suggested that such an instrument might properly be described as a gift.[5]

Proof of the mere fact that the consideration is inadequate will not supply the required element of benefaction[6] but it still seems to be open to a court to find that the consideration is so grossly inadequate as to provide strong evidence from which benefaction may be inferred.[7]

The problems which may arise when considering whether an instrument is one of benefaction or an instrument carrying into effect a business arrangement are illustrated by *Comptroller of Stamps v. Joe White Maltings Pty. Ltd.*[8]

> The A Company traded as a maltster and grazier. It decided to create Company B to take over its malting business. Company B was formed. Company A entered into a contract to sell an estate in fee simple in Blackacre (land under the Transfer of Land Act) on which the malting business had been carried on to company B for £50,000 being the value of the fee in Blackacre in the books of company A as shown by the last annual balance sheet. Shares in company B were allotted in such a way that the shareholders in company B were substantially but not exactly the same as the shareholders in company A. By an instrument of transfer the A Company transferred Blackacre to the B Company for an estate in fee simple for a consideration of £50,000. The true value of the fee in Blackacre between the date of the contract of sale and the transfer was £300,000. Was the transfer dutiable under Heading VI as on a sale of real property or was it dutiable under Heading IX as a gift?[9] The mere inadequacy of consideration was not determinative. How far could one look beyond the instrument of transfer to determine whether this was a business arrangement or a benefaction?

[4] *Collector of Imposts v. Cuming Campbell Investments Pty. Ltd.* (1940) 63 C.L.R. 619; [1940] Argus L.R. 246.

[5] *Macrow v. Collector of Imposts* [1921] V.L.R. 23, 28; (1920) 27 Argus L.R. 50, 51; *Collector of Imposts (Vic.) v. Peers* (1921) 29 C.L.R. 115, 121-122; (1921) 27 Argus L.R. 63, 64.

[6] *Collector of Imposts v. Cuming Campbell Investments Pty. Ltd. supra; Comptroller of Stamps v. Joe White Maltings Pty. Ltd.* [1956] V.L.R. 253; [1956] Argus L.R. 760.

[7] *Atkinson v. Collector of Imposts* [1919] V.L.R. 105, *per* Hood J.; (1918) 25 Argus L.R. 23, 25. *Collector of Imposts v. Cuming Campbell Investments Pty Ltd.* (1940) 63 C.L.R. 619, 642 *per* Dixon J.; [1940] Argus L.R. 246, 254. 'No doubt to allow any transaction for value to be placed under the category of gift is to abandon a definite *discrimen* and to make the classification depend upon matters of degree and perhaps to compel an inquiry into purpose.'
Comptroller of Stamps v. Joe White Maltings Pty. Ltd. [1956] V.L.R. 253, 266-267 *per* O'Bryan J.; [1956] Argus L.R. 760, 771.

[8] *Supra*, n. 6.

[9] This would not be the issue now. This case arose before the legislation passed in 1957 by which a deed of gift of real property which is for some pecuniary consideration which is inadequate attracts special rules. These will be examined later. The problem in this case could arise again in connection with transfer or assignment of a lease for an inadequate consideration.

Apparently one could look at the circumstances surrounding the instrument of transfer. One could look to see who were the shareholders of company A and company B. In this case the fact that the shareholders of company A and company B were substantially the same suggested that despite the discrepancy between consideration and value the instrument of transfer was no more than a means to bring about re-arrangement of company A's business. The instrument of transfer was part of a genuine sale of real property not involving any intention to make a benefaction.

Contrast the situation where X owned 9,995 of the 10,000 shares in the A Company and the shareholders in the B Company were X's five sons holding equally. An instrument of transfer by which the A Company transferred Blackacre worth £300,000 to the B Company for a consideration of £50,000 might well be held to be dutiable as a gift.

(b) SPECIAL RULES APPLICABLE TO INSTRUMENTS DEALING WITH REAL PROPERTY OR WITH A MARKETABLE SECURITY OR RIGHT IN RESPECT OF SHARES

(i) *Deed of gift of real property*

Formerly when a conveyance or instrument of transfer of real property was made on an inadequate consideration but the absence of an element of benefaction prevented the instrument being dutiable under Heading IX, it would normally be dutiable under Heading VI as a sale of real property. The duty payable on that instrument as on a sale was computed according to the value of the consideration and was thus lower than that which would have been assessed under Heading IX where the duty was computed on the full value of the property dealt with by the instrument. In his dissenting judgment in *Collector of Imposts v. Cuming Campbell Investments Pty. Ltd.*[10] Latham C.J. suggested a simple way of dealing with an instrument which was made on an inadequate consideration. He would have held the instrument dutiable as a sale to the extent of the consideration shown therein and dutiable as a gift to the extent to which the consideration was inadequate.[11] Under this view it would not be necessary to ask whether the transaction was a benefaction or a business arrangement. The courts did not adopt this view as the proper interpretation of Heading IX.

