[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF STAMP DUTIES FOR NEW SOUTH WALES . . } APPELLANT;

AND

SIMPSON . . . . . RESPONDENT.

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SYDNEY, *Aug.* 21, 22; *Sept.* 5; *Dec.* 10.

Barton, Isaacs and Gavan Duffy JJ.

Stamp Duties—Settlement—"Contract or agreement" whereby property is settled—Deed poll in exercise of power of appointment—Trusts to take effect after death of settlor—Statute—Interpretation—Definition section—Stamp Duties Act 1898 (*N.S.W.*) (*No.* 27 *of* 1898), *secs.* 3, 49—*Stamp Duties* (*Amendment*) *Act* 1904 (*N.S.W.*) (*No.* 24 *of* 1904), *sec.* 20.

Sec. 3 of the *Stamp Duties Act* 1898 (N.S.W.) provides that "In this Act, unless the context or subject matter otherwise indicates or requires, 'settlement' means any contract or agreement (whether voluntary or upon any good or valuable consideration other than a *bonâ fide* pecuniary consideration) whereby any property, real or personal, is settled or agreed to be settled, or containing any trusts or dispositions to take effect after the death of any person." Sec. 49 (2) provides that duties to be levied, collected, and paid according to the Third Schedule to the Act shall also be charged upon "(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."

Held, by *Barton* and *Gavan Duffy* JJ. (*Isaacs* J. dissenting), that sec. 3 limits the meaning of the word "settlement" to instruments which are "contracts or agreements," that there is nothing in the Act which "indicates or requires" that the word "settlement" in sec. 49 (2) (A) (*a*) should have any other meaning, and therefore that where, in exercise of a general power of appointment contained in the will of her father, A executed a deed poll of appointment creating thereby trusts to take effect after her death, no duty was payable under sec. 49 (2) (A) (*a*) in respect of the property passing on A's death by virtue of the deed poll.

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Decision of the Supreme Court of New South Wales: *Simpson* v. *Commissioner of Stamp Duties*, 17 S.R. (N.S.W.), 217, affirmed.

APPEAL from the Supreme Court of New South Wales.

The Commissioner of Stamp Duties for New South Wales stated a case for the Supreme Court, which was substantially as follows:—

1. By the will of John Thomas Baptist, deceased, the father of Amelia Curtis, dated 16th August 1869, certain lands and hereditaments in this State were devised to the trustees thereof upon trust during the life of the said Amelia Curtis to pay the rents and annual income thereof to her as therein mentioned, and from and after the death of the said Amelia Curtis upon trust for such of her children or other issue as she should appoint, and in default of any such appointment, upon trust for all her children in equal shares and in default of any such issue upon trust for such other person or persons as the said Amelia Curtis should by any deed or deeds or by will notwithstanding coverture appoint, with divers remainders over.

2. The testator died on 15th September 1873, and probate of his said will was shortly thereafter granted by this Court to the executors and trustees therein named.

3. At the date of the deed of appointment in the next succeeding paragraphs hereof mentioned the said Amelia Curtis was a widow and never had any issue, and she remained a widow until her death.

4. By deed poll of appointment dated 8th July 1910 the said Amelia Curtis, in exercise of the powers given to her by the said will of her said father and of every or any other power enabling her in that behalf, thereby absolutely and irrevocably appointed and directed that from and after her decease the trustees of the said will for the time being should stand and be seised and possessed of the messuages, lands and hereditaments so devised as aforesaid and of all property whether real or personal over which she then had or might at the time of her decease have any power of appointment under the said will of the said testator, upon trust to sell and convert the same into money, and stand possessed of the proceeds of such sale and conversion upon trust to make thereout in the first place

certain payments of the amount and to the persons therein mentioned, and to hold the balance of the said proceeds after making the payments aforesaid upon trust to pay and divide the same amongst certain of her nephews and neices therein mentioned and Magdalen Bryne, the wife of her nephew Edward Baptist Bryne, and the said Amelia Curtis thereby directed that the share of the said Magdalen Bryne should be held on trust for her for her life and thereafter on trust for her children as therein mentioned.

