Principles of Disclaimer of Gifts

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There are many circumstances in which a person may wish to reject (or 'disclaim') a proffered gift. This article considers the nature, requirements for, and the legal consequences of an effective disclaimer. It will be seen that these elements vary according to the nature of the gift and the type of property comprising it, and in particular whether the gift operates at common law, in equity by way of trust, or under the provisions of a will. The article aims to identify the general principles of law applicable to these situations.

IT is basic law that a person cannot, in any circumstances, be forced to accept a gift of property unwillingly. The general principle is that, unless and until a donee has assented to a gift, it may be rejected.[1] The rejection of a proffered gift is called a disclaimer: to disclaim is 'to renounce all claim to it or refuse to accept it'.[2] The law, however, presumes a donee's assent until disclaimer. The principle of presumed assent is, of course, 'artificial, but [it] is founded on human nature'.[3] A donee may reasonably be presumed to assent to that to which he or she in all probability would assent if the opportunity existed.[4]

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1. This article is concerned with principles of law affecting voluntary dispositions of all kinds, whether inter vivos or testamentary, whether of realty or personalty, and whether effective at common law or in equity. This raises an issue of terminology. Rather than adhere to the conventional 'gift' for an inter vivos disposition operating at common law, 'legacy' or 'devise' and 'testator' and 'beneficiary' in respect of a will, and 'settlor' and 'beneficiary' in respect of an inter vivos trust, consistency of style has suggested the words 'gift', 'donor' and 'donee' for all these types of disposition, and this style has largely been adopted. It has been departed from on a few occasions due to considerations of clarity.
2. W Jowitt *Dictionary of English Law* 2nd edn (London: Sweet & Maxwell, 1977) 620-621.
3. *Halsbury's Laws of England* 3rd edn (London: Butterworths, 1937) vol 18, 389 ¶ 740.
4. Ibid.

These principles were affirmed by Latham CJ in *Cornell's* case:

> An estate cannot be forced on a man .... He is supposed to assent to it, until he does some act to show his dissent. The law presumes that he will assent until the contrary be proved; when the contrary, however, is proved, it shows that he never did assent ... and ... that the estate never was in him.[5]

There are in fact many reasons why a donee, instead of accepting a gift of unwanted property and converting it into money by sale, might wish not to accept it at all. Disclaimer will usually occur for one of two quite different kinds of reasons: those attributable to financial considerations and those based on principle or sentiment.

Disclaimer due to financial considerations may occur where a gift carries onerous conditions, as where its acceptance would entail uneconomic payments to a third party;[6] where a lease containing unperformed onerous covenants is expiring;[7] where shares in a failing company are not fully paid-up;[8] where the property is an interest in a failing or debt-ridden partnership; where disclaimer is desirable for taxation reasons;[9] or pursuant to a contract between parties affected by the terms of a will or settlement.[10]

Disclaimer due to considerations of principle or sentiment may occur where the subject-matter of a gift represents an asset or source of wealth of which the donee disapproves;[11] where money intended as a gift will only be accepted as a loan;[12] where the donee has quarrelled with, or disapproves of, the donor;[13] where acceptance of the gift could lead to a family dispute; or where the donee is bankrupt and wishes to avoid the property passing to creditors.

Whatever the reason or motive, an effective disclaimer will operate in law to defeat the donor's intention to give the property to that donee under the terms of

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5. *FCT v Cornell* (1946) 73 CLR 394, 401, citing with approval *Townson v Tickell* (1819) 3 B & A 31, 38; 106 ER 575, 577 (Holroyd J). See generally as to disclaimer: *Re Stratton's Disclaimer* [1958] Ch 42; *Re Wimperis* [1914] 1 Ch 502; *Siggers v Evans* (1855) 5 El & Bl 367; 119 ER 518 where the older authorities are reviewed, especially *Townson v Tickell* supra; *Thompson v Leach* (1690) 2 Vent 198; 86 ER 391; *Butler and Baker's Case* (1591) 3 Co Rep 25a; 76 ER 684; *Sheppard's Touchstone* 7th end (1820) 452. As to disclaimer of equitable interests: *Lady Naas v Westminster Bank Ltd* [1940] AC 366; *J W Broomhead (Vic) Pty Ltd (in liq) v JW Broomhead Ltd* [1985] VR 891; as to interests under a discretionary trust: *Re Gulbenkian's Settlements (No 2)* [1970] Ch 408.
6. *Re Hodge* [1940] Ch 260; *Rees v Engleback* (1871) 12 Eq 225; *Gregg v Coates* (1856) 23 Beav 33; 53 ER 13; *Countess of Bective v FCT* (1932) 47 CLR 417.
7. *Talbot v Earl of Radnor* (1834) My & K 252; 40 ER 96; *Re Sitwell* [1913] WN 261.
8. *Re Paradise Motor Co Ltd* [1968] 2 All ER 625.
9. *Re Stratton's Disclaimer* supra n 5.
10. *Re Gulbenkian's Settlements (No 2)* supra n 5.
11. *Re Stratton's Disclaimer* supra n 5, Jenkins LJ 57.
12. *Dewar v Dewar* [1975] 2 All ER 728; *Hill v Wilson* (1873) LR 8 Ch App 888.
13. *Re Moss* (1977) 77 DLR (3d) 314; *Re Young* [1913] 1 Ch 272.

the particular disposition in question. This article considers the principles of law governing, and the principle consequences of, an effective disclaimer of a gift. It is not concerned with particular modes of making gifts nor with the legal requirements for vesting title to property in a donee.

