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Will -- Income Interests -- Renunciation After Acceptance -- Partial Renunciation -- Taxation

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WILL—INCOME INTERESTS—RENUNCIATION AFTER ACCEPTANCE—PARTIAL RENUNCIATION—TAXATION.—The concept of a disclaimer has been known to equity and the common law for several centuries. In English courts its general characteristics and the respects in which it differs from the concepts of a release and a surrender are so well established that they are rarely discussed at any length in the modern cases. Most of the recent decisions are concerned either with the effects of a disclaimer on the interests of other beneficiaries under a trust or with the consequences under tax statutes of different kinds.

Similar questions have arisen in Canada but, in addition, Canadian courts have recently been confronted with some rather more fundamental issues. These can be formulated as follows: (a) can an adult income beneficiary, who has received payments of income under a trust, make a valid disclaimer of his income interest at some subsequent time? (b) can an income beneficiary disclaim income for a limited period before any payments of income have been received? (c) if a disclaimer of the remaining part of the interest is possible in (a), could a disclaimer for a limited period be made in such circumstances?

It seems unquestionable that English law would give a negative answer to the first question. In the seventeenth century the nature and effect of a disclaimer were described in *Sheppard's Touchstone* as follows:¹

If one devise his land to another in fee-simple, fee tail, for life, or years, and the devisee after the death of the testator doth refuse and waive the estate devised to him; in this case, and by this means the devise to him is become void. And it seems a verbal waiver is sufficient in this case. So if one give goods or chattels to another, and the devisee refuse it; by this means the devise is become void, and any waiver or refusal would suffice in this case; for a man shall not be compelled *volens* to take a thing devised to him.

As, by definition, a disclaimer is simply a refusal to accept an interest which has been conveyed to the disclaiming party, it has been consistently held that no disclaimer is possible after the interest has been accepted. In *Bence v. Gilpin*,² Kelly C.B. made the point with some emphasis:

A disclaimer, to be worth anything, must be an act whereby one entitled to an estate immediately and before dealing with it renounces it; whereby, in effect, he says "I will not be the owner of this property". But for a person who has already possessed himself of an estate and acted as its owner, to come and say "I will not be its owner", is really a contradiction in terms³

Where the subject matter of the transfer is an income interest

¹ (2nd ed., 1648), p. 452.

² (1868), L.R. Ex. 76.

³ *Ibid.*, at p. 81.

under a trust or estate, the English cases leave little, if any, room for an argument that a disclaimer can be made after the disclaiming party has accepted income for any period of time. In *Re Wimperis*,⁴ for example, executors had been directed to set aside a fund sufficient to produce a yearly income of \$250.00 for a particular beneficiary. The beneficiary was a married woman and the annuity was given to her without power of anticipation. The issue which was raised before Warrington J. was whether the restraint on anticipation invalidated an attempted disclaimer by the beneficiary. It was held that, although the restraint would have been effective to bar a release of the annuity after it had been accepted, the restraint did not attach until acceptance had occurred. As the disclaimer signified a refusal to accept, it was not affected by the restraint and would be valid unless the bequest had been accepted at some earlier time. The judge held, further, that the beneficiary's acceptance of the annuity could not be inferred from the facts. He stated that no payment of the annuity had been made and that the beneficiary's part in negotiations to arrange a settlement of her rights under the will did not indicate her acceptance of those rights. The whole tenor of the judge's reasoning indicates that the restraint upon anticipation would have applied if payments had been made and accepted. If this were not correct, the established rule that a married woman without power of anticipation could not release an income interest⁵ would have had virtually no significance. It is, moreover, difficult to think of any acts which would indicate acceptance less equivocally than the receipt of income and its application for the purposes of the beneficiary.

The fundamental distinction between the disclaimer which, for most purposes, avoids a gift of an interest *ab initio* and the various methods by which a person can divest himself of a proprietary interest which he has previously accepted has been recognized for centuries. After having accepted his interest, a life tenant under a trust might subsequently dispose of it by assigning it to another beneficiary or to a third party, by directing the trustee to hold it on trust for such a person, by declaring himself to be a trustee,⁶ by surrendering it to some other beneficiary⁷ or by releasing it to the trustees with the intention of extinguishing it.⁸ In some

⁴ [1914] 1 Ch. 502 (Ch.D.). See, also, *Re Guinness's Settlement*, [1966] 1 W.L.R. 1355, discussed *infra*.

⁵ *Lady Bateman v. Faber*, [1898] 1 Ch. 144 (Ch.D.).