5. The said Amelia Curtis died in England on 17th April 1915, leaving a will probate whereof was duly granted by the High Court of Justice (Probate Division) to Alfred Thomas Simpson, the executor therein named. Exemplification of probate of the said will was on 2nd December 1915 duly resealed by the Court on the application of Sir Thomas Hughes, the duly appointed attorney of the said executor.

6. The value of the property the subject of the said deed poll of appointment was, at the date of the resealing of probate of the said will of the said Amelia Curtis, £63,641 9s. 10d.: such property is vested in the said Sir Thomas Hughes and Charles Baptist Bryne, as the trustees of the said deed poll, by an order of the Chief Judge in Equity dated 16th November 1916.

7. The said Amelia Curtis was at the date of her death possessed of other property of the value of £502 18s. 2d.

8. The Commissioner claimed that duty was payable on the said appointed property on the ground that the said deed poll of appointment constituted a settlement within sec. 49 (2) (A) (*a*) of the *Stamp Duties Act* 1898.

9. The Commissioner duly assessed the duty payable in respect of the said appointed property and the said other property of the deceased at the sum of £6,200 13s. 8d., being at the rate of £9 2s. 3d. per centum.

10. After deducting from the amount so assessed the sum of £295, being the duty already paid upon the execution of the said deed poll of appointment, the net amount of duty claimed by the Commissioner was £5,905 13s. 8d.

11. The Commissioner claimed, in addition, the sum of £350 6s. 3d. for interest.

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12. The said executor paid the said sums of £5,905 13s. 8d. and £350 6s. 3d. under protest, and called upon the Commissioner to state and sign this case.

13. The said executor claims that the said deed poll of appointment does not constitute a settlement within the meaning of the said section, and claims that duty is not payable in respect of the property, the subject of the said deed poll.

The only material question for the determination of the Court was : Is the duty payable in respect of the said appointed property ?

The Full Court by a majority (*Sly* and *Ferguson* J., *Pring* J. dissenting) answered the question in the negative : *Simpson* v. *Commissioner of Stamp Duties* (1).

From that decision the Commissioner of Stamp Duties appealed to the High Court.

Leverrier K.C. and *S. A. Thompson*, for the appellant. The *Stamp Duties Act* 1898 is a consolidation Act. The definition of " settlement " was taken from the *Stamp Duties Act of* 1880, which did not contain a provision similar to that in sec. 49 (2) (A) (*a*). That section was taken from the *Stamp Duties Acts Further Amendment Act of* 1894, an Act which was quite independent of any other Act. There being no definition of " settlement " in that Act, that word had its ordinary meaning, and would have included such a settlement as that in this case. The Court may look at prior legislation in order to interpret sec. 49 (2) (A) (*a*) (*Halsbury's Laws of England*, vol. XXVII., p. 142 ; *Nolan* v. *Clifford* (2)). *Primâ facie*, in interpreting an Act which is purely a consolidation, the Court will endeavour to interpret it in the same way as the Acts which are consolidated. The definition in sec. 3 is not to apply if " the context or subject matter otherwise indicates or requires." It is not necessary to show that the context or subject matter imperatively requires a different meaning to be given to " settlement " in sec. 49 (2) (A) (*a*), but it is sufficient if there is an indication that it should have a different meaning. One indication is that, if " settlement " had the special meaning in sec. 49 (2) (A) (*a*), the result would be to remove all settlements from taxation under the section,

(1) 17 S.R. (N.S.W.), 217. (2) 1 C.L.R., 429.