NATURE AND EFFECT OF A DISCLAIMER

Considered in the abstract it might be said that a threshold question arises in respect of any gift, be it inter vivos or testamentary, and regardless of the nature of the property, namely whether the donee's assent, expressly or by implication, is a necessary precondition of effective donation. If the answer to this question is Yes, then any discussion as to disclaimer of gifts must not only be unnecessary but wholly misconceived. If the donee has not assented, so it would appear, there can be no gift at all; and if the donee has assented, there can be no subsequent disclaimer, assent being not only a necessary condition but also a sufficient condition of donation on the donee's part.

In the civil law, and in modern systems derived from it, a donee's assent, either expressly or by implication, is generally a necessary precondition of donation: any gift is a bilateral transaction and is akin to a contract. Unless the donee has assented there can be no transfer of ownership from donor to donee in the subject-matter of the gift.[14]

There is ample authority in English and Australian law for the view that a gift is indeed fundamentally a bilateral transaction, and that —

> in order to make out a gift, it must be shewn, not only that [it was given] as a gift, but that it was received as a gift. It requires the assent of both minds to make a gift as it does to make a contract.[15]

This view of the law, however, does not necessarily mean that the donee's assent is an essential condition precedent to donation. It could equally mean that, although transfer of ownership may occur without the donee's assent, the gift must at least always be subject to a condition subsequent, namely the donee's non-disclaimer. The 'assent of both minds', to which Mellish LJ referred in *Hill v Wilson,* would arise from the donee's failure to disclaim, which would in itself sufficiently show the donee's assent.

From time to time appellate courts have compared gift to contract.[16] The proper view, it is suggested, is that in our law, although a gift may be assented to or

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14. See eg Code Civil, arts 775, 894, 931.
15. *Hill v Wilson* supra n 12, Mellish LJ 896.
16. Eg *Re Stratton's Disclaimer* supra n 5, Jenkins LJ 51; *Townson v Tickell* supra n 5, Bayley J 577.

disclaimed, it does not entail something like a contractual offer. The legal significance of the latter is that, so long as it exists, it creates the power of acceptance; but that is all. A gift, on the other hand, may be complete in and of itself, subject to disclaimer. It gives rise to something more like a binding option,[17] in that the donor, having made the disposition, is bound by it unless the donee disclaims.

In 1885 in *Standing v Bowring*[18] the Court of Appeal in effect had to decide whether the civil law doctrine of assent to gifts is part of English law. The plaintiff had placed title to certain legal choses in action in the joint names of herself and the defendant, her nephew, who knew nothing of the transaction. The plaintiff's intention was to give the securities to the defendant beneficially if he survived her, retaining for herself the right to the dividends for life. She later asked the defendant to re-transfer the securities into her name alone. The defendant refused. The plaintiff relied on the old but leading case of *Townson v Tickell*,[19] a case still cited as a seminal authority on the law of disclaimer, in which four members of the Court of King's Bench, adopting somewhat different positions on the question of assent, appeared to favour the civil law. It was held in *Standing v Bowring* that the absence of the defendant's knowledge and assent to the transfer of title into his name was immaterial, and that, the transfer having been intended as a gift to the defendant, beneficial title to the property was vested in him subject to his right of disclaimer. Lord Halsbury said:

> If the matter were to be discussed now for the first time, I think it might well be doubted whether the assent of the donee was not a preliminary to the actual passing of the property.[20]

Cotton LJ said:

> Where there is a transfer of property to a person, even though it carries with it some obligations which may be onerous, it vests in him at once before he knows of the

17. *Re Parsons* [1943] Ch 12; *Re Stratton's Disclaimer* supra n 5, 54. The analogy between a gift and a binding option is not, however, exact. An option creates the contract to which it relates only if exercised; assent to a gift is presumed, subject to disclaimer.
18. (1886) 31 Ch D 282.
19. Supra n 5, 576-577. In this case Abbott CJ appeared to consider that English law was similar to the civil law. He affirmed the general principle of disclaimer as follows:
    > The law certainly is not so absurd as to force a man to take an estate against his will. Prima facie, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is so given. Of that, however, he is the best judge, and if it turn out that [he] does not consider it beneficial, the law will certainly, by some mode or other, allow him to renounce or refuse the gift.

    Bayley J thought 'the devise to be nothing more than an offer which the devisee may accept or refuse, and if he refuses, he is in the same situation as if the offer had never been made'. Holroyd J considered that 'the law presumes ... assent until the contrary be proved'.
20. *Standing v Bowring* supra n 18, 286.

> transfer, subject to his right when informed of it to say, if he pleases, 'I will not take it'. When informed of it he may repudiate it, but it vests in him until he so repudiates it.[21]

Lindley LJ said:

> Our ... law [in contrast to the civil law] as to the necessity of assent to gifts seems settled ... [T]hat although a donee may dissent from and thereby render null a gift to him, yet ... a gift to him of property, whether real or personal ... vests the property in him subject to his dissent.[22]

The rule in *Standing v Bowring* operates in two different situations, leading to two different kinds of consequences. The first is where title to the subject-matter of an intended gift has not been transferred into the name of the donee; the second is, like *Standing v Bowring* itself, where title has been so transferred. The cases require separate treatment.