The legislature, however, in 1957 amended the Stamps Act[12] by

[10] *Supra*, n. 4.

[11] Compare assessment of Federal Gift Duty in similar circumstances. *Supra*, n. 64.

[12] Stamps Act 1957, s. 24 provided for the insertion of a new sub-section in the Stamps Act 1946, s. 83, as follows—

'(2) For the purposes of this subdivision where in a deed of gift of real property there is as part of the consideration a pecuniary consideration which is inadequate such deed shall—

(a) to the extent of the inadequacy be an instrument whereby property is given or agreed to be given and subject to this Act be chargeable with duty accordingly; and

(b) to the extent of the said pecuniary consideration be chargeable with duty as a conveyance or transfer on sale of real property.'

adopting the solution suggested by Latham C.J. in relation to instruments of gift of certain types of property including real property. The wording of the new provision is such that this solution operates only where the instrument is 'a deed of gift of real property'. This wording is perhaps unfortunate. Can it be that a conveyance or instrument of transfer of real property made on an inadequate consideration must still have an element of benefaction before it is a 'deed of gift' for this purpose? This difficulty might be thought to be merely theoretical if in a case where there is more than slight inadequacy of consideration no court would be likely to regard the transaction as a business arrangement. But, as the *Joe White Maltings*[13] case shows, that condition cannot be postulated with certainty.

(ii) *Transfer of marketable security or right in respect of shares*

Before the 1957 amendments Heading IV (A) operated in such a way that a transfer of a marketable security or of a right in respect of shares made for a consideration in money or money's worth of less than the unencumbered value of the marketable security or right was dutiable as a deed of gift. Under the 1957 amendments[14] the solution suggested by Latham C.J. in the *Cuming Campbell* case has also been applied to a transfer of a marketable security or a right in respect of shares which is made partly for a consideration in money or money's worth of less than the unencumbered value of the marketable security or right.

(iii) *Deed of gift of mixed property*

If an instrument deals not only with real property or a marketable security or a right in respect of shares but also with other property such as a leasehold or chattels personal the special rules introduced in 1957 will probably not be applicable. Stamp Duty is a tax on the instrument and the special rules can only operate in respect of an instrument which answers the description of a deed of gift of real property or a transfer of any marketable security or right in respect of shares. Thus there will probably be no apportionment of duty in relation to an instrument dealing with mixed property. This points to the need to use several instruments when dealing with property in more than one category.

(2) Deed of Settlement

(a) Element of benefaction is not needed

Whereas the idea of a gift for consideration offends accepted notions, a settlement for consideration is commonplace. Accordingly, the

[13] *Supra*, n. 6.
[14] Stamps Act 1957, s. 15 amending Heading IV (A)

courts have not needed to regard benefaction as an indispensable element of a settlement.[15] Thus an instrument such as a deed of family arrangement even though it appears to be a business arrangement between parties bargaining at arms' length may be a settlement. What then is a settlement? Dixon C.J. has said, 'It is notoriously difficult to define a settlement but that does not mean that it is difficult to recognize one'.[16] 'Settlement' ordinarily 'means a disposition of property for the benefit of some person or persons, usually through the medium of trustees'.[17]

According to Griffith C.J. 'Any instrument, which on its face purports to be the charter of future rights and obligations with respect to the property comprised in it, and which contains such limitations as are ordinarily contained in settlements, is a settlement or agreement to settle within the meaning of the schedule, whether those rights could have been established *aliunde* or not.'[18]

In *Buzza v. Comptroller of Stamps*[19] A by his will left the residue of his estate to T on trust to invest it and pay one third of the income to his wife W for life and subject to that to hold the capital and income on trust for his children. The children being desirous of an immediate distribution before the death of W, a deed was executed whereby it was agreed between the children and W, that a part of the residue should be set aside on trust to produce an income for W during her life or widowhood and that if the annual income should fall below a stated amount the part so set aside should be resorted to in order to make up the deficiency. By the agreement the children were given a right to the immediate distribution of the balance of the residue and a right to the part set aside on behalf of W on termination of her interest.

The High Court (McTiernan J. dissenting) held that the deed was a settlement within Heading IX of the third schedule and that as the consideration was not a pecuniary one the deed was dutiable. The decision on consideration will be discussed later. What is significant here is that this business arrangement was held to be a settlement.

(b) CAN AN INSTRUMENT BE A SETTLEMENT ALTHOUGH IT DOES NOT CREATE ANY NEW BENEFICIAL INTEREST IN ANYONE?