for they would all be made by deed poll. The section was considered in *Commissioner of Stamp Duties* v. *Stephen* (1), where it was held to be limited to the exercise of general powers of appointment only. The Act was therefore amended by the *Stamp Duties (Amendment) Act* 1904, and by sec. 20 it was provided that sec. 49 (2) (A) (*a*) should be deemed to have extended and should extend to special or limited powers of appointment. If sec. 49 (2) (A) (*a*) does apply to a special power of appointment, the word settlement cannot have the limited meaning, for a special power of appointment cannot be exercised by a contract or agreement. See *Farwell on Powers*, 3rd ed., pp. 457, 473. An interpretation section should be applied only in determining the meaning of ambiguous words (*Halsbury's Laws of England*, vol. XXVII., p. 131), and the form of sec. 3 shows that it should be used only in that way in sec. 49 (2) (A) (*a*). The word "settlement" in the latter section should be interpreted in its ordinary legal meaning, because the idea of the exercise of a special power of appointment is repugnant to the idea of a bargain or contract, the words "contract or agreement" implying a benefit to the appointor. The words "has disposed of" in sec. 49 (2) (A) (*a*) are not apt words to use in reference to a contract. They refer to a transfer of rights *in rem*, and not to the creation of contractual rights. If the definition does apply, then a deed poll is a "contract or agreement" between the appointor and the appointees. See *Anson on Contracts*, 14th ed., p. 72. It is a promise by the appointor that on his death the appointees shall have the property, and that promise cannot be altered, and can be enforced by the beneficiaries. The fact that it is under seal makes it a formal contract. The action for breach of trust is an action *ex contractu* (*In re Maddock*; *Llewelyn* v. *Washington* (2)).

[ISAACS J. referred to *Richards* v. *Delbridge* (3).]

A "settlement" according to the definition includes a contract in writing or even a verbal contract, but that is inconsistent with the kind of "settlement" referred to in sec. 49 (2) (A) (*a*), which must be by will or deed. The words "under any authority enabling that person to dispose of the same by will or deed, as the case may

(1) (1904) A.C., 137.
(2) (1902) 2 Ch., 220.
(3) L.R. 18 Eq., 11.

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be," raise an ambiguity in the context, for they may refer to an authority to dispose of in either of two ways, or they may refer to an authority to dispose of by will only or an authority to dispose of by deed only.

Knox K.C. (with him *Lingen*), for the respondent. Judicial tribunals, in interpreting a taxing Act, must " stick to the letter of the Statute " (*Emmerton* v. *Federal Commissioner of Land Tax* (1)), whether it is or is not a consolidating Act (*Bennett* v. *Minister for Public Works (N.S.W.)* (2); *Williams* v. *Permanent Trustee Co. of New South Wales Ltd.* (3)). A word defined in an Act must have that meaning somewhere in the Act; if it is only used once, or if it is always used in the same collocation, it must have that meaning. The fact that, by the Act of 1904, sec. 49 (2) (A) (*a*) was amended so as to include special powers of appointment does not affect the question, for such a power as well as a general power of appointment may be executed by a contract—*e.g.*, a marriage settlement. The essential thing in fraud on a power is intention to benefit someone outside the power (*Farwell on Powers*, 3rd ed., p. 458; *Vatcher* v. *Paull* (4)); so that it cannot be an objection to the exercise of a power that it is by a marriage settlement, for instance. Neither the context nor the subject matter requires or even indicates that the definition should not be applied to sec. 49 (2) (A) (*a*); the word " indicates " cannot be given such a meaning as to put the Court in the position of the Legislature. The word " requires " means that unless another meaning is given the section will be insensible. The word " indicates " means that the definition may be disregarded if the language of the context or subject matter of the particular section shows plainly that the Legislature did not intend to use the word defined in the sense of the definition. The words " contract or agreement " in the definition require that there shall be a document between the parties.

[ISAACS J. referred to *Anson on Contracts*, 10th ed., p. 4; *Brunton* v. *Acting Commissioner of Stamp Duties (N.S.W.)* (5).]

As to the words " under any authority," &c., in sec. 49 (2) (A) (*a*),

(1) 22 C.L.R., 40, at p. 51.
(2) 7 C.L.R., 372.
(3) (1906) A.C., 249.
(4) (1915) A.C., 372.
(5) (1913) A.C., 747.

it cannot affect the question whether the property is disposed of under the authority of the instrument creating the power, that the power is exercised by a contract. A very common form of limitation is a life estate to A with a general power of appointment by deed or will. If the appointee wishes to sell, he does so by way of appointment. It could not be doubted that the appointment although a contract was under the authority of the power. Unless the definition is applied to sec. 49 (2) (A) (*a*), transactions for *bonâ fide* pecuniary consideration would be made liable to duty.

