

In the Supreme Court of South Africa  
In die Hooggeregshof van Suid-Afrika

{ APPELLATE Provincial Division)  
Provinsiale Afdeling)

Appeal in Civil Case  
Appèl in Siviele Saak

C N DENIERS Appellant,

versus

SEC. FOR INLAND REVENUE Respondent

Appellant's Attorney NAUDE & N Respondent's Attorney DEP. STATE ATTORNEY  
Prokureur vir Appellant Prokureur vir Respondent P. G. W. W. W.

Appellant's Advocate H. J. A. van Heerden Respondent's Advocate L. Kentridge  
Advokaat vir Appellant Advokaat vir Respondent E. M. du Toit

Set down for hearing on 7-8-1977  
Op die rol geplaas vir verhoor op

539 12 4

Baron, Kessels, Jodlip, Barrett, Miller ARR et al. folguit W. D.

ITSC Van Heerden - 9.45 - 11.00, 11.15 - 11.30, 12.40 - 12.45, 2.15 - 2.30  
(STOH) Kentridge - 11.30 - 12.40,

The Court dismisses the <sup>C.A.V.</sup>  
said appeal with costs,  
including the costs of two  
counsel  
(Judgment per  
Barrett JA)

[Signature]  
Registrar

5/5/77

Bills Taxed—Kosterekenings Getakseer

Writ issued  
Lasbrief uitgereik

Date and initials  
Datum en paraaf

Date Datum	Amount Bedrag	Initials Paraaf

CAPE INCOME TAX SPECIAL COURT.

Before :

The Hon. Mr. Justice Van Winsen - President.

Mr. H.G. Galbraith - Accountant Member.

Mr. T. Ball - Commercial Member.

CASE OF

(No. 5781).

(Heard at Cape Town on the 22nd November,  
1957.)

J U D G M E N T.

CAPE TOWN. 9th December, 1957.

VAN WINSEN, J.: On the 19th April, 1951 the appellant executed a Notarial Deed of Settlement known as the Rosemarie Trust in which he appointed himself and one Edward Carter as Trustees upon certain terms and conditions, the relevant ones being as follows :-

"1. The Settlor irrevocably donated, ceded and assigned to and settled upon the Trustees, subject to the Trusts and conditions hereinafter mentioned, all his right, title and interest in and to the cash and securities set forth in Schedule "A" hereto, which cash and securities and such other securities as may from time to time hereafter be substituted for or added to them are hereinafter collectively referred to as 'the Trust Estate'.

2. The cash and securities set forth in Schedule 'A' hereto shall be transferred or deemed to have been transferred into the possession of the Trustees on the 18th day of May, 1951, and the Trustees shall thereafter hold the Trust Estate for the Trusts following :-

(a) During the lifetime of the Settlor's daughter ROSEMARIE, but subject to the provisions of Clause 5 hereof :-

(i) To pay her in cash so much of the income thereof as the Trustees shall in their discretion decide;

(ii) To capitalise any surplus income from time to time provided, however, that the Trustees may at any time in their discretion pay such capitalised income or any portion thereof to the said ROSEMARIE

(iii) To make payment to the said ROSEMARIE

of such amounts of capital as they in their discretion may decide;

- (iv) To advance to the said ROSEMARY E. [REDACTED] by way of loan such amounts and on such terms and securities as they in their discretion may decide.

- (b) Upon the death of the said ROSEMARY E. [REDACTED] to divide the Trust Estate remaining in their hands -

- (i) Among her children or such of them as she may by Will appoint, in such manner and subject to such conditions and stipulations as she may by her said Will or Codicil thereto direct or, failing such appointment or such direction, -

- (ii) Equally among the children of the said [REDACTED], the child or children of a deceased child to succeed to his, her or their parent's share by representation;

provided that the Trustees shall retain the share of any beneficiary who has not attained the age of twentyfive (25) years until he or she shall attain that age, but shall pay the income of such share to the lawful guardian of such beneficiary during his or her minority and to the beneficiary himself or herself when such beneficiary attains the age of twentyone (21) years.

3. If the said ROSEMARY E. [REDACTED] survives the Settlor and attains the age of twenty-five years, the whole Trust Estate then remaining in the hands of the Trustees shall be paid over to her and the Trust shall cease and determine.

4. If the said [REDACTED] should die without leaving issue surviving her, the Trustees shall pay and transfer half of the Trust Estate to [REDACTED] created under Deed of Donation dated the 2nd day of August, 1944, or should that Trust have terminated at the date of the death of the said ROSEMARY E. [REDACTED] then the said half share shall be paid or distributed in terms of the said deed dated the 2nd day of August, 1944. The remaining half share of the Trust Estate shall be paid and transferred to THE GILLIAN [REDACTED] created under a Deed of Donation dated the 21st July, 1947, or should that Trust have terminated at the date of the death of the said ROSEMARY E. [REDACTED] then the said half share shall be paid or distributed in terms of the said Trust Deed dated the 21st July, 1947. If at the death of the said ROSEMARY E. [REDACTED] without leaving issue surviving her both the said ELIZABETH [REDACTED] and the said GILLIAN [REDACTED] shall have died without leaving issue, the whole of the Trust Estate shall devolve upon the residuary heirs appointed in the Last Will of the said ROSEMARY E. [REDACTED] in the shares therein nominated, or should she leave no valid Last Will, then upon her intestate heirs.

5. Save as herein provided, the said ROSEMARY E. [REDACTED] shall not be entitled to cede, assign, transfer, pledge or seek in any way to anticipate or alienate her right to the income or capital hereinbefore provided for, and, if she should attempt to do so - and the

decision of the Trustees as to whether such an attempt has been made shall be final - the Trustees shall be entitled to withhold payment of any income then or thereafter received from the Trust Estate and payable to her, and, if the Trustees should decide to withhold payment of any income, as they shall be entitled to do, they may at their discretion instead of paying such income to her, expend it for her use and benefit in such manner, at such time and by payment to such persons as they in their absolute discretion may deem fit.

6. The capital and interest devolving on the said ROSEMARY shall not form part of the Joint Estate of herself and any husband she may marry, nor shall the said funds be subject to the marital power of such husband, but shall be the absolute and uncontrolled property of the said ROSEMARY.

The Trust derives its income from dividends received on certain shares held by it. For each of the years during which the Trust has existed it has derived income from these shares and, save for two years, has paid over portion of the income to the beneficiary and has capitalised the balance in accordance with the provisions of Clause 2 (a)(ii) of the Deed. The income received and the manner in which it was dealt with is indicated in the following table :-

(1) Period or year of assessment ended the 30th June,	(2) Dividend Income (after deduction of allowable expenditure)	(3) Amounts paid to the bene- ficiary.	(4) Balance capita- lised.
1951	£ 78	NIL	£ 78
1952	£467	£350	£117
1953	£452	£ 90	£362
1954	£462	£460	£ 2
1955	£531	£300	£231
1956	£555	NIL	£555

In a further determination of the appellant's liability for super tax for the years of assessment set out in column (1) of the above schedule the Commissioner included in the appellant's income subject to super tax the respective amounts detailed in column (4) above and issued additional assessments on the appellant in respect of his income subject to super tax. Appellant has lodged an appeal against these assessments, claiming that neither by reason of Section 9(5) of the Income

Tax Act, 1941, nor by any other provision of that Act can the amounts in question be deemed to be the income of the appellant.

