SOME THOUGHTS ON THE STATUTE OF FRAUDS IN RELATION TO TRUSTS

Graham Battersby*

The question of the formalities required to establish a trust or to assign a subsisting equitable interest under a trust is analysed at length by Professor Waters in his excellent book, *Law of Trusts in Canada*. It is not proposed in this article to go over the ground so well covered in that book, but rather to offer some additional thoughts on the meaning and effect of the statutory provisions.

The relevant provisions of the English Statute of Frauds 1677 read as follows:

Section 7. Declarations or Creations of Trusts or Confidences of any Lands Tenements or Hereditaments shall be manifested and proved by some Writing signed by the partie who is by Law enabled to declare such Trust or by his last Will in Writing or else they shall be utterly void and of none effect.

Section 8. Provided always That where any Conveyance shall bee made of any Lands or Tenements by which a Trust or Confidence shall or may arise or result by the Implication or Construction of Law or bee transferred or extinguished by an act or operation of Law then and in every such Case such Trust or Confidence shall bee of the like force and effect as the same would have been if this Statute had not beeene made. Anything hereinbefore to the contrary notwithstanding.

Section 9. And bee it further enacted That all Grants and Assignments of any Trust or Confidence shall likewise be in Writing signed by the partie granting or assigning the same or by such last Will or Devise or else shall likewise bee utterly void and of none effect.

These provisions may be summarized as follows:

(i) the creation of a trust relating to land must be proved by some writing signed by the person who is legally capable of declaring the trust;

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* Dean of the Faculty of Law, University of Sheffield, England; Visiting Professor, Faculty of Law, University of Manitoba, 1974-75.

1 Ch. 7, especially at 183-92 (1974).
2 29 Car. 2, c. 3.
3 Since the requirement is only that there must be evidence in writing, which need not be contemporaneous with the declaration of trust: see Rochefoucauld v. Boustead, [1897] 1 Ch. 196 (C.A. 1896), it seems to follow that absence of writing makes the trust unenforceable, not void, as under § 4. As to the person who must sign, see Tierney v. Wood, 19 Beav. 330, 52 Eng. Rep. 377, 23 L.J. Ch. (n.s.) 895, 2 W.R. 577 (1854); Kronheim v. Johnson, 7 Ch. D. 60 (1877).
(ii) a trust which arises by operation of law, i.e., a constructive or resulting trust, need not be evidenced in writing;

(iii) the grant or assignment of an equitable interest under a trust, whatever the nature of the trust property, must be in writing signed by the grantor or assignor.  

Waters \(^5\) has shown that the English statute is in force in Alberta, Manitoba, Saskatchewan, Newfoundland and the territories. Ontario has enacted its own Statute of Frauds \(^6\) in virtually the same terms as the English statute, while New Brunswick \(^7\) and Nova Scotia \(^8\) have enacted similar statutes in more modern language. British Columbia \(^9\) has also enacted its own modern version of the original statute, but, as will be seen, with some significant changes, while Prince Edward Island \(^10\) has created a modern version but with no counterpart of the sections relating to trusts, so that there too the English statute is presumably in force so far as not replaced.

It can thus be seen that the Statute of Frauds, in either its original or a modern form, is in force in all the common law provinces and the territories of Canada. A modern version of the statute has also been enacted in England, where the above provisions are now contained in section 53 of the Law of Property Act, 1925. \(^11\) There appears to be no reported Canadian case on the interpretation of section 9 of the original statute or its modern counterparts; but there are five English cases, all decided in the last fifteen years—three of them decisions of the House of Lords—which have decided important points on the interpretation of section 53(1)(c) of the Law of Property Act, 1925, the present-day replacement for section 9. These cases are, in chronological order, Grey \(^12\) v. Inland Revenue Commissioners, \(^13\) Oughtred \(^14\) v. Inland Revenue Commissioners, \(^15\) Vandervell \(^16\) v. Inland Revenue Commissioners, \(^17\) In Re Holt's Settlement, \(^18\) and In Re Vandervell's Trusts (No. 2). \(^19\)

\(^4\) The actual assignment must be in writing, and will otherwise be void: see Grey v. Inland Revenue Comm'rs, [1960] A.C. 1, [1959] 3 All E.R. 603, [1959] 3 W.L.R. 759.

\(^5\) WATERS, supra note 1, at 179-80.

\(^6\) ONT. REV. STAT. c. 444 (1970).

\(^7\) N.B. REV. STAT. c. 218 (1952).

\(^8\) N.S. REV. STAT. c. 290 (1967).

\(^9\) B.C. REV. STAT. c. 369 (1960).

\(^10\) P.E.I. REV. STAT. c. 64 (1951).

\(^11\) 15 & 16 Geo. 5, c. 20.


\(^16\) [1974] Ch. 269 (C.A.). Leave was granted for an appeal to the House of Lords, but it is understood that the appeal is not being pursued: see text at note 96 infra.
It is intended to examine each of these cases so as to determine their effect and the extent to which they are applicable in Canada.

Section 53(1)(c) reads as follows: "A disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will." This provision differs in several respects from section 9. Firstly, execution by an agent is permitted. Secondly, whereas section 9 refers to "Grants and Assignments", section 53(1)(c) refers to "A disposition". Whether this is a significant change will be discussed below. Thirdly, it was "Grants and Assignments of any Trust or Confidence" (emphasis added) which were caught by section 9, which is changed in section 53(1)(c) to "A disposition of an equitable interest or trust" (emphasis added). It is submitted that this is a mere modernization of language, without substantive effect. Fourthly, in section 53(1)(c), after the words "equitable interest or trust" is inserted "subsisting at the time of the disposition". It is submitted that the latter phrase was intended to be merely clarificatory, to put beyond doubt what was already implicit if sections 7 to 9 of the Statute of Frauds were read together, namely, that section 9 and its modern counterpart relate only to equitable interests already vested in the assignor, in other words to distinguish between a declaration of trust creating a new equitable interest and the assignment of an existing equitable interest. It has been suggested, however, that it is arguable that there is nothing in section 9 to limit its effect to existing interests, so that it applies where, for example, an absolute legal and beneficial owner of personality declares a trust in favour of a third party. This argument should be rejected, since its effect is to produce conflicting formal requirements. Section 7 relates exclusively to declarations of trust, and its only effect is to require trusts relating to land to be evidenced in writing. Section 9, on the other hand, relates to grants or assignments of an interest in any kind of property, real or personal, and requires the grant or assignment to be in writing. These are two different sets of requirements, which cannot be fitted together; it is submitted, therefore, that the Statute of Frauds draws a distinction between creating a trust de novo and assigning an interest under an existing trust. It will be emphasized at various points in this article that this distinction should constantly be remembered for a proper understanding of the statutory provisions.

