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in favour of such persons from the provisions of Acts as to quarantine.

I concur in the view that the Police Magistrate ought to have found that the respondent is not legitimate. I rely on the birth certificate, the difference of race of the parents, and all the circumstances. But I should not like to be taken as saying that the presumption of marriage which arises from living together has no application to the case of a Chinese and a white woman. I merely say that in such a case very slight evidence is sufficient to rebut the presumption.

Appeal dismissed with costs.

Solicitor, for the appellant, *C. Powers*, Crown Solicitor for Commonwealth.

Solicitors, for the respondent, *Croft & Rhoden.*

B. L.

Dist *Stamp Duties, Chief Commissioner of* v *Buckle* (1998) 37 ATR 393

Dist *Stamp Duties, Chief Commissioner of* v *Buckle* (1998) 72 ALJR 243

Disap *Stamp Duties, Commissioner of (Qld)* v *Hopkins* (1945) 71 CLR 351

Dist *Wedge* v *Acting Comptroller of Stamps (Vic)* (1941) 64 CLR 75

Dist *CSD (NSW)* v *Buckle* (1998) 192 CLR 226

Dist *Lam & Kym Pty Ltd* v *Comr of State Revenue* (2003) 52 ATR 742

[HIGH COURT OF AUSTRALIA.]

DAVIDSON (COLLECTOR OF IMPOSTS) . . . APPELLANT;

AND

CHIRNSIDE . . . . . RESPONDENT.

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ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

MELBOURNE, *Sept.* 25, 28, 29, 30; *Oct.* 1, 9.

Stamp duty—"Deed of settlement"—Settlement in pursuance of power in will—Appointment of new trustee—New beneficial interest—Exemption—Special appointment—Stamps Act 1892 (*Vict.*), (*No.* 1274), *secs.* 27, 28, *Schedule, Division VIII.*

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

The question whether an instrument is or is not taxable under the *Stamps Act* 1892 (Vict.) must be determined by an examination of the instrument itself and not upon extrinsic evidence.

Any instrument which on its face purports to be the charter of future rights and obligations with respect to the property comprised in it, and which contains such limitations as are ordinarily contained in settlements, is a settlement or an agreement to settle within the meaning of Division VIII. of the Schedule to the *Stamps Act* 1892, whether those rights and obligations could have been established *aliunde* or not.

An instrument may be a deed of settlement within Division VIII. although it does not create a new beneficial interest in any person.

The contrary principle laid down in *Wisenan* v. *Collector of Imposts*, 21 V.L.R., 743; 17 A.L.T., 257, overruled.

The words "power of appointment" in sec. 28 of the *Stamps Act* 1892 include any authority, in whatever form conferred, to make a disposition of property by deed or other writing, in order to give full effect to the will of the settlor or testator, and the words "instrument of appointment" include any instrument by which such a disposition is made.

A testator by his will directed his trustees to set aside a fund on certain trusts, and he authorized them in their discretion to cause the fund to be settled upon trustees to be nominated by them upon trusts corresponding with those previously declared. The trustees of the will executed an indenture which recited the trusts of the fund and that the trustees of the will would, on execution of the deed by the other parties thereto, pay the fund to those other parties.

The indenture then witnessed that the trustees of the will appointed the other parties to be trustees of the fund, and that those trustees of the fund should hold the fund upon the trusts declared in the will and upon no other trusts whatever. The indenture then continued "it being the purpose and intent of these presents only to nominate or constitute trustees of . . . the fund to hold the same upon the trusts in the said will declared concerning the same and not to create or affect any new or existing beneficial interests therein."

Held, that the indenture was a deed of settlement within the meaning of Division VIII. of the Schedule to the *Stamps Act* 1892, but was also an instrument of appointment in favour of persons specially named in the will as the objects of a power of appointment within the meaning of sec. 28 of that Act, and that, as duty had been paid on the property in respect of which the power of appointment was given, the indenture was exempted from taxation under the Act.

Per Higgins J.:—An instrument operates as an appointment if it prescribe or declare the destination of property apart from any right of ownership that the appointor may have.

Decision of the Supreme Court (*Chirnside* v. *Collector of Imposts*, (1908) V.L.R., 433; 29 A.L.T., 269) affirmed, but on different grounds.

Davidson v. *Armytage*, 4 C.L.R., 205, explained and distinguished.

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DAVIDSON v. CHIRNSIDE.

APPEAL from the Supreme Court of Victoria.

A case was stated by the Collector of Imposts of Victoria for the opinion of the Supreme Court which was as follows:—

No. 1.

1. Andrew Chirnside by his will dated 21st April 1890 declared that his trustees should stand possessed of the net moneys to arise from the sale collection and conversion of his trust estates.

(*a*) Upon trust (among other things) to appropriate and set apart for his daughter Margaret Fair Calvert a legacy or fund of £40,000 to be held by his trustees upon the trusts thereinafter declared for the benefit of his said daughter Margaret Fair Calvert her children and appointees. And in the next place to appropriate and set apart for his daughter Mary Matilda Chirnside a legacy or fund of £60,000 to be held by the said trustees upon the trusts thereinafter declared for the benefit of his said daughter Mary Matilda Chirnside her children and appointees and he declared in the event of any daughter of his dying leaving issue living at his death the trusts thereinafter declared concerning the share or portion of such daughter should take effect as nearly as might be as if such daughter had survived him. He directed the said legacies or funds of £40,000 and £60,000 respectively so set apart for the benefit of his said daughters respectively should be held by his trustees upon trust to invest the same in or upon any of the securities thereby authorized, and upon further trust during the life of his daughter for whose benefit such fund or sum had been set apart. To pay the income or interest thereof as and when the same should become actually receivable and not by way of anticipation into the hands of his same daughter for her separate use as a strictly personal and unalienable provision during her life or until she should do or suffer any act or thing whereby the same income or interest or any part thereof respectively should either voluntarily or involuntarily be aliened or encumbered, but if she should do or suffer any such act or thing then

immediately after the doing or suffering thereof as to the interest and income to accrue during the remainder of her life upon such trusts and subject to such restrictions for the benefit of his same daughter and her issue or any or either of them as his trustees should by any deed or deeds to be made with or without power of revocation and new appointment appoint. And in default of such appointment and subject to any partial appointment to pay and apply the same in such manner as the same would be payable or applicable if his same daughter were dead. And after the death of his same daughter as to as well the capital of the trust premises the trusts whereof where then being declared as the income thenceforth to accrue due for the same. In trust for all or any one or more exclusively of the children and issue of his same daughter (in such proportions for such interests and generally in such manner as she should by any deed executed in the presence of two or more credible witnesses with or without power of revocation and new appointment or by her will or codicil appoint). But no child or other issue in whose favour an appointment should be made should participate under the trusts next thereinafter contained in the unappointed portion of the said settled trust fund without bringing the benefit of such appointment into hotchpot. And in default of appointment and subject to any partial appointment in trust for the child if only one or all the children if more than one of his same daughter who either before or after her death being a son or sons attain the age of 21 years or being a daughter or daughters attain that age or marry under that age such children if more than one to take in equal shares. But if no child of his same daughter being a son should attain the age of 21 years or being a daughter should attain that age or marry under that age then in trust for such person for such interests and in such manner in all respects as his same daughter whether covert or sole should by will or