TITLE NOT VESTED IN THE DONEE

There is no doubt that a donee may effectively disclaim a proposed gift prospectively. If an intended donee, learning of the donor's intention, disclaims the gift in advance then that would, in the normal course, sufficiently rebut the presumption of assent and operate to defeat the gift. It would answer the description of 'some act to show his dissent' to which Latham CJ referred in *Cornell's* case.[23] There seems no legal reason why this act cannot precede the gift. If the donor went ahead, in spite of the disclaimer, and succeeded in placing title to the property in the name of the donee, then although the donee might well own the property at law for the time being, he would not own it in equity. The means by which a disclaimer so operates, and the consequences of this, are considered below.[24]

Next, suppose the case of a testamentary gift. Unless the donee has disclaimed prospectively, there will necessarily be some interval of time between the testator's death and the donee's disclaimer. Does the disclaimer operate retrospectively, and if so, with what effect? In *Re Stratton's Disclaimer*[25] it was argued that a disclaimer negatives the presumption of assent ab initio, not from the time of the disclaimer, and therefore that a disclaiming party is in all respects as though he never had any right at all to the property in question: '[D]isclaimer means the refusal of a proffered gift and [its] effect is that the presumption of assent to the gift originally made by

21. Ibid, 288.
22. Ibid, 290.
23. Supra n 5, 401.
24. Infra pp 70-74.
25. Supra n 5.

the law was wrong and was *always* wrong'.[26] The Court of Appeal rejected this argument. It was held that the true position is that, although disclaimer causes a cesser of the gift from the time of disclaimer, this does not mean that the disclaiming donee has no rights with respect to the gift up until that time. For example, the donee would have been competent to dispose of interests in the property prior to disclaimer. Such a disposition would, of course, indicate assent to the gift.

Unless the deceased's executor has actually assented[27] to, say, a legacy and has transferred title into the name of the donee (which would, of course, make it a *Standing v Bowring* type of case) the donee's disclaimer will constitute an 'extinguishment'[28] of pre-existing rights with respect to the property in question. It will also extinguish, it is suggested, the equitable chose in action which the donee has against the executor while the estate remains unadministered. Thus, it can be said that before *title* vests in the donee a disclaimer operates to extinguish such equitable choses in action as may exist from time to time with regard to the intended gift.

In these cases, then, the disclaimer certainly has a de jure operation. This is in addition to its probable de facto operation of deterring the executor from actually transferring the property into the donee's name, in spite of the disclaimer, where this can be done without the donee's assent. The de jure operation, in the case of a testamentary gift, would be not only to extinguish the donee's rights, but also to activate (albeit not to confer) rights to the relevant property upon the residuary beneficiaries or next-of-kin, as the case may be. The question whether such a disclaimer constitutes a *disposition* of property in favour of these persons is considered below.

LEGAL TITLE VESTED IN THE DONEE

Here we confront the full effects of the rule in *Standing v Bowring*, bearing in mind that it is relevant whenever it is found that title to the subject-matter of an intended gift is vested in the donee. These are cases where title has passed either at common law or pursuant to a statute.

As we have seen, the rule in English and Australian law is that where a donee's assent to a gift is not express, or implied by conduct, then that assent will be

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26. Ibid, Russell QC, 45 arguendo.
27. The doctrine of assent by a deceased's personal representative to assets in the estate prior to their distribution to persons beneficially entitled must not be confused with the question of a donee's assent to gifts. The two doctrines are quite separate and distinct, the one forming part of the law relating solely to the administration of estates of deceased persons, the other to donees generally.
28. *Re Stratton's Disclaimer* supra n 5, Jenkins LJ 55.

presumed, subject always to the donee's right to disclaim.[29] This means that a non-assenting donee who wishes to disclaim presently-vested rights to property cannot merely remain passive. Positive action is required. A disclaimer must be effectively made. The case is not like that of a contractual offer which lapses unless it is accepted: on the contrary, unless there is an effective disclaimer the gift will be complete, the donor will retire from the scene and the donee will be fixed with the full consequences of property ownership.

Where title is in the donee two matters additional to those governing an effective disclaimer require consideration: first, the form, and secondly, the consequences of disclaimer. The two are closely related. Put shortly, the real question is: does the disclaimer operate to divest, or dispose of, the donee's title in cases of the *Standing v Bowring* type or is the situation susceptible of some other analysis? If disclaimer operates as a divestiture or disposition the question is, what title does it divest or dispose of? An equity lawyer would tend to ask a further question, namely whether in cases other than those of beneficial title to trust property being in the donee, an intended gift carries with it the entire legal and beneficial interest, or whether, pending acceptance by non-disclaimer, it carries only a bare legal title.

In *Re Paradise Motor Co Ltd*[30] the Court of Appeal had to consider whether an oral disclaimer of a gift of company shares was ineffective for non-compliance with legislation derived from section 9 of the Statute of Frauds 1677.[31] The legislation would apply if the disclaimer constituted 'a disposition of an equitable interest or trust subsisting at the time of the disposition'. The court disposed of this significant question merely by holding that 'a disclaimer operates by way of avoidance, and not by way of disposition'.[32] There was no further discussion of the problem.