⁶ *Re Chrimes*, [1917] 1 Ch. 30; *Timpson's Executors v. Yerby*, [1936] 1 K.B. 645 (C.A.); *Grey v. I.R.C.*, [1960] A.C.1 (H.L.).

⁷ E.g., *Re Young's Settlement Trusts*, [1959] 1 W.L.R. 457 (Ch.D.); *Re Harker's Will Trusts*, [1969] 1 W.L.R. 1124 (Ch.D.).

⁸ See, *infra*, pp. 320-321.

circumstances, significant consequences might follow from the choice of one or other of these methods. They share, however, the characteristic that they are essentially dispositions of subsisting interests, and that characteristic distinguishes each of them from a disclaimer. Where an interest is disclaimed, it is treated as if it had never been acquired by the disclaiming party.⁹ If, after it has been accepted, it is subsequently assigned, released or surrendered, an existing property interest will pass from the original beneficiary to some other person by virtue of the deliberate act of the former. The fact that in some cases the interest will be extinguished in the sense that it will lose its separate identity should not be allowed to obscure the dispositive nature of the beneficiary's act or to obscure the distinction between a disclaimer on the one hand, and a renunciation of an existing interest on the other. Whether or not the interest will cease to have a separate existence depends not on the nature of the act or the intention of a disclaiming, assigning, or renouncing beneficiary, but solely on the extent of the pre-existing interests, if any, which the future recipients of the income have under the estate. If, for example, the recipients have immediate capital interests which are absolutely vested, or vested defeasibly, the income interest will lose its separate identity whether it is disclaimed, assigned or renounced.¹⁰ If they have only contingent interests, the income interest may continue to have a separate existence notwithstanding the fact that it is disclaimed by the original beneficiary.¹¹ The fact that the interest remains in existence or that it disappears tells us nothing significant about the nature of the act by which the beneficiary divested himself of the income. The fundamental distinction is that the beneficiary who assigns or renounces is disposing of his own property, while the beneficiary who disclaims is refusing to acquire the property of another.

⁹ *Townson v. Tickell* (1819), 3 B. & Ald. 31 (K.B.), at pp. 36-38. Where a question of taxation has been involved, courts have been prepared to recognize that, prior to the disclaimer, the beneficiary was "competent to dispose" of the interest: *Re Parsons*, [1943] Ch. 12 (C.A.), and that he had a "right" which could be extinguished: *Re Stratton's Disclaimer*, [1958] 1 Ch. 42 (C.A.) followed in *Keir Estate v. M.N.R.* (1965), 65 D.T.C. 679 (T.A.B.). These cases on the construction of taxation statutes do not affect the proposition that, in property law, the disclaimer is treated as making the gift void *ab initio*; "a disclaimer operates by way of avoidance and not by way of disposition": *Re Paradise Motor Company Ltd*, [1968] 1 W.L.R. 1125 (C.A.), at p. 1143.

¹⁰ For the effect of a disclaimer, see *Re Flower's Settlement Trusts*, [1957] 1 W.L.R. 401 (Ch.D.), at p. 405, per Jenkins L.J. and *Re Taylor*, [1957] 1 W.L.R. 1043 (Ch.D.). For the effect of an assignment or surrender see *Re Harker's Will Trusts*, *supra*, footnote 7, *Re Keby-Fletcher's Will Trusts*, [1967] 3 All E.R. 1076 (Ch.D.) and *Re Bellville's Settlement Trusts*, [1964] Ch.D. 163 (Ch.D.).

¹¹ *Re Scott*, [1975] 1 W.L.R. 1260 (Ch.D.).

The existence of the distinction has been recognized in a number of recent cases in England. In *Re Bellville's Settlement Trusts*,¹² for example, property had been settled on trust for the settlor's wife for life, with remainder to his son absolutely if the son should be living at the death of the wife, and with further gifts to take effect in the event that the son should predecease the wife. Nine years after the trusts of income had come into operation, the wife purported to assign the life interest to her son "to the intent that such interest shall merge and be extinguished and that the entire interest therein shall become immediately vested in possession in [the son]". Wilberforce J. held that the assignment and release did not destroy the life interest:¹³

This is not the case of a disclaimer: and the only way in which the prior trust, including the life interest, could determine would be if the life interest was merged in a subsequent estate. . . . Cases of disclaimer, seem to me to be very different from the kind of case I have here. They are cases where there is a disappearance of an interest which the testator has created, so that there is a gap in the trust, and it is necessary to fill that gap in some way or other in accordance with what one assumes to have been the intention of the testator, and the doctrine of acceleration is applied as being the way of reaching the result that the testator would have intended to have carried out. But, this is not a case of a gap. This is a case of a subsisting trust, and one has to ascertain whether the trust has been ended or not.