17 Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20.
18 Waters, supra note 1, at 188 n.63, pointing out that this argument is available in all the Canadian common law provinces, including British Columbia (to which may be added the territories).
Let us return now to the question whether there is any difference between "Grants and Assignments" in section 9 and "disposition" in section 53(1)(c). This question was raised but not answered in Grey v. Inland Revenue Commissioners. The facts were that on February 1, 1955, a Mr. Hunter transferred 18,000 shares to the appellant trustees to hold as nominees for himself. The appellants were also trustees of six settlements previously created by Hunter. On February 18, Hunter orally directed the appellants to divide the shares into six blocks of 3,000 shares each, and to appropriate one block to each of the pre-existing settlements. On March 25, the appellants executed six deeds of declaration of trust, which Hunter also executed in order to testify to his earlier oral direction, declaring that since February 18 they held each block of shares on the trusts of the relevant settlement. The question was whether the deeds of March 25 constituted voluntary dispositions for the purposes of the stamp duty legislation, and this turned on whether the oral direction of February 18 was effective legally to require the trustees to hold the shares on the trusts of the pre-existing settlement. The Inland Revenue argued that the oral direction constituted an attempted disposition of an equitable interest, and was invalidated by section 53(1)(c). The essential question of law, therefore, was whether the oral direction constituted a declaration of trust (for which, since the trust property was personalty, no formality was required), or whether it constituted a disposition. Mr. Justice Upjohn, at first instance, concluded that the transaction was a declaration of trust. That decision was reversed by a majority of the Court of Appeal, the dissentient, Lord Evershed, Master of the Rolls, taking the same view as Mr. Justice Upjohn. One of the majority, Lord Justice Omerod, stated his opinion that the transaction was not a grant or assignment within section 9 of the Statute of Frauds, but that it was a "disposition", this word having a wider meaning. The House of Lords unanimously dismissed the further appeal. In the two opinions delivered, the main point considered was whether the Law of Property Act, 1925 was a consolidating Act, so as to bring into play the presumption that such an Act is not intended to alter the law. Both Viscount Simonds and Lord Radcliffe showed that the 1925 Act consolidated previous amending acts, so that the above presumption did not apply. It thus became possible to give the word "disposition" its normal wide meaning, and rendered it unnecessary to decide whether "disposition" was wider than "grants or assignments". That, said Viscount Simonds, would be "a question that might be considered, if it were not for the actual decision of the House of Lords".

Supra note 12.
Stamp Act, 1891, 54 & 55 Vict., c. 39, §§ 1, 54; Finance (1909-10) Act 1910, 10 Edw. 7, c. 8, § 74(1).
Supra note 12.
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Supra note 12.
Lord Reid agreed with Viscount Simonds, and Lords Cohen and Keith of Avonholm concurred in both judgments.
not be easy to answer”. The nearest that Lord Radcliffe came to providing an answer is in the following passage:

Whether we describe what happened in technical or in more general terms the full equitable interest in the 18,000 shares concerned, which at that time was his, was (subject to any statutory invalidity) diverted by his direction from his ownership into the beneficial ownership of the various equitable owners, present and future, entitled under his six existing settlements.

In my opinion, it is a very nice question whether a parol declaration of trust of this kind was or was not within the mischief of section 9 of the Statute of Frauds. The point has never, I believe, been decided and perhaps it never will be. Certainly it was long established as law that while a declaration of trust respecting land or any interest therein required writing to be effective, a declaration of trust respecting personality did not. Moreover, there is warrant for saying that a direction to his trustee by the equitable owner of trust property prescribing new trusts of that property was a declaration of trust. But it does not necessarily follow from that that such a direction, if the effect of it was to determine completely or pro tanto the subsisting equitable interest of the maker of the direction, was not also a grant or assignment for the purposes of section 9 and therefore required writing for its validity. Something had to happen to that equitable interest in order to displace it in favour of the new interests created by the direction: and it would be at any rate logical to treat the direction as being an assignment of the subsisting interest to the new beneficiary or beneficiaries or, in other cases, a release or surrender of it to the trustee.

At first sight, this passage seems to imply that a direction may constitute both a declaration of trust and a disposition. It is submitted however, that Lord Radcliffe did not mean that, for, as argued above, there is a clear conceptual distinction between the two types of transactions, and to confuse them leads to inconsistent formal requirements. What must be meant, therefore, is that a transaction which looks like a declaration of trust may prove on closer examination to be a disposition. Is the oral direction, then, within the mischief of section 9 or its modern Canadian counterparts in similar language? It is submitted that it is. The object of section 9 “is to prevent hidden oral transactions in equitable interests in fraud of those truly entitled, and making it difficult, if not impossible, for the trustees [sic] to ascertain who are in truth his beneficiaries”. That seems a correct view, and implies that section 9 should be construed so as to apply to all transactions whereby an equitable interest is diverted from one beneficiary to a new beneficiary, or, to put it another way, becomes divested from the original beneficiary and vested in a new beneficiary. At the very least, the divesting part of the transaction, which results in the destruction of the original bene-
ficiary's interest, should be regarded as a grant or assignment, for how without a transfer of some sort can that beneficiary divest himself? But if that be accepted, then the whole of the Grey transaction should be regarded as a grant or assignment. A beneficiary, once having released or surrendered his interest, could not give an effective direction in favour of a new beneficiary of his own choosing, for the effect of the release or surrender would be to extinguish the original beneficiary's interest, so that the trustees would hold either on a resulting trust for the original grantor, or on trust for the next beneficiary under the original settlement whose interest would be accelerated. The nomination of the new beneficiary must, therefore, be part of the same transaction as the divesting from the original beneficiary, and the whole transaction should be regarded as a grant or assignment to that new beneficiary.