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codicil appoint. And in default of such appointment and subject to any partial appointment in trust for such person or persons as should at her death be of kin to her and who under the Statutes of Distribution would be entitled to her personal estate if she were dead a spinster and intestate and such persons if more than one to take in the proportions in which they would be entitled under such Statutes. Nevertheless he empowered his same daughter (notwithstanding the trusts therein contained subsequently to the trusts in her own favour) by will or codicil to appoint one moiety or equal half part of the income to accrue after her death or any lesser part of such income to or for the life or any lesser period of any husband of his same daughter who should survive her. By his said will he authorized and empowered his trustees in their discretion to cause the said funds respectively or either of them to be settled upon two or more trustees to be nominated by them (but of whom no husband of his daughter should be competent to act as trustee) upon trusts corresponding with those hereinbefore declared and such settlements should be prepared under the direction of his said trustees and should contain such usual and necessary clauses powers and provisoes as they should deem proper including such allowances of commission to the trustees thereof respectively as his trustees should see fit to allow. And he directed that as soon as a settlement was executed and the settled fund therein comprised paid or transferred to the trustees thereof his trustees should (notwithstanding any defect or irregularity in the nomination or appointment of the trustees of the settled fund) be exonerated from all responsibility with respect thereto and the receipt of the trustees of such settlement respectively should respectively (notwithstanding as aforesaid) be good discharges to his trustees. And he declared that if his trustees thereby constituted or any of them should die in his lifetime or if they or any of them or

any trustees or trustee appointed as thereinafter provided should after his death die or desire to be discharged or refuse or become incapable to act then and in every such case it should be lawful for his said wife during her life and after her death for the surviving or continuing trustees or trustee for the time being and for this purpose every refusing or retiring trustee should if willing to act in the execution of this power be considered a continuing trustee or for the acting executors or executor administrators or administrator of the last surviving or continuing trustee to appoint a new trustee or trustees in the place of the trustee or trustees so dying desiring to be discharged or refusing or becoming unfit or incapable to act as aforesaid and upon every or any such appointment as aforesaid the number of trustees may be augmented or reduced. And he appointed Arthur Rankin Blackwood Charles Edward Gates and Robert Selmon Whiting to be trustees and executors of that his will and the will was proved by them on 7th August 1890.

2. By an indenture dated 3rd April 1907 and made between Andrew Spence Chirnside, Robert Logan Chirnside and The Union Trustee Company of Australia Limited (hereinafter called "The Will Trustees") of the one part and the said The Union Trustee Company of Australia Limited and John Mackiehan the manager of the said Company (hereinafter called "The Settlement Trustees") of the other part and which is indorsed "Appointment of Trustees of Mrs. M. F. Calvert's portion under Will of Andrew Chirnside deceased." It is recited (*inter alia*) that the said Andrew Chirnside had by his will declared that his trustees should stand possessed of the net moneys to arise from the sale and conversion of his trust estates upon trust amongst other things to appropriate and set apart for his daughter Margaret Fair Calvert a legacy or fund of £40,000 to be held by his trustees upon the trusts thereinafter declared and hereinbefore set forth. And it is also therein recited that the will trustees had then appropriated and set apart the said legacy or fund of £40,000 and held the same upon the trusts in

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the said will declared for the benefit of the said Margaret Fair Calvert her children and appointees. And it is further recited that the will trustees were desirous of causing the said legacy or fund of £40,000 to be settled upon two trustees to be nominated by them upon trusts corresponding with those by the said will declared concerning the said legacy or fund and that the persons thereinafter nominated (being the settlement trustees) had consented to act as such trustees and hold the said legacy or fund upon the said trusts. And that the indenture now in recital had been prepared under the direction of the will trustees and contained such usual and necessary clauses powers and provisions as the will trustees deemed proper. And further that the will trustees would forthwith on the execution thereof by the settlement trustees pay to them the said legacy or fund of £40,000. And it was thereby witnessed that pursuant to the powers and authority in that behalf in the said will contained and to every other power in that behalf them enabling the will trustees thereby nominated and appointed the settlement trustees to be the trustees of the said legacy or fund of £40,000. And it was thereby agreed and declared that the settlement trustees should hold the legacy or fund of £40,000 upon the trusts in the said will declared concerning the said legacy or fund as thereinbefore recited or intended so to be and upon no other trusts whatever it being the purpose and intent of the indenture only to nominate or constitute trustees of the said legacy or fund to hold the same upon the trusts in the said will declared concerning the same and not to create or affect any new or existing beneficial interest therein.

3. Mary Chirnside the widow of the testator Andrew Chirnside and the only person empowered to appoint trustees of the will and codicil of the said testator, was not party to the last-mentioned indenture and did not appoint or purport or affect to appoint the trustees of the said last-mentioned indenture such appointment being made by the will trustees solely.

4. At the date of the last-mentioned indenture Mary Chirnside the widow of the testator Andrew Chirnside was and still is living and after payment by the will trustees to the settlement trustees of the said legacy or fund of £40,000 there remained in

the hands or under the control of the will trustees other moneys and property forming part of the testator's estate which are still held and are being administered by the will trustees in accordance with the trusts and provisions of the testator's will.

5. On 10th April 1907 Messrs. Madden and Butler as the solicitors of Messrs. Andrew Spence Chirnside and Robert Logan Chirnside parties to the last-mentioned indenture produced to the Collector of Imposts under the Stamps Acts the said indenture and required the opinion of the said Collector—

(*a*) Whether it was chargeable with any duty.

(*b*) With what amount of duty it was chargeable.

6. On 26th June 1907 the said Collector acting under powers given him by the Stamps Acts required Messrs. Madden and Butler to state the nature of the property comprised in the said indenture and they in response to such requirement on 16th August 1907 informed the said Collector the property was money, viz., the sum of £40,000.