It is common cause that liability on the appellant can arise, if at all in this case, only under the provisions of Section 9(5) of that Act.

The section reads as follows :-

"If any person has made in any deed of donation, settlement or other disposition, a stipulation to the effect that the beneficiaries thereof, or some of them, shall not receive the income thereunder, or some portion of that income, until the happening of some event, whether fixed or contingent, so much of any income as would, in consequence of the donation, settlement or other disposition, but for such stipulation, be received by or accrue to or in favour of or be deemed to be received by or to accrue to or in favour of the beneficiaries, shall, until the happening of that event, or the death of that person, whichever first takes place, be deemed to be the income of that person."

Mr. Meyerowitz, who appeared for the appellant, argued that before Section 9(5) can be applied to any income under the Trust Deed, firstly the Deed must contain a stipulation to the effect that the beneficiary shall not receive the income thereunder until the happening of some event, fixed or contingent, and, secondly, that but for such stipulation the income would in consequence of the Deed be received by or accrue to the beneficiary.

Developing the first argument Mr. Meyerowitz contended that the "event" referred to in Section 9(5) of the Act could not be that contemplated in Clause 3 of the Deed since it was clear that the beneficiary could, by virtue of the exercise by the Trustees of their powers under Clause 2(a)(1) of the Deed, receive income prior to the date contemplated in Clause 3. Accordingly, if that was not the "event" the only alternative, so the argument ran, was to treat the exercise by the Trustees of their discretion in terms of Section 2(a)(1) of the Deed as such "event". Despite previous decisions in the Income Tax Special Court to the effect that such an exercise of discretion could be treated as an "event" within the meaning

of Section 9(5) (see e.g. Rulett v. Commissioner for Inland Revenue, 13 S.A.T.C. 58; Income Tax Appeal No. 3533 (unreported); Income Tax Case No. 775, 19 S.A.T.C. 314). Mr. Meyerowitz contended that the exercise of the Trustees' discretion could not be regarded as an "event". Accordingly, as the Deed of Settlement contained no stipulation that the beneficiary was not to receive the income thereunder until the happening of some "event" within the meaning of that word as used in Section 9(5) of the Act, the first requirement for the application of that section was not present and accordingly it had no application to the Deed with which this Court is dealing.

I do not agree with the submission that there is in the present Deed no "event" within the meaning of Section 9(5) of the Act. It is unnecessary to decide whether or not in an appropriate case the exercise by the Trustees of a discretion to withhold payment of income to a beneficiary can or cannot be an event within the meaning of that section. There has, as I have indicated above, been more than one decision in the Income Tax Special Court that the exercise of discretion by the Trustees does qualify as such an "event". It is unnecessary for me to express any opinion on the correctness or otherwise of those decisions. In the present case, however, in my view the event stipulated in the Deed of Settlement was the beneficiary surviving the donor and attaining the age of 25 years, i.e. the event stipulated for in Clause 3 of the Deed. Until the happening of that event the beneficiary was not entitled to receive such portion of the income of the Trust as the Trustees in their discretion might decide not to pay her. The stipulation absolutely prevents the beneficiary from receiving either the whole or such portion of the income as the Trustees may decide not to pay to her and is accordingly, despite Mr. Meyerowitz's submission to the contrary, a stipulation that the beneficiary "shall not receive the income thereunder, or some portion of that income, until the happening of some event,

whether fixed or contingent, ...".

In my view the Deed of Settlement in the present case satisfies the first requirement for the application of Section 9(5) of the Act in that it contains a stipulation that the beneficiary shall not receive the income or such portion thereof as the Trustees in the exercise of their discretion under the Deed may decide, until the happening of an event, namely the beneficiary surviving the donor and attaining the age of 25 years. //

Is the other requirement for the application of Section 9(5) present, namely that but for such stipulation the income would in consequence of the Deed be received by or accrue to the beneficiary? That such must be the effect of the Deed before the income not received by the beneficiary can be deemed to be the income of the donor is, I think, clear from the wording of Section 9(5) itself as well as from the decisions in the Income Tax Special Court in Income Tax Case No. 673, 16 S.A.T.C. 230; and Income Tax Case No. 775, 19 S.A.T.C. 314. As I understood the argument of Mr. Lagbart, for the Commissioner, he did not seek to controvert these propositions. In the first of these cases the Court was dealing with a Trust Deed which inter alia provided that the income available from the Trust Fund from time to time was to be vested in the donee subject to the rights reserved to the donor. The Deed went on to provide that on the death of the donor one half of such income was to be paid to his widow for and during her lifetime and the other half would be paid to the donee. On the death of the widow of the donor the whole of the income would be paid to the donee. One of the questions in issue was whether the provisions of Section 9(5) as it then read were applicable to the Deed so that the income from the Trust Fund could be deemed to be the donor's income. In the course of his judgment the President of the Income Tax Special Court said :-

"An analysis of the sub-section shows that it first of all contemplates a hypothesis, viz., the existence of a stipulation that the beneficiary shall not receive the income under the Deed till the happening of an event. Secondly, the sub-section provides what is to be deemed to be the devolution of the income until the event takes place. That devolution is back to the donor if apart from the stipulation it would be received by or accrue to the beneficiary concerned."

In that case it was held that but for the stipulation that the donee was only to receive one half of the income upon the death of the donor the donee would have been entitled to have been paid the income forthwith. It was accordingly held that the terms of Section 9(5) of the Act applied. This decision was followed in the second of the two cases quoted above, in which Hewton Thompson, J. quotes with approval the passage from the Judgment of the President of the Income Tax Special Court in Income Tax Case No. 673 as set out above. The learned Judge then went on to apply the reasoning in the passage quoted above to the circumstances of the case before him.

Reference was also made to Income Tax Case No. 823, 21 S.A.T.C. 77, in which Hewton Thompson, J. was required to decide whether certain income received by a Trust created by the settlor must be deemed to be income in the hands of the settlor in terms of Section 9(5) of Act 31 of 1941. I do not understand this judgment to depart in any way from the principle accepted in the two previous judgments, namely, that before Section 9(5) can apply it must be shown that but for the stipulation in the Deed the income would in consequence of the Deed be received by or accrue to the beneficiary. The result arrived at in this latter case, viz. Income Tax Case No. 823, it is true, differs from that arrived at in Income Tax Case No. 775, supra, but the learned Judge ex-



pressly states that the judgment in Income Tax Case No. 775 was given on the basis of the facts of that particular Trust Deed which he stated to be different from those he was considering in Income Tax Case No. 823.

