capital receipt in documents and letters relevant to the receipt, the whole transaction may be given a capital flavour, and while the Court may not want to be in the hands of the draftsman, it is difficult to see how it can avoid looking to the written evidence of the transaction. Certainly, the *London & Thames Case* does not provide the solution.

R. P. AUSTIN, Case Editor — Fourth Year Student.

LEGAL AND EQUITABLE ESTATES: THE CONCEPT OF DUALISM

VANDERVELL v. *I.R.C.*[1]

Background

Section 23C (1) (c) of the Conveyancing Act, 1919 (N.S.W.),[2] which is identical to s.53 (1) (c) of the Law of Property Act 1925 (U.K.), has recently received much judicial attention. Successor to s.9 of the Statute of Frauds, which was enacted in 1677 and was designed to prevent fraud by requiring written evidence to support actions based on certain transactions, the section has "recently received a new lease of life as an instrument in the hands of the Revenue".[3] Stamp duties are a constantly increasing source of revenue, especially in New South Wales and the other Australian States, where the State Governments do not levy income tax. Although no longer an absolute proposition,[4] it may still be generally stated that "the Statute taxes instruments and does not tax transactions".[5] The Revenue authorities have therefore been relying on s.23C (1) (c)[6] to ensure that certain transactions are in writing, in order that the Revenue Acts can render the instruments subject to duty.[7] This has caused lawyers, intent on minimising duty on transactions, to enter upon elaborate schemes to avoid the application of s.23C (1) (c), and thus avoid the creation of dutiable instruments.

In 1960, to the delight of the Revenue authorities, the House of Lords extended the scope of s.23C (1) (c). In *Grey* v. *I.R.C.*,[8] it was argued that if X holds property in trust for A who is the absolute equitable owner, and A directs X to hold the property in trust for the absolute benefit of B, this is not a "disposition" of an equitable interest within the meaning of s.23C

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[1] (1967) 2 A.C. 291; (1967) 1 All E.R. 1.

[2] S.23C (1) (c) states: "Subject to the provisions of this Act with respect to the creation of interests in land by parol . . . a disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing signed by the person disposing of the same or by his will, or by his agent thereunto lawfully authorised in writing".

[3] *Vandervell* v. *I.R.C.*, *supra* n.1, *per* Lord Wilberforce, (1967) 2 A.C. at 329; (1967) 1 All E.R. at 18.

[4] See, e.g., N.S.W. Stamp Duties Act, 1920-1968, s.66C.

[5] *Per* Lord Loreburn, L.C., in *Minister of Stamps* v. *Townend* (1909) A.C. 633 at 639. His Lordship was referring to the N.Z. Stamp Act, 1882, and was citing with approval a similar statement of Lord Esher, M.R. in *I.R.C.* v. *C. Angus & Co.* (1889) 23 Q.B.D. 579 at 589. It is submitted that the same comment applies to the N.S.W. Stamp Duties Act, 1920-1968.

[6] For the sake of consistency, the provision will be referred to in this article as s.23C (1) (c) whether the English or the N.S.W. Act is being considered. As noted, the provisions in the two Acts are identical, and it is submitted that they have precisely the same effect.

[7] E.g., the N.S.W. Stamp Duties Act, 1920-1968 in s.66 attaches liability to stamp duty to "conveyances", which are defined in s.65 to include, *inter alia*, "every . . . *instrument* . . . whereby any property in New South Wales is transferred to or vested in or accrues to any person. . . ."

[8] (1960) A.C. 1.

(1) (c) and therefore no writing is necessary.[9] Reliance was placed on previous constructions of s.9 of the Statute of Frauds, that had limited the scope of that section to "grants and assignments". Their Lordships unanimously rejected this argument, by denying that s.23C (1) (c) was a consolidation of s.9[10] and attributing to the word "disposition" its natural broad meaning, which clearly covered the situation in that case. To give effect to such disposition, whether voluntary or for consideration, writing is therefore necessary.