7. The Collector is of the opinion that the said sum of £40,000 has been severed from the estate of the testator by the will trustees and has been constituted into a new and distinct fund pursuant to powers in that behalf contained in the said will and that original trustees of that fund, viz., the settlement trustees, have been appointed by the will trustees under powers also contained in the said will and not by Mary Chirnside the widow of the testator Andrew Chirnside who is the only person empowered by the said will to appoint new trustees of that will. And that the settlement trustees have declared the trusts upon which they hold the said fund and that the trusts so declared are new trusts although corresponding with the trusts declared by the said will in respect of the said legacy or fund of £40,000 and that the above-mentioned indenture by which the settlement trustees have been appointed and by which they declare the trusts upon which they hold the fund comprised in and subject to the said indenture is a deed of settlement or gift within the meaning of the Stamps Acts and of Subdivision VIII. of the Schedule to the *Stamps Act* 1892 and as such is liable to duty under the said Acts and the said Schedule and the Collector is also of opinion that the fact that the said indenture is by the indorsement

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thereon called " Appointment of Trustees of Mrs. M. F. Calvert's portion under Will of Andrew Chirnside deceased " and that the said indenture purports to provide that it was the purpose and intent of the said indenture only to nominate or constitute trustees of the said legacy or fund to hold the same upon the trusts in the said will declared concerning the same and not to create or affect any new or existing beneficial interest therein does not in any way prevent the said indenture being a settlement within the meaning of the said Acts and Schedule for the purpose of being liable to duty and that such last mentioned provision in the said indenture was and is *ultra vires* and nugatory.

8. The Collector of Imposts, being of opinion that the instrument was chargeable with stamp duty as a settlement within the meaning of the Stamps Acts has accordingly assessed the duty payable at £600 on the amount settled, viz., £40,000 at the rate of £1 10s. per centum.

9. On 22nd August 1907 Messrs. Madden and Butler paid to the Collector of Imposts the duty £600 as assessed and the indenture was thereupon impressed with £600 in duty stamps.

10. On 22nd August 1907 Messrs. Madden and Butler by letter informed the Collector of Imposts that Messrs. Andrew Chirnside and Robert Logan Chirnside parties to the said indenture being dissatisfied with the assessment of duty made by him thereon desired to appeal therefrom and required the Comptroller of Stamps (thereby meaning the Collector of Imposts) to state and sign a case pursuant to sec. 71 of the *Stamps Act* 1890.

11. In compliance with the requisition in this behalf, and pursuant to sec. 71 of the *Stamps Act* 1890, I, James Davidson, Collector of Imposts under the Stamps Acts, do hereby state and sign this case, setting forth the question upon which the opinion of the Collector of Imposts was required, and the assessment made by him as follows :—

(1) Such question is whether the indenture of 3rd April 1907 is a settlement within the meaning of the Stamps Acts and of Clause VIII. of the Schedule to the *Stamps Act* 1892.

(2) Such assessment is the sum of £600.

The question for the Court is—

(*a*) Is the said instrument chargeable with any duty?

(*b*) With what amount of duty is it chargeable?

The Full Court answered that the instrument was not chargeable with any duty (*Chirnside* v. *Collector of Imposts* (1)), and the Collector thereupon appealed to the High Court.

Arthur, for the appellant. The indenture is a deed of settlement within the meaning of Division VIII. of the Schedule to the *Stamps Act* 1892. The tax is imposed on instruments, and not upon the transactions evidenced by them. The testator gave the trustees of his will a discretion, which they might or might not exercise, to revoke the trusts created by the will as to this particular fund and to create corresponding trusts in respect of it. In other words, the testator gave the trustees power to settle the fund and they have settled it: *Russell* v. *Inland Revenue Commissioners* (2). The exercise of a power of appointment by deed is a deed of settlement within the Schedule: *Moffat* v. *Collector of Imposts* (3). The effect of the indenture is that the fund was freed from the trusts of the will and became subject to the trusts of the indenture, which thenceforward was the instrument of title to the fund. No change of beneficial interest or creation of a new beneficial interest is necessary to constitute a settlement, and the decision in *In re Strachan* (4) to the contrary cannot be supported. Even if a change in the beneficial interest is necessary to constitute a deed of settlement, that is satisfied here, for the beneficiaries now hold their interests under the indenture, and not under the will, and the beneficial interests may be different in the case of forfeiture, or of the fund being encumbered, or of insolvency. By the introduction of new trustees new persons may benefit. This is not a mere appointment of new trustees, for, if it were, the beneficiaries' rights would continue to be governed by the original trusts of the will, whereas they are now governed by the trusts of the indenture. Though

(1) (1908) V.L.R., 433; 29 A.L.T., 269.

(2) (1902) 1 K.B., 142, at p. 149.

(3) 22 V.L.R., 164; 18 A.L.T., 144.

(4) 28 V.L.R., 118; 23 A.L.T., 236.

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the indenture may have the same result as the will, it may create new interests and there is a new instrument of title: *Sweetapple* v. *Horlock* (1).

[ISAACS J. referred to *Attorney-General* v. *Earl of Selborne* (2).]

The fact that the indenture arises out of the will does not exempt it from taxation: sec. 27 of the *Stamps Act* 1892. If a person sought to be taxed comes within the letter of the law, he must be taxed: *Partington* v. *Attorney-General* (3); *Craies on Statute Law*, 4th ed., p. 431. The mere fact that the indenture is described on its face as an appointment of new trustees does not render it any the less a deed of settlement. The words of Division VIII. are in substance a definition of what is a "deed of settlement or gift": *Davidson* v. *Armytage* (4); *In re Kelly's Transfer* (5), and are not merely descriptive of the particular classes of what are known to lawyers as deeds of settlement and gift which are intended to be taxed. It is not necessary to constitute a settlement that the settlor should have a beneficial interest or any interest in the property settled: *Spensley* v. *Collector of Imposts* (6). This indenture is not an execution of a special power of appointment, and is not exempted from taxation by sec. 28 of the *Stamps Act* 1892. That section was not intended to deal with settlements as distinguished from gifts or appointments. If this indenture is an appointment, it is effected by a deed of settlement which is taxable. It is a re-settlement under a power to re-settle. No person is specially named or described in the will as the object of the power. Sec. 28 contemplates the ordinary case where a person is empowered to select the objects of the appointment. In this case persons might take other than those named or described in the will. The fact that the instrument has a similar effect to that of a deed of appointment does not make it an appointment.

[He also referred to *Castlemaine Brewery Co.* v. *Collector of Imposts* (7); *Johnstone* v. *Somerset* (8); *Alpe on Stamp Duties*, pp. 169, 203; *In re Austin*; *Embling* v. *Collector of Imposts* (9);

(1) 11 Ch. D., 745.
(2) (1902) 1 K.B., 388.
(3) L.R. 4 H.L., 100.
(4) 4 C.L.R., 205.
(5) 29 A.L.T., 91.
(6) 24 V.L.R., 53; 19 A.L.T., 243.
(7) 22 V.L.R., 4; 21 A.L.T., 282.
(8) 21 V.L.R., 421; 17 A.L.T., 161.
(9) 27 V.L.R., 408; 23 A.L.T., 85.