In 1902 the Full Court of Victoria said it could not.[20] In 1908 this view was overruled by the High Court in *Davidson v. Chirnside*.[21]

In *Chirnside's* case, A made a will appointing T_1, T_2 and T_3 his

[15] *Buzza v. Comptroller of Stamps* (1951) 83 C.L.R. 286, 297, *per* Dixon J.; [1951] Argus L.R. 353, 358.
[16] (1951) 83 C.L.R. 286, 300; [1951] Argus L.R. 360.
[17] (1951) 83 C.L.R. 286, 302 *per* McTiernan J.; [1951] Argus L.R. 361.
[18] *Davidson v. Chirnside* (1908) 7 C.L.R. 324, 340-341; (1908) 14 Argus L.R. 686, 689.
[19] *Supra*, n. 15. [20] *In re Strachan* (1902) 28 V.L.R. 118; (1902) 8 Argus L.R. 109.
[21] *Supra*, n. 18.

executors and trustees. He bequeathed £40,000 to his trustees on trust for his daughter D for life under a protective trust, subject to her life interest for such of D's issue as D by deed or will should appoint and in default of appointment her children were given contingent interests. In default of any of those interests vesting the trust was for such persons as D should by deed or will appoint followed by a gift in default of appointment. By a later clause A gave his trustees discretion to cause the legacy to be settled upon two or more trustees to be nominated by them on trusts corresponding with those previously declared. He declared that as soon as a settlement should be executed and the legacy fund paid to its trustees, the trustees of the will should be exonerated from all responsibility with respect to the legacy fund. The will was proved in 1890. In 1907 by a deed made between T_1, T_2 and T_3 of the one part and T_3 and T_4 of the other part which recited (*inter alia*) that the will trustees were desirous of causing the legacy fund to be settled, T_3 and T_4 were nominated trustees of the legacy fund to hold it upon the trusts of the will.

Although this deed did not create a beneficial interest in any person in whom it did not previously exist the High Court unanimously held that it was a settlement.[22] The provision in the will authorizing the trustees to diminish their responsibility by setting up a separate trust of the legacy fund would not now be necessary in a will. The Trustee Act 1953 (Vic.) by sections 41 and 42 (1) (b) empowers trustees to do this. Provisions of this kind, however, were first enacted in Victoria in 1896 after the will was made. A deed of appointment of new trustees under the powers given by the Trustee Act would not now be likely to be regarded as a settlement so long as it purports to be nothing more than an instrument by which those powers are exercised. One of the contributing reasons for the decision in *Chirnside's* case was the form of the deed to which the High Court attached significance.

There may now be doubt as to the propositions for which *Chirnside's* case can now be regarded as authoritative since the later High Court decision in *Wedge v. The Acting Comptroller of Stamps (Vic.)*.[23] C was entitled under his father's will to the residuary estate given under it subject to an annuity payable to his mother M. C executed an instrument by which he undertook to hold the whole of the residuary estate subject to the trusts of the will in consideration of his mother agreeing to the transfer by the executor to him of the whole of the residuary estate. Subsequently the executor transferred the real

[22] The High Court went on to decide that although the deed was a settlement it was exempt from duty under provisions now contained in s. 88 in that it was an instrument of appointment in favour of a person specially named in a will in respect of property on which Victorian Probate Duty had been paid.

[23] (1941) 64 C.L.R. 75; [1941] Argus L.R. 45.

estate to the son by an instrument of transfer in which the consideration was stated as follows: 'In consideration of an arrangement made between M and C whereby C is entitled to be registered as the proprietor of an estate in fee simple.' The High Court unanimously held that the first instrument was not a settlement. *Davidson v. Chirnside* was distinguished. The distinction between the two cases, if it is anything more than one of form, is difficult to see.

How far it remains true that an instrument may be a settlement although it does not create any new beneficial interests is doubtful.[24]

If the distinction between the two cases is no more than one as to the form of the instrument it can only mean that if a practitioner were to copy into a deed of appointment of new trustees all the trust provisions of the earlier trust instrument he would be in danger of producing a settlement. It could become a new starting point of the rights of the beneficiaries.[25] If on the other hand the deed in form merely appoints new trustees of an existing trust it would not be a settlement.

If all the beneficiaries are *sui juris* and one undertakes to hold for those other beneficiaries with their consent in an instrument which sets out the trusts which were in the original trust instrument a settlement may be produced. On the other hand if he merely undertakes to hold the property in accordance with the trusts of the will *Wedge's* case suggests that the instrument evidencing the undertaking will not be a settlement.

Such a distinction would seem to be formal since an instrument might well incorporate by reference the trusts of the will and yet be intended to be a new starting point of the rights of the beneficiaries.

(c) LATER INSTRUMENT VARYING TRUSTS OF EARLIER INSTRUMENT

Of course if a later instrument varies the trusts of an earlier instrument the later instrument will clearly be a settlement.

