PRIVY COUNCIL. 1906.

WILFLEY ORE CONCENTRATOR SYNDICATE LTD. v. GUTHRIDGE.

The present case is said, no doubt, to be of a very substantial character; but in the opinion of their Lordships that is not a sufficient ground to induce them to recommend His Majesty to give leave to appeal from the decision of the High Court of Australia. They will, therefore, humbly advise His Majesty that the petition ought to be dismissed. The petitioners must pay the costs of the petition.

[HIGH COURT OF AUSTRALIA.]

DAVIDSON (COLLECTOR OF IMPOSTS) . . APPELLANT;

AND

ARMYTAGE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Sept.* 24, 25, 26; *Oct.* 15.

Griffith C.J., Barton and O'Connor JJ.

Stamps Act 1892 (*Vict.*) (*No.* 1274), *secs.* 4, 28, *Schedule, Part VIII.—Stamp duty —"Deed of settlement"—Deed executing special power of appointment.*

A deed exercising a special power of appointment created by a settlement, which was executed at a time when no *ad valorem* duty was payable thereon, is a "deed of settlement" within the meaning of Part VIII. of the Schedule to the *Stamps Act* 1892.

Moffat v. *Collector of Imposts*, 22 V.L.R., 164; 18 A.L.T., 144, approved.

The value of the actual interest dealt with in such deed is the basis on which the duty is to be assessed.

Decision of Full Court (*Armytage* v. *Collector of Imposts*, (1906) V.L.R., 504; 28 A.L.T., 9), reversed.

APPEAL from the Supreme Court of Victoria.

A special case was stated by the Comptroller of Stamps for Victoria under sec. 71 of the *Stamps Act* 1890 (Vict.), which set out the following facts: On 1st March 1886 a disentailing assurance and re-settlement was made between Frederick W. Armytage,

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Mary S. Armytage, his wife, and trustees, by which certain station lands were vested in the trustees to the use of Frederick W. Armytage for life, and thereafter to the use of his wife for life, and, after the death of the survivor of them, to the use of the trustees, in trust for all or such one or more of three named sons, Harry, Frank, and Bertram Armytage in such shares, and subject to such provisions and limitations over, and in such manner as the said Frederick W. Armytage, should by deed or will appoint, and in default of appointment in trust for the three sons equally, with gifts over upon death under 21 years. *Ad valorem* duty was not then payable on such deed. All the sons attained 21 years.

By deed poll, executed on 24th January 1895 Frederick W. Armytage irrevocably appointed one undivided third part of the lands (subject to the life estates) upon trust for Bertram Armytage.

By deed poll, executed on 7th June 1904 Frederick W. Armytage recited a previous appointment of the remaining two-thirds, subject to a power of revocation therein reserved, and he revoked that previous appointment and irrevocably appointed one-fifteenth part of the lands upon trust for Bertram Armytage, and the remaining nine-fifteenths upon trust for Frank Armytage. Both the instruments recited the disentailing assurance of 1st March 1886.

On 2nd August 1904 the two instruments of appointment were lodged with the Collector of Imposts, and he was required to give his opinion as to whether they were dutiable, and, if so, with what amount they were chargeable.

The Collector was of opinion that "the instruments were made in favour of persons who were the objects of a power of appointment in a settlement on which *ad valorem* duty had not been paid, and that they fell under the heading 'Settlement or gift, deed of,' and were not exempted by sec. 28 of the *Stamps Act* 1892 from payment of stamp duty on the value of the property settled or given by them." The Collector thereupon required a statement of the property appointed, and of its value, in compliance with sec. 30 of the *Stamps Act* 1892. Statutory declarations were thereupon made that the property in question was

that settled by the instrument of 1st March 1886, and that it was of the value of £50,766.

In respect of the appointment of 24th January 1895 the Collector assessed duty on £16,922 at £1 5s. per cent., and demanded £211 10s. 6d. duty, £105 15s. 3d. for penalty under sec. 26 (2) and £161 17s. for penalty under sec. 26 (4) of the Act. In respect of the appointment of 7th June 1904, the Collector assessed duty on £33,844 at £1 10s. per cent., and demanded £505 13s. 2d. for duty, £50 15s. 4d. for penalty under sec. 26 (1) and £6 6s. 10d. for penalty under sec. 26 (4). These sums were paid, and, upon the request of Frederick W. Armytage, a case was stated for the opinion of the Supreme Court asking the following questions in respect of each of the instruments:—

(1) Whether it was chargeable with duty.