Newman v. *Collector of Imposts* (1); *In re Gowan*; *Gowan* v. *Gowan* (2); *In re Parrott*; *Walter* v. *Parrott* (3); *Hubbard* v. *Hubbard* (4); *Stamp Act* 1891 (54 & 55 Vict. c. 39) sec. 62; *Challis on Real Property Law*, p. 60; *Lewin on Trusts*, 11th ed. p. 140; *Farwell on Powers*, 2nd ed., p. 519.]

Guest, for the respondent. The intention of Division VIII. of the Schedule to the *Stamps Act* 1892 is to impose taxation in those cases in which the beneficial ownership of property is changed by means of deeds of settlement or gift. It was recognized that it was not sufficient to say that a tax should be imposed on property the subject of deeds of settlement or gift, and therefore words were inserted in the several clauses of the Schedule with the object of preventing persons from evading the tax by resorting to instruments not ordinarily known as deeds of settlement or gift. Neither the title of the Division nor the subsequent words govern, but the whole of the Division must be read together. It is those things which ordinarily would be carried out by deeds of settlement or gift that are taxed, and it is always easy to say on looking at the particular instrument whether it is in substance a deed of settlement or gift. Division VIII. does not impose taxation upon changes of the bare legal estate irrespective of the beneficial estate. There is no power given by the will to the trustees to make a new settlement. The whole of the equitable rights are disposed of by the will and nobody can alter them. The trusts are executed trusts under the will. This is not a case of revocation and new settlement, for the will gives no power to revoke the trusts. The fact that an instrument merely evidences the existence of a trust does not make it a deed of settlement, but the instrument, in order that it may be taxed, must create a trust. The trusts of the will and the equitable rights arising out of these trusts continue in force notwithstanding that by this indenture the fund is handed over to other trustees: *Viscount Massereene* v. *Inland Revenue Commissioners* (5). The title of the beneficiaries is contained in the will, and all that has been done is to create new trustees of part

(1) 29 V.L.R., 161.
(2) 17 Ch. D., 778.
(3) 33 Ch. D., 274.
(4) (1901) P., 157.
(5) (1900) 2 I.R., 138.

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of the testator's property. The power to grant to the new trustees usual and necessary powers does not authorize an alteration of the trusts of the will. There cannot be a settlement unless there is at least some mention of a new beneficial interest: *In re Austin*; *Embling* v. *Collector of Imposts* (1).

[ISAACS J. referred to *Gisborne* v. *Gisborne* (2); *West* v. *Viscount Holmesdale* (3).]

Even if the trusts were fully set out in the indenture, it would be none the less an appointment of new trustees. It is a usual thing in a deed appointing new trustees to set out the trusts.: *Key and Elphinstone's Precedents*, p. 118. *Viscount Massereene* v. *Inland Revenue Commissioners* (4) makes it clear that in the case of two instruments like these the settlement is made by the earlier instrument and not by that by which new trustees are appointed. If the will gives a power to settle, which is equivalent to a power of appointment, and that power has been exercised by this indenture, then the indenture is exempt from taxation under sec. 28 of the *Stamps Act* 1892. There is no distinction between a power to settle and a power of appointment, and an instrument is none the less an appointment because it purports to re-settle: *Russell* v. *Inland Revenue Commissioners* (5).

[He also referred to the *Insolvency Act* 1890, sec. 72; *Encyclopædia of Forms and Precedents*, vol. XIII., pp. 169-171, 231.]

Arthur in reply. This indenture is a settlement in the language of lawyers: *Underhill and Strahan's Interpretation of Wills and Settlements*, 2nd ed., p. 248. It does not follow that, because all appointments are re-settlements, therefore all re-settlements are appointments. The meaning of a power of appointment as used in sec. 28 of the *Stamps Act* 1892 is that the trusts are not completely declared by the original will or settlement, and the testator or settlor has indicated a person who in his stead is fully and finally to specify the trusts. Here the beneficial interests are completely defined in the will.

(1) 27 V.L.R., 408; 23 A.L.T., 85.
(2) 2 App. Cas., 300.
(3) L.R. 4 H.L., 543.
(4) (1900) 2 I.R., 138.
(5) (1902) 1 K.B., 142.

[He also referred to *Glenorchy* v. *Bosville* (1); *Leake's Digest of the Law of Land*, p. 374; *Attorney-General* v. *Mitchell* (2).]

Cur. adv. vult.

October 9.

GRIFFITH C.J. read the following judgment:—

The testator Andrew Chirnside by his will directed his trustees to set aside a legacy or fund of £40,000 on trust for the benefit of his daughter Mrs. Calvert and her issue, with power, in the event of her attempting to alienate her interest or any part of it, to declare new trusts of the income during her life for the benefit of her and her issue. By a subsequent clause he authorized his trustees in their discretion to cause the fund to be settled upon two or more trustees to be nominated by them upon trusts corresponding with those previously declared, and directed that such settlement should be prepared under the direction of his trustees, and should contain such usual and necessary clauses, powers, and provisions as they should deem proper, including such allowance of commission as the trustees of the settlement should think fit, and he declared that as soon as the settlement should be executed and the settled fund paid to the trustees thereof the trustees should be exonerated from all responsibility with respect to it. By other clauses in the will the trustees of the will were entitled to a fixed commission of 5 per cent. on income received by them, and were empowered to decide absolutely whether any particular sum received by them should be regarded as capital or income. The trustees of the will were, therefore, empowered to have inserted in the settlement provisions as to the rate of commission, if any, to be allowed to the trustees of the settlement, and also as to the maintenance and advancement of Mrs. Calvert's children (which are usual clauses), and which, if inserted, would confer upon the trustees of the settlement an authority which in their absence could only have been exercised by the Court.

By a deed dated 3rd April 1907, made between the trustees of the will of the one part and one of themselves and another person of the other part, which recited the material parts of the

(1) Wh. & T.L.C., 7th ed., vol. II., p. 795. (2) 6 Q.B.D., 548.

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will, including the trusts of the fund, and further recited that the trustees of the will would on the execution of the deed by the parties of the second part pay to them the fund of £40,000, it was witnessed that pursuant to the powers and authority in that behalf contained in the will, and to every other power enabling them in that behalf, they nominated and appointed the parties of the second part to be trustees of the legacy or fund. The deed concluded with the following words:—"And this indenture also witnesseth and it is hereby agreed and declared that the said Company and the said John Mackiehan shall hold the said legacy or fund of £40,000 upon the trusts in the said will declared concerning the said legacy or fund as hereinbefore recited or intended so to be and upon no other trusts whatever it being the purpose and intent of these presents only to nominate or constitute trustees of the said legacy or fund to hold the same upon the trusts in the said will declared concerning the same and not to create or affect any new or existing beneficial interests therein." It did not contain any provisions as to commission to be allowed to the trustees, or as to maintenance, advancement or management.

