Wimpey & Co. Ltd. v. *B.O.A.C.*[42] are, in summary, seen to be rather fewer than the disputed questions they reveal. The cases will bring little satisfaction to the practitioner, though they may be enjoyed by students of jurisprudence. Theorists may be intrigued, for instance, by the opposite decisions reached by Viscount Simonds and Lord Porter in the latter case, while both of them stoutly insisted that they were adding nothing to the words of the section as they stood.[43]

W. HOWARD, Case Editor—Third Year Student.

VALUATION OF NOTIONAL ASSETS
SNEDDON v. *LORD ADVOCATE*

The recent decision of the House of Lords in *Sneddon* v. *Lord Advocate*[1] is likely to have important consequences in the attitudes taken by the Australian and British courts with regard to the question of valuation of "notional" assets in a deceased person's estate. The idea of "notional" assets arose when towards the end of the last century it was realised that it was not sufficient to tax the property actually passing on death, as many persons by making gifts shortly before death diminished considerably their taxable estates. Accordingly, the appropriate statutes were amended to provide for the inclusion in the estate for the purpose of assessment of death duty of certain classes of property, the most important of these being gifts made by the deceased within a number of years before his death. The term "notional" indicates that though the deceased did not actually own the property at his death, it was nevertheless deemed to be part of his estate.

These provision gave rise to several serious problems, for it became clear that the subject-matter of a gift would be liable to change in the period between the date of gift and the date of death. It might decrease or increase in value or be destroyed altogether. It might lose its original identity as where the gift had been monetary and had been used to purchase shares or other forms of property or the money might simply have been dissipated by the donee.

Though by legislative provision the date of valuation was fixed at the date of death, it did not resolve the doubt as to what had to be valued at that date. To that question two answers could be given. It might be that the property to be valued was the property originally given, whether still in existence or not. If it had since been destroyed, then it should be assessed as if it were still intact at the time of death at the value it would then have had. On the other hand it might be that the duty should be assessed on the property to which the original gift could be traced, such as shares which had been bought with the money given. On this view, if the money had been dissipated it could not be included in the dutiable estate, for there would be no property to which the money could be traced.

The latter approach was taken by the Australian Courts in relation to similar New South Wales and Commonwealth legislation[2]. In *The Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd. (Watt's Case)*,[3] the deceased, Watt, had within a year before his death applied a sum of money for the benefit of a friend who was going overseas. He spent part of the sum in the purchase of a steamship ticket and gave the balance to his friend who spent it

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[42] (1955) A.C. 169.
[43] *Id.* at 178, 184.

[1] (1954) A.C. 257.

[2] Stamp Duties Act, 1920 (N.S.W.), Act No. 47, 1920—Act. No. 41, 1952, s. 102 (2) (b); Estate Duty Assessment Act, 1914-1950 (Cwth.), No. 22 ,1914—No. 80, 1950, s. 8 (4) (a). The wording of the Australian statutes is not identical with that of the British statute, but it has never been suggested that anything turned on this.

[3] (1926) 38 C.L.R. 12.

abroad. The High Court held that the money did not form part of the dutiable estate. The reasoning of the Court was based on the inability of State parliaments to legislate with extra-territorial operation[4] and so to levy duty on property not present within their jurisdiction. It is to be observed that the Court was not here insisting on the existence of the original subject-matter of the gift at the time of death; this would usually frustrate the "notional" assets provisions, especially in regard to monetary gifts.[5] The Court was rather following the tracing principle in order to find the property on which duty could be assessed; but in this particular instance the tracing led them to property which was beyond the jurisdiction. In *Moss* v. *Federal Commissioner of Taxation*[6] Williams, J. was more emphatic on that point when His Honour stated:[7] "In my opinion a gift of property consisting of money must like any other kind of property be capable of being identified in its original or some derivative form at the date of death before it can be included in the notional estate and must be valued in the form in which it exists at that date."

The High Court also on several occasions had to consider the specific problem which later was to arise in *Sneddon* v. *Lord Advocate*, that is, the case of a monetary gift by way of voluntary trust deed where the money had been invested by the trustees in the purchase of shares. From the above it is clear that in Australia such shares would be held to represent the original subject-matter of the gift and constitute the "identical" assets, and this was the view adopted in *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation (Teare's Case)*.[8] There Rich J. said:[9] "I am content to adopt the view that the property to be valued at the death of the deceased is represented by the shares into which the money has been transmogrified." This decision was followed in *Vicars* v. *The Commissioner of Stamp Duties (N.S.W.)*[10] where Dixon, Starke and Williams, JJ. seem to have founded their judgments on the broad basis of the tracing principle while Rich, J., supported by Dixon, J., laid more emphasis on the continuing identity of the trust fund following the decision of the Court of Appeal in *Re Payne*[11] (hereinafter to be considered). Latham, C.J., dissenting, rejected both *Re Payne* and the tracing principle, and insisted — a view which has found no followers — that duty could be levied only on the original subject-matter of the gift to the extent that it remained in existence *in specie* at the date of death.