In *Oughtred* v. *I.R.C.*[11] their Lordships were again required to consider the meaning of s.23C (1) (c). Broadly the facts were that X held shares in trust for A, who in an oral agreement with B, agreed to assign for consideration the beneficial ownership in the shares to B, by directing X to hold the shares in trust for B. A subsequent deed of release signed by A, B and X recited that pursuant to the oral agreement, B was now the beneficial owner of the shares, and X intended to transfer the shares to B. Further a deed of transfer was executed by X and B, whereby X transferred the shares to B absolutely. The issue was whether the transfer from X to B was dutiable, and to determine this their Lordships had to decide whether A's equitable interest had been transferred to B by virtue of the oral agreement.[12] It was held by a majority[13] that the transfer was liable to duty, but it is submitted that although their Lordships' decision throws little light on the precise effect of s.23C read as a whole, it is quite clear that s.23C (1) (c) must be read broadly and literally. It is submitted that the reason for the division in the House was their Lordships' differing views as to the effect of s.23C (2)[14] in cases of agreements for valuable consideration to assign equitable interests. The most recent decision on s.23C (1) (c), and one that appears to draw a line as to just what the words "disposition of an equitable interest" mean, is *Vandervell* v. *I.R.C.*[15]

Facts of Vandervell v. *I.R.C.*

In June 1958 V, who controlled a very successful private company, decided to give £150,000 to the Royal College of Surgeons as a gift. The

[9] It is submitted that this was the view taken by Dixon, J. (as he then was) in *Comptroller of Stamps (Victoria)* v. *Howard Smith* (1936) 54 C.L.R. 614 at 622, where he said: "A beneficiary who is *sui juris* and entitled to an equitable interest corresponding to the full legal interest in property vested in his trustee may require the transfer to him of the legal estate or interest. He may then transfer the legal interest upon trust for others. Without going through these steps he may simply direct the existing trustee to hold the trust property upon trust for the new beneficiaries. . . . Accordingly, a voluntary disposition of an equitable interest may be effected by the communication to the trustee of a direction, intended to be binding on him, thenceforward to hold the trust property upon trust for the donee. . . ."

[10] See, e.g., Lord Radcliffe at 17-18: ". . . I think that there is no direct link between section 53 (1) (c) of the Act of 1925 and section 9 of the Statute of Frauds. The link was broken by the changes introduced by the amending Act of 1924, and it was those changes, not the original statute, that section 53 must be taken as consolidating. If so, it is inadmissible to allow the construction of the word 'disposition' in the new Act to be limited or controlled by any meaning attributed to the words 'grant' or 'assignment' in section 9 of the old Act."

[11] (1960) A.C. 206.

[12] The question which arose was whether the transfer by X was a "conveyance on sale" within the meaning of s. 54 of the (English) Stamp Act, 1891, which depended on whether it was "an instrument . . . whereby any property, or any estate or interest in any property upon the sale thereof is transferred to or vested in a purchaser. . . ." This in turn depended on the question whether by the time of the written transfer, and in pursuance of the oral agreement, B was the beneficial owner of the shares, which further depended upon the question whether A's equitable interest could be orally transferred in view of s. 23C (1) (c).

[13] Lords Keith, Jenkins and Denning (Lords Radcliffe and Cohen dissenting).

[14] S.23C (2) reads: "This section does not affect the creation or operation of resulting, implied or constructive trusts."

[15] *Supra* n.1.

company's issued share capital was (i) 500,000 ordinary shares, substantially all of which were held by V; (ii) 100,000 "A" ordinary shares, held by a bank as a bare trustee for V; (iii) 2,600,000 "B" ordinary shares, of which V held 546,692 and the rest were held by a trustee company as trustees of a family settlement. Only shares of class (i) carried voting rights. In order to avoid any difficulties if the company were converted into a public company, on the advice of R, his accountant and financial adviser, V adopted the following method of effecting the gift. He instructed the bank which held the 100,000 "A" ordinary shares as trustee for him that he intended to transfer these shares to the College. This instruction to the bank was made orally. On 14th November, 1958 the bank forwarded a blank transfer of these shares, executed by it, together with the share certificates to R, as V's agent. On 19th November, these documents were handed to the College by R, together with an option deed giving an option to the trustee company whereby the College agreed that in the event of the trustee company exercising the option, the College would transfer the 100,000 "A" ordinary shares to the trustee company for £5,000. It was made clear to the College that V, as director of the company, and as the owner of almost all of the shares which carried voting rights, would declare, by way of dividend on the "A" ordinary shares, the sum of £145,000. This together with the £5,000 on the option was to constitute the £150,000 gift to the College. The College subsequently sealed the transfer of the 100,000 "A" ordinary shares as transferee, and was registered in the books of the company as holder of the shares. The College also executed the option deed. During the next two financial years, V declared by way of dividend £145,000 on the shares held by the College, and in October 1961, the trustee company exercised the option and repurchased the shares for £5,000.