The learned authors of Meagher, Gummow and Lehane *Equity: Doctrines and Remedies*[33] suggest that one implication of this decision is that the title to the shares enjoyed by the donee was a bare legal title only: '[T]he beneficial interest would vest in the donee only when, having become aware of the gift, he failed to disclaim it'.[34] If this were not so, and the title to the shares carried the beneficial

29. Supra pp 65-66.
30. Supra n 8.
31. The relevant provision is found in Australian State statute law as follows — NSW: Conveyancing Act 1919 s 23C; Vic: Property Law Act 1958 s 53(1)(c); Qld: Property Law Act 1974 s 9; WA: Property Law Act 1969 s 34(1)(c); SA: Law of Property Act 1936 s 29(1)(c); Tas: Conveyancing and Law of Property Act 1884 s 60(2).
32. *Re Paradise Motor Co Ltd* supra n 8, 632. See also *Re Stratton's Disclaimer* supra n 5, Jenkins LJ 54.
33. RP Meagher, WMC Gummow & JRF Lehane *Equity: Doctrines and Remedies* 3rd edn (Sydney: Butterworths, 1992) ¶¶ 749-750.
34. Ibid, ¶ 750.

interest, the disclaimer could, at best, only vest equitable title in the donor because the donee remained at all relevant times their registered legal owner. This would squarely raise the question whether the statutory provisions governed the form of the disclaimer. The learned authors also point out that this view of the donee's title is difficult to reconcile with one of the most basic of equitable doctrines, namely that an owner of property (here, the donor) does not own both a legal and an equitable interest in the property. He simply owns the property.[35] Equity will, of course, call into existence its own estates and interests where this is necessary to give effect to its doctrines[36] — for example, under the law of trusts. But it must be questioned whether there is anything in the law of trusts which suggests that a trust of any kind arises when an intending donor causes title to property to be placed in the name of the donee.

An evident intention to make a gift by simple transfer of title to the donee can surely have no meaning other than that the donor intends to give the donee the entire beneficial interest in the property. How, then, can it be said that in a case like *Re Paradise Motor Co Ltd,* or indeed in *Standing v Bowring* itself, the donee has a bare legal title pending a failure to disclaim and is, until that point is reached, a trustee for the donor? The donor's intention being merely to make a gift at common law by simple transfer of title, the case cannot be one of express trust. Nor can it be one of resulting trust: the evidence would rebut the presumption of resulting trust that might otherwise apply. The case is not one of constructive trust: the parties, one presumes, are not in a fiduciary relationship; there is no breach of fiduciary duty, no unconscionable conduct.

It is suggested that this type of case is correctly analysed as follows. By placing title to property in the donee's name the donor intends an immediate gift of the property, without distinction between legal and beneficial interests. There is, therefore, no trust of any kind arising *out of the transfer of title.* But the voluntary transfer of title is, like any gift, subject to an essential condition of donation, namely non-disclaimer by the donee. This condition is an integral part of any gift, so that the gift cannot be made at all should the donee disclaim. It follows that disclaimer itself cannot divest or dispose of a separate beneficial title. There is none to divest: it did not exist in equity previously and disclaimer cannot, in and of itself, call it into existence. Disclaimer does not create an express trust. It follows, further, that a disclaimer is not a disposition of any kind, and therefore it does not attract the operation of legislation derived from section 9 of the Statute of Frauds.

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35. *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431, especially Aickin J 463-464.
36. *Burns Philp Trustee Co Ltd v Viney* [1981] 2 NSWLR 216, Kearney J 223-225; *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694, 712.

Of course, in a *Standing v Bowring* type of case, the fact that title resides in the donee means that from (but only from) the moment of disclaimer equity will, for its own purposes, say that a trust exists simply because, following an abortive gift, legal title to property is found to reside in somebody other than the real owner. This is a resulting trust. It arises 'at the very moment' of effective disclaimer, as Aickin J said in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)*.[37] Being a resulting trust it is, of course, exempt from any formal requirements by sub-section 2 of the legislation. This trust is, it is further suggested, a bare trust. The donee, being the mere repository of legal title by force of the disclaimer has, subject to what appears below, no duties to perform other than to re-transfer title to the donor, and the duty to comply with court orders made to secure execution of whatever documents may be necessary for this purpose.

What is the position between the time of vesting of title in the donee and the time of disclaimer? It is suggested that the property belongs entirely to the donee, as the donor intended, and that during this time the donee enjoys the benefits and bears the burdens. If income has been received it is entirely the donee's property. This is precisely why the law ordinarily says that immediately a donee elects to accept the benefits of a gift then assent has been given to the gift itself. Of course, the donee may merely have *received* income or other benefits without having *accepted* them beneficially. This could certainly make the donee a trustee.[38] It is, in a given case, a question of fact. If the facts show that the donee can still disclaim, then benefits received but not accepted by the donee belong to the donor in equity.

How, exactly? Where such benefits received are in the donee's name they will be held on a resulting trust for the donor; where they are not, then it is suggested that, by disclaiming the gift, the donee has a fiduciary duty, enforceable in equity, to account to the donor for assets received. The assets are trust property; and this trust is a constructive trust, carrying with it all the normal incidents of such a trust. It has nothing to do with the terms of the gift or with any supposed duality of title existing prior to the moment of disclaimer. There is no such duality. It means, simply, that by electing to disclaim the donee has become accountable to the donor in equity.

EQUITABLE TITLE VESTED IN THE DONEE

Is the situation different if the donee's title to the property is equitable? Suppose the donee learns that he or she is the sole beneficiary of a fixed trust and,

37. Supra n 35.
38. *Re Hodge* supra n 6.

being of full age and capacity, is absolutely entitled to the property in equity. In such a case the donee does not merely have an equitable chose in action against the trustee but has equitable title to the trust property itself.[39]

Does the foregoing analysis apply here? It is suggested that it does not. It is quite unnecessary. In the *Standing v Bowring* type of case we are dealing with legal title 'placed' or registered in the donee's name. The essential point is that the donor cannot recover the property without the donee's co-operation. The case of equitable title, on the other hand, is much more akin to that of a testamentary gift, out of which, indeed, equitable title may well arise.