In my view, accordingly, this principle must be applied in the case of the present Deed and the question remains whether but for the stipulation contained in Clause 3 of the Deed the amounts which the Trustees in the exercise of their discretion did not pay to the beneficiary would by virtue of the Deed have been received by or accrued to the beneficiary.

Mr. Lambert contended that but for the stipulation the amounts not paid by the Trustees to the beneficiary would have been paid to or received by her. He pointed out that Rosemarie was, while she lived, the only beneficiary contemplated by the Deed and if she survived the donor and reached the age of 25 years she would be entitled to the accumulated income as well as the capital in the hands of the Trustees at that time.

Mr. Meyerowitz, on the other hand, submitted that the income received by or accrued to the Trustees could only be received by or accrue to the beneficiary, but for the stipulation, if in terms of the Deed she had a vested right to the income at the time of receipt by or accrual of such income to the Trustees. If the beneficiary had no such right the income could not be received by or accrue to her whether or not there is a prohibition in the Deed against the beneficiary receiving the income. Accordingly, so the argument ran, the prohibition against receipt can only have meaning and effect where the beneficiary has a vested right to the income and would have been entitled to receive it but for the fact that the stipulation prohibits her from receiving it.

I cannot agree with this submission. It seems to me that if the beneficiary has a vested right to the income at the time of its receipt by the Trustees the income could be treated

as taxable in the hands of the beneficiary in which event it would not be taxable in the hands of the Trustees or the donor. In the present case the beneficiary has no vested right to receive the income at the time of its receipt by or accrual to the Trustees, but she has a contingent right to receive that income and but for the fact that the Deed stipulates that she was until she reached 25 years of age, having survived the donor, not to receive such portion of the income as the Trustees in their discretion decided not to pay her, she would during the tax years in question have received or there would have accrued to her all the income.

This conclusion, which refers only to the tax years ending on the 30th June, 1951 to 1956, inclusive, is not affected by the fact that there may eventually prove to be alternative beneficiaries should Rosemarie not survive the donor or, surviving him, not reach 25 years of age. During the tax years in question she was alive and the only beneficiary contemplated by the Trust and but for the stipulation in Clause 3 of the Deed of Settlement the income would have been received by or have accrued to her.

I conclude, therefore, that the second requirement for the application of Section 9(5) of the Act is present in this case and the income of the Trust not paid to the beneficiary in each of the tax years in question must be deemed to be the income of the appellant.

The appeal accordingly fails.

PRUDENTIAL.

(Adv. D. Meyerowitz, instructed by Messrs. Syfret, de Clanton and Low, Attorneys of Cape Town, appeared on behalf of appellant.)

Mr. J.A. Lambert represented the Commissioner for Inland Revenue.)

TRANSVAAL INCOME TAX SPECIAL COURT

Before

The Hon. Mr Justice G. Colman - President

Mr H.V. Hefer - Accountant Member

Mr S.T. Firman - Commercial Member

CASE

(NO. 6973)

(Heard in Johannesburg on 13th August, 1975)

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J U D G M E N T

JOHANNESBURG, 18th August, 1975

COLMAN J: On the 31st July, 1968 the appellant created a Trust for the benefit of his son Michael, born in June 1945. At the same time he created another Trust for the benefit of his son Peter, who was born in September 1947. There was a third Trust in favour of another son, but nothing relating to that third Trust affects the present appeal. The Trusts were framed in identical terms, and to each of them the appellant made a donation of R10 000. In addition, it would appear, he pro-

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vided each of the Trusts with further funds on some basis.

The evidence in that regard was not clear, but that is of no importance because the appellant and the respondent were both content to have the appeal decided on the footing that the capital of each of the Trusts came from the appellant.

The Trust Deeds are lengthy documents, but two of the material provisions which appear in each of them may be summarized in these terms: In each case the capital of the Trust was not to be paid to the beneficiary before the deaths of both the appellant and his wife, and in any event not before the beneficiary had reached the age of 30 years. If the beneficiary died before he became entitled to the capital of the Trust, his interest therein would devolve upon another person or persons.

The only other provision which is material to this appeal is Clause 25 of the Trust Deed, reading in each case as follows:

"All nett income accruing from the assets in the Trust from time to time shall be utilised and devoted by the Trustees for the maintenance, support, education and reasonable pleasures of the Donee or other beneficiary, but the Trustees shall have the power, in their absolute discretion, to withhold the whole or any portion of the income and such income or portion thereof so withheld shall be added to the capital and reinvested."

The Trustees did not, during the tax years ended 28th February, 1971 and 28th February, 1972, distribute the whole of the income of the Trusts. In each year some income was retained. The figures are not important, and there are no facts in dispute. The only question is whether the Secretary was right or wrong in applying Section 7(5) of the Income Tax Act, as he did, and in contending, on that basis, that the withheld income was deemed to be the income of the appellant. Sub-section 5 of Section 7 of the Income Tax Act of 1962 reads as follows:

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"If any person has made any donation, settlement or other disposition which is subject to a stipulation or condition, whether made or imposed by such person or anybody else, to the effect that the beneficiaries thereof or some of them shall not receive the income or some portion of the income thereunder until the happening of some event, whether fixed or contingent, so much of any income as would, but for such stipulation or condition, in consequence of the donation, settlement or other disposition be received by or accrue to or in favour of the beneficiaries, shall, until the happening of that event or the death of that person, whichever first takes place, be deemed to be the income of that person."

The sub-section embodies four requirements which must be satisfied before income accruing to a Trust can be deemed thereunder to be the income of the donor.

Firstly, there must have been a donation, settlement or other disposition. Secondly, it must have been subject to a stipulation or condition governing the distribution of

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the income, or part of it, to a beneficiary. Thirdly, that stipulation or condition must provide that the income, or part of it, is not to be received by a beneficiary until the happening of some event. Fourthly, the circumstances must be such that, but for the stipulation or condition, the income in question would have been received by, or would have accrued to a beneficiary.

The first and second of the requirements which I have mentioned are clearly present in this case. There is no  
10 dispute about that.

~~11~~ I heard some argument on the question whether the fourth requirement was or was not satisfied, and also on the question whether an exercise of discretion by the Trustees, under a provision like Clause 25, could be an 'event' within the meaning of the third of the requirements which I have extracted from the subsection. I need not discuss those debates, or their subject-matter, however, because it was ultimately accepted by the representatives of both parties (correctly in my view) that both questions should be  
20 answered in the affirmative. That left only one matter in

contention, namely, whether the stipulation or condition governing the distribution or non-distribution of the income in the Trust Deeds before me was one which provided that the income, or part of it, was not to be received by the beneficiary in each case until the happening of the material event, namely, the exercise by the Trustees of the discretion conferred upon them in Clause 25.

