

The law of formalities
is really a series of ad
hoc responses



I will start my essay off by explaining what formality is all about and then explain its requirements under S. 53 (1) (c) LPA 1925 and I will also use case examples for explanation and to make my point. My essay will also cover situations issues regarding Inland revenue. I will give my conclusion at the end of the essay.

The main purpose of formality requirements is the prevention of fraud through hidden transactions of equitable interests, particularly oral transactions and when the legal interest remains with trustees and the equitable interest moves elsewhere, any lack of writing makes the trust difficult if not impossible to enforce at the suit of those who are, or at least reputed to be beneficially entitled.

The formality requirements arose out of the Statute of frauds 1677, which were also incorporated into related statutes such as the Wills Act 1752 repealed and replaced by the Wills Act 1837 (as amended) and some of the provisions of the Statute of Frauds are reproduced under section 53(1) (c) of the Law of Property Acts 1925.

My point here are principally concerned with the disposition of equitable interests and the four ways in which those interests may be dealt with was articulate by Romer LJ in *Thomas Executors v Yerbury* [1936] 1 KB 645 5 and I will also be discussing the four methods articulated by him.

Romer said “ Now the equitable interest in property in the hands of a trustee can be disposed of by the person entitled to it in favour of a third party in any one of four ways. The person entitled to it (1) can assign it to the third party directly; (2) can direct the trustees to hold the property in trust for the
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third party (see per Sargant J in *Re Chrimes*); (3) can contract for valuable consideration to assign the equitable interest to him; or (4) can declare himself to be a trustee for him of such interest.” Category (2), as Lord Evershed pointed out in *Grey v IRC* “ appears to have been regarded as distinct from both an assignment, on the one hand, and a declaration of trust of the interest in the beneficial owner’s hands, on the other.”

It is to be noted that such a direction is a “ disposition” within Law of Property Act 1925 s. 53, according to the wide construction put upon that word by the ‘ House of Lords, and required therefore to be in writing. If the beneficial owner authorises the trustees to transfer the legal estate to donees, then the beneficial interest passes to the donees without express mention.

It should also be noted that category (4) creates what is usually called a sub-trust; a situation in which A holds property on trust for B, and B declares himself to be trustee of his interest for C. Unless B has specific duties to perform, he is a bare trustee and apparently drops out, the original trustee A holding on trust for C.

Grey v IRC 1960 A. C 1 established that a direction to bare trustees that they transfer assets to other trustees of a separate settlement, to be held on trust of that settlement, involves disposition of a subsisting equitable interest within s. 53 (1)(c), and that the word ‘ disposition’ should be given its natural meaning, which is wider than s. 9 of the Statute of Frauds 1677. 8 The oral direction, the intent of which was to determine his equitable interest in the shares was, therefore, a purported ‘ disposition’ within s. 53(1)(c). 9 The

directions were rendered ineffective for non-compliance with s. 53(1)(c).

Green submits that ' where the disposer is beneficially owner of the interest in question

I am going to consider the case of Vandervell v Inland Revenue Commission (1967) 2. A. C. 291. This was one of the cases decided under section 53(1) (c) This case involved a variety of transactions which attracted the attention of the IRC as including attempts to avoid stamp duty. Stamp duty is payable on instruments transferring property or an interest in property, not on the transaction itself and is calculated ad valorem on the value of the interest being transferred. The duty will however be avoided if a transfer can be validly affected orally.

But where this cannot be done and the writing requirements imposed by section 53(1) (1) (c) are not complied with, the attempted transfer will be void and this proves an added incentive for the revenue to use the section. In this case the Revenue succeeded by a majority of three to two. The option was held on trust for Vandervell. He was effectively the grantor of the option, although it as in form granted by the Royal College. It was taken by Vandervell Trustees LTD upon trust, but no effective trusts of the option were declared, " and so the defendant's company held the option on an automatic trust for Mr. Vandervell.