It seems that equitable title to property is, simply, 'extinguished'[40] by disclaimer. The disclaimer, as has been seen, is not a disposition and therefore does not attract the legislation derived from section 9 of the Statute of Frauds. There are, in fact, no formalities required. The effect of disclaimer is that, equitable title under the express trust having been extinguished, it must be concluded either that the trust, insofar as the donee is concerned, is now a nullity[41] or else that it has become impossible of performance vis-à-vis the donee and is now void for that reason. In either case the express trust is at an end so far as the trustee's relationship with the donee is concerned. The trustee (unless it be the settlor in person) now holds the disclaimed property on a resulting trust.

GIFTS OF CHOSES IN ACTION— A SPECIAL CASE?

Is it possible for a donor of a chose in action to assign the chose effectively to an unwilling donee? If so, what are the requirements for disclaimer?

Legislation derived from section 25(6) of the Judicature Act 1873 (UK)[42] typically provides that an assignment of 'any debt or other legal chose in action' made in accordance with its terms 'is effectual in law' to transfer the legal right to the chose in action to the assignee as from the date when written notice of the assignment is given to the person liable. There is ample authority for the view that, despite its merely declaratory terms, this statutory mode of assignment is mandatory

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39. HAJ Ford & WA Lee *Principles of the Law of Trusts* 2nd edn (Sydney: Law Book Co, 1990) ¶¶ 148, 149. In most discretionary trusts, a member of the class of objects has no equitable title to the trust property: *Gartside v IRC* [1968] AC 553; *Re Weir's Settlement Trusts* [1971] Ch 145.
40. See supra n 28.
41. *Standing v Bowring* supra n 18, Lindley LJ 290.
42. The relevant provision is found in Australian State statute law as follows — NSW: Conveyancing Act 1919 s 12; Vic: Property Law Act 1958 s 134; Qld: Property Law Act 1974 ss 199-200; WA: Property Law Act 1969 s 20; SA: Law of Property Act 1936 s 15; Tas: Conveyancing and Law of Property Act 1884 s 86.

in respect of the assignments to which it applies.[43] In addition, the High Court has held that the legislation applies to assignments of equitable choses as well as to legal choses.[44]

There is nothing in the legislation requiring the donee-assignee's assent to, or acceptance of, an assignment. Its terms plainly state that by compliance with them a donor-assignor can cause ownership of the chose in action, whether it be an ordinary common law debt or a claim in equity against a trustee, to become vested in the donee. What is the form required for, and what is the effect of, a disclaimer by the donee? Does the legislation make this a special case?

A proper assignment is declared to be 'effectual in law'. It is suggested that either the legislation cannot have been intended to have this effect in the event of an otherwise effective disclaimer or, alternatively, that its formality requirements do not apply to a disclaimer of an assignment. In the first case the legislation would be read in the light of its history and the mischief to which it was originally directed. It was primarily meant to provide, for the first time, a simple and comprehensive legal means for assignment of choses in action. It was not intended to change the fundamentals of the law relating to gifts. That is why it is couched in declaratory terms. On this construction, a disclaimer would make a purported assignment a nullity as from the time of disclaimer, and would relate back to the time of the notice given to the person liable. In this case the assignment would not be 'effectual in law' at all. On the other hand, if these words are applied literally then the question arises as to the form required for an effective disclaimer.

It seems absurd that a disclaiming donee-assignee, in order to reject the proffered gift of a chose in action, must go through the prescribed form in order to re-assign to the donor. This could lead to an indefinite game of legal tennis between donee and donor where neither wished to own the chose, each assigning to the other in turn. It is suggested that by far the preferable approach here is to regard the legislation historically (ie, as facilitative only) in the case where a donee-assignee disclaims and as impliedly requiring assent to a voluntary assignment. On this construction, the disclaimer prevents the 'effectual' assignment of a chose in action at all. The law of gifts applies, not the literal words of the legislation. If this be correct it follows that there are no formalities applicable to an effective disclaimer of a voluntary assignment of a chose in action under the legislation, any more than to any other disclaimer.[45] It also follows that, from the time of disclaimer, the purported assignment is a nullity.

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43. *Olsson v Dyson* (1969) 120 CLR 365; *Norman v FCT* (1963) 109 CLR 9, especially Windeyer J; Meagher et al supra n 33, ¶¶ 609-620.
44. *FCT v Everett* (1979) 143 CLR 440, Barwick CJ, Stephen, Mason and Wilson JJ 447.
45. See infra pp 79-80.

What, then, if the party liable has already paid the disclaiming assignee? It seems there is no difference between this case and that considered at page 73 above. Usually, of course, acceptance of payment will imply assent to the assignment and will preclude disclaimer. But if there has been no acceptance, so that the disclaimer may be effective, then moneys received will be held upon the constructive trust previously identified.[46]

If the foregoing be correct, it follows that assignments of choses in action are not a special case merely by reason of the legislation and that their disclaimer can proceed in accordance with general principle.

EFFECTIVE DISCLAIMER

When will a disclaimer be legally effective? Occasions for disclaimer may raise this fundamental issue in three different situations: first, where disclaimer is asserted by a donee wishing to avoid the gift; secondly, where it is asserted by a donor wishing to repent the gift; thirdly, in testamentary cases, where it is asserted by a residuary beneficiary, or next-of-kin, wishing to obtain the property the subject of the gift. In each situation equally, the question is whether the disclaimer is legally effective to rebut the presumption of the donee's assent. To have this effect a disclaimer must, it is submitted, satisfy three basic criteria: it must be timely; it must be peremptory; and it must be communicated. These require separate consideration.