In British Columbia, the modern counterpart of section 9 reads:

No assignment or surrender of a beneficial interest in any property held in trust is enforceable by action unless evidenced in writing, signed by the party assigning or surrendering same.

It will be observed, firstly, that under this provision only evidence in writing is required, and in this British Columbia differs from all other Canadian common law jurisdictions and England; secondly, since a surrender is expressly mentioned, it would seem that the above argument should apply, a fortiori, in British Columbia.

It might possibly be argued that the decision in Grey is based on the concealed premise that the court wishes to defeat a transparent attempt to avoid a taxing statute, and that, since, as far as the present writer is aware, comprehensive stamp duty does not exist in Canada, a Canadian court would be free to take a different view. Certainly, it is to be hoped that a Canadian court would examine the problem de novo, and not follow Grey slavishly, but it is submitted that nevertheless this argument should be rejected for the following reasons: (i) the judgments throughout the Grey litigation are cast in terms of an analysis of the Statute of Frauds (and its modern counterpart) and its application to the various forms of transactions which may be effected by a beneficiary under a trust—that analysis is equally applicable in Canada; (ii) under the English stamp duty legislation it is perfectly clear that it is documents which are taxable, not transactions, so that if a transaction can be and is effected orally, no duty is payable—the crucial question, therefore, in Grey, was whether the vesting in the new beneficiary could be effected orally, and that is governed by trusts law and

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28 Cf. Inland Revenue Comm'rs v. Buchanan, [1958] Ch. 289, at 296, 299, [1957] 2 All E.R. 400, at 402, 404 (C.A.), where the surrender to remaindermen of a life interest was said to be a disposition.


34 The land transfer tax in Ontario, for example, is a tax only on transfers of land presented for registration: see Ont. Stat. 1974 c. 8, amended by Ont. Stat. 1974 c. 16 & c. 93.
the statutory provisions relating to formalities; (iii) in any event, it is by no means to be assumed that an English court would start with a predisposition against the taxpayer—it is at least equally plausible to assume that the court would adopt the premise that a heavy burden of proof always lies on the Revenue to show that the particular transaction is within the letter of a taxing statute. 26

In *Grey*, it will be noticed, the legal title to the trust property, the 18,000 shares, remained vested in the original trustees, and only the beneficial interest was shifted. What would be the position if the original beneficiary orally directed the trustees to transfer the legal title to X, with the intention that X should become legally and beneficially entitled, and the legal title is so transferred? If there is no separate assignment to X, or surrender to the trustees, of the beneficial interest, are we compelled by *Grey* to conclude that X holds on a resulting trust for the original beneficiary? This was the question which arose in *Vandervell v. Inland Revenue Commissioners*. 26 The appellant wished to transfer to the Royal College of Surgeons some shares which were vested in a bank as nominee for himself. He, therefore, directed the bank to execute share transfer forms in blank. The bank did so and handed the forms to the appellant's agent who, on the appellant's instructions, filled in the name of the College as transferee and handed the forms to the College, which was then registered in the company's books as owner of the shares. Subsequently, dividends were declared on the shares and paid to the College. The Revenue assessed the appellant to tax on these dividends, alleging that the appellant had not "divested himself absolutely" 27 of all interest in the shares. One argument of the Revenue, in the Court of Appeal and the House of Lords, 28 was that the appellant's beneficial interest in the shares had never passed to the College, since there was no writing signed by him so as to comply with section 53(1)(c) of the Law of Property Act, 1925. (Here it seems apparent that there can be no distinction between section 53(1)(c) and section 9 of the Statute of Frauds). Both appellate courts unanimously rejected this argument, holding that when the legal title to the trust property is transferred at the direction of a beneficiary absolutely entitled, no separate assignment is required of the equitable interest co-extensive with that legal title. (Presumably the same will follow

26 As one might expect, the attitude of the courts is somewhat unpredictable, though the present writer's impression is that they are generally on the side of the taxpayer (after all, judges pay taxes too!). See the references cited in A. Easson, CASES AND MATERIALS IN REVENUE LAW 26-39 (1973).

27 *Supra* note 14. For the sequel to this decision, see text between notes 81-96 infra.

28 At first instance, the Revenue relied only on a quite separate argument that the beneficial interest in an option to purchase the shares, granted by the College to a trust company, was held by the company on a resulting trust for the appellant. This argument succeeded in all three courts.
if the direction is given by two or more beneficiaries who are together entitled to the entire beneficial interest).

This is undoubtedly a convenient result, and for that reason is likely to be followed in Canada. It is nevertheless worth pausing to consider whether the result is legally defensible, for, it is submitted, the reasoning of the various judges is not entirely convincing. In the Court of Appeal, Lord Justice Harman stated:

Section 53(1)(c) ... only applies where the disposer is not also the controller of the legal interest. Here the bank had a bare legal interest so long as they were on the register. The taxpayer was the absolute beneficial owner. He could direct the bank to transfer the shares to him and could then pass them to the college without any instrument except a share transfer. I am of the opinion that he could pass his equitable interest to the college by directing the bank to fill in a transfer in the name of the college without the intervening step. Any other result would be ridiculous and I do not believe that section 53(1)(c) has such an effect.

I do not think there is any authority constraining us to this exceedingly inconvenient conclusion.

But with all respect to the memory of Lord Justice Harman, who was a judge of learning and common sense, that is assertion, not explanation, and section 53(1)(c) cannot be dismissed so easily. Lord Justice Diplock stated:

Prima facie a transfer of the legal estate carries with it the absolute beneficial interest in the property transferred. No separate transfer of the beneficial interest is necessary. The presumption may be rebutted by evidence to show that transfer of the beneficial interest to the transferee of the legal estate would constitute a breach of trust by the transferor. In the absence of any evidence to this effect section 53 of the Law of Property Act, 1925, in my view, does not come into operation at all.