(2) With what amount of duty it was dutiable.

The Supreme Court having answered the questions by saying as to each instrument that it was not chargeable with any duty (*Armytage* v. *Collector of Imposts* (1)), the Collector of Imposts now appealed to the High Court.

Hayes, for the appellant. The instruments in question are deeds of settlement or of gift within the meaning of the Schedule, Division VIII., to the *Stamps Act* 1892. Every deed executing a power of appointment is a settlement. The words in Schedule VIII. "whereby any property is settled in any manner whatsoever" define what is meant by a deed of settlement. It is not necessary to a settlement that there should be a creation of interests in succession: *Kane* v. *Kane* (2), where property given to a married woman for her separate use was held to be "settled." In *In re Player, ex parte Harvey* (3), a settlement is defined as "a disposition of property to be held for the enjoyment of some other person." That case was approved in *Wiseman* v. *Collector of Imposts* (4). An instrument is a settlement if it creates a beneficial interest in some person in whom it did not previously exist. Here there is an alteration of the trusts of the original settlement, for the gift over to the three sons as tenants in

(1) (1906) V.L.R., 504; 28 A.L.T., 9.
(2) 16 Ch. D., 207.
(3) 15 Q.B.D., 682, at p. 687.
(4) 21 V.L.R., 743; 17 A.L.T., 251.

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common is cut out. In *Russell* v. *Commissioners of Inland Revenue* (1) an exercise of a special power of appointment was held to be a new settlement. The interests created by these instruments are new interests, although they are of the same amount. Sec. 28, which exempts from taxation an instrument exercising a special power of appointment if the original settlement has paid duty, implies that, if the original settlement had not paid duty, the instrument would be taxable. [He also referred on this point to *Sweetapple* v. *Horlock* (2); *In re Jackson's Will* (3); *Moffat* v. *Collector of Imposts* (4); *In re Austin* (5); *Castlemaine Brewery Co. Ltd.* v. *Collector of Imposts* (6); *Commissioner of Stamp Duties* v. *Stephen* (7); *Spensley* v. *Collector of Imposts* (8); *Webb* v. *McCracken* (9); *Real Property Act* 1890, sec. 62.]

If the instruments are dutiable the basis of taxation is the whole value of the property dealt with, and not the value of the interests created. *Alpe on Stamp Duties*, p. 205; *Onslow* v. *Commissioners of Inland Revenue* (10).

Weigall, for the respondent. Neither of these instruments is a settlement. The lands referred to in them were settled in 1886, and the only power the respondent had was to fix the proportions of the estate which each of his sons should take. The effect of the settlement of 1886 was to create estates in the three sons, subject to being divested by the respondent exercising the power of appointment. Such an instrument is not commonly called a settlement, although in exercising a power of appointment the appointor may make a settlement. *Farwell on Powers*, 2nd ed., pp. 320-325. A settlement means an instrument whereby a succession of interests in property is created or the enjoyment of property is restricted. *See Vaizey on Settlements*, vol. I., chap. I., sec. I.; *In re Knowles' Settled Estates* (11). There must be something analogous to what is ordinarily known as a settlement: *Davey* v. *Danby* (12). These instruments are not

(1) (1904) 2 K.B., 342, at p. 348.
(2) 11 Ch. D., 745.
(3) 13 Ch. D., 189.
(4) 22 V.L.R., 164; 18 A.L.T., 144.
(5) 27 V.L.R., 408; 23 A.L.T., 85.
(6) 22 V.L.R., 4; 17 A.L.T., 282.
(7) (1904) A.C., 137.
(8) 24 V.L.R., 53; 19 A.L.T., 243.
(9) 3 C.L.R., 1018.
(10) (1891) 1 Q.B., 239.
(11) 27 Ch. D., 707.
(12) 13 V.L.R., 957; 9 A.L.T., 163.

deeds of gift, for a gift connotes the parting with property with the object of benefaction. *See Key and Elphinstone's Precedents and Forms in Conveyancing* (8th ed.), vol. I., pp. 89, 98; vol. II., p. 693.