Disclaimer must be timely

The act of disclaimer must generally occur before any act constituting assent to a gift.[47] Once the latter has occurred it is too late to disclaim. Assent may be shown in various ways; but it will in general be indicated by acts showing acceptance of beneficial ownership of the property or, alternatively, by acceptance of particular benefits flowing from it.[48] One cannot approbate and reprobate a gift: the burden goes with the benefit.

In *Re Hodge* the plaintiff was the devisee of dwelling house properties under his wife's will, and her residuary beneficiary. He was also her executor. The devises were conditional upon his paying an annuity to a third party. The income from the properties was insufficient for this purpose, but for a period of six years he dutifully paid the annuity making up the deficit out of his own funds. He then

46. Supra p 73.
47. See, however, the discussion at infra pp 80-82.
48. *Bence v Gilpin* (1868) LR 3 Ex 76; *Re Hodge* supra n 6.

wished to disclaim the devises, saying he had merely been dealing with the properties as executor, not as beneficiary. It was held that it was too late for him to disclaim. He had had six years in which to do so. His conduct showed that he had really assented to the gift. This case shows, first, that assent may be by conduct; secondly, that acceptance of a benefit may well constitute assent to the gift; and thirdly, that actual elapsed time can be a significant factor relevant to the presumption of assent. A period of six years, in respect of a relatively small deceased's estate, can be an unduly long time.

Where disclaimer is asserted, not by a donee wishing to avoid a gift, but by a donor wishing to repent it, or by a third party wishing to obtain the property, then somewhat different considerations apply. Here the assertion of disclaimer is made to obtain, in effect, a retraction of the gift. Clearly, the disclaimer must be positively proved by the asserting party. But in addition the law says that the donee, in intending to disclaim, must have had at least reasonably full and proper knowledge of the interest alleged to have been disclaimed.

The leading case is the decision of the House of Lords in *Lady Naas v Westminster Bank Ltd*[49] in which property had been settled on the appellant by a deed to which the appellant was named as a party but which she had never executed. The settlor later alleged that the settlement was ineffective and that in any event the appellant had disclaimed the benefits which it conferred. It was held that the settlement was effective. The case is interesting because it is an example of equitable title residing in a donee in circumstances broadly analogous to those of *Standing v Bowring* in respect of legal title. For present purposes, however, the point of the case is that the House of Lords affirmed that where disclaimer is asserted by a donor (or third party) then, as Lord Wright said, disclaimer must be 'fully proved by the party alleging it, who must also establish that it was made with full knowledge and with full intention'.[50]

These principles may be restated as follows. Where a donee asserts disclaimer, mere silence or inactivity will not be sufficient: there must be 'some act to show his dissent'.[51] Where a donor or third party asserts disclaimer, on the other hand, it must be shown not only that the donee had 'full intention' to disclaim, but that this intention was informed by 'full knowledge' of the property interest alleged to be disclaimed. This is because the asserting party is seeking to obtain for himself or herself property which presumably belongs to the donee. *In Lady Naas v Westminster Bank Ltd* the assertion was that the equitable interest had been

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49. Supra n 5.
50. Ibid, 400.
51. *FCT v Cornell* supra n 5, Latham CJ 401; *Lawson v Lawson* (unreported) NSW Sup Ct 18 Nov 1997.

disclaimed by deed, a solemn act of disclaimer. The heavy burden of proof laid down by Lord Wright seems too widely expressed to apply to less formal disclaimers. In the same case Lord Russell of Killowen said that in this type of case 'disclaimer can only be made *with knowledge* of the interest alleged to be disclaimed, and with an intention to disclaim it'.[52] In *Re Paradise Motor Co Ltd*[53] Danckwerts LJ, referring to the judgment of Pennycuick J in the same case, said that it must be shown that the donee had 'reasonably full information'[54] about the gift. The latter seems to be the correct principle.

Disclaimer must be peremptory

An effective disclaimer must constitute an absolute rejection of the gift. It must evince a final and non-negotiable refusal to accept the property which the donor proffers. It must be 'simple':[55] it must not purport to do anything other than disclaim.[56] The reason is that a qualified disclaimer might well constitute a form of assent to the gift. A disclaimer must not purport to dispose of the property in some other way, such as by release. It must not purport to operate so as to change the terms of the gift. For example, a gift of residue by will, although comprising many different assets, can only be disclaimed in its entirety.[57] A residuary disposition is one gift, not several. Where a gift is, say, of a house and contents (if, as a matter of construction, this is one gift and not two) then the donee cannot disclaim the house and accept the contents.[58] A gift cannot be disclaimed subject to some qualification sought to be imposed by the donee, such as disclaimer only for a period of time.[59]

It is a necessary incident of an effective disclaimer that, being peremptory, it cannot be retracted.[60] A disclaimer is effective in and of itself. As has been seen, it

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52. *Lady Naas v Westminster Bank Ltd* supra n 5, 396 (emphasis supplied).
53. Supra n 8.
54. Ibid, 631.
55. *Re Boyd* [1966] NZLR 1109, Haslam J 1113; *Davidson's Precedents in Conveyancing* 3rd edn (1865) vol 5, pt 2, 662-663.
56. *Re Boyd* ibid; *CIR v McLaren* [1961] NZLR 338.
57. *Green v Britten* (1872) 42 LJ Ch 187; *Hawkins v Hawkins* (1880) 13 Ch D 470.
58. See eg *Pearce* (1926) 45 NZLR 698; *Guthrie v Walrond* (1883) 22 Ch D 573, Fry J 577; *Re Joel* [1943] Ch 311.
59. *Re Skinner* (1970) 12 DLR (3d) 227.
60. *Re Paradise Motor Co Ltd* supra n 5; *Sheppard's Touchstone* supra n 5. Superficially, there appears to be some authority to the contrary on this question, in that in relation to testamentary gifts it has been said a donee may retract a disclaimer so long as nobody has been prejudiced by the disclaimer: *Re Young* [1913] 1 Ch 272; *Re Cranstoun* [1949] Ch 523; *Re Boyd* supra n 55. A close reading of these cases, however, shows that they do not in fact decide this point; and it would be quite inconsistent with fundamental principle. See also *Lawson v Lawson* supra n 51.