I have great difficulty with the contention on behalf of the Secretary that the stipulation or condition was of that character. The subsection provides for a suspensive provision whereunder the beneficiary shall not receive income until the happening of an event. I stress the expressions 'shall not' and 'until'. Each of the Trust Deeds before me embodies a resolute provision. It requires that the income shall go to the beneficiary unless the Trustees make the election to withhold, which constitutes, for the purposes of the subsection (if that subsection applies at all) the necessary event. I stress here the words 'shall' and 'unless'.

I am dealing with a charging provision which artificially deems income to be the income of a taxpayer when de facto

it is not, and such a provision must be strictly interpreted. I do not see on what basis I would, in making the necessary interpretation, be entitled to equate the expression 'shall .... unless' with the expression 'shall not ... until', which, to my mind, conveys precisely the opposite meaning. It is my view therefore that the stipulation or condition in Clause 25 is not such a stipulation or condition as is required to be operative before Section 7(5) can be applied.

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I am fortified in that view by the unreported decision by Bloch J in Income Tax Appeal No.5928, decided on 18th November, 1960. The learned Judge, sitting as President of the Cape Income Tax Special Court, was there called upon to deal, inter alia, with Section 9(5) of the Income Tax Act then in force. That section was similar in its material terms with the present Section 7(5). He had to decide whether the provision was or was not applicable to

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a Trust Deed which embodied, as each of the Trust Deeds before us does, an injunction that the Trust income was to devolve upon or for the benefit of a beneficiary, but subject to a proviso that the Trustees, in their discretion,



might elect to withhold the income or part of it.

The learned Judge, after expressing the view that the exercise of a discretion by the Trustees could be an event within the meaning of the subsection with which he was concerned, went on to say this:

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"... a stipulation that a minor beneficiary shall receive no income unless and until a trustee decides that he has reached an age of discretion could make the exercise of the trustees' discretion an event. Such a case, however, seems to me to be fundamentally different from the present one. To start with, it seems to me to be an abuse of language to construe words like 'the income shall go to the beneficiary but during her minority the trustees may in their absolute discretion withhold it' as being tantamount to 'a stipulation that the beneficiary shall not receive the income unless the trustees so decide'. In the former case the income goes automatically to the beneficiary unless there is a decision to withhold: in the latter case nothing can go to the beneficiary unless the trustees decide that the beneficiary shall receive it."

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The decision in Income Tax Appeal No. 5928 was reversed on appeal, but on a ground which was entirely unrelated to the part of the judgment which I have quoted. The Appellate Division, indeed, found it unnecessary to say anything at all about Section 9(5).

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In the circumstances it is, in my view, unfortunate that the judgment of Bloch J on that aspect of the matter was never reported. As I have indicated, I agree with his approach; indeed, I see no contrary approach which is

tenable, and I therefore adopt it.

The appeal succeeds and the matter is referred back  
to the Secretary for reassessment on the footing that  
Section 7(5) of the Income Tax Act is inapplicable.

PRESIDENT

(Mr S.W. Sapiro of Messrs I. Mendolow and Browde, Attorneys,  
Johannesburg, appeared on behalf of appellant;  
Mr R. Langley represented the Secretary for Inland Revenue).

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the appeal of:

ESTATE LATE C.N. DEMPERS ..... appellant

versus

SECRETARY FOR INLAND REVENUE ..... respondent.

Coram: Wessels, Trollip, Corbett et Miller, JJ.A., et  
Galgut, A.J.A.

Heard: 11 March 1977

Delivered: 5 <sup>May</sup> ~~March~~ 1977

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J U D G M E N T

CORBETT, J.A.:

This is an appeal, by way of a case stated,  
from the Special Court for the hearing of income tax appeals  
within the area of jurisdiction of the South West Africa  
Division of the Supreme Court. The then appellant appealed  
against assessments of normal tax and super tax for the  
year/.....

year of assessment ended 30 June 1969 and of normal tax for the tax years ended 30 June 1970, 30 June 1971, 30 June 1972 and 30 June 1973, raised upon him by the respondent. The Special Court dismissed the appeal. The matter now comes directly to this Court, the parties having agreed to dispense with the intermediate right of appeal to the South West Africa Division.

While the appeal to this Court was pending the appellant died. At the hearing before us appellant's counsel applied for the substitution of the executors testamentary in the appellant's estate as appellants in the matter. There was no objection and the substitution was granted. For convenience, however, I shall continue to refer to the late Mr Dempers as the appellant.

It appears from the statement of case that during the relevant period the appellant was a resident of Windhoek, in South West Africa. He carried on business as a financier and derived income by way of salary and fees as a director

of/....

of companies, interest and dividends. By nine separate deeds of donation the appellant created nine trusts in favour of each of his two major children and each of his seven grandchildren. Eight of the trusts were executed on 16 April 1969 and the ninth on 28 September 1970. To each of the trusts the appellant donated the sum of R100 000-00. The various trust deeds are in similar terms. That in favour of his grandson, John Dempers van Zyl, is taken as being typical of them all and has been annexed to the statement of case. In it appellant is referred to as "the Donor" and grandson John as "the Donee". The preamble to the deed recites, inter alia -

"WHEREAS the Donor out of love and affection which he has for and bears unto the Donee, is desirous of making provision for him in the manner hereinafter set forth and is also desirous of benefiting certain institutions."

In the body of the deed it is provided that the Donor gives, settles and donates upon trust the sum of R100 000-00 upon the terms and conditions and for the purposes thereafter set

forth/....

forth. The deed proceeds to nominate the first trustees appointed to administer the trust, to define their powers and duties and the rights of the Donor, and to stipulate how the income and capital of the trust is to be applied and is to devolve. Clauses 17 and 18, which fall into the last-mentioned category, are of paramount importance in this appeal and should, therefore, be quoted in full. They read:

"17. (a) Until the Donor's death the net annual income of the Trust, after the deduction of legitimate expenses and disbursements and trustee's remuneration as hereinbefore provided, may be used and expended by the Trustees in making donations to any charitable, ecclesiastical and/or educational institutions as they may from time to time decide upon, and/or for the benefit, welfare, and maintenance of the Donee and/or issue;

PROVIDED that it shall be in the absolute and uncontrolled discretion of the trustees as to the selection of any beneficiary to the income or as to the amount to be paid out and the trustees shall be entitled to pay any one or more or none of the beneficiaries and to accumulate the whole or any portion of the/.....

the income and provided further that any income not paid out in any year shall become and form part of the capital of the Trust.

- (b) After the Donor's death the Trustees shall in their sole and absolute discretion use the income of the Trust Fund or such portion as they may deem necessary for the welfare and benefit of the said Donee and the balance of the income (if any) shall accumulate in the Trust.

18. (i) The Trust shall terminate in the following way:-

- (a) One third of the total Trust Fund as it then exists shall be paid to the Donee on him reaching the age of 25 years
  - (b) 50% (Fifty per cent) of the remaining of the total Trust Fund shall be paid to the Donee on him reaching the age of 30 years
  - (c) The balance of the Trust Fund shall be paid to the Donee on him reaching the age of 35 years.
- (ii) If the Donee shall have predeceased the date of Termination of the Fund as set out above the Fund as it then exists on the death of the Donee shall be paid in equal shares to issue surviving the said date and if there be no issue so surviving then in equal shares to the other trusts established by the Donor during his lifetime.