The result was that the same persons remained beneficially entitled to the fund, and to the same extent, as before, but with this change—that the power of appointment conferred on the trustees of the will in the event of any attempted alienation by Mrs. Calvert would have to be exercised by the trustees of the settlement.

The appellant, the Collector of Imposts, claimed that this deed was dutiable under Part VIII. of the Schedule to the *Stamps Act* 1892 (No. 1274) which reads as follows:—

"VIII.—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.

"(2) Any instrument declaring that the property vested in the

person executing the same shall be held in trust for the person or persons mentioned therein but not including religious, charitable, or educational trust."

The Full Court held that the deed was not a deed of settlement or gift within the meaning of the Act, following the previous case of *In re Strachan* (1), in which *Madden* C.J., and *à Beckett* J. held (*Williams* J. *dubitante*) that a similar instrument, executed under similar circumstances, was not a settlement, inasmuch as it did not effect any change of beneficial interest.

The Full Court examined at some length the case of *Davidson* v. *Armytage* (2) in this Court, and came to the conclusion that that case did not affect the authority of *In re Strachan* (1). I agree that *Davidson* v. *Armytage* (2) has no bearing upon the present case, but in deference to the learned Judges I will say a few words about that case.

The question for determination in that case was not whether the instrument in question was a settlement as distinguished from gift, but whether an appointment under a special power in a settlement fell within the terms of Part VIII. of the Schedule. In the judgment, as in the argument, the word "settlement" was used in a generic sense, to include any such instrument as therein described. This Court held: (1) following the opinion of the Judicial Committee in *Commissioner of Stamps Duties* v. *Stephen* (3) that the word "settlement" as used in the Schedule was large enough to include an appointment under a special power if the context showed that it was intended to be used in that sense; (2) that such a context was found in sec. 28 of the Act, which specifically dealt with such appointments and treated them as settlements; (3) that such an instrument is a settlement although it does not create successive interests and although the appointee would have had an interest (not the same) in the property if the appointment had not been made. In delivering judgment I quoted a dictum of *Madden* C.J. in the case of *Wiseman* v. *Collector of Imposts* (4). "It" (a settlement) "must create a beneficial interest in some person in whom it did not previously exist" (5). It was not necessary to express any opinion as to the

(1) 28 V.L.R., 118; 23 A.L.T., 236.
(2) 4 C.L.R., 205.
(3) (1904) A.C., 137.
(4) 21 V.L.R., 743; 17 A.L.T., 251.
(5) 4 C.L.R., 205, at p. 211.

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correctness of that proposition, but I pointed out that, if that were a necessary condition, it was fulfilled, since the appointment in question created a new interest.

This dictum seems to be the foundation of the decision in *In re Strachan* (1), where, however, it is quoted with the modification: "It must effect some change in the beneficial interest." The words of the Schedule include instruments that would in ordinary language be described as agreements or appointments or gifts rather than as settlements. In the case of an instrument the only operation of which, if any, would be to transfer an interest in property, but which shows on its face that it has not that operation, it may well be that it would not be within the Schedule. But the proposition cannot be used as a canon for determining whether an instrument is a settlement or not. It has often been pointed out that the duty is payable in respect of the instrument, not of the transaction evidenced by it.

The question whether an instrument is or is not within the Act must, in my judgment, be determined by examination of the instrument itself, and not upon extrinsic evidence. In order that an instrument may be a settlement in the ordinary acceptation of that term it is clearly not necessary that the instrument should itself operate as a transfer of the property settled. For instance, in the very common case of a settlement of money, or shares, or stock the transfer is ordinarily not effected by the deed of settlement, which merely declares and defines the trusts upon which the settled property is to be held. Again, in cases in which a trust may be created without writing, an instrument is not the less a settlement in the ordinary sense of the term because the trusts declared by it had been already declared by word of mouth. Nor is it material that the rights declared by the instrument are, so far as regards the effective enjoyment of the property, substantially the same as rights already existing, whether under a previous instrument or otherwise. The rights conferred or declared by the settlement are, in a real and substantial sense, new rights. In the present case the rights under the two instruments are by no means identical.

In my opinion any instrument, which on its face purports to

(1) 28 V.L.R., 118; 23 A.L.T., 236.

be the charter of future rights and obligations with respect to the property comprised in it, and which contains such limitations as are ordinarily contained in settlements, is a settlement or agreement to settle within the meaning of the Schedule, whether those rights could have been established *aliunde* or not. If a statement of already existing rights is added as a mere incident to the main operation of the instrument, as in the case of the appointment of a new trustee of an existing trust, this condition is not fulfilled, for in such a case the charter would still be the original settlement. In the present case no one would dispute that, but for the previous settlement made by the will, the instrument in question would be a settlement of the fund. It was so regarded by the testator, who authorized the trustees of the will to make such a settlement. Unless, therefore, the doctrine laid down by the Full Court is sound, it is a settlement in the ordinary acceptation of that term. But as the fund was already settled by the will, it operates as a re-settlement.

In my judgment the only question is whether the instrument falls within the words of the Schedule. If it does, it is a "Deed of Settlement or Gift," and is taxable.

For these reasons I am opinion that the rule laid down by the Supreme Court in *In re Strachan* (1), and followed in this case, cannot be supported, and that the instrument now in question is a settlement, and is taxable as such, unless it is within the exemption created by sec. 28 of the Act. This point was not raised before or decided by the Supreme Court.

Sec. 28 provides that: "where any person is specially named or described as the object of a power of appointment . . . 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 respect of such property is not liable to duty."

In my opinion the words "power of appointment" include any authority, in whatever form conferred, to make a disposition of property by deed or other writing in order to give full effect to the will of the testator, and the words "an instrument of appointment" include any instrument by which such a disposi-

(1) 28 V.L.R., 118; 23 A.L.T., 236.

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tion is made. The limits of a special power may be wide or narrow. A re-settlement may be an appointment, although the word "appoint" is not used in it, as in the case of *Russell* v. *Inland Revenue Commissioners* (1).

In the present case the authority conferred on the trustees of the will to settle the fund in the hands of new trustees is an authority to make a disposition of property by deed in order to give effect to the will of the testator. It is a limited power to re-settle. Mrs. Calvert is specially named, and her children are specially described, as the objects of the power: the deed in question is an instrument making such an authorized disposition: and, lastly, duty has been paid in respect of the will. All the conditions of the section are therefore fulfilled, and the deed, although a settlement, is on this ground exempt from taxation.

The appeal must therefore be dismissed.

BARTON J. I concur.