The instruments, if taxable, are taxable according to the value of the property settled: *In re Twopenny* (1). It cannot be said that the whole property is settled when only estates in remainder are settled: *Onslow* v. *Commissioners of Inland Revenue* (2) deals with the particular words of the English Act, which are different from those of this Act. *See Stamp Act* 1870 (33 & 34 Vict. c. 97), sec. 3 and Schedule; *Alpes on Stamp Duties*, p. 205; *Key and Elphinstone's Precedents and Forms in Conveyancing* (8th ed.), p. 545*n*.

Hayes, in reply, referred to *Key and Elphinstone's Precedents and Forms in Conveyancing* (8th ed)., vol. II., p. 562.

Cur. adv. vult.

The judgment of the Court was delivered by

GRIFFITH C.J. The question for determination in this case arises under the *Stamps Act* 1892. Under the Schedule to that Act an *ad valorem* stamp duty is payable upon settlements and deeds of gift. The 8th clause is in these words:—"SETTLEMENT OR GIFT, DEED OF—(1) Any instrument other than a will or codicil whether voluntary or upon any good or valuable consideration other than a *bonâ fide* adequate pecuniary consideration whereby any property is settled or agreed to be settled in any manner whatsoever, or is given or agreed to be given in any manner whatsoever, such instrument not being made before and in consideration of marriage." The Act imposes an *ad valorem* duty in accordance with "the value of the property," —whatever that may mean. The present appeal relates to two instruments, dated respectively 24th January 1905, and 7th June 1904, both of which were made in execution of a power of appointment contained in a settlement made on 1st March 1886, before the passing of the Act by which the lands now in question were conveyed to trustees, subject to the life

(1) 24 V.L.R., 596; 20 A.L.T., 179. (2) (1891) 1 Q.B., 239.

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estates of Frederick William Armytage and Mary Susan Armytage, upon trust for Harry Armytage, Frank Armytage, and Bertram Armytage, or such one or more of them for such estates or interest and in such manner as Frederick William Armytage should by deed or will appoint, and, in default of appointment, for the three objects of the power as tenants in common in fee. By the two deeds now in question Frederick William Armytage exercised the power of appointment in favour of Bertram Armytage and Frank Armytage respectively, by appointing to them in fee after the expiration of the life estates. The question is whether these are settlements within the meaning of the Act. The learned Judges of the Supreme Court, who were of opinion that the instruments were not settlements, relied to a great extent upon the decision of the Full Court in *Castlemaine Brewery Co. Ltd.* v. *Collector of Imposts* (1). The document under consideration in that case was in no sense a settlement, but the Judges made use of some general observations that are, in turn, applicable to the present case. They cannot, however, be taken as a complete definition of what is a settlement.

It was contended by Mr. Weigall for the respondent that these instruments are not settlements, and in support of that contention he used various arguments. He maintained, amongst other things, that the term "settlement" necessarily connotes either restriction of power of disposition or a succession of interests. Restrictions alone cannot be the test, for a deed conveying land to trustees for uses for various persons in succession, might be a settlement, although there might be no restriction on the power of disposition of the beneficiaries. The case of *Kane* v. *Kane* (2) is a case showing that there may be a settlement without any succession of interests.

In the case of *Moffat* v. *Collector of Imposts* (3) the Court held, and in my opinion correctly, that an instrument was a settlement although it was an appointment of a sum of money to the appointee absolutely for his own use. So that this cannot be the test.

In the case of *Wiseman* v. *Collector of Imposts* (4), *Madden*

(1) 22 V.L.R., 4; 17 A.L.T., 282.
(2) 16 Ch. D., 207.
(3) 22 V.L.R., 164; 18 A.L.T., 144.
(4) 21 V.L.R., 743, at p. 748; 17 A.L.T., 251.