PROVIDED/.....

PROVIDED that if the said Donee shall have died leaving no issue but leaving a spouse surviving, the Trustees may in their sole and absolute discretion from time to time decide the amount to be paid out in the support of such surviving spouse as long as they see fit and thereafter they shall pay in equal shares the remainder of the total trust fund to the other trusts established by the Donor during his life-time.

PROVIDED further that if any beneficiary by virtue of clause 18 (ii) be a minor, his/her share shall be retained and held in this trust with all the rights and powers contained in this Deed and the Trustees shall use so much of the income of such share as they shall in their sole discretion deem necessary for the welfare and maintenance of the said minor, accumulate the balance and pay the capital and accumulated income to the said minor when he or she has reached the ages as provided in clauses 18 (i)(a), (b) and (c).

If any or all of the said beneficiaries shall have predeceased the date of Termination of the Fund as set out above, the other stipulations of clause 18 shall prevail."

With these clauses must be read clause 4 which defines the term "Trust Fund":

"4. The terms "Trust Fund" wherever it occurs in this Deed shall mean and include:-

- (a) all the assets initially forming the subject of the settlement, whether such assets/.....



assets are registered in the names of the Trustees or otherwise;

- (b) any security or assets in which from time to time the proceeds thereof shall be invested;
- (c) all the additional sums or assets which the Donor or any person may donate to and vest in the Trustees as part of the settlement and trust administered by them in terms of this Deed, and
- (d) all interest and accumulations of interest income and growing produce generally arising from any funds, investments or re-investments held or made from time to time by the Trustees."

On 27 June 1973 separate deeds were executed by the appellant amending the original deeds by deleting clauses 17(a) and 17(b) thereof and substituting a new clause 17 reading as follows:

"The net annual income of the Trust, after the deduction of legitimate expenses and disbursements and trustee's remuneration as hereinbefore provided, may be used and expended by the trustees for the benefit, welfare, and maintenance of the donee and/or issue."

tax

This variation affects only the 1973/year.

After/.....

After the trusts had been constituted the amounts of R100 000-00 which had been donated to each of them were lent by the trustees at a rate of interest to a company known as General Imports (Proprietary) Limited (hereafter referred to as "General Imports"). Appellant and General Imports carried on a partnership business under the name of C. Dempers and Company. Interest payments by General Imports on these loans were put through the books of the partnership and credited to the various trust accounts maintained therein.

During the tax years in question all the interest paid in respect of the trusts created in favour of the appellant's children was distributed by the trustees to the children as and when received. Consequently, for reasons which will later become apparent, these trusts do not figure in this appeal. In the case of the trusts in favour of appellant's grandchildren the vast bulk of the interest accruing was accumulated by the trustees. Relatively small amounts were in some instances and in some years expended by the trustees for/.....

for the benefit of the individual grandchildren. The total amount so expended during the relevant tax years was R2 256; whereas the total amount accumulated over the same period was R257 906. The trustees made no payments out of the interest by way of donation to "charitable, ecclesiastical or educational institutions".

In determining the appellant's liability for income tax under Ordinance 10 of 1961 (South West Africa) for the years of assessment under review, the respondent, applying sec. 9 (5) of the Ordinance, included in appellant's income for each tax year the annual amounts of interest (totalling R257 906) which the trustees had accumulated and not paid out to the beneficiaries under the trusts. The crisp issue which arises on appeal is whether or not the amounts in question fall within the ambit of section 9(5). The Special Court found that they do. It is contended on behalf of appellant that they do not. I now address myself to this issue.

Section/.....

Section 9(5) of Ordinance 10 of 1961 (the English text of which was signed by the Administrator) reads as follows:

"If any person has made in any deed of donation, settlement or other disposition, a stipulation to the effect that the beneficiaries thereof, or some of them, shall not receive the income thereunder, or some portion of that income, until the happening of some event, whether fixed or contingent, so much of any income as would, in consequence of the donation, settlement or other disposition, but for such stipulation, be received by or accrued to or in favour of or be deemed to be received by or to accrue to or in favour of the beneficiaries, shall, until the happening of that event, or the death of that person, whichever first takes place, be deemed to be the income of that person."

The English wording of this subsection is identical to that of sec. 9(5) of the Union Income Tax Act No. 31 of 1941, as amended by sec. 4 of Act 39 of 1945. Act 31 of 1941 was repealed and replaced by the Income Tax Act No. 58 of 1962.

In this latter Act the counterpart of sec. 9(5) is to be

found/.....

found in sec. 7(5), which in turn was amended by sec. 9 of Act 55 of 1966. In its present form, sec. 7(5) differs in certain minor respects from sec. 9(5) of the 1941 Act, as amended, but is essentially the same provision.

So far as I am aware, there is no reported decision dealing with the interpretation to be placed on sec. 9(5) of the Ordinance. There are, however, a number of decisions, mainly of the Income Tax Special Courts, relating to the construction of sec. 9(5) and sec. 7(5) of the South African legislation. From their lack of uniformity these decisions indicate that the courts have not found these sections easy to apply when confronted with certain types of donation or settlement. Before considering some of these problems, however, there is one matter deserving of mention.

Prior to the hearing of this appeal and as annexures to their heads of argument, respondent's counsel (as is often the practice) furnished the Court with copies of certain unreported judgments of <sup>certain</sup> ~~the~~ Special Courts. At the hearing Mr Kentridge (on behalf of respondent) indicated that he

proposed/.....

proposed to refer to these judgments in argument. He was then asked by the Court whether the use of these judgments in this way would not involve a contravention of the secrecy provisions contained in section 4 of Act 58 of 1962. (See also the similarly worded sec. 4 of the present Income Tax Ordinance in South West Africa, 5 of 1974.) Mr Kentridge pointed out that in one instance (Case No. 5928) the judgment had been taken on appeal to this Court (see CIR v Berold, 1962 (3) SA 748 (AD) ) and although decided on appeal on another aspect of the case the whole judgment had, by virtue of the appeal, become public property, as it were. In regard to the other cases he conceded that as far as he was aware the taxpayers concerned had not consented to the contents of the judgments being disclosed in this way and indicated that he did not propose to make use of these judgments. I think that in this regard counsel acted very properly.

The use in tax appeals of unreported judgments of the Special Court by the legal representative of the Secretary for Inland Revenue is a matter that has arisen frequently in the Special Courts and in several instances

before/.....

before this Court. It is consequently appropriate, bearing in mind the secrecy provisions in the Act and in the S.W.A. Ordinance, that this Court should state its attitude to this practice.