In the House of Lords, however, Lord Upjohn rightly denied the existence of such a presumption, and said that "it is a matter of intention in each case". Lord Upjohn's own reasoning (and Lord Donovan adopts substantially the same view) is to equate the transaction in Vandervell with a case where the absolute legal and beneficial owner transfers the property. In the latter case, it cannot be argued that a separate written assignment of

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The only contrary authority is a considered dictum by Wilberforce, J., as he then was, in Inland Revenue Comm'rs v. Hood Barrs (No. 2), 41 Tax Cas. 339, at 361 (1963).

[1966] Ch. at 296-98.

Id. at 287-88. Willmer, L.J., expressed agreement with Diplock, L.J., on this aspect of the case: id. at 293.


Of the other members of the House of Lords, Lord Reid rejected the Revenue's argument on § 53(1)(c) but without giving reasons, Lord Pearce agreed with Lord Upjohn, and Lord Wilberforce equated the facts with In re Rose, [1949] Ch. 78, [1948] 2 All E.R. 971, the appellant having done everything in his power to transfer the shares to the College (for comment on this latter point, see Strauss, Imperfect Gifts and the Law of Property Act, 1925, s. 53(1)(c), 30 MODERN L. REV. 461 (1967)).
the beneficial interest is necessary, therefore none is necessary on the facts of Vandervell. This argument certainly gives effect to the mischief which appears to underlie section 53(1)(c), namely, to prevent hidden oral transactions in equitable interests, and to ensure that the trustees can ascertain the identity of the beneficiaries, "but it stretches the mischief rule of construction a very long way. Moreover, the analogy with an out-and-out transfer by the legal and beneficial owner is strained; in that case, the beneficial interest is subsumed in the larger legal interest, whereas in Vandervell the two interests were at the outset separated, and the question is whether they can be brought together again without a separate assignment of the beneficial interest. A better line of reasoning, it is submitted, would be to hold that the appellant cannot assert his equitable interest against the College after the legal title to the shares has been vested in the College at his direction. Since the transfer by the bank was not in breach of trust, it is not a breach of trust for the College to refuse to recognise his equitable interest. In other words, a transfer of the legal title at the instigation of or with the concurrence of the beneficiary results in the destruction of the beneficiary's interest, and no assignment of that interest is required.

The decision, if not the reasoning, in Vandervell is certainly welcome, and the decision should, it is submitted, be followed in Canada. In British Columbia, as we have seen, "section 3 of the Statute of Frauds includes not only an assignment but also a surrender. Can it be argued that there was a surrender of the appellant's interest in Vandervell? Firstly, it is doubtful whether the express inclusion of a surrender adds anything to "Grants and Assignments" in section 9 of the Statute of Frauds 1677 or "disposition" in section 53(1)(c) of the Law of Property Act, 1925." Secondly, if the reasoning of Lords Upjohn and Donovan in Vandervell be accepted, the transfer of the legal title takes with it the beneficial interest, so that there is no room for the assertion that that interest is surrendered. Thirdly, if the present writer's rationalization of Vandervell be accepted, the extinguishment of the beneficial interest is by operation of law; equity will not allow the instigating or concurring beneficiary to assert his interest against a transferee of the legal title who took without breach of trust. The effect is as if the beneficiary had surrendered his interest, but there is no surrender in fact."

44 Supra note 31.
45 This argument was first proposed by Spencer, Of Concurring Beneficiaries and Transferring Trustees, 31 CONVEY. (n.s.) 175 (1967). A possible further argument would rely on the rule in Strong v. Bird, L.R. 18 Eq. 315, [1874-80] All E.R. Rep. 230 (1874): the gift of the beneficial interest is imperfect for want of writing, but is perfected by the transfer of the legal title. But the rule in Strong v. Bird is somewhat anomalous (see the discussion by Waters, supra note 1, at 158-65) and might well not be extended to this situation, especially as its effect would be to cure a statutory invalidity.
46 It is submitted that Vandervell is clearly consistent with Grey v. Inland Revenue Comm'rs, supra note 12; cf. Waters, supra note 1, at 191.
47 See text at note 33.
48 See Inland Revenue Comm'rs v. Buchanan, supra note 32.
49 Equally, if the alternative argument based on Strong v. Bird be accepted (see
We turn now to what is probably the most difficult of the English cases, *Oughtred v. Inland Revenue Commissioners.*

Trustees held 200,000 shares in trust for the appellant, Mrs. Oughtred, for her life, and then for her son Peter absolutely. Mrs. Oughtred was also the absolute owner of 72,700 shares. On June 18, 1956, Mrs. Oughtred and Peter orally agreed that she would transfer to him her 72,700 shares and in exchange he would surrender to her his reversionary interest in the 200,000 shares and thus make her the absolute beneficial owner. On June 26, a deed of release was executed by Mrs. Oughtred, Peter and the trustees, which firstly recited that the 200,000 shares were now held by the trustees in trust for Mrs. Oughtred absolutely and that they intended to transfer the shares to her, and which then released the trustees from the trusts of the settlement. On the same day, the trustees transferred the 200,000 shares to Mrs. Oughtred, who in turn transferred her 72,700 shares to nominees for Peter. The question before the courts was whether the transfer by the trustees of the shares was a transfer on sale of Peter's interest, and thus liable to ad valorem duty under the stamp duty legislation. There was a considerable difference of judicial opinion. Mr. Justice Upjohn, at first instance, held that under the oral agreement of June 18, Peter became a constructive trustee of his equitable reversionary interest in favour of his mother, a constructive trust being exempted from the requirement of writing; as from that date, Mrs. Oughtred was absolute beneficial owner of the 200,000 shares, as recited in the deed of release, and the transfer of June 26 passed only the bare legal title to the shares, and was to be regarded not as a transfer on sale (the sale being complete on June 18) but on the winding up of the trust and on the release of the trustees. The Court of Appeal unanimously reversed that decision, on a ground largely irrelevant to this article, that the transfer of June 26 was the formal completion of the oral agreement of June 18, and was therefore a transfer on sale. On this view, it was unnecessary to decide the question about formalities, and the court was content to remark, rather cryptically: “We are not, however, with all respect to the judge, prepared to accept, as we understand it, his conclusion upon the effect of section 53 of the Law of Property Act, 1925.” And so to the House of Lords, which dismissed the appeal by a bare majority of three to two. The majority took substantially the same view as the Court of Appeal, that whether or not the oral agreement was effective to

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note 45 *supra*), the statute's express inclusion of a surrender cannot make any difference.