These cases were reviewed by Fullagar, J. in his recent decision in *Elder Trustees and Executors Co. Ltd.* v. *Federal Commissioner of Taxation*[12] where his Honour held that the original amount of a gift of money was dutiable, thought the money had been spent in reduction of a debt. His Honour treated the benefit derived from the reduction of the debt as an asset into which the money could be traced. He accepted the tracing principle as settled law, but gave it a novel application to overcome, at least partially, the grave defects of that view which tended to punish the cautious investor and favour the prodigal.

Contrary to the "tracing" view treated as settled law in the above case, the British Courts had held that it was the original subject-matter of the gift which should be valued at the time of death. This principle is best exemplified in the decision of the Court of Session in *Lord Strathcona* v. *Lord Advocate*[13] regarding a gift of certain shares which had been sold by the donee. Though at the date of the donor's death the donee possibly might have held assets representing the proceeds of sale, the Court nevertheless held that duty was payable on the value of the original shares at that date, Lord Sands saying[14]: ". . . the property

[4] See *A.G.* v. *McLeod* (1891) A.C. 451.

[5] But see dissenting judgment of Latham C.J. in *Vicars* v. *Commissioner of Stamp Duties (N.S.W.)* 71 C.L.R. 309, *infra.*

[6] (1948) 77 C.L.R. 184.

[7] *Id.* at 188.

[8] (1941) 65 C.L.R. 134.

[9] *Id.* at 141.

[10] (1945) 71 C.L.R. 309.

[11] (1940) Ch. 576.

[12] (1953) 88 C.L.R. 200.

[13] (1929) S.C. 800.

[14] *Id.* at 807 later approved by the Privy Council in *A.G. for Ontario* v. *National Trust*

donated should be treated as if no donation had been made, and the property in question had remained part of the deceased's estate and had actually passed upon his decease". Certain difficulties were envisaged by their Lordships as regards the valuation of property which had in the intervening years been destroyed or had deteriorated such as the case of a race-horse valuable at the time of gift, but useless for racing at the date of the donor's death. Lord Clyde's view was that one had to value the race-horse by estimating the price of just such a valuable young horse as formed the subject of the gift if such valuable young horse was sold at the date of death.[15] Lord Sands on the other hand felt that the actual horse now grown old must be valued as at the date of death.[16] The Court was generally of the opinion that it should not be taken into consideration what the donee had done with the property in the meantime.

The above case dealt with out-and-out gifts, but in *Re Payne*[17] the Court of Appeal had to consider the question of a settled gift. In that case the donor had settled a sum of money, which was immediately invested by the trustees in company shares which considerably increased in value. The Court held that the duty should be assessed on the value of the shares at the date of death of the donor, each of the Lord Justices however taking a different line of approach. Scott, L.J. took the view that the property passing by the trust deed was not the money, but the trust fund "with its continuing though changing character",[18] and that the gift was not a gift of money, but of "the totality of equitable rights in the beneficiaries", the essence of these rights being the power of the beneficiaries to "require the trustees to administer the trusts in accordance with the declaration".[19] Verbally, Scott, L.J. did not deviate from the principle laid down in *Lord Strathcona's Case*, for he treated the trust fund as "the property", though at the same time he adopted the tracing principle in order to determine the contents of the property. Clauson, L.J. based his judgment on certain special statutory provisions and Luxmoore, L.J., while expressly disagreeing with Scott, L.J.'s judgment, came to the same conclusion on a special finding of fact to the effect that the gift was one of patent rights and not of money and that the shares, having been bought with the proceeds of the sale of these patent rights, were caught by the statutory definition of "property", which includes the proceeds of sale of property and any investment representing such proceeds of sale.

Scott, L.J.'s judgment, though it could not be said to constitute the final *ratio decidendi* of the case, was quoted by the Australian High Court in *Teare's Case* and *Vicars' Case* in support of the tracing principle accepted in Australia both in regard to trust funds and other kinds of gift. Only Latham, C.J. in his dissenting judgment in *Vicars' Case* pointed out that it was difficult to regard *Re Payne* as authority for any proposition having regard to the divergent reasoning of the members of the Court.