The instant proceedings arose in the following way. The Revenue assessed surtax on V on the basis that the £150,000 was part of his income within the meaning of s.415 of the Income Tax Act 1952 (U.K.).[16] V argued that the £150,000 was "income from property of which the settlor had divested himself absolutely by the settlement". The Revenue denied that this was so and issues were joined. By the time the proceedings reached the House of Lords, the Revenue had abandoned some of the grounds it had relied upon in the Courts below, and argued that V had not "divested himself absolutely" of the property by relying on two alternative and independent lines of argument. First it argued that the option deed in favour of the trustee company had the effect of creating a constructive trust for V. This argument was based on the fact that the trustee company held all its assets, including the benefit of the option agreement, in trust for V on a family settlement. It was argued that V had not "divested himself absolutely" of the shares, for they were held for him on constructive trust by the trustee company. Second it argued that by virtue of the operation of s.23C (1) (c) no interest passed at all to the College, and that on that basis, V had not divested himself absolutely of the shares.

The Decision

As regards the first argument of the Revenue, their Lordships in the House of Lords, and those in the Courts below, all agreed on the principles of law that were applicable, but divided on their findings of fact. By a

[16] The relevant parts of s.415 state: "(1) Where, during the life of the settlor, income arising under a settlement . . . is . . . payable to or applicable for the benefit of any person other than the settlor, then, unless . . . the income . . . (d) is income from property of which the settlor has divested himself absolutely by the settlement . . . the income shall be treated for the purposes of surtax as the income of the settlor."

majority[17] the Revenue's claim was upheld, as their Lordships held that the facts disclosed the existence of a constructive trust in favour of V. Those dissenting held that no such trust existed.[18]

The writer does not intend to discuss this part of the decision and will concentrate solely on the problems associated with the second argument of the Revenue. This was based on s.23C (1) (c). It was argued that at all relevant times the bank had the legal estate in the shares which it held on trust for V, whose interest was purely equitable. The bank could and did transfer the legal estate to the College by executing the transfer of shares and having it registered in the company's books, but only V was capable of transferring the equitable estate. As in the present case there was no writing by V, then independently of V's intentions to do so, he could not and did not assign his equitable interest in the shares to the College; and therefore he had not "divested himself absolutely" of his equitable interest, and the income from the shares was part of his income within the meaning of s.415. The Revenue relied on the cases of *Grey* v. *I.R.C.*[19] and *Oughtred* v. *I.R.C.*,[20] which made it clear that s.23C (1) (c) was to be read literally, and any disposition of a subsisting equitable interest must be in writing to be effective. It pointed out that V's interest was an equitable one and that he had purported to dispose of it without writing.

The Revenue further relied upon a "passing observation" of Wilberforce, J. (as he then was) in *I.R.C.* v. *Hood Barrs (No. 2)*[21] where he said:

> The argument is this: that the section (s.23C (1) (c)) . . . does not apply to a case where the equitable owner gives a direction to the legal owner of the property . . . to transfer the whole property in the shares, legal and equitable, to another person. . . . I find myself quite unable to accept that argument. . . . What is said is that if the equitable owner intends that his equitable interest shall pass to the new legal owner, or shall disappear in favour of the new legal owner when the legal estate is transferred, then his equitable interest either goes with the legal interest or disappears — at any rate, he cannot enforce any equitable interest against the legal owner. I for my part doubt whether that can possibly be so as a matter of law, unless there is something in writing signed by the equitable owner.