As the remainder interest of the son was contingent on his surviving the widow, and as other persons would become entitled to the fund if that event did not occur, it was held that the release did not produce a merger of the life interest with the remainder interest. It is clear that, in emphasizing that he was not concerned with the case in which there was a "gap" in the trust, Wilberforce J. was attributing significance to the fact that the interest was subsisting at the time of the release and not to the fact that the beneficiary had indicated the persons whom she wished to benefit. There could be no gap once the interest had been accepted.¹⁴

Although, at first sight, it might seem difficult to reconcile the last proposition with the decision of Goff J. in *Re Guinness's Settlement*,¹⁵ there is no inconsistency between the two cases. Under clause 4 of the settlement the settlor's wife was entitled to the income from the settled property for life. Less than eighteen months after the settlement was executed, she executed the following release:

¹² *Supra*, footnote 10.

¹³ *Ibid.*, at pp. 168 and 173.

¹⁴ The same distinction is implicit in the discussion of *Re Davies*, [1957] 1 W.L.R. 922 (Ch.D.) in *Re Kebby-Fletcher's Will Trusts*, *supra*, footnote 10 and *Re Harker's Will Trusts*, *supra*, footnote 7.

¹⁵ *Supra*, footnote 4.

Mrs. Guinness as beneficial owner hereby releases unto the trustees all that the estate and interest of Mrs. Guinness in all the income of the trust fund to become payable hereafter during the life of Mrs. Guinness and all her right, title, claim and demand to and in the same to the intent that the settlement may henceforth be read and construed as if clause 4 thereof aforesaid were deleted.

It was held that the release created a "hiatus" in the trust so that the property "resulted"¹⁶ back to the settlor. This conclusion was reached entirely on the basis of the beneficiary's intention as revealed by the words in the deed or release. The life tenant had, in effect, directed the trustees to deal with the future income as if the settlement did not contain clause 4. It was conceded that, if the settlement had been constructed in that manner, the income would have been held on a resulting trust.¹⁷ In short, the hiatus or gap created by the release was not produced by an ineffective disposition of the settlor; it was created by the life tenant's direction that the income interest was to be dealt with *as if* the settlor had made an ineffective disposition. Goff J. placed all the emphasis on the intention of the life tenant and, despite the short duration of the settlement, he recognized expressly that no disclaimer of the interest had occurred "because she had already begun to enjoy it".¹⁸

The decision in *Re Guinness's Settlement* underlines one of the necessary consequences of the distinction between a disclaimer of an interest and a renunciation or disposition after its acceptance: the destination of the disclaimed income is determined solely by the intention of the settlor or testator or by the law governing distribution or intestacy; the destination of income, which has been renounced or otherwise disposed of after acceptance, is determined, in the first place, solely by the intention of the beneficiary.

A further illustration is provided by *Re Young's Settlement Trusts*¹⁹ where a life tenant purported to "irrevocably surrender and forego the interest for life to which he is entitled under the settlement in the income of the property comprised therein to the intent that [his] life interest in any and every part of such income shall henceforth be absolutely determined". Harman J. said:

My difficulty has been that in the deed [of surrender] there was no mention of a surrender to any person. Coke on Littleton, 17th edn. sec. 636, reads as follows:

¹⁶ The use of the term "resulting trust" in the judgment is a little confusing as the fact that the income "resulted" to the estate was determined by the intention of the life tenant and not by that of the settlor; nor was it a consequence of an ineffective disposition by the latter. For a discussion of the two varieties of resulting trusts see *Vandervell v. I.R.C.*, [1967] 2 A.C. 291 (H.L.), at pp. 312-314, per Lord Upjohn.

¹⁷ *Supra*, footnote 4, at p. 1361.

¹⁸ *Ibid.*, at p. 1363.

¹⁹ *Supra*, footnote 7.

“Surrender . . . is a yielding up an estate for life or years to him that hath an immediate estate in reversion or remainder . . .”²⁰

By implication from the use of the word “surrender”, he held that the remaindermen were entitled.