C.J., speaking of the term "settlement," said :—"It must create a beneficial interest in some person in whom it did not previously exist." That is, of course, not an exhaustive definition, but that condition is fulfilled in the present case, because, although in default of these deeds of appointment the same persons would have taken a share of the property as tenants in common in fee, it is settled by *Sweetapple* v. *Horlock* (1), the authority of which has not been disputed, that the interests taken under the deeds are new interests.

In *Moffat* v. *Collector of Imposts* (2) an executrix had under the will power to revoke the trusts declared in the will as to a sum of £5,000, with the consent of the person for whose benefit that sum had been given, and to make a new appointment. She did exercise that power with the consent of that person, and appointed the same to him absolutely. The Full Court, reversing the judgment of *Williams* J., held that that was a settlement. The learned Judges in the present case thought that there might be a distinction between that and the present case, because in that case the power of appointment was general. It was general in one sense, but it could only be exercised with the consent of the person in whose favour it was ultimately exercised. But whether it was a general or a special power cannot make any difference in the nature or character of the instrument by which the power is executed. In other words, the question whether the appointment is a settlement or not cannot depend upon whether the power is special or general. We are unable to distinguish the case of *Moffat* v. *Collector of Imposts* (2) from the present case, and, for reasons which I will give directly, we think that case was rightly decided.

The construction of similar words was considered by the Privy Council in the case of *Commissioner of Stamp Duties* v. *Stephen* (3). In that case the question was whether a particular instrument was a settlement or not. The instrument was made in execution of a special power of appointment. The judgment of the Judicial Committee was given by Lord *Lindley*. The material words of the Act in question are set out in the judg-

(1) 11 Ch. D., 745.
(2) 22 V.L.R., 164; 18 A.L.T., 144.
(3) (1904) A.C., 137.

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ment and are as follows :— "Duties to be levied, collected, and paid according to the duties mentioned in the said third schedule shall also be charged and chargeable upon and in respect of :—(A) All estate, whether real or personal—(*a*) Which any person, dying after the twenty-second day of May, one thousand eight hundred and ninety-four, has disposed of, whether before or after that date, by will or by settlement containing any trust in respect of that estate to take effect after his death, under any authority enabling that person to dispose of the same by will or deed, as the case may be." The 3rd schedule contained these words :—"Third Schedule.—*Duties on the Estates of Deceased Persons.*—Part I.—On the probate or letters of administration to be granted in respect of any estate real and personal of deceased persons. Where the value of such estate is under," &c. "Part II.—(2) Settlement of property taking effect after death of settlor—same duties as under Part I." After reading this enactment, Lord *Lindley* said :—"Their Lordships are of opinion that the foregoing language would be wide enough to cover property over which a deceased person had only a special power of appointment if there was any indication of an intention to include such property; for such a power is to some extent and in some sense a power of disposition, although within narrow limits. But the language itself is much more appropriate to general powers of disposition than to special powers of selection or distribution amongst a particular class, and the words cannot, in their Lordships' opinion, be extended so as to include the latter class of powers without some plainer indication of intention to include them." Then he proceeded to inquire whether there was anything in the context to show an intention to include special powers, and came to the conclusion that the context showed that it was not intended to include them. The rule there laid down is a rule which we think we are bound to follow. The learned Judges of the Supreme Court were of opinion that the words now in question are not capable of bearing the construction sought to be placed on them by the Crown. We are of opinion that they are capable of bearing it, and should be so read if there is anything in the context to show that that was the intention of the legislature. In the present case the legislature has shown in the plainest

language in sec. 28 what it meant. On the assumption that a special power of appointment is included, that section proceeds to deal with the specific case. It provides that:—"Where any person is specially named or described as the object of a power of appointment in a settlement or gift on which *ad valorem* duty has been paid, or in a will in respect of property on which duty under any Act imposing duties on the estates of deceased persons has been paid, an instrument of appointment in favour of such person in respect of such property is not liable to duty." So that the precise case is dealt with. If settlement duty has once been paid on a settlement of the whole estate, no further duty is payable on the exercise of the special power of appointment. Upon the construction of the words and upon the authorities we think we are bound to hold that both these instruments were liable to stamp duty.