Leverrier K.C., in reply, referred to *Farwell on Powers*, 3rd ed., p. 476.

[BARTON J. referred to *Taylor* v. *Corporation of Oldham* (1).]

Cur. adv. vult.

Dec. 10.

The following judgments were read :—

BARTON J. The main principle to be observed in the construction of Statutes was, with the aptness and clearness usual to that distinguished Judge, stated in these terms by Sir *John Jervis* C.J. in *Abley* v. *Dale* (2) :—"If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied, where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning."

The *Stamp Duties Act* 1898 (No. 27 of 1898) purports to be a consolidation of the taxing Statutes on that subject. Dealing with a consolidating Statute which afforded ample room for a conjectural interpretation conveying the probable meaning of Parliament, *Griffith* C.J. said in *Bennett* v. *Minister for Public Works* (*N.S.W.*) (3) : "We have to look at the language of the Legislature, and where we

(1) 4 Ch. D., 395, at p. 405.
(2) 11 C.B., 378, at p. 391.
(3) 7 C.L.R., at p. 378.

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find that the Legislature has expressed itself in clear and unmistakable language, we must give effect to that language, although we may conjecture that it was used through inadvertence." And in the case of *Lumsden* v. *Commissioners of Inland Revenue* (1) Viscount *Haldane* L.C. said: "A mere conjecture that Parliament entertained a purpose which, however natural, has not been embodied in the words it has used if they be literally interpreted is no sufficient reason for departing from the literal interpretation."

In respect of taxing Acts the rule is even more strongly stated by high judicial authorities. For instance, in the case just cited, *Haldane* L.C. said (2):—"The duty of Judges in construing Statutes is to adhere to the literal construction unless the context renders it plain that such a construction *cannot* be put on the words. This rule is especially important in cases of Statutes which impose taxation."

These principles must be kept in view in construing sec. 49 of the *Stamp Duties Act* 1898. That section enacts (sub-sec. 2) that the duties to be levied, collected and paid according to the Third Schedule shall also be charged upon "(A) all estate, whether real or personal—(*a*) which any person dying after" a certain date in 1894 "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."

By sec. 3 of the same Act "settlement" means any contract or agreement (whether voluntary or upon any good or valuable consideration other than a *bonâ fide* pecuniary consideration) whereby any property, real or personal, is settled or agreed to be settled, or containing any trusts or dispositions to take effect after the death of any person.

In this interpretation section, the meanings assigned to the words and phrases set forth are to apply "unless the context or subject matter otherwise indicates or requires." The context or subject matter referred to must be that of the Act. There is nothing in the context, in my view, to point out or require any other meaning than the section itself assigns to the word "settlement." As for

(1) (1914) A.C., 877, at p. 892. (2) (1914) A.C., at p. 896.

the subject matter, there does not appear to be anything in the subject of stamp duties on deeds or that of estate duties (sec. 49) which either shows or demands that the Legislature intended the word "settlement" in sec. 49 (2) (A) (*a*) to bear a larger meaning than the rather narrow interpretation attached to it by the definition clause.

The instrument which is the subject of controversy is a deed poll executed by Amelia Curtis, deceased, under a power given her by the will of John Thomas Baptist, deceased, to appoint certain property upon trust by deed or will. There is no serious contention that this deed poll is a contract or an agreement within the qualifying words in the interpretation section. If such a contention were serious, I should waste no more words than I am using now in saying that it is entirely untenable.