Neither *Re Guinness's Settlement* nor *Re Young's Settlement Trusts* indicates how an English court would deal with the case of a simple release to the trustees where no clear intention to benefit particular persons appeared. On the assumption that the release was made to the trustees in their capacity as such, the alternatives would seem to be to treat it as invalid for uncertainty, or lack of sufficient formality, or to presume that the beneficiary intended future income to be distributed as if the instrument contained no express disposition of income. The last solution appears to be the most reasonable and is supported by decisions in Ontario²¹ and in the United States.²²

The dispositive nature of a surrender was recognized in the English Court of Appeal in *Inland Revenue Commissioners v. Buchanan*.²³ An income beneficiary for life had a protected interest which she was permitted to surrender in favour of the remaindermen alone. When she executed a surrender in accordance with the terms of the instrument, it was argued that this completed a disposition made by the testator and involved no disposition by her. The three judges of the Court of Appeal were unanimous in rejecting the argument:

Mr. Russell has argued very strenuously that a surrender is not a disposition. I should have great difficulty in holding that: I think it clearly is a disposition. A person can dispose of his interest in a fund or in a chattel or in anything else in a variety of ways, but if having an interest in a fund, although the interest may not then be in possession, he surrenders that interest, it seems to me that he disposes of that interest. Still more is it clear in my mind that if he surrenders the interest the person next entitled to that interest or to the income under the interest becomes thereby advanced.²⁴

. . .

Persuasive as that argument is, I find myself unable to accept it. It is true that [the life tenant's] interest was a protected life interest, but she was left free as regards dealing with it in one particular way: that is to say, by way of surrender in favour of persons entitled in remainder. She was entitled to the income under the protective trust, and it was for her to decide at her will and pleasure whether she should retain that income or surrender it for the benefit of those interested in the remainder, namely, her three infant children. She chose to take the latter course, and the result was that the income she would otherwise have been

²⁰ *Ibid.*, at p. 464. See, also, *Re Penton's Settlements*, [1968] 1 W.L.R. 248 (Ch.D.), at p. 261.

²¹ *Re Graydon*, [1942] O.W.N. 130, discussed *infra*.

²² See Scott on Trusts (3rd ed., 1967), pp. 2732-2735.

²³ [1958] Ch. 289 (C.A.).

²⁴ *Ibid.*, at p. 296, per Lord Goddard C.J.

enjoying as life tenant from the moment when her life interest fell into possession went to the children and became payable or applicable to them or for their benefit. Accordingly, I am unable to accept that part of Mr. Russell's argument.²⁵

In cases in which the only question is the power of the income beneficiary to divest himself or herself of the right to income and vest it in another beneficiary, the distinctions between a disclaimer, a surrender and a disposition will usually be of no significance unless a question of formality is in issue. A disclaimer of an equitable interest can be oral²⁶ but a release, surrender or disposition of such an interest will probably not be valid unless it is in writing.²⁷

Cases involving restraints upon anticipation are not likely to arise with any frequency in the future, but an issue similar to that in *Re Wimperis*²⁸ could arise under the modern forms of protective trusts. Under such trusts property is usually settled to pay the income to a particular beneficiary for life or until he should do any act which would deprive him of the right to receive the income and, in the latter event, discretionary trusts for the beneficiary and his family are to come into effect until his death. If, in such a case, the income beneficiary attempted to surrender his interest to the ultimate remainderman, the attempt would appear to be ineffective and the discretionary trust would come into operation. If, however, he disclaimed his interest, the reasoning in *Re Wimperis* would suggest that the disclaimer would be valid.

Another area in which the distinction between the different concepts could have some importance is that of taxation. Whereas, a release or a surrender of an existing interest might well be regarded as a disposition²⁹ and, if made gratuitously, a gift, it could be argued that in the absence of any special statutory provision, a disclaimer should be regarded differently. For the purposes of gift tax in Ontario such a special provision exists.³⁰

²⁵ *Ibid.*, at pp. 297-298, per Jenkins, L.J. "As I see it, a man does not cease to own property simply by saying 'I don't want it'. If he tries to give it away the question must always be, has he succeeded in doing so or not.": *Vandervell v. I.R.C.*, [1966] Ch.D. 261, at p. 275, per Plowman J., approved by Lord Upjohn, *supra*, footnote 16, at p. 314.

²⁶ *Re Paradise Motor Company Ltd*, *supra*, footnote 9, at p. 1143.

²⁷ *Grey v. I.R.C.*, *supra*, footnote 6; Scott on Trusts, *op. cit.*, footnote 22, pp. 2733-2734.

²⁸ *Supra*, footnote 4.