In each of these statutes sec. 4 prescribes that every person employed in carrying out the provisions of the Act (or the Ordinance) shall preserve and aid in preserving secrecy with regard to all matters that may come to his knowledge in the performance of his duties and shall not communicate any such matter to any person whatsoever other than the taxpayer concerned or his lawful representative, nor may he permit any person to have access to any records in the possession or custody of the Secretary except in the performance of his duties under the Act (or the Ordinance) or by order of a competent Court. As was pointed out in Silver v Silver (1937 NPD 129), it is necessary for the purpose of administering the Act that the fullest information be available to the Department of Inland Revenue; and that if such information is to be obtained there must be some guarantee as to secrecy. For this reason the courts do not readily grant orders, against

the will of the taxpayer, for the disclosure of information falling within the terms of sec. 4.

This secrecy extends to proceedings before the Special Court. Sec. 83(11) of the Act and sec. 59(8) of the Ordinance each provides that the sittings of the Court shall not be public and empowers the Court on the application of the appellant to exclude from the sitting or to require to withdraw therefrom any person whose attendance is not necessary for the hearing of the appeal under consideration. And in practice the Secretary's representative, when seeking to use information gleaned from the affairs of another taxpayer, has been required not to disclose the source of his information or the fact that it is information given by a particular taxpayer (see Income Tax Case No. 879, 23 SATC 232; but see also Regulation B7 of the regulations promulgated under the Income Tax Act of 1962). In terms of Reg. B15 the Secretary is empowered, with the consent of the appellant concerned and in such form as the appellant may approve, to arrange for the publication of such decisions and judgments of the Court as he may consider to be of general interest. These judgments are published/....



published in South African Tax Cases in a form which omits reference to the name of the taxpayer and, generally, other identificatory information.

Ideally, judgments which are not so reported would relate to cases where the taxpayer had refused to give his consent to publication or where the judgment was not of general interest. Where the Secretary's representative seeks to quote a judgment of the Special Court as an authority, it means that the judgment must be of general interest. If, therefore, it is unreported, this would be attributable to the taxpayer's refusal to consent to publication; since, if the taxpayer were willing, it ought to be reported. The use in Court by the Secretary's representative of unreported judgments, where the consent of the taxpayer concerned has not been obtained, amounts thus, in my view, to a breach of sec. 4 of the Act either by the representative himself or, when he is not a member of the Department, by the Departmental member who briefed him. To the extent that this has become a practice in the courts dealing with income tax appeals, this Court should, in my opinion, state that the practice is not in accordance with the above-mentioned secrecy provisions.

I return now to the merits of the appeal.

As has been pointed out in many of the previous cases dealing with the South African legislation, upon analysis sec. 9(5) first of all contemplates a hypothesis and, secondly, provides for a deemed devolution of income. In the case of donations, the hypothesis is that the deed of donation contains a stipulation to the effect that the beneficiaries thereof or some of them shall not receive the income thereunder, or some portion thereof, until the happening of some event, whether fixed or contingent. If it does, then (and here I ignore the case of income deemed to accrue or to be received) so much of any income as would in consequence of the donation, but for the stipulation, be received by or accrue to or in favour of the beneficiaries is deemed to be the income of the donor until the happening of the event or the death of the donor, whichever first takes place. It would seem that the mischief which the subsection is designed to combat is a certain type of tax avoidance. Generally speaking, a taxpayer is perfectly/.....

perfectly entitled to reduce the amount of his income, and thereby the income tax payable, by giving away income producing assets owned by him (see CIR v King, 1947 (2) SA 196 (AD), 208). In sec. 9 of the Ordinance, however, (as in the case of the corresponding South African legislation) certain limitations are placed upon the right to avoid in this way liability for the payment of tax. One is that a taxpayer cannot avoid such liability if he makes his minor child the beneficiary of the income to be derived from the assets so donated (sec. 9(3)); nor can he avoid liability by achieving this in an indirect manner through the instrumentality of a third party (sec. 9(4) ). Another limitation is that he does not avoid liability where he retains the right to revoke the right of the beneficiary to receive the income of the donated assets or to confer the right upon someone else (sec. 9(6)). And finally there is the limitation contained in the subsection presently under consideration (sec. 9(5) ), which seems to be aimed generally at preventing/.....

preventing the avoidance of tax liability where and so long as the donor does not permit the beneficiary of the gift to enjoy immediately the income to be derived therefrom. In each case avoidance is prevented by the income in question being deemed to be that of the donor.

In determining the applicability of sec. 9(5) to the facts of the present case, the first question which the Court is required to decide is whether the hypothesis is satisfied, i.e., whether the trust deed, which is undoubtedly a deed of donation, contains a stipulation to the effect that the beneficiaries thereof shall not receive the income thereunder, or some portion thereof, until the happening of some event, whether fixed or contingent. An essential ingredient of such a stipulation is an "event" until the happening of which the beneficiaries of the Trust shall not receive the income thereof. In the case of the trust presently under consideration (and similar kinds of trust) there appear to be two types of event which might possibly conform to the requirements of sec. 9(5). They are:

- (1) the exercise by the trustees of the discretionary power granted to them under clause 17 (both in its original form and as amended) of the deed of trust to pay the income, or portion thereof, to the beneficiary; or, alternatively,
- (2) the attainment by the donee, successively, of the ages of 25, 30 and 35 years in terms of clause 18 of the trust deed.

As regards the first of these, there are a number of cases in which the exercise of such a discretionary power by a trustee has been regarded as being an event within the terms of sec. 9 (5) (see, e.g., Hulett v CIR, 1944 NPD 263, 269; Income Tax Case No. 775, 19 SATC 314; Income Tax Case No. 1033, 26 SATC 73). The general reasoning in support of this view is that a provision in a trust deed whereby a trustee is given an unfettered discretion either to distribute the annual income of the trust, or portion thereof, or to accumulate it, amounts to a stipulation that until that event, viz. the exercise of that discretion, the

-beneficiary/....

beneficiary shall not receive the income and, accordingly, that such a provision satisfies the hypothesis under sec. 9(5). In this connection it has been emphasized that the word "event" is —

"..... one of wide significance and its ambit is increased by the addition of the words 'whether fixed or contingent'."

(See Income Tax Case No. 1033, supra, at p 77.) This view commended itself to the Court a quo with reference to the provisions of clause 17 of the trust deed in both its original and amended forms.