O'CONNOR J. I have had an opportunity of reading the judgment of the Chief Justice. It expresses my views, and I have nothing to add.

ISAACS J. read the following judgment:—

The result arrived at by the Full Court of Victoria in this case is correct, and the judgment should be affirmed. But as the reasons which led to that conclusion cannot, in my opinion, be supported, I desire, in deference to the learned Judges of the Supreme Court, to state upon what principles their judgment should be sustained.

The groundwork of the decision of the Full Court is that a document to be a settlement within the meaning of the *Stamps Act* 1892 "must create a beneficial interest in some person in whom it did not previously exist." In other words, the Court applies the test of the ultimate effect of the *transaction* having regard to the antecedent rights of the parties, and not the legal effect of the *instrument*.

But sec. 4 of the *Stamps Act* 1892 enacts specifically that the

(1) (1902) 1 K.B., 142.

duties are to be charged "upon and for the several *instruments* specified in the said Schedule."

Upon an enactment of a similar character, the *Stamp Duties Act* 1870, *Martin* B. in delivering the judgment of *Kelly* C.B., *Channell* B., and himself in the case of *Limmer Asphalte Paving Co.* v. *Commissioners of Inland Revenue* (1) said:— "In order to determine whether any, and if any what, stamp duty is chargeable upon an instrument, the legal rule is that the real and true meaning of the instrument is to be ascertained; that the description of it given in the instrument itself by the parties is immaterial, even although they may have believed that its effect and operation was to create a security mentioned in the *Stamp Act*, and they so declare. For instance, if a writing were headed by a recital that the parties had agreed to execute the promissory note thereinafter written, yet if in truth the contract set forth was not a promissory note but an agreement of another character, the stamp duty would be not that of a promissory note but of the agreement. The question, therefore, stamp or no stamp, and if a stamp to what amount, is to be determined upon *the real and true character and meaning of the writing.* It is sufficient to refer to the case of *Rex* v. *Inhabitants of Ridgwell* (2) to establish this proposition. The argument, therefore, of the learned Solicitor-General, founded upon a supposed estoppel, is without foundation; *the true character of the instrument* is the matter to be ascertained."

In *Rex* v. *Inhabitants of Ridgwell* (3) *Bayley* J. said:— "Whether the stamp of £1 was the appropriate stamp for this instrument depends on *the legal effect of the instrument itself.*"

What, then, is the real and true character and meaning, or in other words the legal effect, of the instrument? If the dictum in *Wiseman* v. *Collector of Imposts* (4) were correct, it would apply to exempt every settlement made under an executory trust where the limitations are stated by the creator of the executory trust. The beneficiary's interest under such an executory trust is the same before as after the trust is executed. It may need ascertainment by interpretation. The instrument which, for instance,

(1) L.R. 7 Ex., 211, at p. 214.
(2) 6 B. & C., 665.
(3) 6 B. & C., 665, at p. 669.
(4) 21 V.L.R., 743; 17 A.L.T., 251.

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in the case of *West* v. *Viscount Holmesdale* (1) the House of Lords called and regarded as a settlement in the strictest sense, would not under the logical application of the test in *Wiseman* v. *Collector of Imposts* (2) be a settlement at all.

But the instrument by which an executory trust becomes executed is only as Lord *Cairns* said (3) "carrying into effect through the operation of an apt and detailed legal phraseology, the general intention compendiously indicated by the testatrix."

In *Wiseman* v. *Collector of Imposts* (2) the definition of settlement under the bankruptcy law by *Cave* J. in *In re Player*; *Ex parte Harvey* (4), followed in Victoria by *Webb* J. in *Davey* v. *Danby* (5), was relied on. But apart from the special meaning of "settlement" under the Insolvency Statutes, (see *per Rigby* L.J. in *Hubbard* v. *Hubbard* (6)), the important word in the definition referred to is "held," as denoting permanency. The creation of a new beneficial interest in the grantee in *In re Player*; *Ex parte Harvey* (4) was beyond question; its nature was the important feature. The illustrations given by *Cave* J. are distinct to show this. The relevancy of the two cases of *In re Player*; *Ex parte Harvey* (4); and *Davey* v. *Danby* (5), to the facts of *Wiseman's Case* (2) is not easy to discern; and yet apparently the few words in the definition given by *Cave* J. seem to have started the doctrine which has led to the decision of the majority in *In re Strachan* (7) and the unanimous decision in the present case.

The real nature of the instrument in question here is unmistakeable. It recites the legacy and trusts of the will, the authority and power of the trustees to settle the fund upon corresponding trusts, and with such usual and necessary clauses as the trustees might think proper, the desire of the trustees to settle it accordingly, the preparation of the instrument under the trustees' direction, and the fact that it contains such usual and necessary provisions as the trustees think proper, and it then witnesses the exercise of the power &c., and that the trustees of

(1) L.R. 4 H.L., 543.
(2) 21 V.L.R., 743; 17 A.L.T., 251.
(3) L.R. 4 H.L., 543, at p. 571.
(4) 15 Q.B.D., 682.
(5) 13 V.L.R., 957; 9 A.L.T., 163.
(6) (1901) P. 157, at p. 160.
(7) 28 V.L.R., 118; 23 A.L.T., 236.

the settlement shall hold the legacy or fund "upon the trusts of the will," a compendious incorporation by reference.

True, it declares the purpose and intent of the document only to nominate and constitute trustees of the legacy to hold upon the trusts of the will, and not to create or affect any new or existing beneficial interest therein, but as *Martin* B. said, that declaration is immaterial if the true character of the document is otherwise; and here it clearly is otherwise. It is studiously worded to effect the full object authorized by the testator and yet, so far as mere verbiage could avail, to avoid admitting a taxable character, in other words, to be a settlement within the meaning of the will, and not to be a settlement within the meaning of the Act. But having the real and substantial nature of a settlement, and falling within the very words of the Schedule, it cannot escape the legal result: *Tennant* v. *Smith* (1). On its face it does settle the property on trustees for the daughter, and does so by the authority of the will from which she primarily derives all her rights. The moment that instrument was executed it became for all practical purposes the new starting point of her rights; it is now in effect the source of the powers and duties of the settlement trustees, and regulates henceforth the relations between them and their *cestui que trust*. The trusts of the will as such no longer apply to her or her legacy; and although the trusts, which do apply, correspond to the trusts of the will, they are not trusts of the will. The document is, therefore, not a mere appointment of trustees, nor a mere recognition of the trusts of the will, but a separate and independent title deed which answers technically and substantially to the description of settlement as generally understood, as applied to it by the testator himself in repeated terms, and as used in the Schedule to the *Stamps Act* 1892.