²⁹ The reasoning in *I.R.C. v. Buchanan*, *supra*, footnote 23, would seem equally applicable for the purposes of Canadian income tax and succession duty in Ontario. In addition, a surrender would seem to fall within s. 54(c)(ii)(B) of the Income Tax Act, S.C., 1970-71-72, c. 63 and s. 1(g) (i)(ii) and (viii) of The Succession Duty Act, R.S.O., 1970, c. 449.

³⁰ The Gift Tax Act, S.O., 1972, c. 12 s. 4(2)(b); *Re Stratton's Disclaimer*, *supra*, footnote 12; *Keir Estate v. M.N.R.*, *supra*, footnote 9.

Under the Income Tax Act the position is not altogether clear, but, as a gift of an income interest can produce severe tax consequences for the donor, the question is of some practical importance.³¹ The position of Revenue Canada, as set out in *Interpretation Bulletin IT-385, Renunciation of an Income Interest in a Trust*, is that a true disclaimer will prevent the disclaiming party from acquiring an interest.³² In consequence, it will not produce proceeds of disposition and will not give rise to an inclusion in the income of the donor. More remarkably, the *Bulletin* seems to indicate that a gratuitous surrender or release of an income interest will not be treated as a disposition:

5. A taxpayer who for no consideration validly renounces his income interest in respect of future payments (not due and payable at the time of the renunciation) will not be considered to have received any proceeds of disposition. The result will be the same if the taxpayer designates or otherwise agrees which person or persons will benefit by reason of the renunciation, if the same person or persons would be entitled to benefit in the same way without such designation or agreement.

There must be some doubt whether this position is required by the terms of the Income Tax Act. As was recognized in *Inland Revenue Commissioners v. Buchanan*,³³ a renunciation of the type contemplated is in substance a disposition of the property of the person who executes it. For the reasons given above,³⁴ the fact that it will in some cases result in the extinguishment of the interest through merger or enlargement should hardly be material. As the decision in *Re Bellville's Settlement*³⁵ illustrates, this does not always occur and, when it does occur, it results from the nature of the pre-existing interests of the persons who receive the benefit of the release or surrender and not from the kind of act performed by the original beneficiary of the interest which is extinguished. The consequences in property law will be precisely the same whether an income beneficiary has purported to assign his interest, or to surrender it, to the remainderman.³⁶

³¹ *Supra*, footnote 29, s. 106(2)(a); discussed in M.C. Cullity, *Estate Planning in Canada* (1977), 25 Can. Tax J. 180. The discussion antedated the release of *Interpretation Bulletin IT-385*.

³² Para. 2.

³³ *Supra*, footnote 23.

³⁴ *Supra*, p. 319.

³⁵ *Supra*, footnote 10.

³⁶ English courts have usually refused to attribute significance to the particular form of words used by the disclaiming or renouncing party: e.g., in *Nicholson v. Wordsworth* (1818), 2 Swans. 363 (L.C.), a "release" was treated as a disclaimer, and in *Re Schar*, [1950] 2 All E.R. 1069 (Ch.D.) a "disclaimer" was treated as a release. However, as *Re Young's Settlement Trusts*, *supra*, footnote 7, illustrates, the beneficiary's description of the act might provide an indication of the intended destination of the income.

It is not clear whether the concession in paragraph 5 of the *Bulletin* applies only to a surrender of the right to all of the income payments which the party who has executed the surrender would otherwise have been entitled to receive. If it applies to renunciations for a limited period, it would, for example, permit a life tenant under a trust to renounce income for the following year while retaining the right to accept it, or to renounce it, for future years.³⁷ The *Bulletin* is also silent on the question of attribution of income where an existing interest has been renounced. While it seems clear that a disclaimer will not be regarded as a transfer or a disposition, paragraph 5 appears to contain no similar implication.

The second question was whether in English law an income beneficiary can disclaim income for a limited period before any payment had been accepted. There appear to be no decisions directly in point. In one line of cases in which beneficiaries under a will have attempted to disclaim onerous devises or bequests while accepting other benefits, the validity of the disclaimer has been held to depend upon whether the testator had intended to make a single undivided gift or separate gifts. Only in the latter case will the disclaimer be effective. It is clear that these decisions do not turn on any principle that a beneficiary who accepts a benefit under a will must accept all the provisions of the will, including those which impose burdens on him.³⁸ If this were so, a disclaimer in the case of separate gifts should be as ineffective as in the case of a single undivided gift.