The Court of Appeal[22] unanimously refused to accept the argument by the Revenue that s.23C (1) (c) had any application here. Diplock, L.J. (with whom Willmer, L.J. agreed) said:

> There is no authority binding on this Court that in the absence of writing s.23C operates to defeat the intended transfer of an equitable interest in property co-extensive with the legal estate therein to a transferee who is or becomes the transferee of the legal estate; although there are certain observations by Wilberforce, J. in *I.R.C.* v. *Hood Barrs (No. 2)*[23]

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[17] Lords Upjohn, Pearce and Wilberforce (Lords Reid and Donovan dissenting).

[18] On options see *Cory* v. *I.R.C.* (1965) 1 All E.R. 917; and in N.S.W. the Stamp Duties Act, 1920-1968, ss. 64, 66C.

[19] *Supra* n.8.

[20] *Supra* n.11.

[21] (1963) 41 Tax Cas. 339 at 361-2. It is interesting to note that Mr. Wilberforce, Q.C. (as he then was) was senior Counsel for the Revenue in both *Grey* v. *I.R.C.* and *Oughtred* v. *I.R.C.*, and that Lord Wilberforce (as he now is) was a member of the House of Lords in the instant case. The *Hood Barrs Case* was not cited to the House, and neither Lord Wilberforce nor any of the other Law Lords referred to it. However, as discussed below, Lord Wilberforce's view of the facts made it unnecessary for him to discuss this question, on which he preferred to reserve his decision. See *infra* at nn. 32-33.

[22] (1965) 2 All E.R. 37.

[23] (1963) 41 Tax Cas. 339.

> which lend some support to this proposition. With great respect, however, I do not think that this is right.[24]

The third member of the Court, Harman, L.J. expressed a similar view when he said:[25] "In my judgment s.23C (1) (c) in dealing with dispositions of an equitable interest, only applies where the disposer is not also the controller of the legal interest".

The House of Lords[26] unanimously affirmed the Court of Appeal's decision on this point. Lord Reid[27] simply stated: "I agree that the Crown's . . . argument is unsound". Lord Donovan said:

> (S.23C (1) (c)) clearly refers to the disposition of an equitable interest as such. If owning the entire estate, legal and beneficial, in a piece of property, and desiring to transfer that entire estate to another, I do so by means of a disposition that ex facie deals only with the legal estate, it would be ridiculous to argue that (s.23C (1) (c)) has not been complied with, and that therefore the legal estate alone has passed. The present case, it is true, is different in its facts in that the legal and equitable estates were in separate ownership: but when V being competent to do so, instructed the bank to transfer the shares to the College and made it abundantly clear that he wanted to pass, by means of that transfer, his own beneficial, or equitable, interest, plus the bank's legal interest, he achieved the same result as if there had been no separation of the interests. . . . In such case I see no room for the operation of (s.23C (1) (c)).[28]

Similarly Lord Upjohn (with whom Lord Pearce agreed) said:

> Counsel for the Crown admitted that where the legal and beneficial estate was vested in the legal owner and he desired to transfer the whole legal and beneficial estate to another he did not have to do more than transfer the legal estate and he did not have to comply with (s.23C (1) (c)); and I can see no difference between that case and this. As I have said, that section is, in my opinion, directed to cases where dealings with the equitable estate are divorced from the legal estate and I do not think that any of their Lordships in *Grey* v. *I.R.C.* and *Oughtred* v. *I.R.C.* had in mind the case before your Lordships.[29]

Only Lord Wilberforce took a more cautious line of approach.[30] His Lordship construed the facts in the following manner. When R, as the agent of V, received the share certificate and the transfer form executed by the Bank on 14th November, V needed only to insert his name as transferee and register the transfer to become the legal owner. V thus became, at least in equity, the owner of the shares.[31] His Lordship concluded that "no separate transfer, therefore, of an equitable interest ever came to or needed to be