There is one consideration apparent on the face of the Act which appears to me to strongly support the view I have taken. Part VIII. of the Schedule taxes any instrument by which property is either settled or agreed to be settled. If, therefore, there were, first, an agreement to settle property, and afterwards a formal settlement in pursuance of the agreement, both would, on

(1) (1892) A.C., 150.

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the words of the Schedule, be taxable, the settlement being chargeable notwithstanding the only beneficial interest was already created by the agreement. But sec. 27 (2) especially provides that in such case the formal settlement shall not be taxed if the duty had been paid on the agreement. On the principle of the dictum in *Wiseman* v. *Collector of Imposts* (1) sec. 27 (2) was wholly unnecessary. But the instrument here is *primâ facie* liable to taxation, and if no exemption were to prevail in its favour, would be subject to duty.

It followed naturally from the view taken by the Supreme Court that the instrument was not an instrument of appointment within the meaning of sec. 28 of the Act. And it was regarded by the learned Judges as in contrast with such an instrument. It follows, however, from the opposite view taken by this Court, that on the facts of this case it is an instrument of appointment in favour of a person specially named or described as the object of a power of appointment in a will, and as duty was paid on the property included in the settlement, the exemption provided by sec. 28 arises and leaves the instrument free.

HIGGINS J. read the following judgment:—

Apart from the authorities which have been cited, this case seems to be simple. At the execution of the deed of 3rd April 1907 the legacy of £40,000, the subject thereof, was paid to the Union Trustee Co. and Mr. Mackiehan, its manager; and it was by the deed agreed and declared that these trustees should hold the legacy upon the trusts in the will declared concerning the same. The deed, therefore, incorporates the trusts declared in the will, so far as they relate to the legacy when severed from the rest of the testator's estate; and the result is the same as if the trusts were all set out, word for word, in the deed. That is to say, the income is to be paid to Mrs. Calvert, a daughter of the testator, for life, or until alienation, and after alienation, upon such trusts for the benefit of the daughter and her issue during her life as the trustees should appoint, or as if she were dead; and then in trust for all or any of her children as she should by deed or will appoint; and in default of such appoint-

(1) 21 V.L.R., 743; 17 A.L.T., 251.

ment, for her children in equal shares; with power for the daughter to appoint part of the income to a surviving husband. Apart from the *Stamps Act* 1892, such a deed, the creature of bounty, and containing elaborate provisions for successive interests in the fund, would clearly be called a "settlement," or "deed of settlement," but for one fact—the fact that it is executed under a power in the will. It might have been doubted, but for sec 28 of the Act, whether Schedule VIII. to the Act could refer to subsidiary instruments, such as appointments under a power, and in particular a special power—whether it does not refer only to principal instruments such as create the power. But sec. 28 puts an end to any such doubt; for it specially excepts instruments of appointment made under a special power in a previous settlement or will on which duty has been paid; thereby showing that, but for sec. 28, the instrument would have been included in the Schedule. The exception proves the rule (see also secs. 24 and 27).

The fact is that both Acts, the *Stamps Act* 1890, and the *Stamps Act* 1892, impose a tax on instruments—not on transactions (Act of 1890, sec. 32; Act of 1892, sec. 4). The more instruments you want, the more stamps you must buy; and "instrument" means and includes every written instrument (sec. 31 of Act of 1890). The Act of 1890 taxed bills of exchange, receipts for £5 and upwards, conveyances or transfers on sale of any real property, annual insurance licences. The Act of 1892 taxed bills of lading, contract notes, customs entry warrants, &c., exchanges of real property, leases, receipts for £2 and upwards, deeds of settlement or gift—put out tentacles for revenue in all directions. "Deed of Settlement or Gift" is defined under two headings. The first heading seems to relate to settlements or deeds of gift which either transfer or accompany a transfer of property; and the second to declarations of trust by an owner—where he declares that property of his "shall" (thereafter) "be *held* in trust for the person or persons mentioned therein." Now this deed seems to come under the first heading: "Any instrument other than a will . . . whereby any property is settled . . . in any manner whatsoever . . . such instrument not being made before and in consideration of

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marriage." This fund is "settled," not "given" straight out. To constitute a settlement, the subject thereof need not be transferred by the instrument itself, as Mr. *Guest* frankly admitted. The two first precedents of settlements in *Davidson* are cases of settlements which did not transfer the property, but which recited that the stock or funds or shares or mortgage debts had been transferred in the usual way; and the deed of settlement merely declared the trusts on which they were to be held. I take it that the word "settled" here is used in contradistinction to the word "given"; and that an instrument, which declares the trust on which the fund is to be held on a transference thereof to trustees, is an instrument whereby the fund is "settled." It may be difficult in some cases to say what is the precise boundary line between a gift and a settlement. It appears that a succession of interests is not essential: *Davidson* v. *Armytage* (1). A gift to a married woman for her separate use has been held to be "settled": *Kane* v. *Kane* (2), followed in *In re Berens' Settlement Trusts*; *Berens* v. *Benyon* (3). But we are not called on here to formulate an exhaustive definition; for here is a declaration of limitations in succession of property to be held by trustees.

But it seems that in the Victorian Court a doctrine has obtained currency to the effect that an instrument is not a settlement unless it "create a beneficial interest in some person in whom it did not previously exist." This doctrine was first laid down by *Madden* C.J. in *Wiseman* v. *Collector of Imposts* (4); and, to judge from the report of the case, there was no argument to the contrary. The document in that case was one of mutual agreement between equitable tenants in common of various pieces of land, partly for division of lands between the parties, and partly for appropriate transfers *inter se*. It is hard to see how the land could be said to be "settled" by such an instrument. As the learned Chief Justice himself said, in *Spensley* v. *Collector of Imposts* (5), *Wiseman's Case* "relates to a thing which could not be a settlement in any view." The difficulties, and possible disputes, were "settled"; but in no sense

(1) 4 C.L.R., 205.
(2) 16 Ch. D., 207.
(3) 59 L.T., 626.
(4) 21 V.L.R., 743; 17 A.L.T., 251.
(5) 24 V.L.R., 53, at p. 59; 19 A.L.T., 243, at p. 245.

could the instrument be treated as a "settlement" of property; so that the actual decision is, no doubt, right. The learned Chief Justice based his dictum on expressions used in the cases of *In re Player*; *Ex parte Harvey* (1), and *Davey* v. *Danby* (2)—cases decided under the English *Bankruptcy Act*, and the Victorian *Insolvency Act* respectively. In the one case it was held that a gift of money outright, and in the other case that a deed of assignment for creditors, was not a "settlement" within the meaning of a bankruptcy section avoiding settlements made within certain times before bankruptcy. *Cave* J. said (3) that "the transaction must be in the nature of a settlement . . . the end and purpose of the thing must be a settlement, that is, a disposition of property to be held for the enjoyment of some other person." I do not think that these words justify the inference of *Madden* C.J. that, for the purpose of the *Stamps Act* 1892, there can be no "settlement" unless it "create a beneficial interest in some person in whom it did not previously exist." The sections of the Bankruptcy Acts referred to deal, of course, with voluntary transactions creating beneficial interests which did not exist before; but the Stamps Acts deal with instruments, and stamps on instruments; and any deed such as the present, which is executed on the transfer of a fund to outsiders, declaring, either expressly or by incorporation, the trusts on which the fund is to be held, would be a settlement within the meaning of the first heading of Schedule VIII. The second heading of Schedule VIII. includes under deeds of settlement or gift on which stamp duty has to be paid even a mere declaration of trust—trust for the future—even where there has been no transfer of the fund or property. In the cases which follow *Wiseman* v. *Collector of Imposts* (4), counsel for the Collector do not appear to have disputed the dictum of *Madden* C.J. in that case.