In this situation, Lord Wilberforce said " no need, or room to invoke a presumption. The conclusion, on the facts found, is simply that the option was vested in the trustee company as a trustee on trusts, not defined at the time, possibly to be defined later. But the equitable, or beneficial interest,

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cannot remain in the air: the consequence in law must be that it remains in the settlor". An indication of the parties' intention, as opposed to what they might be supposed to have desired, would of course have changed the whole situation. But the donor's mere intention not to have the beneficial interest cannot prevent a resulting trust.

In *Re Vandervell's (No 2)*, the Court of Appeal, reversing Megarry J found that the resulting trust of the option in favour of Vandervell terminated with the exercise of the option; and that a trust of the shares had been declared in favour the children's settlements. Criticisms of the finding of a declaration of trust have already been made. Another difficulty is that even if the acts of the trustees were sufficient to manifest an intention to create a new trust, how could the option and the shares be separated? Is it however right to say: " Before the option was exercised, there was a gap in the beneficial ownership. So there was resulting trust for Mr. Vandervell. But as soon as the option was exercised and the shares registered in the trustees' name, there was created a valid trust of the shares in favour of the children's settlement"?

There has been some developments post-Vandervell, The principle of special reservation of benefit covers this. This was familiar under the estate duty regime; this concept was not relevant to capital transfer tax. It was reintroduced by the Finance Act 1986 and is a fundamental feature of inheritance tax. The object of this principle is that donor should not be permitted to take advantage of the potentially exempt transfer rule by making gifts where he effectively retains an interest. The first happened in

Oughtred v IRC (1958) ch. 375; this was a case where an oral agreement of shares to an assignment for the purposes of s. 53 (1) (c).

The trustees held shares for the benefit of Mrs. Oughtred for life with remainder to her son, Peter. In return for some shares of his mother's, Peter made an oral contract to transfer his interest in remainder his interests to her. Subsequently, formal transfers were executed transferring these shares to the mother. The Inland Revenue claimed stamp duty on the transfers, as they were the documents that effectively transferred the interest.

The mother contented that, by virtue of the doctrine of conversion that operates on a specifically enforceable contract, the equitable interest had already passed to her. Hence, the writing transferred nothing. The majority of the House of Lords rejected this line of reasoning. The contract did not pass the full equitable interest in the shares and, therefore, the document was subject to stamp duty. This appears to be a sensible conclusion, as, if the contract was rescinded or specific conclusion as, if the contract was rescinded or specific performance ceased to be available, the entire equitable interest would remain with the son.

The second development is the tax avoidance scheme that Vandervell entered into requiring interpretation of section 53 (1) (c) is now dealt with by the principle stated in Ingram v IRC {2001} 1 A. C. This case was about Lady Ingram who transferred her property to a nominee for herself who then granted her a 20 year lease. Which prohibited assignment and subletting (the transfer to the nominee being necessary because a freeholder cannot grant a lease to himself). The nominee then transferred the freehold

reversion, subject to the lease, to trustees on certain trusts. The object as thus to “ carve out” the lease before making the gift.

The House of Lords held that this scheme did not amount to a gift with reservation. When Lady Ingram died, only the then-valueless lease was part of her estate. (Lady Ingram died within three years of the gift of the freehold reversion; it was a chargeable transfer. However, it was values as the date of the gift. Land values had increased sharply by the date of her death. Had the reservation rule applied, the reversion would have been treated as part of her estate at its higher value at the date of death). Such scheme isn't effective anymore in relation to disposal of gift on or after March 9 1999. While the original provision continues to operate, gifts not within them may now be caught by the new ss. 102A or 102B of the Finance Act 1986.

As Lord Hoffman has put, “ Not only not have your cake and eat it, but if you eat more than a few de minimis crumbs of what was given, you are deemed for tax purposes to have eaten the lot”.

Questions raised in Oughtred which weren't resolved which as a stamp duty case which hinged on the interpretation of the Stamp Duty Act 1981 was resolved in *Neville v Wilson* [1997] Ch 144 COA; although tax invasion wasn't involved in this case, nominees held shares in U Ltd on trust for J Ltd, a family company. The shareholders of J Ltd agreed informally to liquidate the company and divide its equitable interest in the U Ltd shares amongst themselves in proportion to their existing shareholdings.