It was submitted by appellant's counsel that, although the word "event" ("gebeurtenis" in the Afrikaans text) was in general of wide enough import to include the exercise of a discretion, in the context of sec. 9(5) it could not be read to comprehend the exercise by a trustee of his discretion to pay income to beneficiaries under a trust deed, such as the one presently under consideration. In

elaboration/....

elaboration of this submission it was argued, in the first place, that the kind of event contemplated by the subsection was a single, once-and-for-all occurrence until the happening of which the beneficiary did not receive the income and after the happening of which he did. Prior to the event the income was deemed by way of a fiction, to be that of the donor. After the event the fiction ceased and it became permanently that of the beneficiary. Counsel sought to derive support for this submission from the anomalies which could arise if an occurrence such as the exercise by a trustee of his discretion were regarded as an event. The example was cited of a trustee with discretionary powers who decided on the last day of the financial and tax year to distribute to beneficiaries income which had accrued to the trust, possibly at different times, during the tax year. It was contended that, if this decision were regarded as an event, a literal application of the whole of sec. 9(5), including the portion containing the deemed devolution, would/.....

would result in all the income which accrued during the year being deemed to be that of the donor, despite the fact that on the last day of the year it was actually paid to, and received by, the beneficiaries. This would seem to be quite contrary to the aim of the enactment which was to tax the income of the trust in the hands of the donor only when it was not received by the beneficiaries. The same or similar anomalies would arise were the trustee to decide several times during the course of the year to distribute income to beneficiaries.

In the second place, counsel argued that, if the exercise of such a discretion were regarded as an "event", it would mean that once the trustee exercised his discretion, either against or in favour of the beneficiaries, the tax liability of the donor would cease; because the question is not whether the occurrence of the event in fact resulted in the beneficiaries receiving income but whether the event before the occurrence of which they were not entitled to receive income, had in fact occurred. This showed that



the event contemplated by the section was one which would finally vest the income in the beneficiaries.

There is undoubtedly some force in these arguments. It is not necessary, however, to pronounce upon their correctness or to consider the counter-arguments advanced by respondent's counsel because, even assuming that they are correct, it does not follow that sec. 9(5) has no application. I say this because, in my view, there are other occurrences stipulated for in the deed of trust (i.e., other than the exercise of the trustees' discretion) which do constitute events in terms of sec. 9(5) and which are not vulnerable to the above-mentioned, or other similar, arguments. This brings me to the second type of event listed above and the provisions of clause 18 of the trust deed, relating to the termination of the trust. In terms of para. (i) of this clause the trust is to terminate by the donee receiving the total trust fund in three successive stages: one-third of it as it then exists, on attaining the age of 25 years;

half/.....

half of what remains when he reaches the age of 30; and the balance at 35. The clause (in para. (ii) ) also provides for the devolution of the trust fund upon the donee's issue in the event of the donee predeceasing the date of termination of the fund. It is clear from the provisions of clause 4 of the deed (quoted above) that the trust fund which is to devolve in this way includes all income of the trust which from time to time has been accumulated by the trustees as a result of their decision not to distribute it to the beneficiaries. Assuming for the moment that the donee survives to the age of 35, then it is clear that on attaining the age of 25 he will receive portion of the accumulated income, that at 30 he will receive another portion and at 35 the remainder. (This is apart from the capital proper which he will also receive at these ages.) It may, therefore, be said that clauses 17 (in both forms) and 18, read together, contain a stipulation to the effect that (i) the donee shall not receive until he attains the age of 25 years that portion of the income of the trust which the trustees have decided not to pay out but accumulate and to which/.....

which he becomes entitled upon attaining the age of 25 years;

(ii) he shall not receive until he attains the age of 30 years that portion of the accumulated income to which he then becomes entitled; and (iii) he shall not receive until he attains the age of 35 years that portion of the accumulated income to which he then becomes entitled. The stipulation would thus refer to three successive events, each of which would, of course, be contingent upon the donee attaining the age postulated. Similarly, as far as the substitute beneficiaries, the donee's issue, are concerned, there is a further provision, amounting to a stipulation, to the effect that they shall not receive the accumulated income until the happening of the event upon which their rights to receive it are contingent, viz. the predecease of the donee. Such stipulations appear to satisfy the requirements of sec. 9(5) and are not open to the objections (discussed above) to treating the exercise of the trustee's discretion as an event and to regarding the provision to the effect that the beneficiary shall/.....

shall not receive income until the exercise of such discretion as a stipulation under sec. 9(5). This analysis of the position finds support in three decisions of the Special Court: Income Tax Case No. 673, 16 SATC 230; Income Tax Case No. 823, 21 SATC 77; and Income Tax Case No. 903, 23 SATC 516.

It was contended by appellant's counsel that in this case there was not a stipulation conforming to the requirements of sec. 9(5) since it could not be said that until the happening of the suggested "event", viz. the attainment of each of the ages referred to in clause 18(i), there was a stipulation that the donee shall not receive the income thereunder. On the contrary, so the argument ran, the trustees were expressly empowered, in their discretion, to take steps which would result in the donee receiving, possibly, the whole income of the trust. Sec. 9(5) required a stipulation that the beneficiary shall not receive the income, or portion thereof, until the happening of an event. It is true that clauses 17 and 18 do not

contain/.....

contain an express statement that the donee shall not receive the income, or portion thereof. As I have shown, however, until the happening of the event this is indeed the effect of these clauses in regard to that portion of the income which the trustees, in their discretion, decide to accumulate each year. In my opinion, that constitutes sufficient compliance with the requirements of sec. 9(5).

It was also submitted that sec. 9(5) could not be applicable because on the happening of the events postulated (the attainment of the various ages) the donee would not receive any "income" but only capital, the accumulated income in the meanwhile having been capitalized. This argument is unsound. Assuming that it is implicit in the subsection that upon the happening of the event the beneficiary should receive the income that has hitherto been withheld, it is clear to me that this is precisely what would happen under clauses 17 and 18. The fact that the trust deed speaks of such accumulated income being  
capitalized/....

capitalized and added to the trust fund cannot alter its essential character, in the eye of the income tax law, of being "income". Counsel sought to reinforce his argument that the accumulated income could not be regarded as income in the hands of the donee, when ultimately received by him under clause 18, and generally that sec. 9(5) could not apply to this situation, by contending that if the accumulated income were so regarded and sec. 9(5) applied, double taxation would result; the donee would be taxable on the accumulated income when he received it and the donor will have been taxed thereon from time to time in the tax years in which it originally accrued. The answer to this contention is that once this income has been deemed under sec. 9(5) to be that of the donor, it is so deemed for all time and there is no room for any finding that subsequently it accrued to the donee as income.

To sum up the position thus far, the conclusion

to/.....

to which I come is that the requirements of the first portion of sec. 9(5), the hypothesis, are satisfied. The trust deed, clearly a deed of donation, contains, in clauses 17 and 18, a stipulation to the effect that until the happening of an event, viz. the termination of the trust by the attainment by the donee of the ages stated in clause 18(i), or the predecease of the donee, causing a devolution upon his issue in terms of clause 18(ii), the beneficiaries under the trust shall not receive so much of the income of the trust as the trustees decide not to pay them and to accumulate in the trust fund. Excluded from this amount of income would be the sums actually paid out by the trustees to either the donee or his issue or to any charitable, ecclesiastical or educational institution under the original clause 17 or to the donee or his issue under

the/.....

the amended clause 17.

The next question is whether the devolutionary portion of the subsection can be applied to trust provisions such as those contained in clauses 17 and 18. The relevant words of this portion read —

"..... so much of any income as would in consequence of the donation....., but for such stipulation, be received by or accrue to or in favour of..... the beneficiaries, shall until the happening of that event be deemed to be the income of (the donor)."