No doubt, there is great room for speculation as to whether the Legislature wished that the word "settlement" used in sec. 49 should bear the restricted meaning assigned to it in sec. 3. It is conjectured at some length that, because of the concluding words of par. (*a*), the meaning the Legislature attached to the word in that paragraph was more comprehensive. I should think the speculation and conjecture very reasonable as such, and I should also think that the wider use of the term "settlement" was more than possibly in the mind of the Legislature. But as *Griffith* C.J. said during the argument in the case of *Bennett* v. *Minister for Public Works (N.S.W.)* (1), already cited, "that may be the object of the Legislature, but the question is what have they said." To use the words of Lord *Macnaghten* (for the Judicial Committee) in *Williams* v. *Permanent Trustee Co. of New South Wales Ltd.* (2), the Act of 1898 must "be read and construed as it was enacted. The Court has no authority to take the Act to pieces and to rearrange the sections so as to produce an effect which, on the face of the Act as it stands, does not seem to have been intended." To pursue such a process in the case of any Act would, in my view, be a dangerous departure from principle. If it can be more dangerous in one case than in another, then the taxing of the subject is the last case for its application.

(1) 7 C.L.R., at p. 374. (2) (1906) A.C., at p. 253.

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I am therefore of opinion that the majority of the Supreme Court were right in their decision, and that the appeal should be dismissed with costs.

ISAACS J. Amelia Curtis, by deed poll of appointment dated 8th July 1910 creating trusts to take effect after her death, exercised a general power of appointment which, in the events that had happened, she then possessed under her father's will. She died in 1915. The value of the property which passed on her death by virtue of the appointment was £63,641 9s. 10d. The only other property she had at the time of her death amounted to £502 18s. 2d. The Commissioner, under sub-sec. 2 (A) (*a*) of sec. 49 of the *Stamp Duties Act* of 1898, claims as duty on the appointed property £5,905 13s. 8d., the balance left after deducting a sum of £295 already paid upon the deed of appointment.

No question was raised in argument as to quantum, the whole contention being as to liability. That turns on whether the deed is a "settlement" within the meaning of the sub-section referred to. It is not disputed that it is a "settlement" for the purpose of passing the property, but it is said that, nevertheless, it is not one for the purpose of paying duty. The sum of £295 was paid upon it as a "settlement," and to understand this it is necessary to explain the amendment of 1904.

The Principal Act was passed in 1898 (No. 27), and is entitled "An Act to consolidate the Laws relating to Stamp Duties." It repealed the then existing Statutes, the last mentioned in the First Schedule being 57 Vict. No. 20, which is of high importance here. Part I. of the Act of 1898 is preliminary, and contains an interpretation section (sec. 3). That section begins: "In this Act, unless the context or subject matter otherwise indicates or requires," and then follow a number of expressions defined, subject to the governing words quoted. Among the expressions so defined is "settlement." Sec. 4 imposes the duties in respect of the several instruments and matters described or mentioned in the Act, and in the Second and Third Schedules, subject to the exemption mentioned. It declares: "Such duties shall be denoted in stamps upon the material upon which any such instrument or matter is written or expressed."

It is therefore plain (1) that what in the absence of contrary intention is dutiable is always an "instrument or matter," and (2) that every dutiable "instrument or matter" is written or expressed on material on which a stamp may be placed. The two Schedules mentioned contain the whole list of dutiable "instruments and matters."

The Second Schedule contains the "Duties on deeds or other instruments relating to transactions between living persons." It contains no imposition on "settlements" as such, but contains this statement: "Deed of any kind whatever not otherwise charged in this Schedule £1." The imposition on "settlements," as such, came in 1904.

The exemptions under the Second Schedule of the Act of 1898 include the following: "Any instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment created by a previous settlement duly stamped in respect of the same property, or by will where probate duty has been paid in respect of the same property as personal estate."

So far, any "deed" of appointment, even such as in the present case, would be liable under the main part of the Schedule. It would be an "instrument of appointment" within the meaning of the exemption, and the words "a previous settlement" would appear to recognize it as a "settlement" for the purpose of the Second Schedule—which is an important step in the present case.

The Third Schedule refers to duties on the estates of deceased persons, and is divided into two parts. Part I. relates to duties "on the probate or letters of administration" of the deceased person's own estate at time of death. Part II. is confined to "Settlement of property taking effect after death of settlor," that is, property which upon his death did not belong to his "estate" either because it never was his or because his death was the event on which under the settlement another person became entitled.