50 Supra note 13.

51 See note 21 *supra.*

52 Supra note 13.

53 Statute of Frauds 1677, § 8; Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 53(2).

54 Supra note 13.

55 [1958] Ch. at 687, [1958] 2 All E.R. at 446. See also *id.* at 689, [1958] 2 All E.R. at 447-48, where the opinion is expressed, without reasons, that the oral agreement did not vest in Mrs. Oughtred the entire beneficial interest in the 200,000 shares.

56 Supra note 13.
transfer Peter's reversionary interest to his mother, that oral agreement was implemented by the trustees' transfer, which was therefore a transfer on sale. Lord Jenkins declined to answer the questions about formalities, since, even if it were correct to say that, as a result of the constructive trust engrafted by equity on to the oral agreement, Mrs. Oughtred thereby acquired the entire beneficial interest, that would not alter his view that the transfer of the shares was a transfer on sale. He did remark, however, that "the title secured by a purchaser by means of an actual transfer is different in kind from, and may well be far superior to, the special form of proprietary interest which equity confers on a purchaser in anticipation of such transfer". This is undoubtedly true when the property being purchased is a legal title, but, it is suggested, is not true where the property is a mere equitable interest. The third member of the majority, Lord Denning, took the same view of the status of the transfer, but also expressed, briefly and without reasons, a view on the formalities questions. "I do not think," he said, "the oral agreement was effective to transfer Peter's reversionary interest to his mother. I should have thought that the wording of section 53(1)(c) of the Law of Property Act, 1925, clearly made a writing necessary to effect a transfer; and section 53(2) does not do away with that necessity." The dissentients, Lords Radcliffe and Cohen, adopted substantially the same reasoning as Mr. Justice Upjohn. In brief, their argument is that the oral agreement, being specifically enforceable, created a constructive trust; that when, on June 26, Mrs. Oughtred conveyed the consideration shares to Peter, he became in a full sense trustee for her of his equitable reversionary interest, and she was the effective owner of the entire beneficial interest. She could then direct the trustees to transfer to her the legal title in the 200,000 shares, she did so, and that transfer was correctly described as a transfer on the winding up of the trust.

It will be seen that Oughtred is thus inconclusive on the effect of a specifically enforceable contract to assign an equitable interest. The issue, essentially, is this. Since such a contract creates a constructive trust, and

57 With whom Lord Keith of Avonholm agreed.
59 See text between notes 62-67 infra.
61 Id. at 227-28 (Lord Radcliffe), 230-32 (Lord Cohen), [1959] 3 All E.R. at 625-26, 626-28, [1959] 3 W.L.R. at 901-02, 903-05. There are different nuances in the two speeches, and in particular Lord Cohen accepts the view that Peter's interest was never transferred to his mother because § 53(1)(c) applied and there was no disposition in writing: id. at 230, [1959] 3 All E.R. at 627, [1959] 3 W.L.R. at 903-04. Nevertheless, he concludes that Peter could not dispute his mother's title to the settled shares: id. at 231-32, [1959] 3 All E.R. at 628, [1959] 3 W.L.R. at 905, so that even on this view the end result is the same as if Peter had assigned his interest to her. For this reason, the statement by Waters, supra note 1, at 190, that Lord Cohen agreed with Lord Denning that "writing would be necessary, and that section 8 did not affect that necessity", is misleading. Cf. In re Holt's Settlement, supra note 15, discussed in the text between notes 67-75 infra, and see the discussion in J. W. HARRIS, VARIATION OF TRUSTS 106-09 (1975).
since such a trust is exempted from any requirement of writing, is the transaction to be viewed as an assignment of an existing beneficial interest or as the creation of a sub-trust, and if the former, does section 8 of the Statute of Frauds apply or section 9? To reduce the question to its basic essentials, consider the following simple situation: X holds on trust for Y, and Y contracts to sell his equitable interest to Z, but no written assignment is ever executed. Does X now hold on trust for Y, and Y for Z, or does X now hold directly for Z? It is submitted that, since Y intended to drop out of the picture entirely, and has no active duties to perform, equity would give effect to the intention, and X would therefore hold for Z. The English cases of Grainge v. Wilberforce and In Re Lashmar are authority for this proposition as, in effect, are the speeches of Lords Radcliffe and Cohen in Oughtred. This proposition seems, therefore, not to be in doubt, but it is more difficult to ascertain whether, since the end result of Y’s contract is to make Z the effective owner of Y’s interest, that result can be achieved without a written assignment. So far as English law is concerned, it is submitted that no writing is required, and that Lords Radcliffe and Cohen are correct on this issue also. The vesting in Z is brought about by a constructive trust, and section 53(2) of the English Law of Property Act, 1925 provides: “This section does not affect the creation or operation of resulting, implied or constructive trusts.” Since the requirement of section 53(1)(c) that a disposition be in writing is contained in “this section”, it is submitted that section 53(2) removes the need for writing. Alternatively, one could follow Lord Cohen and say that, although there has been no disposition to Z, nonetheless the informal constructive trust in his favour precludes Y from asserting a claim to the equitable interest, so that Z is now the effective owner of Y’s interest.

The more recent decision of Mr. Justice Megarry, in In Re Holt’s Settlement is relevant at this point. So far as material, the question to be decided was whether an order under the Variation of Trusts Act, 1958 is by itself sufficient to vary the trusts, or whether in addition there must be a document executed by any beneficiary on whose behalf the court is unable to consent. It was argued that, so far as any such beneficiary is concerned,
his consent to the variation operates, pro tanto, as a disposition of his interest, so that there must be writing. It was held that, on the true construction of the Act, the court's order approving the variation was sufficient to carry it into effect, without the execution of any other document. Alternatively, the argument as to the need for writing was rejected on the ground that, following the reasoning of Lords Radcliffe and Cohen in *Oughtred*, when there exists a specifically enforceable contract, the constructive trust imposed by equity itself passes the beneficial interest to the purchaser.