The most detailed analysis of the English authorities is contained in the judgment of the New Zealand Court of Appeal in *Re Pearce*.³⁹ The conclusion reached by the court placed the emphasis entirely on the intention of the testator and denied any significance to the distinction between beneficial and onerous gifts:

... the principle is much broader than is contended for by counsel. The only question in the interpretation of a will is, What was the intention of the testator? When two distinct bequests are given in the will the question remains, What was the intention of the testator? Are they to be taken together, or may one be taken and the other left? It would be unlikely, if both were acceptable to the donee, that he would take one and decline the other. If one was not acceptable to him it could be fairly assumed that it was not in his opinion advantageous, but was burdensome and onerous. Hence the distinction that would generally apply and the use of those words in the authorities is simply a convenient way of distinguishing that which was acceptable to the donee and which he wished to retain, and that which he wished to disclaim. Therefore it is

³⁷ See *Rose Herman v. M.N.R.* (1961), 61 D.T.C. 700 (T.A.B.), a decision which is inconsistent with that in *Re Skinner*, [1970] 3 O.R. 35 (Ont. H.C.); see, *infra*, p. 329.

³⁸ In *Codrington v. Codrington* (1876), L.R. 7 H.L. 854, at p. 866, the doctrine of election was explained upon this basis.

³⁹ (1926), 45 N.Z.L.R. 698 (C.A.).

not essential to prove, in order to apply the rule, that the gift is onerous, in the sense of entailing a financial burden. To do so would limit the application of the overriding principle that the intention of the testator is the real question.

Bearing that in mind the principle is clear, and may be thus stated: Where a testator gives two distinct properties in the same will to the same person and one of these is not acceptable to the donee, *prima facie* he is entitled to disclaim it and take the other. But in some cases it is a question of the intention of the testator, to be gathered from the will, whether the donee must elect to take all or none of the gifts in the will, or whether he may accept the one gift and repudiate the other. In cases, however, where both properties are included in the same gift the donee cannot accept the one and disclaim the other, unless the will manifests a sufficient intention of the testator to the contrary.⁴⁰

On this basis, the rule that there can be no disclaimer of a single undivided gift is simply a presumption or rule of construction which will bow to an indication of a contrary intention.

The analysis in *Re Pearce* is supported by English decisions⁴¹ and its emphasis on the intention of the testator is consistent with the conclusions in most of the English treatises.⁴² It suggests that a disclaimer of an income interest for a limited period would not be effective unless there was something to indicate the testator's intention that this should be permitted.

Obviously, this conclusion is not absolutely compelling. Rules or presumptions of construction are generally applied much less rigidly in modern cases and, in the absence of special circumstances, it is not altogether clear why the testator should be presumed, in effect, to have made the gift of the income interest conditional on acceptance of the entire interest or, indeed, why he should not be presumed to have been totally indifferent on the question. However, if the above is correct, the question does not turn on anything inherent in the concept of a disclaimer. At least as far as testamentary gifts are concerned, it is to be determined solely as a problem of construction and any doubt which exists is confined to the presumption which a court will apply in the absence of any clear indication of the testator's intention.

There are two other English decisions on testamentary gifts

⁴⁰ *Ibid.*, at pp. 716-717.

⁴¹ See, in particular, *Warren v. Rudall* (1860), 1 John. & H.1, where Page-Wood V.-C. stated that "the question is one of intent only" and denied that there was "any rigid formula" that required a legatee to accept all the provisions of the will; *Guthrie v. Walrond* (1883), L.R. 22 Ch.D. 573 (Ch.D.), at p. 577; *Re Joel*, [1943] 1 Ch.D. 311 (C.A.).

⁴² Halsbury's Laws of England (3rd ed., 1962), Vol. 39, p. 933; Williams on Wills (4th ed., 1974), pp. 256-257; Bailey, *The Law of Wills* (6th ed., 1967), pp. 131-132. See, also Atkinson on Wills (2nd ed., 1953), p. 775. Williams and Mortimer, *Executors, Administrators and Probate* (1970), pp. 778-779 and Jarman on Wills (8th ed., 1951), pp. 565-567 place more emphasis on the onerous nature of the gift.

which might be regarded as having some limited relevance to the question of a partial disclaimer of an income interest. In *Re Young*⁴³ and *Re Cranstoun's Wills Trusts*⁴⁴ it was held that the unlimited disclaimer of an interest could subsequently be revoked if no other person had acted to his detriment on the faith of it. In a later case⁴⁵ the English Court of Appeal refused to accept this proposition for the case of *inter vivos* gifts and it expressly left open the question whether the cases on wills were correctly decided. While the notion of beneficial interests vesting in a beneficiary, being divested by a disclaimer and vesting in some other person and then, on the revocation of the disclaimer, revesting in the original beneficiary may smack of conceptual untidiness, that is probably the worst criticism that could be made of those cases. The fact that revocation might not be permitted under the old law relating to conveyances by deeds or in cases of other *inter vivos* transfers where the donor is informed of, and accepts, the disclaimer, should not necessarily be decisive when the question arises under a will.