Appellant's counsel submitted that these provisions were inapplicable in this case in that it could not be said that, but for the stipulation, the income withheld in terms of the stipulation would have been received by or accrue to or in favour of the donee during the tax years under review. Two reasons were advanced in substantiation of this submission:-

- (a) that the devolutionary portion of sec. 9(5) can only apply where the beneficiaries have vested rights to the accumulated income and in the instant case they do not; and

(b)/.....



(b) that it cannot be said that, if the provisions of the deed in its original form giving the trustees a discretion to pay out income to the beneficiaries or withhold it from them be ignored or notionally deleted, the income withheld would have been received by or have accrued to the beneficiaries, since the trustees had the power to apply any portion of the income to donations to charitable, ecclesiastical and/or educational institutions. (It was conceded that this argument did not apply after the amendment of clause 17.)

The argument that sec. 9(5) applies only where the beneficiaries have vested rights to the accumulated income finds support in Income Tax Case No. 775 (19 SATC 314) but it would seem that that decision went off on the particular facts of the case and should not be pressed further as an authority (see Income Tax Case No. 823, supra). In other cases the "vested rights" argument has not found favour (see

Income/.....

Income Tax Case No. 903, supra; Income Tax Case No. 974,  
24 SATC 802).

In my view, in the application of sec. 9(5),  
a vested right to the accumulated income is not a sine qua  
non. Naturally, if the beneficiaries have vested rights,  
then this would be a strong, possibly decisive, factor  
leading to the conclusion that, but for the stipulation withhold-  
ing the income, it would have been received by them. That sec-  
tion 9(5) is not confined in its application to instances where  
the beneficiary has a vested right to the income which is to  
be withheld, is indicated, in my view, by the use of the  
words "fixed or contingent" in denoting the event until the  
happening of which he is not to receive the income. A  
"contingent event" (Afrikaans text: "ongewisse gebeurtenis")  
is an event which may or may not happen. A "fixed event"  
(Afrikaans: "gewisse gebeurtenis") is the converse: it is  
an event which will certainly and inevitably happen. The  
word "contingent" is also used to describe a right which  
is conditional and uncertain, as opposed to a vested right  
which/....

which is certain, unconditional and immediately acquired, even though in some instances enjoyment of the right may be postponed (Jewish Colonial Trust v Estate Nathan, 1940 AD 163, 175-6; Durban City Council v Association of Building Societies, 1942 AD 27, 33-4). A right under a will or contract may be contingent in the sense that, though imperfect at the time of its creation, it is capable of becoming perfect on the happening of some uncertain, future event (Durban City Council case, supra, at p 33). On the other hand, a right under a will or contract may be vested though its enjoyment be postponed until the happening of some certain future event. Applying these concepts to sec. 9(5) and postulating the case where the donor has stipulated that the beneficiary shall not receive the income until the happening of some contingent event, it is difficult to see how the beneficiary's right to the income could be anything but contingent, i.e., not vested. At any rate, these considerations show that the case of a beneficiary who in terms of the stipulation has only a contingent right to the income falls

within/.....

within the intended scope of the subsection.

It might be contended, in the alternative, that in such cases it is the stipulation itself which causes the right to receive the income to be contingent and that the proper approach is to have regard to the position as if the stipulation had not existed, i.e.. "but for such stipulation", and then ask whether the beneficiary's right is vested or contingent. The difficulty about this is that it is often the stipulation itself that confers upon the beneficiary the right to receive the income; consequently, if the stipulation be ignored, there is no remaining provision in regard to the disposal of the income which can be examined.

In truth the application of the devolutionary portion of the subsection involves a hypothetical, notional enquiry which cannot be directed solely to questions such as whether the beneficiary's right to income is vested or contingent. The question which the Court must ask itself is whether, in the absence of the stipulation withholding

trust/.....

trust income, this income would have been received by or have accrued to the beneficiary. In answering this question regard must be had to the terms of the instrument generally, the donor's general benevolent intention, as evinced by the terms of the instrument, and all the relevant circumstances. In this enquiry the fact that in terms of the instrument as a whole the beneficiary has a vested right to the income would, as I have indicated, be an important factor but it would not be the sole touchstone.

I shall accept for the purposes of this case that appellant's counsel is correct when he says that the donee (John van Zyl) did not have vested rights to the accumulated income during the tax years in question. That, as I have indicated, does not, however, conclude the enquiry. A reading of the deed as a whole convinces me that John was dominantly the object of the appellant's bounty. This appears clearly from the preamble, the most relevant portion of which is quoted above, and from the substantive provisions of the trust deed which contemplate that prior to the termination/.....

mination of the trust in terms of clause 18(1) income may be paid to John or expended for his benefit and that ultimately he will receive the entire corpus, together with the accumulated income. Nor do I think that this overriding intent to benefit John is detracted from to any material degree by the substitution of John's issue in the relatively unlikely event of his predeceasing the termination of the trust or by the power conferred on the trustees to benefit charitable and other institutions (a power which incidentally was not exercised in the first five years of the existence of the trust or, indeed, in the case of any of the other trusts in favour of the grandchildren).

This brings me to argument (b) above. It does not appear to me to be of substance. Ex hypothesi what is being considered is the accumulated income, i.e., that which has not been distributed to either the donee or to charitable

or/.....

or other institutions. In the notional enquiry as to who would have been the recipient of such income, but for the stipulation, I think that the charitable and other institutions can justifiably be ignored.

Viewing the matter in its totality, I am of the view that but for the stipulation in this case, the income of the trust under consideration would have accrued to and been received by the donee. The conclusion, therefore, is that both the hypothesis and the devolutionary portion of sec. 9(5) apply to the trust income which is the subject matter of objection and appeal. In terms of sec. 9(5), therefore, it must be deemed to be that of the donor, the appellant.

Finally, I would simply add that any other conclusion would lead to the somewhat curious result that, while sec. 9(5) would clearly apply to a trust whereunder the trust income was absolutely withheld from the ultimate beneficiaries and accumulated for a defined period, it would not apply, generally speaking, to a trust in terms of which,

again/.....

again for a defined period, the trustees were empowered, at their discretion, either to withhold and accumulate the income or to pay it to the beneficiaries. While each case must obviously be considered on its individual merits, the latter is a form of trust which frequently occurs and, having regard to the general object of the enactment, it seems unlikely that the Legislature would have intended to exclude such a transaction from the operation of sec. 9 (5).

For these reasons it is clear that appellant was correctly assessed by the respondent and that the Court a quo correctly rejected his appeal.

The appeal is dismissed with costs. The costs of two counsel are allowed.

  
 M.M. CORBETT.

WESSELS, J.A.)  
 TROLLIP, J.A.)  
 MILLER, J.A.)  
 GALGUT, A.J.A.)

CONCUR.