operates either to prevent vesting of the property in the donee or to divest (at least in equity) property already legally so vested. If the disclaiming donee later repents the disclaimer, the donor may, of course, still give the property to the donee. But this would be a new gift, not a revival of the original gift. And herein lies the fundamental basis of the principle that a disclaimer must be peremptory: any gift is the donor's gift, and must be assented to or disclaimed on the donor's terms. A contract must (at least nominally) be negotiated; a gift, being a transfer of property for nothing, must be assented to or disclaimed. There is, by the fundamental policy of the law, no middle ground. A gift altered by negotiation is a new gift.

Disclaimer must be communicated — formal requirements

It is necessarily implicit in the foregoing that to be effective a disclaimer must be communicated to the donor or the donor's agent. As in the case of notice in equity, it is suggested that effective notice to the donor of the donee's disclaimer may be actual, constructive or imputed. The donee may be said to bear the burden of communication. This is a further consequence of the presumption of assent. As will be seen, the mode of communication is, generally, irrelevant. But even the most formal act of disclaimer (ie, by deed) will not be effective if, say, the document is merely locked away for safe-keeping without communication of its terms.

Subject to special statutory provisions in some jurisdictions,[61] and to the foregoing discussion as to dispositions of equitable interests and statutory assignments of choses in action (as to which it was concluded that they do not apply to disclaimers), there is no generally applicable form of disclaimer required by the law.[62] A disclaimer may be made by any means effective for the purpose: by deed or other writing, such as a letter; by word of mouth; or by conduct. The essential feature is not the form but the substance, namely an effective communication, by whatever means, rejecting ownership of the subject-matter of the proffered gift that is both timely and peremptory.

There seems to be no reason in law or in principle why a disclaimer may not be in general terms, provided that the general clearly includes the particular. For example, a communication to an executor by a beneficiary under a deceased's will may effectively disclaim all dispositions made by the will to that beneficiary.

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61. At least in New Zealand it appears that in some circumstances statutory provisions may apply to disclaimers in respect of certain kinds of property: see *Re Boyd* supra n 55; *Pearce* supra n 58.

62. *FCT v Cornell* supra n 5, per Latham CJ 401; *Perpetual Executors & Trustees of Australia Ltd v Commissioner of Probate Duties* [1981] VR 91; *Re Clout and Frewer's Contract* [1924] 2 Ch 230; *Re Moss* supra n 13; *Re Birchall* (1889) 40 Ch D 436; CH Sherrin, RFD Barlow, RA Wallington (eds) *Williams on Wills* 7th edn (London: Butterworths, 1995) 297.

Whether a general disclaimer includes a particular disposition is a question of fact.

Equally, but conversely, a disclaimer operates only with respect to the gift disclaimed. It follows that, as in *Re Hodge*, where the same person is both specific devisee or legatee and also residuary beneficiary, disclaimer of the specific gift does not prevent the same property passing to the same donee under the residuary gift. If it does, then it will, of course, pass free of whatever conditions may have been attached to the specific gift. The reason is that the disclaimer has caused the specific gift to fail; having failed, all of its terms have also failed. The residuary disposition is wholly separate, and operates wholly upon, and only upon, its own terms.

DISCLAIMER v ASSENT: ONEROUS GIFTS

Some gifts carry more than usually significant burdens. It is necessary to consider the point at which the right of disclaimer is lost with respect to gifts of this kind.

Onerous gifts fall into two classes. First, there are those which, quite clearly and according to their terms, carry conditions, sometimes financially burdensome, which must be carried out by the donee. These are technically called gifts 'cum onere'. They give rise to personal rights against an assenting donee by the person enjoying the benefit of the condition. Secondly, some gifts carry with them unusual, hidden or unsuspected burdens, such as liability to pay calls on shares or to comply with burdensome covenants in an expiring lease. These are distinguished from gifts cum onere in that the burden is not a stipulated term of the gift itself but is attached to the property which is its subject-matter. We have considered the general principle that a gift may be disclaimed at any time before assent. The question now is whether the general principle requires qualification in the case of onerous gifts.[63] Put simply, the question is whether a donee who has assented in

63. There are a few dicta to the effect that the presumption of assent applies only where a gift is beneficial to the donee: see eg *Harris v Watkins* (1856) 2 K & J 473, 476; 69 ER 869, 870; RA Brown *The Law of Personal Property* 3rd edn (Chicago: Callaghan, 1975) 128. But no case discovered by the present writer appears to have established this, and there is ample authority for the general principle, especially the leading case of *Siggers v Evans* supra n 5, in which the authorities were reviewed, and which appears to have decided this point. Lord Campbell CJ, delivering the judgment of the Court of King's Bench said:

> Almost every conveyance, in truth, entails some charge or obligation which might be onerous in the way of covenant or liability: and we think it much safer that one general rule should prevail, than that the courts should be asked in each particular instance if the deed may not be considered onerous, and that doubts should be raised as to the particular moment at which the deed operates by the assent of the grantee.