The next question is—How much duty? For the Crown it is contended that duty is payable upon the whole value of the estate that is, of the land which is the subject matter of the settlement. The words of the schedule are: "Where the value of the property does not exceed £1,000.—10/- per cent.," &c. The test therefore is the value of the property. What, then, is the meaning of the term "the property" in that context? Reliance is placed for the Crown upon the case of *Onslow* v. *Commissioners of Inland Revenue* (1), in which very similar words received interpretation. By the *Stamp Act* 1870 (33 & 34 Vict. c. 97) *ad valorem* duty is imposed upon "any instrument . . . whereby any definite and certain principal sum of money . . . or any definite and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever." In that case there had been a settlement of contingent reversionary interests in certain specified amounts of stock which were vested in trustees with power to vary the securities, and it was held by the Court of Appeal that duty was chargeable upon the amount of the stock quite irrespective of the fact that the interests referred to in the settlement were only reversionary and only contingent. If that case were not distinguishable from the present it would be binding upon us. But upon consideration we are of opinion that

(1) (1891) 1 Q.B., 239.

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it is not an authority governing this case. The real basis of the decision is to be found in a few observations of *Bowen* L.J. and *Fry* L.J. (1). *Bowen* L.J. pointed out that: "'Definite and certain' in the clause which we are considering are terms applied, not to the interest or the nature of the interest, but to the amount of the stock, and that the amount of the stock does not become uncertain because the chance of getting the stock may be uncertain." *Fry* L.J. said:—"Now it is obvious at once that the words I have read (any definite and certain amount of stock is settled) contain no definition or reference to the interest of the settlor in that 'definite and certain amount.' They simply refer to the stock. Two possible readings of those words seem to me to occur to the mind: the one would be to say, there was no settlement of that sum unless the settlor had an absolute and indefeasible interest; the other is to say that it applies to every case in which the settlor had any interest in that sum, whether that interest be vested or liable to be divested, or contingent, provided it is an interest." He thought the section related to the second class of interest, and that the only test was whether the sum itself was definite and certain. That is not the case here. The words used are "the value of the property." What is the property the subject of the settlement? Suppose the subject of the settlement were a term of years. It could not be contended that the value of the land was the subject of the settlement. If that is obviously so in the case of a term of years, why is it not so in the case of a freehold interest after an estate for life? What difference can it make if a partial interest is the subject matter of the settlement, whether that partial interest is present or future? We do not think that we are bound by the authority of that case to hold that duty is payable on anything more than the value of the property dealt with by the settlement, that is, the reversion expectant upon the deaths of the tenants for life.

The conclusion at which we have arrived, that the actual interest dealt with in the settlement is the only thing intended to be taxed, is confirmed, I think, by sec. 28 of the Act to which I have already referred. That section assumes that, when duty

(1) (1891) 1 Q.B., 239, at p. 244.

has once been paid upon the whole value of any land under a settlement, duty will not be payable on any subsequent dealing with that land under the settlement. It seems to follow that, when land has once been made the subject of a settlement and no duty has been paid, if subsequently a smaller interest is carved out under the settlement, duty should be charged on that interest only.

I should have mentioned that a similar view of the meaning of the term "settlement" had been expressed by *Phillimore* J. in *Russell* v. *Inland Revenue Commissioners* (1). That however was only a dictum. Upon the authority of the Privy Council we are bound to hold that this is a settlement within the meaning of the Schedule.

Mr. Hayes contended that the intention of the legislature was by that definition to include practically every conveyance not being a conveyance upon sale. It is unnecessary to say that these two descriptions include all possible conveyances, but it is hard to point out one that is not included.

We are of opinion, therefore, that the appeal should be allowed to this extent, by declaring that the instruments in question are chargeable with *ad valorem* duty to be computed in respect of the value of the expectant estates in remainder dealt with by the respective instruments. The respondents should pay the costs of the appeal.

Appeal allowed. Declaration as above. Respondent to pay costs of appeal.

Solicitor, for appellant, *Guinness*, Crown Solicitor for Victoria.
Solicitors, for respondent, *Blake & Riggall*, Melbourne.

B. L.

(1) (1901) 2 K.B., 342, at p. 348.