The question was whether s. 53 (1) (c) invalidated this agreement (in which case the equitable interest would have passed o the Crown court hen J Ltd <https://assignbuster.com/the-law-of-formalities-is-really-a-series-of-ad-hoc-responses/>

was struck off the register). The Court of Appeal held that each shareholders agreement gave rise to an implied or constructive trust as that s. 53 (2) applied. Thus the agreement was effective to vest the equitable interest in the shareholders without writing. The analysis given in *Oughted v IRC* by Lord Radcliffe in his dissent that a specifically enforceable agreement to assign passed the equitable interest to the assignee was correct. It was noted that Lords Jenkins and Keith had left the point open and that Lord Denning (with whom Lord Cohen appeared to agree) had rejected the application of S. 53 (2) without giving reasons.

It is, however, unclear how *Vandervell* divested himself of his equitable interest without writing. The House of Lords incorrectly held that there was no difference between this case and where the legal estate and beneficial interest are vested in the legal owner. *Grey* and *Oughtred* were distinguished on the ground that these cases only dealt with the equitable interest. Section 53(1)(c) appears ideal for a situation where the transfer starts with a subsisting interest split from the legal title, whereas transfers by persons absolutely beneficially entitled, involves no dealings with a separately subsisting equitable interest. *Vandervell* seems to permit absolutely entitled beneficiaries to direct their trustee to transfer property to another trustee, on trust for other beneficiaries, without needing to comply with s. 53 (1)(c). This effectively provides a means of avoiding *Grey* and s. 53 (1)(c).

Vandervell 2 held that a conscious and intentional transfer of subsisting equitable interest must be in writing, but that when an equitable owner intends to disclaim an equitable interest, a written disclaimer is not required.

It was held that the initial resulting trust, in favour of *Vandervell*, only arose
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in the absence of his true intention being clear. It was a 'stop-gap resulting trust,' which died and was replaced with a newly declared trust. It cannot be the law that disposition of an interest under a resulting trust does not require writing: that would be inconsistent with 53(1)(c). The mischief rule is only open when there is ambiguity; the literal interpretation of s. 53 should have been used. It is difficult to understand Lord Denning's reasoning that no formalities were required to terminate the resulting trust, since divesting of the subsisting beneficial interest involves a release or

Surrender, i. e. a disposition under s. 53 (1)(c). 15 Section 53(2) concerns operation and creation of resulting trusts, not their termination. The Court of Appeal's decision is unsatisfactory; the court provided too easy an escape from Grey: a settlor could transfer property to nominees, leaving equity to imply a resulting trust, and could then, by oral direction, in form of a release and declaration of trust, divest equitable interest to new beneficiaries.

My conclusion is that I believe that Section 53(1) (c) has lost much of its importance as far as tax-avoidance system is concerned and it's principal importance remains that which existed at the time of the Statute of Frauds. Sometimes it isn't clear whether a transaction amounts to the declaration of trust or is, instead, of the disposition of an equitable. Section 53 (1) (c) has no application at all to trust which is a newly created since there is no subsisting equitable interest if it has only been brought into existence. It is only when instructions are issued to trustees or a person begins to deal by disposition with it after a trust has been created that provision is triggered.

It is not also clear whether transactions actually amounts to declaration of trusts or if it is instead, the disposition of an equitable interest. A lot of cases which are considered and which appear are inconsistent and illogical. This is because many of them are avoidance cases that involve the Inland Revenue. As dispositions have to be in writing and writing attracts stamp duty, the Inland Revenue tends to argue for a disposition rather than a declaration. Stamp duty is charged on an instrument rather than a transaction itself. As I have considered previously in the Vandervell cases, it is in the interest of the Inland Revenue to establish for tax reasons, that an oral disposition had been ineffective due to lack of writing.