This must be correct. Any qualification of the general principle would not produce a fair or workable rule of law. It is for a donee, not for a court, to decide whether a gift is

ignorance of the burden of a gift may nevertheless subsequently disclaim upon learning of the burden. There are various dicta but little direct authority on this question. Recourse to general principle, however, certainly provides guidance. Several points are apposite.

First, the concept of assent to any gift necessarily carries with it the notion of burdens naturally and probably associated with ownership of property of the kind in question. This is because burden with respect to property *necessarily* accompanies benefit. This is a matter of fact as well as of law. It is almost impossible to imagine property of any kind that does not carry some kind of burden, be it only the burden of anxiety (responsibilities of management, fear of loss, fear of legal liability) or the burden of maintenance and outgoings. The concept of assent to a gift, therefore, must really mean *considered* assent, that is, consideration of burdens as well as benefits. This may not, however, always be the case: the donee's assent might have been hasty or ill-considered. It seems naturally to follow that the presumption of assent may be rebutted by a disclaimer which demonstrates that, notwithstanding some previous act of assent by the donee, the assent was not in fact *considered* assent. This, of course, is a question of fact which may have to be proved by evidence. It is suggested that the relevant principle is that disclaimer may be effective, notwithstanding previous assent, where it can be shown that the donee did not in fact know, and could not reasonably have been expected to know, of particular burdens associated with the gift. The donee has a reasonable time in which to acquire this knowledge.[64]

Secondly, in the case of a gift cum onere, where the burden of the gift is expressed in its very terms, proof of knowledge of those terms would, in the normal course, preclude disclaimer following the donee's previous act of assent. The classic example of this is *Re Hodge*, which has already been considered. The donee could not disclaim, having already assented, because he clearly knew of the burden of the gift cum onere. The only question was whether he had acted as executor or as donee.

Thirdly, in the type of case in which the burden of a gift is not stated in its terms, but is hidden or unsuspected, then more equitable considerations apply. This is the type of situation in which the donor's motive may not be generosity at all, but simply a desire, perhaps an urgent desire, to get rid of burdensome property which by very reason of the burden is unsaleable. What is the law here when the donee has given ill-considered assent to the gift?

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beneficial; and it would entail an evidentiary burden which differed according to whether the disclaimer was based on financial considerations or upon principle or sentiment. This would seem to be a wrong distinction.

64. *Re Paradise Motor Co Ltd* supra n 5, *Hill v Wilson* supra n 12, Mellish LJ 897; Meagher et al supra n 33, 750.

This matter has already been noticed by implication in another context.[65] The case is analogous to that in which the donor, wishing to repent the gift, asserts disclaimer: here, the donor, wishing to enforce the gift, asserts non-disclaimable assent. The two cases are similar in that in each of them it is the interest, usually the financial interest, of the donor that is the occasion for the assertion. There seems no reason why the principles laid down in *Lady Naas v Westminster Bank Ltd* and by Pennycuick J in *Re Paradise Motor Co Ltd* should not apply here as in the case of a repenting donor's assertion of disclaimer. The interests of the parties are ultimately the same as in that type of case. The only difference is one of pleading. It is therefore suggested that in this type of case it must be shown that the donee *assented* with 'full intention'[66] to accept, and with 'reasonably full information'[67] as to the nature, value and circumstances of the property.

Where this cannot be shown by the donor then, it is submitted, there has been at best merely an ill-considered act of assent by the donee. This does not preclude an effective subsequent disclaimer.

CONCLUSION

The true legal operation of effective disclaimer of a gift is in the nature of an evidentiary rebuttal of a presumption of law, namely the presumption of assent. To speak of disclaimer generally as though it were the refusal of an offer, the failure to exercise a binding option, or as the avoidance of, or dissent from, a gift, or as a disposition, divestiture or extinguishment of title, can be misleading. These and related concepts, drawn from other areas of the law, tend to obscure the essential point.

The concept of disclaimer in Anglo-Australian law is sui generis. The law of gifts having developed, both at common law and in equity, without incorporating the civil law doctrine of assent as a condition precedent to donation, the legal effect of a given disclaimer will differ according to the type and incidents of the gift in question. In particular, it will differ according to whether or not title resides in the donee and whether the gift is at law, in equity, or whether it is testamentary.

The law of disclaimer may cast positive legal duties, for the purpose of self-protection, upon an unwilling donee — duties which may be created by the unilateral act of another.

Disclaimer may be effective either prospectively or retrospectively. It may or may not extinguish legal title: that will depend upon the form of that title. But it

65. Supra pp 76-78.
66. *Lady Naas v Westminster Bank Ltd* supra n 5, Lord Wright 400.
67. *Re Paradise Motor Co Ltd* supra n 8, Danckwerts LJ 631.

will always extinguish equitable title or equitable choses in action in the disclaiming donee.

Disclaimer asserted either by a donee against a donor, or by a donor or third party against a donee, will be effective if it is timely, peremptory and communicated; but where asserted against the donee it may also have to be shown that the donee had reasonably full information about the gift. Disclaimer may be timely where a donee's previous act of assent to property carrying hidden or unsuspected burdens was unconsidered, provided that the subsequent disclaimer is nevertheless made within what is in all the circumstances of the case a reasonable time.

One is, possibly, mildly surprised to see that the legal embodiment of a fundamental principle of simple common sense can appear so conceptually various in its particular manifestations. It is an example of Holmes' classic dictum that '[t]he life of the law has not been logic: it has been experience'.[68]

68. OW Holmes *The Common Law* (Boston: Little Brown, 1963 — M DeWolfe Howe (ed)) 5.