> A by will leaves property to T on trust for his daughter D, as to one half part thereof for her absolutely and as to the other half part thereof on trust to pay the income to her for life and after her death on trust for such of her children as she shall by deed or will appoint with gifts in default of appointment. After A's death D who is *sui juris* is party to an instrument whereby *the whole* of the trust property is settled on her for life and after her death on trust for such one or more of her children as she should by deed or will appoint with gifts in default of appointment identical with those in the will. The instrument

[24] In *Wedge's* case, Rich A.C.J. ((1941) 64 C.L.R. 75, 79; [1941] Argus L.R. 45, 46) pointed out that no new beneficial interest was created by the instrument in question there. If *Chirnside's* case was good law on this aspect, that factor would have been irrelevant.

[25] *Davidson v. Chirnside* (1908) 7 C.L.R. 324, 345, *per* Isaacs J.; (1908) 14 Argus L.R. 690.

is a dutiable settlement.[26] Whether the instrument would be dutiable in respect of all the property comprised in it or only that in respect of which new interests are created will be considered later.

(i) *Exercise of a Power of Appointment*

There is one type of instrument supplementing an earlier instrument, which in certain circumstances will not be dutiable. This is the exercise of a special power of appointment. This is the effect of section 88 providing:

> Where any person is specially named or described as the object of a power of appointment in a settlement or gift on which *ad valorem* duty has been paid or in a will in respect of property on which duty under any Act imposing duties on the estates of deceased persons has been paid, an instrument of appointment in favour of such person in respect of such property shall not be liable to duty.

(i) A by instrument *inter vivos* transfers property to T on trust for his son S for life and upon S's death for such one or more of S's children absolutely as S shall by deed or will appoint and in default of appointment for S's children absolutely in equal shares. Stamp Duty is paid on this instrument. Later S by deed appoints to his son G. The deed by which the power of appointment is exercised is not dutiable. The same would be true if the power had been given in A's will and Victorian Probate Duty had been paid on the property.

(ii) Suppose that in case (i) S had been given power to appoint to any person. That would be a general power in contrast to the special power in (i). It would not be the kind of power contemplated by section 88. An instrument in which that power is exercised could be a settlement irrespective of whether duty had been paid on the creation of the power. This would be so whether the donee S appointed to another person or to himself. If he appointed to another person it could be a settlement since he is destroying his right to make the property completely his own. If he appointed to himself he would be converting what was his almost complete ownership to complete ownership. The exercise of the power in favour of himself would cut off the rights of donees in default of appointment under an express gift in default or the rights of the creator of the power if there is no express gift in default.

(iii) Suppose that in case (i) S had been given power to appoint to any person other than himself.[27] This would not be a general power of appointment but would it be within section 88? Can it be said that 'any person is specially named or described as the object' of the power?

(iv) Suppose that in case (i) S had been given power to appoint among the issue of A. Under that power S would be able to appoint to himself. Such a power though in favour of a limited class has been held to be a general power for death duty purposes.[28] Nevertheless it is a power within section 88.

[26] *Affleck v. Collector of Imposts* (1901) 7 Argus L.R. 237; *Re Settlement of Austin* (1901) 27 V.L.R. 408; *sub nom. Embling v. Collector of Imposts* (1901) 7 Argus L.R. 234; *Newman v. Collector of Imposts* (1903) 29 V.L.R. 161; (1903) 9 Argus L.R. 120.

[27] Such a power conferred by a will might be held invalid in Australia. *Tatham v. Huxtable* (1950) 81 C.L.R. 639; [1951] Argus L.R. 1. The invalidity would rest on the principle that a testator cannot delegate his will-making power.

[28] *In re Penrose* [1933] Ch. 793.

If the policy of section 88 is to exempt from liability only those instruments exercising powers which cannot be exercised in favour of the donee, its wording is not apt for this purpose as cases (iii) and (iv) indicate.

Is section 88 concerned with only the first exercise of a power of appointment?

> A by instrument *inter vivos* transfers property to T on trust for B for life and then for such of B's children absolutely as B by deed, with or without power of revocation and new appointment, or will shall appoint. Stamp Duty is paid on this instrument. B appoints by deed to his son C reserving a power of revocation and new appointment. This deed is exempt from duty by virtue of section 88. B later by deed revokes the appointment to C and re-appoints to his other son D. There is no clear statutory indication as to whether the instrument of re-appointment would be exempt.

If duty has not been paid on the instrument creating the special power will the instrument in which that power is exercised be dutiable?

> A by instrument *inter vivos* transfers land situate in New South Wales to T on trust for B for life and on his death for such of B's children absolutely as B shall by deed or will appoint. The instrument is exempt from the provisions of Heading IX of the third schedule because the property is situate outside Victoria. T in exercise of a power of sale sells the land and invests the proceeds in property situate in Victoria. B by deed appoints to his son S. Is B's deed dutiable?