Part III. of the Act relates to "Duties on estates of deceased persons." Sec. 49 is the first section of this Part. Sub-sec. 1 refers to the actual property of the deceased which constitutes his "estate" after his death. Sub-sec. 2 refers to other property. Par. (*a*) is

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the one with which this appeal is directly concerned. That paragraph was the subject of decision in *Stephen's Case* (1) in 1903, in which it was held that as the Act then stood par. (*a*) was confined to general powers of appointment. In the following year Parliament reviewed the whole field of stamp duties, in Act No. 24, and stated its intention as to various matters which presented themselves in the working of the Principal Act. It declared by sec. 20 that sec. 49, sub-sec. 2 (A) (*a*), extended to special or limited powers of appointment. It also by Schedule I. added to the list of specifically mentioned instruments others therein described. Included in this is "settlement," making the instrument dutiable ad valorem as on a conveyance on sale; with a provision for deduction of that new duty from any duty payable under sec. 49 of the Principal Act. Under this provision the duty of £295, in accordance with the practice hitherto prevailing, was charged and paid on the "settlement"; and, in accordance with the same practice for thirteen years, the balance now sued for was claimed by the Commissioner on the death of the settlor, but this payment was challenged, and hence this action and appeal.

In this case two learned Judges of the Supreme Court thought the property was not dutiable, while the third thought it was. *Pring* J., who thought it was, did not definitely say the case was not within the statutory definition, but came to the conclusion that though the strict definition "probably" did not cover the case the context or subject matter indicated or required that the matter fell within the taxing provisions. *Sly* J. thought there was no "contract or agreement," and as in his Honor's opinion the strict definition could be applied to sub-sec. 2 (A) (*a*) of sec. 49 so as to make clear sense, that ended the alternative view. *Ferguson* J. considered all settlements excluded from the strict definition that were not "contracts." His Honor said it was not within the alternative view, but gave no reasons.

All their Honors pointed out the anomaly involved in the respondent's contention—because a settlement by will (and, they might have added, a settlement by deed *inter partes*) left the property taxable but a settlement by deed poll under the same circumstances

(1) (1904) A.C., 137.

did not. The usual course here in such cases, as *Pring* J. justly observed, is to execute a deed poll; and therefore the Legislature, of necessity, if its intention were as held, must have known that in future such settlements would always be by deed poll, leaving its words as to "will" and its intention as to deeds *inter partes* inoperative, and consequently making sub-sec. 2 (A) (*a*), and probably also sub-sec. 2 (A) (*e*), practically futile provisions, with a vast effect on the public finances. This, though an astonishing anomaly in a finance Act, and one for which no reason can be assigned, may be the inescapable result of the inadvertent language of the Legislature, and it is the duty of a Court to follow the language to whatever conclusion it leads, when sensibly read. Such a position, however, must induce great caution before assenting to that construction. No doubt, in a taxing Act an impost requires clear and unambiguous words; but even taxing Acts must be read reasonably. The *Golden Horseshoe Estates Co. Ltd.* v. *The Crown* (1) is an illustration (see at p. 488).

The question turns on (1) whether the statutory definition of "settlement" is not, upon its true construction, satisfied by the deed in this case; and (2) whether, assuming that on a true construction of that definition such a deed as exists in this case is not within it, the context or subject matter of sub-sec. 2 (A) (*a*) of sec. 49 indicates or requires that the strict statutory definition should not apply. The peculiarity of this case is that, in addition to the ordinary task of construing the words of a Statute, the determination of either of the points mentioned involves the consideration of various fundamental principles of both law and equity. On the right understanding and application of those principles, which the Legislature must be assumed to have had in mind, the whole value of Part III. of the *Stamp Duties Act* depends, and, as will appear, even that of other portions of the Act also. In view of the various views entertained, there appears to me to be no short cut possible for judicial expression, and unless the intention of Parliament was as I conceive it, no short cut would be safe for legislative alteration, so as to avoid future litigation or disturbing the general scheme of the Act. The Act of Parliament seems to me as it stands to have

(1) (1911) A.C., 480.