If *Re Young* and *Re Cranstoun's Will Trusts* were correctly decided, they would provide some persuasive support for the proposition that a beneficiary should be able to disclaim his income interest for a limited period. If it is possible to disclaim an income interest in its entirety, and then to revoke the disclaimer, it would be curious if it is not possible to disclaim the interest for a limited period at the outset. Be this as it may, on the present state of the English authorities, it seems most likely that a testamentary gift of such an interest would be regarded as a single gift and incapable of being disclaimed in part.

It will be noted that, if it were possible to make a limited disclaimer, a further question would be whether the disclaimer could be renewed from year to year. Most probably, this would not be permitted because of the rule that acceptance would be presumed unless a disclaimer is made within a reasonable time of the vesting of the gift.

The answer to the third question follows logically from the answer to the first. If it is not possible in English law for a beneficiary who is *sui juris* to disclaim an income interest after payments of income have been accepted, a limited disclaimer at such a time must also be ineffective.

There have been three decisions in Ontario in which the issues considered above have been raised.

⁴³ [1913] 1 Ch. 272 (Ch.D.).

⁴⁴ [1949] Ch. 523 (Ch.D.).

⁴⁵ *Re Paradise Motor Company Ltd*, *supra*, footnote 9, at p. 1143.

In *Re Graydon*,⁴⁶ the testator's widow was entitled, *inter alia*, to a share of the income from his estate until his death. She received income for more than ten years and then notified the executor that she did not wish to receive further benefits from the estate. Subsequently, she executed a document in which she purported to "renounce, disclaim and forever release" all benefits due to her under her husband's will or upon his intestacy. The executor applied to the court for advice and directions as to the future distribution of the income and his counsel questioned whether the purported renunciation and disclaimer could be effective after the widow's acceptance of income for a number of years. Gillanders J.A. referred to the decisions on onerous gifts and to that in *Re Young*⁴⁷ and concluded as follows:⁴⁸

It is submitted that, upon acceptance of any part of the income provided for her, a life estate becomes vested in her, and cannot be disclaimed. She has, however, refused to accept further payments of income from the trustee; there are no conditions or obligations attached to the receipt of this income, or the receipt of any payments she has received in the past. When no-one else is prejudicially affected by her action and she has not formally renounced her claim and refused to accept further payments, I fail to see why the income on hand and that accruing due should be forced upon her or held longer for her. Under the circumstances here, I think she is entitled to renounce, and whether her refusal to accept further benefits from the trustee should be called a disclaimer or not is probably not important. She cannot complain if the trustee deals otherwise with the income, and no-one else is prejudiced. I see no reason why, until further or other order of this court, the income now in the hands of the executor, and the future income in question should not be disposed of by the executor to those otherwise entitled.

It was held that, until the death of the widow, the income should be paid to the persons who would be entitled on a partial intestacy, with the exception of the widow. The disclaimer of her right to share in the intestate estate was assumed to be effective.

Re Graydon is clearly not a strong authority, if it is any authority, for the proposition that a true disclaimer of an income interest can be made after income has been accepted. Gillanders J. did not find it necessary to decide the point for the simple reason that nothing turned upon it. Whether the document contained a release or a disclaimer, the result would have been the same. The decision is completely consistent with that in *Re Guinness's Settlement*.⁴⁹

The decision in *Re Graydon* is, nonetheless, important because the reasoning of the learned judge appears to have had some

⁴⁶ *Supra*, footnote 21.

⁴⁷ *Supra*, footnote 43.

⁴⁸ *Ibid.*, at pp. 133-134.

⁴⁹ *Supra*, footnote 4.

influence in *Re Coulson*⁵⁰ in which the Court of Appeal overruled a decision which appears to bear directly on the second question which was discussed above.