The Full Court of Victoria in *Armytage v. The Collector of Imposts*[29] reasoned that the exercise of a special power could never be a settlement or deed of gift since the person exercising the power was not giving that which was his own. The existence of the provision now in section 88 did not affect this since 'a section making a needless exemption from a tax cannot impose a tax.'[30] On appeal the High Court reversed the decision of the Supreme Court.[31] Thus if duty has not been paid on the instrument creating the power an instrument in which the power is exercised will be dutiable even though the power is special.

(ii) *Release of a Power of Appointment*

On general principle a release of a power should not be dutiable. Although it makes indefeasible the interests of those entitled in default of appointment it does not dispose of property and thus it could not be a deed of gift. Similarly it seems difficult to bring a release within any of the attempted definitions of a deed of settlement.

[29] [1906] V.L.R. 504; (1906) 12 Argus L.R. 305.
[30] [1906] V.L.R. 509; (1906) 12 Argus L.R. 307.
[31] *Sub nom. Davidson v. Armytage* (1907) 4 C.L.R. 205; (1907) 12 Argus L.R. 538.

(3) What is 'pecuniary' consideration?

It is important to know what is meant by 'pecuniary' since an instrument made for '*bona fide* adequate pecuniary consideration'[32] is not caught by Heading IX and the special rule applicable to deeds of gift of real property made for some inadequate consideration operates only when that consideration is pecuniary.

In *Buzza v. Comptroller of Stamps*[33] the High Court appears to have given 'pecuniary' a very limited meaning. The facts of this case have been stated.[34]

What emerges from the majority views is that 'pecuniary' excludes some types of consideration which would ordinarily be described as 'money's worth'.[35]

The Administration and Probate (Estates) Act 1951 (Vic.) provides that property the subject matter of certain dispositions made by a deceased person in his lifetime shall be deemed to form part of his estate for purposes of assessing Victorian Probate Duty. These dispositions are called 'settlements' (defined in section 2 (1)) and 'gifts *inter vivos*' (also defined in section 2 (1)). Among the dispositions excluded from the definitions are those made for 'full consideration in money or money's worth'.

By the Administration and Probate Act 1928 (Vic.)[36] when any property the subject matter of a disposition *inter vivos* is assessed for Probate Duty the amount of Probate Duty is reduced by the amount of any Stamp Duty paid in respect of such property.

As a result of this imbalance as to types of consideration an instru-

[32] Contrast the phrase used in Heading IV (A) and in the Gift Duty Assessment Act 1941-1957 (Cth.), 'consideration in money or money's worth'.

[33] (1951) 83 C.L.R. 286; [1951] Argus L.R. 353.

[34] *Supra*, n. 19.

[35] *Per* Latham C.J. (1951) 83 C.L.R. 294; [1951] Argus L.R. 356: 'A pecuniary consideration is a consideration in money, not in money's worth.'

Per Dixon J. (1951) 83 C.L.R. 298; [1951] Argus L.R. 358: 'It was contended that a consideration might be pecuniary although it was neither expressed nor satisfied in money or the equivalent of money. Such an interpretation of the words "pecuniary consideration" is not admissible. Pecuniary consideration means a consideration consisting of or having relation to money.'

Per Williams J. (1951) 83 C.L.R. 310-311; [1951] Argus L.R. 366: 'The consideration moving from each of the parties to the indenture of the first and second parts was that they gave up their existing equitable interests in the residue and the consideration moving to each of them was that they acquired new equitable interests in the same property. Accordingly, each gave consideration for what they received which could be described as *bona fide* and adequate, but to take a settlement out of Part IX (1), it is necessary that the consideration shall be pecuniary. The consideration under discussion could not, in my opinion, be said to be a pecuniary consideration. Such a consideration must be a payment in money and not a bringing into a pool of an interest in property.'

Webb J. (1951) 83 C.L.R. 312; [1951] Argus L.R. 367, held that 'there was no pecuniary consideration moving to or from any party or person'.

Per Fullagar J. (1951) 83 C.L.R. 313; [1951] Argus L.R. 368: 'I am, however, quite prepared to rest my decision on the view that, if the instrument was made upon consideration within the meaning of the statute, [*i.e.* Stamps Act] the consideration, though it was certainly *bona fide* and probably ought to be regarded as adequate, was not a pecuniary consideration.'

[36] S. 178.

ment *inter vivos* of the kind in *Buzza's* case which does not escape Stamp Duty because the consideration is not pecuniary should not be caught for Probate Duty since the consideration is 'money's worth'.