It seems fairly safe to conclude that this was the correct result in England. Is this also true in Canada? The only material difference is that in the current English statute (the Law of Property Act, 1925) all the provisions about trust formalities are in the same section (section 53), which states that "this section" does not affect constructive trusts. In the original Statute of Frauds, however, the layout of the statutory provisions is different: section 7 states that trusts relating to land shall be evidenced in writing, section 8 states a proviso that no writing shall be required in relation to (inter alia) constructive trusts, and section 9 requires grants or assignments of equitable interests to be in writing. It is a very plausible argument, therefore, that section 8 qualifies only section 7, and in no way affects section 9. It could further be argued that this literal interpretation should be adopted since otherwise there would be a situation where what amounts to an assignment could be made informally and secretly, with resulting difficulties to the trustees in ascertaining their beneficiary, the very mischief the statute was designed to prevent.

It is submitted, however, that there are stronger countervailing arguments. The parties to the contract have made only an agreement to transfer an equitable interest, have declared no trust and
have not reached the stage of an actual transfer. Equity chooses to impose a constructive trust, and may well go further and say that the constructive trust itself constitutes a transfer; but it would be wrong then to argue backwards and say that, because it constitutes a transfer, therefore the constructive trust must be in writing, therefore the material parts of the contract must be in writing. Otherwise, the imposition of the constructive trust, far from being remedial, would here constitute a trap; it would make the contract itself void in equity. As an alternative argument, one could again follow Lord Cohen and say that the constructive trust does not truly constitute a transfer.

So far, in this section, we have considered the situation where Y, a beneficiary, contracts to transfer his beneficial interest to Z, and it has been submitted that no formalities are required unless the trust property consists of or includes land or an interest in land. What if Y expressly declares himself a trustee, holding his equitable interest for Z? If Y is a bare trustee, with no active duties to perform, it is submitted that he should drop out of the picture, and X, the original trustee should hold for Z directly. But if that is so, it seems difficult to resist the conclusion that Y has in truth transferred his interest to Z, and the transaction must therefore be in writing. The trust is clearly not constructive, its effect is to shift the equitable interest from Y to Z, and the argument based on the mischief of the Statute of Frauds is strong. The transaction is, in truth, not far removed from that in Grey v. Inland Revenue Commissioners. If, on the other hand, Y as trustee does have active duties to perform, i.e., there is some material difference between the administrative provisions of his trust and those of the original trust, Y must remain as trustee, and the transaction must be viewed as the creation of a derivative trust or sub-trust. No transfer is involved, and the only relevant formality is that the trust must be evidenced in writing if it relates to land.

The above argument also supports the earlier submission that Grey v. Inland Revenue Commissioners should be regarded as authoritative on section 9 of the Statute of Frauds. On the facts of that case, the oral direction to the trustees must be regarded either as an assignment or as a declaration of trust. If the former, it is clearly within section 9. If the latter, the original beneficiary would drop out, since he has no active duties to perform as trustee, and the transaction thus operates as an assignment.

Before finally leaving the Oughtred case, it is perhaps worth remarking that it is clear, since Vandervell v. Inland Revenue Commissioners, that whether or not Peter’s reversionary interest had ever been effectively vested in his mother, once the trustees had properly transferred the settled shares

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76 See text at note 66, and note 61 supra.
77 Supra note 12.
78 Id.
79 See text between notes 30-35 supra.
80 Supra note 14.
to her, his interest was at an end. But that, of course, would not have answered the stamp duty point.

The last case to be considered is *In Re Vandervell's Trusts (No. 2).* This is the latest episode in what appears to be a continuing saga caused by the defective legal execution of Mr. Tony Vandervell's desire to endow a chair at the Royal College of Surgeons. One aspect of the decision of the House of Lords in *Vandervell v. Inland Revenue Commissioners* has already been considered. It is material here to state another aspect of the transaction effected by Vandervell, the creation of an option to purchase by which a trustee company, Vandervell Trustees Ltd., was entitled to purchase from the College for £5,000 the shares transferred to the College at Vandervell's direction. In the *Vandervell* case, the House of Lords, affirming the lower courts, held that, since the trusts on which Vandervell Trustees Ltd. were to hold the option had not been declared, the company must hold for the original grantor, Mr. Tony Vandervell himself, who had therefore not absolutely divested himself of his interest in the shares and was liable to tax on dividends arising from the shares. In October, 1961, the trustee company exercised the option, using £5,000 from a fund which they held for Vandervell's children, and there was evidence that at that time it was the intention of both Vandervell and the trustee company that the shares should be added to funds held on existing trusts for Vandervell's children. Dividends subsequently declared on the shares were added to the funds of the children's settlement. In January, 1965, Vandervell executed a further deed by which he transferred to the trustee company all or any right, title or interest which he had in the option, the shares or the dividends to be held on the trusts of the children's settlement. The Revenue claimed that Vandervell did not absolutely divest himself of his interest in the shares until he executed the deed of January, 1965, and tax amounting to some £628,000 was assessed in respect of the dividends accrued from October, 1961 (date of exercise of option) until January, 1965 (date of divesting deed). Vandervell died in March, 1967 (whether or not his death was hastened by his legal problems is not reported), and the present action was by his personal representatives for a declaration that they were entitled to all moneys received by the trustee company as dividends on the shares between the above dates.

It seems clear that the 1965 deed could not retrospectively divest Van-

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If Lord Cohen's view is accepted (see note 61 *supra*), it seems arguable that, prior to the transfer of the legal title, Peter had some shadowy beneficial interest still vested in him, and had therefore not absolutely divested himself. For the consequences, see text between notes 36-39 *supra*, and the discussion of *In re Vandervell's Trusts (No. 2)* in the text between notes 81-96 *infra.*

*Supra* note 16.