In *Re Skinner*,⁵¹ an income beneficiary for life purported to disclaim the income for one year. On the basis of the English decisions on a beneficiary's attempt to disclaim part of the benefits conferred upon him by a will, Addy J. held that the disclaimer was ineffective:⁵²

It seems to me that on a fair reading of [the relevant paragraph] of the will, one could not come to any other conclusion but that the gift to the son . . . is a single gift of the revenue from the residue of the testatrix's estate for life. There is nothing there or elsewhere in the will to indicate that the gift would be one of successive and severable yearly gifts of income, nor is there anything else in the will which would indicate any right of disclaimer to part of the gift of the income for life.

It does not appear from the report whether the beneficiary had previously received income from the estate. On either view, the decision and the reasoning appear to have been consistent with the principles which have been applied in English courts.⁵³ If that is correct, the decision of the Court of Appeal in *Re Coulson*⁵⁴ appears to indicate that those principles are not to be applied in the courts of Ontario.

In *Re Coulson* a beneficiary who was entitled to income for her life and had received income for many years executed a document in which she did "renounce, disclaim and surrender all my right, interest and benefits in the rents, profits and income from the said . . . trust for the period commencing on the 15th day of July, 1975, and ending on the 14th day of July, 1976". The document did not indicate in whose favour the renunciation was made. A question formulated for the advice of the court was whether the "Disclaimer" by the life tenant was "effective to divest her of all her right and interest in the income" of the testamentary trust for the period specified. At first instance, Osler J.⁵⁵ felt obliged to follow *Re Skinner* and answered the question in the negative. In delivering the judgment of the Court of Appeal, Estey C.J. stated that the question was the same as that considered in *Re Skinner*, that Addy J. had not referred to *Re Graydon*, that the authorities relied upon by Addy J. were cases of onerous bequests and that, having considered the decisions in Ontario and in England, the court was unanimously of the opinion that *Re Skinner* was wrongly decided. In the result it was held that the disclaimer was effective notwithstanding the

⁵⁰ (1977), 16 O.R. (2d) 497 (C.A.). ⁵¹ *Supra*, footnote 37.

⁵² *Ibid.*, at p. 38. ⁵³ *Supra*, footnote 41.

⁵⁴ *Supra*, footnote 50. ⁵⁵ *Ibid.*, at p. 499.

beneficiary's receipt of income in previous years and notwithstanding the fact that it was limited to a twelve month period.

On the basis of *Re Coulson*, it follows that the law of Ontario provides answers to the three questions posed at the beginning which are the reverse of the answers which the English decisions would seem to support. There is, of course, no absolutely compelling reason why principles of property law should develop in precisely the same way in different jurisdictions, but it would be helpful if the points of departure were clearly recognized and clearly indicated. It is suggested that on the basis of the traditional principles the reasoning in *Re Coulson* is open to criticism on the following grounds:

- (a) it ignored the fundamental rule that there can be no disclaimer after acceptance;
- (b) by so doing, it blurred, if it did not totally obscure, the distinction between disclaimers and other methods of renouncing an interest; and
- (c) it ignored the principle upon which the English cases on onerous gifts were decided.

In view of the terms of *Interpretation Bulletin* IT-385, the proposition that a renunciation of the kind in *Re Coulson* will be a valid disclaimer would seem to carry with it the conclusion that the income which is renounced will not be payable to the disclaiming beneficiary within the meaning of subsection 104(13) of the Income Tax Act and could not be taxed to him. Moreover, if disclaimers in Ontario are to be regarded as operating by way of avoidance rather than by way of disposition,⁵⁶ and if this distinction is to be recognized for the purposes of income tax, there would seem to be no possibility that a disclaimer for a limited period, repeated, perhaps, from year to year, will give rise to income attribution under subsection 75(1) or subsection 56(4) of the Income Tax Act or constitute a disposition of an income interest for the purposes of paragraph 106(2)(a). As a matter of taxation law these consequences are at least as surprising as the propositions of property law which are implicit in the decision in *Re Coulson*.

Finally, it should be mentioned that it does not seem possible to explain the decision in *Re Coulson* by assuming that Estey C.J. was using the term "disclaimer" in a non-technical sense and that, in answering the question presented to the court, he merely recognized the ability of the income beneficiary to dispose of her interest. Such an interpretation would be inconsistent with the decision to overrule *Re Skinner*.

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⁵⁶ The decision in *Smith v. Stuart* (1866), 12 Gr. 246 (C.C.U.C.), suggests that a disclaimer by a trustee will prevent the creation of an *inter vivos* trust. The English law is that it will avoid the legal interest of the trustee without preventing the beneficial interests from being acquired by the beneficiaries: *Mallott v. Wilson*, [1903] 2 Ch. 494 (Ch.D.).

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