Clearly payment in cash and probably payment by a cheque would be regarded as pecuniary considerations. 'Money' is defined[37] as including all sums expressed in Australian or any other currency. What of a promise to pay a sum of money? A executes an instrument in the form of a settlement by which he transfers an interest under a will to his son S in consideration of a covenant by S to pay for the interest in cash by instalments spread over a period of some years together with interest. The estate of the testator does not comprise any real property.[38] If the sum stated is the full value of the assignor's interest as at the date of the instrument and interest at an appropriate rate is charged the consideration is not inadequate merely because it is not executed.[39] If no interest were charged and the debt was not immediately enforceable the consideration would be inadequate. Is the consideration pecuniary? The consideration is the promise constituting the contractual liability of the transferee. The promise is expressed in terms of money and in that sense it is related to money. But what does the transferor have immediately after the transfer? He has only rights in contract enforceable in the future, a chose in action. If pecuniary consideration requires him to have money or a close equivalent, such as a cheque which can be immediately converted to money, a promise to pay may well be outside pecuniary consideration. It is understood, however, that in practice such a promise to pay is treated as a pecuniary consideration. Compare the case where the consideration for a transfer of property is the assignment by the transferee to the transferor of the transferee's right to an annuity.[40]

(4) Summary statement of meaning of 'Gift' and 'Settlement' [41]

The effect of the cases on Heading IX may be summed up:—

(i) For a transaction to be a gift there must be some element of benefaction.

(a) The fact that the consideration is inadequate is itself not determinative of gift or no-gift. But complete absence of

[37] Stamps Act 1946, s. 3.

[38] For the position where the assignment is of an interest in an estate comprising any real property and the assignment is for adequate valuable consideration see s. 64 (2).

[39] *Fadden v. Federal Commissioner of Taxation* (1945) 70 C.L.R. 555, a decision on Gift Duty Assessment Act 1941-1942 (Cth.) s. 4. *Supra*, n. 55.

[40] For the position where real property is conveyed subject to future payment see ss. 67 and 68 (1). Probably these provisions are limited to conveyances on sale and do not extend to conveyances on gift or settlement. S. 67 is regarded as applying where the annuity comes into existence at the time of the conveyance. S. 68 (1) is regarded as applying where the annuity existed before the conveyance.

[41] This summary omits consideration of the effect of Heading IV (A) in relation to a transfer of a marketable security or a right in respect of shares and the effect of a deed of gift of real property for some inadequate consideration. *Supra*, nn. 10-14.

consideration or a merely nominal consideration may be evidence of benefaction.

(b) The contrast is between benefactions and business transactions. A business transaction though for an inadequate consideration will not be a gift.

(ii) For a transaction to be a settlement an element of benefaction is not needed.

(a) A business transaction may or may not be a settlement.

(b) Whether a business transaction is a settlement depends on how closely its provisions can be assimilated to the form of an ordinary settlement involving trustees and laying out of interests whether in succession or not.

(c) An instrument evidencing a settlement will be dutiable if it is not for a *bona fide* adequate pecuniary consideration and is not within the exemptions.

(iii) An instrument evidencing a transaction which is neither a gift because it lacks the element of benefaction) nor a settlement (because it lacks the form of a settlement) will not be dutiable under Heading IX merely because the consideration though pecuniary is inadequate or though adequate is not pecuniary.

C. 'WHETHER REVOCABLE OR NOT'—'OR DIRECTED TO BE GIVEN'

Heading IX refers to instruments 'whether revocable or not' and also instruments by which property is 'directed to be given'.

In *Comptroller of Stamps (Vic.) v. Howard-Smith*[42] the High Court construed a letter written by a beneficiary under a will requesting the executor to pay various amounts out of his interest under the will to persons named by him, to be a revocable mandate rather than an assignment and held that it was not within Heading IX as it then stood. In 1938[43] Heading IX was amended by inserting the phrases 'and whether revocable or not' and 'or directed to be given'. It is arguable that the amendment would not bring such a letter within Heading IX. The introductory words of Heading IX 'Settlement or Gift, Deed of—' should limit the application of the clause to dispositive instruments. The point of the *Howard-Smith* decision was that a revocable mandate is not a dispositive transaction. The decision was not based on the narrower proposition that the arrangement was revocable.[44] Clearly if the instrument sets up a revocable trust the fact that the settlor has reserved a power of revocation will not prevent the trust instrument being dutiable.

[42] (1936) 54 C.L.R. 614; [1936] Argus L.R. 198.
[43] Stamps Act 1938.
[44] *Supra*, n. 26.

D. 'PROPERTY'

To be dutiable under Heading IX the instrument must affect property. 'Property' would include any recognized interest which is vested absolutely, vested subject to divestment, vested with enjoyment postponed or even contingent.

(i) B is a beneficiary of a trust under which T holds securities on trust for A for life and on A's death for B absolutely if he is then living. A is still alive. B's interest is contingent. B transfers his interest to his son S by written instrument in consideration of his natural love and affection for S. The instrument is one whereby property is given.