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[24] (1965) 2 All E.R. at 44 (letter A).
[25] *Id.* at 49.
[26] *Supra* n.1.
[27] (1967) 2 A.C. at 307; (1967) 1 All E.R. at 4.
[28] (1967) 2 A.C. at 317; (1967) 1 All E.R. at 11.
[29] (1967) 2 A.C. at 311; (1967) 1 All E.R. at 7.
[30] See *supra* n.21.
[31] His Lordship relied upon *Re Rose* (1948) 2 All E.R. 971. It is submitted that that case correctly states the law regarding voluntary assignments in equity of legal estates assignable at law, and that it is in line with the view taken by Windeyer, J. (dissenting on another point) in *Norman* v. *Federal Commr. of Taxation* (1963) 109 C.L.R. 9 at 28-29, where his Honour said: "In equity there is a valid gift of property transferable at law if the donor, intending to make, then and there, a complete disposition and transfer to the donee, does all that *on his part* is necessary to give effect to his intention and arms the donee with the means of completing the gift according to the requirements of the law." It is conceded that this proposition is open to doubt: see, e.g., *William Brandts' Sons & Co.* v. *Dunlop Rubber Co.* (1905) A.C. 454 at 461 (Lord MacNaghten); *Anning* v. *Anning* (1907) 4 C.L.R. 1049 (Isaacs and Higgins, JJ.); *Brunker* v. *Perpetual Trustee Co. (Ltd.)* (1937) 57 C.L.R. 555 at 600-2 (Dixon, J.). However it is submitted

made and there is no room for the operation of (s.23C (1) (c))".[32] His Lordship then went on to reserve the point that the other Lords in fact had fully decided, when he said:

> What the position would have been had there simply been an oral direction to the legal owner (viz. the bank) to transfer the shares to the College, followed by such a transfer, but without any document in writing signed by V as equitable owner, is not a matter which calls for consideration here.[33]

It is therefore submitted that apart from Lord Wilberforce, who reserved the question (and who may well be suspected of thinking otherwise) all their Lordships, in both the House of Lords and the Court of Appeal, may be said to have agreed that if V, the beneficial owner, directed the bank, the holder of the legal estate, to transfer the legal estate to the College, whilst making it clear that he intended the College to be also the beneficial owner, there was no need for any further document, or further words in the document assigning the legal estate, to pass the beneficial interest to the College.

Consequences of the Decision

The case, it is submitted, raises important problems concerning the nature of estates and interests in property. It is clear that if A holds property in trust for B, and B intends to dispose of his interest to C, then s.23C (1) (c) applies because this is a "disposition of a subsisting equitable interest", and therefore writing is necessary.[34] It is also clear that if X owns the property both legally and beneficially, and intends to transfer to Y, no writing is necessary, as s.23C (1) (c) does not apply.[35]

At first sight, the latter proposition seems hard to justify on a literal reading of s.23C (1) (c). After all, on the generally accepted view, X has both the legal and the equitable interest in the property, and whilst his disposal of his legal interest is unaffected by s.23C (1) (c), it is hard to see how he can dispose of his equitable interest without writing. Their Lordships in *Vandervell's Case* did not consider this problem, as counsel for the Revenue conceded that in such a case, no writing is necessary by virtue only of s.23C (1) (c).[36] Their Lordships therefore assumed that this was the case, and were content to show that where A is the bare trustee for B, and B orally directs A to transfer the legal estate to C (making it clear that his own equitable estate would also pass) this is analogous to where (in the above example) X transfers to Y, and that therefore no writing is required. The Court of Appeal and the House of Lords gave different reasons for the equitable estate passing with the legal estate when X transfers the property to Y. In the Court of Appeal Diplock, L.J. said[37] that "prima facie

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that the passage set out is in line with the view of Griffith, C.J. in *Anning* v. *Anning*, and also with that of Dixon, C.J., in *Norman* v. *Federal Commr. of Taxation* (*supra*) at 16, despite his Honour's apparently different approach in *Brunker* v. *Perpetual Trustee Co.* (*Ltd.*). This lastmentioned case may perhaps be distinguished as referring only to transactions under the N.S.W. Real Property Act, 1900-1967, which provides exhaustively for means of transferring of interests in land to which it applies. See L. R. Zines, "Equitable Assignments: When Will Equity Assist a Volunteer?" (1965) 38 *A.L.J.* 337.

[32] (1967) 2 A.C. at 330; (1967) 1 All E.R. at 18.

[33] *Ibid.*

[34] See the *Grey* and *Oughtred Cases*, *supra* nn. 8, 11. Compare however the view of Dixon, J. (as he then was) quoted *supra* n.9.

[35] See *Vandervell* v. *I.R.C.* *per* Lord Upjohn, (1967) 2 A.C. at 311; (1967) 1 All E.R. at 7; *per* Lord Donovan at 317 and 11 respectively; and *per* Lord Wilberforce, at 330 and 18 respectively.