*Supra* note 14. See text between notes 35-49, and especially note 38 *supra.*

*The personal representatives were compelled so to act, for the assessed tax was a charge on the estate, and the House of Lords in Vandervell Trustees Ltd. v. White, [1971] A.C. 912, [1970] 3 All E.R. 16, [1970] 3 W.L.R. 452, declined to allow the Revenue to be added as a party.*
derivell of any interest in the dividends, so that everything turned on whether there was an effective declaration of trust in favour of the children at the time when the option was exercised in 1961. In the Court of Appeal, it was argued that, even if there was sufficient evidence of an intention to declare such a trust, Vandervell could divest himself of his equitable interest in favour of the children only by writing, and since there was no document the purported disposition therefore failed. The Court of Appeal unanimously rejected that argument.

The opinion of Lord Denning, Master of the Rolls, was short and simple, and may be summarized by saying that a resulting trust which arises when there is a gap in the beneficial ownership can be terminated by merely bridging the gap, for example, by declaring a valid trust in favour of someone else. Where, as here, the property is personalty, a trust can be declared without any writing; such a trust had been declared in favour of the children, and therefore the resulting trust in favour of Vandervell was at an end. The opinion of Lord Justice Lawton was more subtle, and his actual language should be quoted:

The exercise of the option and the transfer of the shares to the trustee company necessarily put an end to the resulting trust of the option. There could not be a resulting trust of a chose in action which was no more. The only reason why there had ever been a resulting trust of the option was the rule that the beneficial interest in property must be held for some one if the legal owner is not entitled to it. The legal, but not the beneficial, interest in the option had vested in the trustee company. The beneficial interest had to be held for some one and as the trustee company had declared no trusts of the option, the only possible beneficiary was Mr. Vandervell. Once the trustee company took a transfer of the shares the position was very different. The legal title to them was vested in the trustee company and by reason of the facts and circumstances . . . it held the beneficial interest for the trusts of the children's settlement. There was no gap between the legal and beneficial interests and in consequence no need for a resulting trust in favour of Mr. Vandervell to fill it. Neither the extinction of the resulting trust of the option resulting from its exercise nor the creation of a beneficial interest in the shares by a declaration of trust amounted to a disposition of an equitable interest or trust within the meaning of section 53(1)(c) . . . of the Law of Property Act, 1925.

The third member of the Court of Appeal, Lord Justice Stephenson, ex-

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84 Megarry, J. expressly so decided: supra note 16, at 303-08. The Court of Appeal did not need to decide this point, in view of its decision on the situation after the exercise of the option in 1961: see text infra.

85 The argument as to formalities was not put to Megarry, J., but he held that there was insufficient evidence that Vandervell at any time before the 1965 deed intended to declare a trust in favour of his children: supra note 16, at 297-302.

86 Id. at 320.

87 Id. at 325-26. Both Lord Denning and Lawton, L.J., argue in addition that Vandervell during his lifetime had by his conduct estopped himself from denying the existence of his children's beneficial interest which he had done his best to create: id. at 320-21, 324-25. But, with respect, neither of the appellate judges even attempts to meet the reasons of Megarry, J. for rejecting the estoppel arguments: see in particular, id. at 300-02.
pressed doubts, but was content in the end to agree with the opinions of Lord Denning and Lord Justice Lawton. 

It is submitted, however, that neither of those opinions is acceptable. In a nutshell, Lord Denning's view is that no formalities are required to terminate the resulting trust which equity, without formalities, implies so as to bridge a gap in the beneficial interest. It is difficult to understand why that should be so. The resulting trust is, after all, a trust, however it arose, and the interest of the beneficiary under it is a subsisting beneficial interest; the divesting of that interest involves, at the least, a surrender, which, it seems clear, is a grant or assignment within section 9 of the Statute of Frauds and a disposition within section 53(1)(c) of the Law of Property Act, 1925. Nothing in either section 8 of the Statute of Frauds or in section 53(2) of the Act of 1925 seems designed to eliminate the need for writing. Consider the following simple examples: (1) A conveys property to X to hold on trust for Y for life, and then for Z absolutely. It is beyond argument that Z has an equitable reversionary interest, and that any assignment by him must be in writing. (2) A conveys property to X to hold on trust for Y for life. Here the reversionary interest is not disposed of, and X must therefore hold that interest on a resulting trust for A. A's interest is precisely the same as that of Z in the previous example, and there can be no good reason for distinguishing between them in relation to the formalities for an assignment. The apparent mischief of the Statute of Frauds, to prevent concealed assignments and to allow a trustee to ascertain his beneficiaries, applies equally in both cases. (3) A conveys land to Y for life. Here A retains a legal reversionary interest, which he can dispose of inter vivos only by a deed. The only difference between this situation and that in example (2) is that here A retains the legal estate expectant on X's life estate (A has the legal reversion), whereas in (2) A conveyed the whole legal estate to X, but retained the equitable interest expectant on A's life estate (A has the equitable reversion). In (2) the situation is called a resulting trust, but that is only the equitable counterpart of what the common law calls a reversion. There is no ground for putting the beneficial interest under a resulting trust on a special shelf marked "No formalities extend here".

To summarize, the submission is that once the resulting trust has come into existence, any creation by the beneficiary of a new interest, involving a transfer by that beneficiary, must be in writing. The only exception

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88 It is regrettable that the Court of Appeal did not include at least one judge with a background in Chancery practice, when the appeal raised complex question of trust law, and the Court was considering a reserved and learned judgment by an eminent Chancery judge.

89 See text between notes 32-34 supra.

90 See text at note 31 supra.

91 In England, since 1926, both Y's life estate and B's reversion could exist only in equity behind a trust, owing to § 1 of the Law of Property Act, 1925. But legal limited estates can still be created in common law Canada.

92 That, indeed, appears to be the very point decided by Grey v. Inland Revenue.
would be where the original trust, under which the resulting trust arises, contains an overriding power for the nomination of new beneficiaries. A simple example would be a conveyance by A to X to hold on trust for Y for life and then on such trusts as B should appoint. There is initially a resulting trust for A expectant on Y's life estate, but that resulting trust may be displaced by an appointment by B; and since the power of appointment belongs to the original trust, its exercise is not an assignment by A of his beneficial interest, but rather the creation of a new beneficial interest which defeats A's under a power in that behalf. This reasoning cannot apply, however, if the power is reserved by the settlor himself, for in that situation, even if the power purports to limit the class of appointees, the settlor in fact remains free to transfer his beneficial interest to any person of his choice; a transfer by him, therefore, does not override the resulting trust, but is an assignment of his interest under that trust. It seems possible that both Lord Denning and Lord Justice Lawton viewed the In Re Vandervell fact situation in this light, that the option and, after its exercise, the shares were held on trust for Vandervell or on such trusts as he or the trust company should decide, and that the latter, with Vandervell's acquiescence, nominated the children's settlement. If so, the exercise of the trust company's power of nomination, but not Vandervell's, overrides the resulting trust. On that basis, the decision is consistent with principle, but the reasoning is nonetheless phrased in a very misleading way.