(ii) T holds securities on trust for A for life and on his death on trust for such of A's issue as A shall by deed or will appoint and in default of appointment on trust for A's brothers X, Y and Z. S is a son of A. A has made a will appointing in favour of S. Before A's death S purports by a voluntary deed to declare himself trustee for his son G of all property to which he may thereafter become entitled by virtue of any exercise of the power of appointment by his father. The instrument is not one whereby property is given or agreed to be given. S has a mere expectancy or *spes successionis* which is not property.[45]

(iii) A, the registered proprietor of an estate in fee simple in Blackacre (land under the Transfer of Land Act) executes an instrument of transfer in registrable form whereby he transfers his estate in fee simple in Blackacre to his son S in consideration of the natural love and affection borne by A towards S. A delivers the signed instrument of transfer and the relevant duplicate certificate of title to S. Is the instrument of transfer dutiable under Heading IX before it is registered? Under the accepted practice it is assumed that it is, but it is arguable that before registration the instrument is not one whereby any property is given or agreed to be given.

It has been stated earlier[46] that the donee who has been given an instrument of transfer in registrable form together with the relevant duplicate certificate of title has, before registration, no interest in the property dealt with by the instrument. He has no more than a power to become registered as the proprietor free from obstruction by the donor.

Admittedly the donee would have acquired the property in the paper constituted by the instrument of transfer delivered to him by way of gift but duty could not be chargeable on that transaction but only on an instrument and there would be no instrument evidencing the gift of the paper.

The provisions of section 84 (2) requiring duty to be paid within one month after execution of the deed of settlement or deed of gift by the settlor or donor would seem to apply only to those instruments which are themselves dispositive without the need for registration,

[45] *Re Rule's Settlement* [1915] V.L.R. 670; (1915) 21 Argus L.R. 499.
[46] *Supra*, n. 37.

e.g. a voluntary conveyance of an estate under the general law. On this argument a voluntary instrument of transfer cannot be a deed of gift before registration.

Of course if valuable consideration which is not illusory be given equity will treat the incomplete transfer as an enforceable agreement to transfer and the person named as transferee in the instrument will be regarded as having an equitable interest in the land dealt with by the instrument before it is registered. Such an instrument for inadequate consideration would attract the special rules discussed earlier.[47]

E. DUTY IS CHARGEABLE UNDER HEADING IX ONLY IN RESPECT OF 'THE VALUE OF THE PROPERTY'

(1) What is the meaning of 'the value of the property'?

These words raise a problem in relation to settlements like that in *Buzza v. Comptroller of Stamps*.[48] The problem is that a settlement may deal with a certain amount of property but may only settle a part of that property. Thus in *Buzza's* case the instrument dealt with the full interest of the widow and the four children in residuary estate valued at £29,594 and defined their future rights in it. But although the instrument dealt with all their interests in the residue it was argued that duty should be assessed not on the whole of their interests but only upon the value of the interests which each party gave up in the course of the arrangement. Thus it could be said that the children assigned their interest in the realty worth £12,681 set aside for the widow's income and that the widow assigned her one-third interest in the income of the other assets. The argument then urged that duty should be assessed on the value of those interests rather than the value of the residuary estate. In *Buzza's* case Latham C.J. took this view though he regarded the realty worth £12,681 as the only property settled. But he was in a minority. Dixon, Williams, Webb and Fullagar JJ. held that duty was assessable on the value of the whole of the residue since in their view the settlement created new equitable interests in the whole of the residue. The decision is not conclusive of a case where a settlement deals with a certain amount of property but new interests are created in only a part of that property. For that type of case there is Victorian authority for the proposition that duty is assessable on the value of all property comprised in the settlement.[49]

If *Davidson v. Chirnside* still has any authority to sustain a proposi-

[47] *Supra*, nn. 10-13. [48] *Supra*, n. 15.

[49] *Spensley v. Collector of Imposts* (1898) 24 V.L.R. 53; (1898) 4 Argus L.R. 151; *Re Settlement of Austin* (1901) 27 V.L.R. 408; *sub nom. Embling v. Collector of Imposts* (1901) 7 Argus L.R. 234.

tion that an instrument may be a settlement although it does not create a new interest in any person it must follow that 'the value of the property' means the value of the property comprised in the settlement.

(2) Where the property comprised in a deed of settlement or gift is subject to a prior created encumbrance

Special provisions are contained in section 89.

> '(1) When the property comprised in any deed of settlement or gift is subject to any mortgage debt or certain charge annual or otherwise created prior to the execution of the deed of settlement or gift, such deed shall be liable to the duty payable on the amount or value of such property after a deduction has been made of the amount of such mortgage debt or charge.'

Before amendments to section 89 were made in 1957 the application of this section was not as straightforward as might at first have appeared. Section 89 applied only if there was a deed of settlement or gift. Transfers of property subject to mortgages *etc.*, often involve assumption by the transferee of liability in respect of the mortgage *etc.*, which in some measure relieves the transferor. The giving of this relief to the transferor could result in the transaction being regarded as the result of a bargain rather than a gift.