[36] *Loc. cit. supra* n.29.

[37] *Supra* n.22 at 44.

the transfer of the legal estate carries with it the absolute beneficial interest in the property transferred". Lord Upjohn[38] however disagreed with this proposition and preferred to base his decision on the intention of the parties as to whether the equitable estate was also to pass. It is submitted that both their Lordships nevertheless accept the view that if[39] B instructs A to transfer the legal estate to C, making it quite clear that the equitable estate is also to pass to C, there is no need for either a further document, or further words in the document assigning the beneficial interest.[40]

However, while these judgments explain why the equitable interest passes together with the legal estate, they shed no light whatever on the problem posed above — namely, how can the equitable estate possibly pass without writing in view of s.23C (1) (c). Their Lordships are content to reiterate that s.23C (1) (c) only applies "where dealings with the equitable estate are divorced from the legal estate".[41] For practical purposes this may be accepted as a working interpretation of s.23C (1) (c) — but by itself, it does not explain why the obviously wide words of s.23C (1) (c) should be thus delimited.

One explanation of this problem involves considering the intention of the legislature that passed the predecessor of s.23C (1) (c) — s.9 of the Statute of Frauds. As the name of the Act implies, it was passed to prevent certain fraudulent transactions. One such type of fraudulent transaction that the Statute sought to prevent was oral alienation by beneficiaries of their equitable interests in property which might render a trustee, ignorant of such transaction, liable in an action for breach of trust to the alienee. On this view the section was not intended to affect the situation where one person had both the legal and the equitable estate and there was no trust. This explanation assumes that there is a direct link between s.9 and s.23C (1) (c)[42] and further that the unambiguous words of a modern Act of Parliament should be construed in the light of an intention attributed to a legislature passing an Act almost 300 years ago.[43] Furthermore, such explanation assumes that the intention of Parliament, whatever it was in 1677, has remained the same. It is submitted that that is not the case at all, and that today at least one important function of s.23C (1) (c) is its Revenue aspect: to compel certain transactions to be in writing in order that duty may be levied upon them. The writer therefore rejects the "legislative intention" explanation of why s.23C (1) (c) is not applicable where the legal and equitable estates are with the same person.

The only other possible explanation for this view is that the courts are using an *argumentum ab inconvenienti*. Thus the explanation offered by Lord Upjohn[44] was that "to hold to the contrary would make assignments unnecessarily complicated; if there had to be assignments in express terms of both legal and equitable interests, that would make the section more productive of injustice than the supposed evils it was intended to prevent". With respect, it is submitted that such a statement is inadequate in seeking to explain why s.23C (1) (c) is not applicable in such cases, and that the real explanation rests on different grounds.

The difficulty of justification arises as a result of the traditional view[45]

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[38] *Loc. cit. supra* n.29.
[39] In the above case where A is a bare trustee holding property on trust for B.
[40] *Per* Lord Upjohn, *loc. cit. supra* n.29.
[41] *Ibid.*
[42] But see *contra* Lord Radcliffe in *Grey* v. *I.R.C.*, quoted *supra* n.10.
[43] This has sometimes been called the "mischief rule" of construction, as stated in *Heydon's Case* (1584) 3 Co. Rep. 7a, 76 E.R. 637. See *contra Vacher & Sons, Ltd.* v. *London Society of Compositors* (1913) A.C. 107.
[44] *Loc. cit. supra* n.29.
[45] E.g., as stated by Jordan, C.J. in *McCaughey* v. *Stamp Duties Commr.* (1946) 46 S.R. (N.S.W.) 192.