Moreover, there is sufficient indication otherwise in the Act itself that an instrument may be a "settlement" within Division VIII. of the Schedule, even though it do not create a beneficial interest in some person in whom it did not previously exist. As

(1) 15 Q.B.D., 682.
(2) 13 V.L.R., 957; 9 A.L.T., 163.
(3) 15 Q.B.D., 682, at p. 687.
(4) 21 V.L.R., 743; 17 A.L.T., 251.

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I pointed out during the argument, articles for a settlement are frequently drawn up which state precisely the beneficial interests in property to be settled; and the settlement afterwards prepared adopts precisely the same limitations. If the doctrine of *Wiseman* v. *Collector of Imposts* (1) is right, the settlement itself is not a "settlement" within Division VIII. of the Schedule, and could not be charged. But Division VIII. makes both instruments liable to duty ("settled or agreed to be settled"); and sec. 27 (2) qualifies the obligation by saying that where a settlement is made in pursuance of any previous agreement or articles, upon which the duty has been paid in respect of the same property, the settlement is not to be charged with duty. This provision would not have been necessary if the second instrument, which creates no new beneficial interests, were not within Schedule VIII.

Mr. *Guest*, in his able argument, urged strenuously that this deed is a mere appointment of new trustees; that in every appointment of new trustees of a will there is a declaration that the property shall be held on the trusts of the will; and that this deed could not be a settlement, as it made no change of ownership. But the deed is rather a creation of original trustees under a new instrument. There was no retirement of the trustees of the will. They remained as before; but this fund was taken out of the ring fence of the will, and vested in other trustees. The legal title to the fund was transferred to outsiders. The outsiders hold under what the Chief Justice has aptly termed "a new charter." Then, although the trustees of the deed hold for the beneficiaries referred to in the will, they are not bound by the same trusts in many respects. In order, as I infer, to avoid this very stamp duty, the deed has been drawn without inserting therein any of the usual clauses, powers and provisions which the trustees of the will had power to insert, and the purpose is stated to be "not to create or affect any new or existing beneficial interest therein." No doubt, those who framed the deed thought that they could safely rely on the statutory powers and provisions contained in the various Trust Acts, and on the right of the Union Trustee Company under its Act to charge commission on both

(1) 21 V.L.R., 743; 17 A.L.T., 251.

corpus and income of the fund, in addition to the commission which they got as trustees of the whole property comprised in the will. But the trustees of this instrument hold the fund freed from the power in the will to apply moneys annually for charity, freed from the power to mortgage for debts or expenses, freed from the provisions that Mr. Whiting should be employed as solicitor and receive full remuneration, freed from the 5 per cent. commission on income which has to be paid to the trustees of the will; and they do not enjoy the powers of investment contained in the will, or the powers of determining what is capital and what is income, and of settling other difficulties. If this were a mere case of appointment of new trustees the "new trustees" (so called) would be subject to all the provisions and enjoy all the powers of the trustees whom they replaced. I am clearly of opinion that this instrument is a deed of settlement within the meaning of Schedule VIII., and that it is therefore *primâ facie* liable to stamp duty.

But sec. 28 has to be considered. It means that, if duty has been paid on the instrument which creates a special power of appointment, duty need not be paid also on the instrument of appointment.. In such a case, there is really only one gift—from the creator of the power to the appointee—although the donee of the power states what the appointee is to take. In other words, where property is settled or given by two steps instead of one, duty is not to be paid twice. Now, duty has been paid on the estate of the testator, Mr. Chirnside, and his will specially named and described Mrs. Calvert and her issue as objects of this power; so that the only question that remains is, is the power conferred by the will to cause this fund to be settled on Mrs. Calvert and her issue, a power of appointment, and is this instrument an instrument of appointment in favour of these objects? That it is a power of appointment appears from *Russell* v. *Inland Revenue Commissioners* (1); and that it is an appointment in favour of Mrs. Calvert and her issue, although trustees are interposed, appears from *Kenworthy* v. *Bate* (2). There is no magic in the word "appoint." I take it that an instrument operates as an appointment if it prescribe or declare the destina-

(1) (1901) 2 K.B., 342; (1902) 1 K.B., 142. (2) 6 Ves., 793.

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tion of property apart from any right of ownership that the appointor may have.

I concur in the opinion that stamp duty is not payable on this instrument, because of sec. 28.

Appeal dismissed with costs.

Solicitor, for appellant, *Guinness*, Crown Solicitor for Victoria.

Solicitors, for respondent, *Madden & Butler*.

B. L.

Cons *Sydmar Pty Ltd* v *Statewise Developments Pty Ltd* 73 ALR 289

Appl *J C Scott Constructions* v *Mernaid Waters Tavern (No1)* [1983] 2 QdR 243

Disod *Just Juice Corp Pty Ltd; James* v *Commonwealth Bank* (1992) 37 FCR 445

Appl *Walker* v *Department of Social Security* (1995) 36 ALD 513

Cons *Elphick* v *Elliott* [2003] 1 QdR 362

[HIGH COURT OF AUSTRALIA.]

HILL (ADMINISTRATRIX) . . . . . APPELLANT;
DEFENDANT,

AND

ZIYMACK . . . . . RESPONDENT.
PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1907, 1908.

SYDNEY, 1907

Dec. 11, 12, 13, 19, 20. 1908

April 1.

Griffith C.J., Barton and Isaacs JJ.

Equitable set off—Damages in action of tort—Unsettled accounts between parties—Stay of execution by injunction in equity.

Action for conversion—Evidence in reduction of damages—Money expended by defendant in paying off mortgage on subject matter of action.

Administration—Money paid for benefit of estate before appointment of administrator—Ratification—Amendment of statement of claim.

Where a plaintiff has recovered damages in an action for conversion, equity will not, on the ground of equitable set off, restrain the plaintiff from issuing execution to recover the amount of the verdict merely because there