A is the registered proprietor of Blackacre which is under the Torrens system. The unencumbered value of Blackacre is £5,000. Blackacre is subject to a mortgage to X on which £5,000 is owing. B, taking a chance on Blackacre's value rising rapidly, pays £100 to A for Blackacre and agrees to indemnify A against liability under the mortgage. The transfer of Blackacre in these circumstances should be regarded as one of sale rather than gift. Duty will be *assessed on the consideration* under Heading VI. *I.e.* duty on £5,100.

Suppose, however, that A wishes to transfer Blackacre to his son S in consideration of his natural love and affection for S. S did not expressly promise to indemnify A against liability under the mortgage. A transfers Blackacre (still encumbered by the mortgage) to S. The transfer is one by way of gift. There is no promise of indemnity which could be regarded as consideration. There is no bargain. Duty on transfers by way of gift is *assessed on the value of the property given* under Heading IX. The value of A's interest in Blackacre is nil. Before the 1957 amendment it could be argued that no duty should be payable. The matter is complicated, however, by section 46 of the Transfer of Land Act 1954 (Vic.) under which in every transfer of land subject to a mortgage there is implied a covenant by the transferee to indemnify the transferor against liability in respect of the mortgage. Does the presence of this implied covenant which in some measure potentially lessens the liability of A constitute consideration making the transfer one by way of sale rather than gift? Probably before the 1957 amendment it should have been said that the basic difference between a sale and a gift is the presence in the former and the absence from the latter

of an element of bargain. Statutory implication of an indemnity produces a result which could flow from a bargain but does not itself supply the element of bargain. Thus the transaction should still have been considered a gift. Once it was established to be a gift rather than a sale section 89, as it stood before 1957, confirmed what should have been the position anyway.

In 1957 there was added to section 89 a provision designed to clarify the law.[50] It provides that where the value of the mortgage *etc.* is not less than the value of the property comprised 'in the instrument, being a deed of gift of real property or any estate or interest therein or of marketable securities or rights in respect of shares' the instrument shall be deemed to be a conveyance or transfer on sale for a consideration equal to the value of the mortgage *etc.* It is possible to imagine instances where the value of the mortgage *etc.* is slightly less than the value of the property and to these cases the principles discussed earlier would seem to be applicable.

F. EXEMPTIONS — COMMONWEALTH SECURITIES

In addition to the exemptions set out in Heading IX a significant exemption is provided by the Comonwealth Inscribed Stock Act 1911-1946 (Cth.) section 52A. That section provides that certain instruments including 'documents relating to the . . . transfer' of Commonwealth Government Inscribed Stock, Australian Consolidated Inscribed Stock, Australian Consolidated Treasury Bonds and Debentures shall not be liable to stamp duty unless they are declared to be so liable by the prospectus relating to the loan in respect of which they are issued. The draftsman of a trust by which any of these securities are to be settled should have regard to the case law explaining the phrase 'documents relating to the . . . transfer'. For example, a settlement under which the settlor undertakes to transfer Australian Consolidated Inscribed Stock to trustees upon trusts declared in the settlement would not transfer the legal interest to the trustees since the settlement would not be in the form prescribed for transfers of the legal interest (sections 24, 19). As a transfer of what at the most would be an equitable interest it would not be a 'document relating to the . . . transfer' of stock within section 52A.[51] Suppose the settlement concerned Australian Consolidated Treasury Bonds not declared in the prospectus. Would the position be any different? Treasury bonds are transferable by delivery.[52]

According to a New South Wales decision, *Chartres v. Commissioner of Stamp Duties*,[53] this fact makes no difference.

[50] New sub-s. (5) added by Stamps Act 1957, s. 26.

[51] *Fairbairn v. Comptroller of Stamps* (1935) 53 C.L.R. 463; (1935) 41 Argus L.R. 377. See also *Commissioner of Stamps (Q'ld.) v. Counsell* (1937) 57 C.L.R. 248; (1937) 43 Argus L.R. 420.

[52] Commonwealth Inscribed Stock Act 1911-1946 (Cth.) s. 51C, Treasury Bills Act 1914-1940 (Cth.) s.6.

[53] (1947) 47 S.R. (N.S.W.) 389.

A settlement by which the settlor agrees to transfer Treasury bonds to trustees to be held upon trusts declared in the settlement would be exempt from stamp duty insofar as it relates merely to the transfer of the bonds. But to the extent to which the settlement operates as a declaration of trust in respect of the bonds by the trustees after they have been transferred there would be nothing to exempt it from duty.

Chartres' case is based on legislation of New South Wales which is not entirely identical with the Victorian provisions but it is probable that its reasoning could be applied in relation to the Victorian provisions.