With this caveat in mind, let us now turn to the judgment of Lord Justice Lawton. His reasoning depends on a distinction between the position before and that after the exercise of the option. The House of Lords had already decided that, before its exercise, the option was held on a resulting trust for Vandervell. After its exercise, says Lord Justice Lawton, the option has disappeared, the resulting trust has been extinguished, and a new trust relating to new trust property, the shares, can be created informally. That distinction, it is submitted, is both artificial and unrealistic. The option to purchase is not a piece of property distinct from the shares, it is merely a limited right carved out of the bundle of rights normally inherent in the shares. The trustee company, as owner of the option, had the right to become owner of the shares. Since it never had the right to exercise the option for its own benefit, both the option, prior to its exercise, and the shares, after its exercise, must be held on a resulting trust for the grantor, Vandervell, unless and until his beneficial interest is displaced by a valid creation of new trusts. The distinction drawn by Lord Justice Lawton be-

Comm'rs, supra note 12, discussed in the text between notes 20-35 supra; the trustees held, 'semble, on a resulting trust for Hunter, who then orally purported to nominate new beneficiaries.

83 Supra note 16, at 319 (Lord Denning), 324-25 (Lawton, L.J.). Certainly, Stephenson, L.J. treated his two colleagues as proceeding along the lines stated in the text: see id. at 323, and, as he points out, support for that view of the facts may be found in Vandervell v. Inland Revenue Comm'rs, supra note 14, at 317, [1967] 1 All E.R. at 10-11, [1967] 2 W.L.R. at 107 (Lord Upjohn & Lord Pearce) (but pace Stephenson, L.J., there was no majority for that view).
tween the option and the shares is, in fact, inconsistent with the decision in Vandervell v. Inland Revenue Commissioners, for the House of Lords held that Vandervell, as beneficial owner of the option, had failed to divest himself absolutely of the shares which it controlled. Further, or alternatively, it seems a very strange view of the facts to regard Vandervell as having left the beneficial interest "in the air" during the period of the option, but as having formed and expressed a clear intention that the shares, once they came into the hands of the trustee company by exercise of the option, should be added to the children's settlement.

It is, therefore, submitted that the decision of the Court of Appeal is unsatisfactory and should in Canada be approached with caution. If the decision is to be explained on the grounds of a power to declare trusts, having priority to the resulting trust, well and good, for then no new legal point emerges, only a rather surprising view of the facts. But, on the face of it, the reasoning about formalities seems intended to be independent of that point, and no valid independent ground for the elimination of writing has been established. Leave was granted for the personal representatives to appeal to the House of Lords, and a clarificatory decision by the House would have been very desirable; it is understood, however, that the proceedings have been settled and that the further appeal will not be pursued.

CONCLUSION

There are a number of different methods by which a beneficiary under a trust may deal with his equitable interest. By way of conclusion and summary, it may be useful to tabulate these methods, and to suggest what formalities would be required for each.

1. The beneficiary (B) assigns his beneficial interest directly to a third party (X). This is clearly within section 9 of the Statute of Frauds, or any of its modern counterparts, and must be in writing.

2. B assigns his interest to new trustees to hold on trust for X. The assignment to the trustees must be in writing, but there is also a declaration of trust, which requires written evidence if the trust property is land. The assignment itself need not contain any particulars of the new trusts.

3. B directs the original trustees to hold his interest for X. This is a disposition within section 53(1)(c) of the English Law of Property Act,
1925. It is submitted that it is also a grant or assignment within section 9 of the Statute of Frauds, but is not at the same time a declaration of trust.

4. B, the absolute beneficial owner, directs the trustees to convey the legal title to X, with the intention that X shall hold beneficially, and the trustees execute the conveyance. X takes beneficially, without the need for any separate assignment by B. 100

5. B contracts for value to assign to X. If the contract is specifically enforceable it creates a constructive trust in favour of X. The original trustees will hold directly for X, so that the transaction resembles an assignment by B to X; nevertheless, it is submitted that, as a constructive trust, the transaction is exempt from the requirement of writing, under both section 53(2) of the English Law of Property Act, 1925 and section 8 of the Statute of Frauds (and its modern Canadian counterparts). 101

6. B contracts for value to assign to new trustees to hold on trust for X. The result is the same as in transaction 5 above, but in addition there is an express declaration of trust, which, if it relates to land, must be evidenced in writing.

7. B declares himself a trustee in favour of X. It is submitted that B will drop out of the picture, unless he has active duties to perform as a trustee. 102 In the latter case, the transaction is a declaration of trust, and must be evidenced in writing if it relates to land. In the former case, the original trustees hold for X directly, the transaction is in truth an assignment, and must be in writing.

8. B is the legal and beneficial owner of personal property which he conveys to persons as trustees but without declaring the beneficial interests. B therefore holds under a resulting trust. B then declares that the trustees shall hold for X. Despite the exemption of a resulting trust from the requirement of writing, it is submitted that B's declaration is an assignment to X which must be in writing, unless the declaration is made under a power reserved to A by the original conveyance to the trustees, and therefore having priority to the resulting trust. 103

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100 Vandervell v. Inland Revenue Comm'rs, supra note 14. Equally, if the transaction is directed by two or more beneficiaries who together own the entire beneficial interest.

101 Cf. Oughtred v. Inland Revenue Comm'rs, supra note 13; In re Holt's Settlement, supra note 15.

102 Grainge v. Wilberforce, supra note 63; In re Lashmar, supra note 64.

103 Cf. In re Vandervell's Trusts (No. 2), supra note 16.