that at all times the law requires the separate existence of two different kinds of interest in property, namely the equitable and the legal, either in the same person, or in different persons. Consequently any dealing with the property must involve dealing with one or both of these interests. The apparent anomaly which arises is that when a person, holding both the legal and the equitable interest in property, seeks to assign the total of his interest in such property, then despite s.23C (1) (c), no writing is required to effect such an assignment. This *prima facie* appears to conflict with the literal interpretation accorded to s.23C (1) (c). It is submitted that the present problem can only be explained in terms that reject that traditional view. Their Lordships of the Privy Council in *Commissioner of Stamp Duties* (*Qld.*) v. *Livingston*[46] stated that the traditional view was fallacious. In that case, their Lordships were considering the nature of the interest of a residuary beneficiary in an unadministered estate. They refused to accept the submission put to them on behalf of the Commissioner that the executors held the legal estate and the residuary beneficiary the equitable estate. They conceded that a Court of Equity would control the executors on behalf of the residuary beneficiary, but denied that an equitable estate as such in the property rested in the residuary beneficiary. Going further than the High Court[47] (from which the appeal came), their Lordships held that the residuary beneficiary's only rights were *in personam* against the executors. Viscount Radcliffe, delivering the opinion of their Lordships[48] said:

> Where, it is asked, is the beneficial interest in those assets during the period of administration? It is not, ex hypothesi, in the executor: where else can it be but in the residuary legatee? This dilemma is founded on a fallacy, for it assumes mistakenly that for all purposes and at every moment of time the law requires the separate existence of two different kinds of estate or interest in the property, the legal and the equitable. There is no need to make this assumption. When the whole right of property is in a person, as it is in an executor, there is no need to distinguish between the legal and equitable interest in that property any more than there is for the property of a full beneficial owner.[49]

On this view a person having full beneficial ownership cannot be said to have a mere aggregate of the legal and equitable estates. These estates, when placed into the same hands, transform themselves into a whole greater than and different from the aggregate of the parts constituting it. There is no longer an "equitable estate", as such, that could be subject to s.23C (1) (c). On this view, it is not correct to say that that person has both the legal and equitable estates, but that he has the complete beneficial ownership, unencumbered by any outstanding equitable interests. In fact their Lordships relegate equitable interests to "impermanent rights of recourse" to Courts of Equity to enforce rights recognised by the doctrines of that Court.[50] It is submitted that it is only such "impermanent rights of recourse" that are "equitable interests" within the meaning of s.23C (1) (c).

This departure from the traditional view of dualism of estates has recently been criticised in this *Review* by P. G. Hely,[51] who reacts with patriotic dismay to their Lordships' rejection of a statement by Sir Frederick Jordan,[52] reaffirming the traditional view of legal and equitable estates. He

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[46] (1965) A.C. 694, on which see P. G. Hely, Note (1966) 5 *Sydney L.R.* 331.
[47] (1962) 107 C.L.R. 411.
[48] The Judicial Committee consisted of Viscount Radcliffe, and Lords Evershed, Reid, Pearce and Upjohn. It is to be noted that the last three sat as Law Lords in the *Vandervell Case.*
[49] (1965) A.C. at 712.
[50] *Ibid.*
[51] *Supra* n.46.
[52] In *McCaughey* v. *Commr. of Stamp Duties, supra* n.45 at 204.

says: "Their Lordships rejected this proposition and implied that in this instance Sir Frederick Jordan was himself ignorant of these elementary and fundamental principles. Fortunately this is a heresy not often uttered in this country".[53] However, the present writer respectfully agrees with the principle enunciated by their Lordships of the Judicial Committee that one should not always seek to identify separate legal and equitable interests in property.

It is submitted that Lord Upjohn[54] (at least) in the *Vandervell Case* implicitly reaffirmed[54] this view of equitable estates when he observed:

> If, however, the intention of the beneficial owner in directing the trustee to transfer the legal estate to X is that X should be the beneficial owner, I can see no reason for any further document, or further words in the document assigning the legal estate also expressly transferring the beneficial interest; *the greater includes the less.*[55]

The last five words, though trite and tautological when taken out of context, are submitted to be significant in this context. His Lordship describes the "legal estate" as the "greater", and the "beneficial interest" as "the less", and states that a relationship of inclusion exists between the two. It is submitted that if one accepts the traditional view of estates, where *ex hypothesi* the two estates are separate and independent, a statement that implies a relationship of inclusion is self-contradictory. Furthermore, if it is even possible to compare "sizes" of the two estates, then it would still be incorrect to have the equitable estate considered the lesser. It is submitted that Lord Upjohn obviously could not, and did not, mean by this statement what the statement *prima facie* appears to mean, but must be taken (with respect) to have sacrificed accuracy to elegance. When his Lordship uses the words "legal estate" he cannot be using these words to mean "legal estate" as opposed to "equitable estate" in the terminology of the traditional view of legal and equitable estates. It is submitted that by the words "legal estate" he must mean that bundle of rights that together constitutes beneficial ownership and which exists when the property, being in the total control of one person, is in no way encumbered by the outstanding interest of anybody else. In such cases, it is meaningless to refer to any legal or equitable interests, for these merge to form a whole greater than the aggregate of its individual components.