An attempt to extend the application of the tracing principle beyond settled funds was rejected by the Court of Appeal in *Attorney-General* v. *Oldham*[20], which expressly affirmed *Lord Strathcona's Case*. It can be said that when *Sneddon* v. *Lord Advocate* came to be decided by the House of Lords, the principle of *Lord Strathcona's Case* was of general application in Britain with the possible exception of settled funds. And verbally, as has been mentioned above, even settled funds were dealt with by Scott, L.J. on the basis at any rate, of the theory of *Lord Strathcona's Case*.

The facts in *Sneddon* v. *Lord Advocate* were similar to those in *Re Payne, Teare's Case* and *Vicars' Case*. The settlor, in 1946, granted by a voluntary trust deed operating as an immediate gift *inter vivos* the sum of Five Thousand Pounds, the trustees to hold and apply it "or investments representing the same"

Co. Ltd. (1931) A.C. 818.
[15] *Id.* at 806.
[16] *Id.* at 809.
[17] (1940) Ch. 576.
[18] *Id.* at 569.
[19] *Id.* at 589.
[20] (1940) 2 K.B. 485.

for the benefit of certain limited interests. The trust deed gave the trustees wide powers of investment, which they used to purchase certain shares to the value of Five Thousand Pounds.

As at the time of death of the settlor in 1948, within five years from the date of gift, these shares had increased in value to £9,250, the question then arose whether duty was to be assessed on £5,000, being the amount of the settlor's cheque, or on £9,250, being the value of the shares as at the date of death of the settlor. The Crown naturally relied in its argument mainly on the judgment of Scott, L.J. in *Re Payne*, claiming that the gift was a gift of the trust fund which was now constituted by the shares.

The House by majority with Lord Keith dissenting, rejected the *dicta* of Scott, L.J. holding that there was no reason why settled gifts should be treated as an exception to the well-established rule of *Lord Strathcona's Case*. Lord Reid as well as Lord Morton stated that such an exception would be more in the public interest, but both stressed the wording of the relevant statute[21] which speaks of "property taken". And as Lord Morton pointed out the term "property taken" could only refer to the property which passed from the settlor and was taken by the trustees from the settlor, i.e. the cheque for £5000. The opposite view that the words "property taken" referred not to the property actually passing from the donor to the trustees, but to the mere right of the beneficiaries to require proper administration of the trust was too artificial a construction of the statute to be upheld. Lord MacDermott in his judgment said also that a trust fund was not "property" in the ordinary sense of the word and the statute did not require a different meaning nor did it make a difference between out-and-out gifts and settled gifts. Even Lord Keith in his dissenting judgment followed the reasoning of Clauson, L.J. in *Re Payne* rather than that of Scott, L.J. As a result *Re Payne* must now be regarded as completely overrruled, for even Luxmoore, L.J.'s judgment in that case was rejected by Lord Reid. The effect in Britain is to establish without qualification the rule that the original property given should be valued as at the date of death of the donor notwithstanding the fact that it has been squandered or converted into other less or more valuable property in the meanwhile.

It seems likely that the Australian Courts will now follow the House of Lords decision and reverse their previous approach. An indication of this is given in a footnote to the end of the report of *Elder Trustees and Executors Co. Ltd.* v. *Federal Commissioner of Taxation*, where Fullagar, J. wrote[22] that if he had been aware of *Sneddon's Case* at that time he would have come to the same conclusion by a shorter route, and his Honour suggested that *Teare's Case* was now no longer good law. It would seem, indeed, that not only *Teare's Case* but also *Watt's Case* and all other decisions based thereon may have to be reviewed, insofar as the High Court may follow House of Lords decisions in preference to its own. If this is correct *Sneddon's Case* has, apart from statutory provisions in New South Wales, dealt a death blow to the principle of continuity of gifts and done away with the anomalous position in Australia setting a premium on dissipation.

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IS A VIEW EVIDENCE ?

SCOTT v. *SHIRE OF NUMURKAH*

Is a view evidence? To this question Dean Wigmore[1] returns an emphatic

[21] Finance Act, 1894, 57 and 58 Vict. c. 30, s. 2 (1) (b) of which provides, read in conjunction with s. 2 (a) of the Customs and Inland Revenue Act, 1881, 44 and 45 Vict. c. 7, that property passing on the death of the testator shall be deemed to include *inter alia* "any property taken under a voluntary disposition purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been made five years before the death of the deceased".

[22] (1953) 88 C.L.R. 200 at 214.

[1] Wigmore, *On Evidence* (3 ed. 1940) 254 ff.