Applying this view to the present problem it is submitted that this is the only adequate means of explanation of why s.23C (1) (c) does not apply to cases where the property is wholly owned by one person. In such cases he is to be taken as having something other than and greater than a mere aggregate of the legal and beneficial estates. He does not have an "equitable interest" within the meaning of s.23C (1) (c)[56] and therefore no writing is required to dispose of his total interest in the property. In the *Vandervell Case* their Lordships did not actually need to consider this problem, since counsel for the Revenue had conceded that if a person was entitled to complete beneficial ownership, no writing is necessary to effect a transfer.[57] However, it is submitted that by deciding the case as they did, their Lordships must be taken to have rejected the traditional dualism of legal and equitable estates.

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[53] Hely, *supra* n.46 at 335.

[54] As pointed out *supra* n.48, his Lordship was a member of the Judicial Committee in *Livingston's Case.*

[55] *Loc. cit. supra* n.29.

[56] As submitted above, s.23C (1) (c) refers only to such equitable interests as are "impermanent rights of recourse" as referred to by Lord Radcliffe in *Livingston's Case.* See *supra* at n.50.

[57] *Loc. cit. supra* n.29.

Conclusion

In the *Vandervell Case* the Court was faced with a difficult situation. If it accepted the interpretation placed on a section of an Act of Parliament by courts of the highest authority, and took it to its logical conclusion, the result would have been (in Lord Upjohn's words) to "make assignments unnecessarily complicated . . . (and) . . . the section more productive of injustice than the supposed evils it was intended to prevent".[58] The Court might have been placed in an even more awkward position had counsel for the Revenue not conceded an important point.[59] However, the Court was still obviously somewhat troubled at the prospect of reconciling s.23C (1) (c) with the concept of effective oral assignments by absolute beneficial owners, and stated simply that in such cases s.23C (1) (c) did not apply. It is submitted that the decision can be justified, not by means of referring to legislative intentions 300 years ago or by *argumentum ab inconvenienti*, but by a complete reconsideration of the traditional view of legal and equitable estates.

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DIRECTORS' AUTHORITY AND THE RULE IN TURQUAND'S CASE

HELY-HUTCHINSON v. *BRAYHEAD LTD.*

The recent decision of *Hely-Hutchinson* v. *Brayhead Ltd.*[1] was concerned with the authority of company directors, with the so-called rule in *Turquand's Case*[2] and with the effect on a contract between a company and one of its directors of a failure by that director to disclose his interest in the contract to the board.

THE FACTS

In 1956 the plaintiff, Hely-Hutchinson, was the chairman and managing director of Perdio Electronics Ltd. (Perdio) and subsequently acquired a controlling interest in the company. A Mr. Richards was also a shareholder and a director of Perdio. In 1962 Richards acquired control of the defendant company, Brayhead Ltd. (Brayhead), of which company he became chairman.

By 1964 Perdio had begun to sustain losses and obtained overdraft facilities for £50,000 from a firm of merchant bankers, Guinness Mahon & Co. Ltd. The plaintiff gave his own personal guarantee to Guinness Mahon in respect of this loan.

However, Perdio's needs were not satisfied by the amount of the overdraft and early in 1965 discussions took place between the plaintiff and Richards which resulted in an agreement whereby Brayhead was to gain effective

[58] *Ibid.*

[59] See *ibid.*: "Counsel for the Crown admitted that where the legal and beneficial estate was vested in the legal owner and he desired to transfer the whole legal and beneficial estate to another he did not have to do more than transfer the legal estate and he did not have to comply with (S.23C (1) (c))."

[1] (1968) 1 Q.B. 549.

[2] *Royal British Bank* v. *Turquand* (1856) 6 E. & B. 327.