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made a very carefully and clearly balanced scheme of taxation, the alteration of any part of which probably affecting other parts, and the duty of the Court is to interpret that scheme as it stands. I do not think Parliament has either blundered or left such an anomaly as is suggested. In my clear opinion—agreeing with that of *Pring* J.—the Crown is perfectly right in the practice it has followed in the past, and in the claim it makes in the present instance. I would answer the two questions I have stated in its favour.

1. *The Construction of the Statutory Definition.*—The history of the section in relation to the rest of the Act is most helpful. The Act of 1898 is, as has been stated, a consolidating Act. It does not profess to amend the law. There is therefore a legislative guide that no alteration in existing law was intended. (See per Lord *Parker* in *Ramdas Vithaldas Durbar* v. *S. Amerchand & Co.* (1).) The original *Stamp Duties Act* was passed in 1880, and contained the statutory definition of settlement as at present. It was amended by 50 Vict. No. 10, which does not affect the question. It was further amended by 57 Vict. No. 20 (1894), sec. 2 of which made the identical provision that is contained in sec. 49 (2) (A) (*a*) of the present Act. It is true the Act was an amendment of the Acts of 1880 and 1886, but it did not expressly say that the statutory definition of " settlement " in the former Acts should apply. That may be so by implication, but, in determining whether that implication should be made, we must remember that the Act of 1894 did not expressly apply the definition, and it used language which *ex facie* excluded part of it, namely, the first alternative, and it adopted from cognate English legislation an expression which was well known to conveyancers, namely, " settlements containing any trusts " &c.; and, further, it referred the settlement to a *power* and not to a contract, and it did this in respect of a new subject matter, namely, *property not belonging to the appointor*, and as to which he *primâ facie* could not be supposed to contract.

As the law stood, then, before the consolidation Act of 1898, it would have been a most violent construction to attach to the word " settlement " the meaning that a " contract or agreement " must exist in every case, including the Act of 1894.

(1) L.R. 43 Ind. App., 164, at p. 170.

I now deal with the words of the definition as they stand in the Act of 1898. Apart from the preliminary governing words of sec. 3, the definition of "settlement" should be read in conjunction with the whole document, that is (*inter alia*) with the aid of the language in sec. 49, sub-sec. 2 (A) (*a*), namely, "Settlement containing any trust in respect of that estate to take effect after his death"; of the language in par. (*e*) of the same section, namely, "in this sub-section the expression 'voluntary settlement' includes any trust, whether expressed in writing or otherwise, in favour of a volunteer &c."; and of the language in the exemption contained in the Second Schedule to the Act of 1898 commencing "any instrument of appointment." It should also receive the aid of the general principles which differentiate a "contract" from a "trust" (see *Bank of Scotland* v. *Macleod* (1)), and from a "disposition" which is a complete transfer, that is, complete in itself (*Duke of Northumberland* v. *Attorney-General* (2) and *Richards* v. *Delbridge* (3)). And see the import of the word "disposition" in par. (*b*). So reading the definition, I think its construction will best appear by adhering to its very words in their own order, but arranging the definition thus: "Settlement" means (1) any contract or agreement (whether voluntary or upon any good or valuable consideration) whereby any property real or personal is settled or agreed to be settled, or (2) containing any trusts or dispositions to take effect after the death of any person. The branch (2) means, of course and by necessary implication, a "settlement" or an instrument containing any trusts or dispositions, &c. The whole Act is dealing with "instruments." Internal examination of the definition materially assists this view. If "contract or agreement" governs the second limb of the definition the result would be extraordinary. In that case the alternative words qualifying "contract or agreement" would be "(i.) whereby any property real or personal is settled or agreed to be settled," and "(ii.) containing any trusts or dispositions, &c." That would give no force whatever to (ii.), because the assumption is that the first branch includes all cases of contract or agreement whereby property is "settled or agreed to be settled." But if we can

(1) (1914) A.C., 311, at pp. 323-324, 327.
(2) (1905) A.C., 406.
(3) L.R. 18 Eq., 11.

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imagine a contract that is to be a "settlement" and yet does not either "settle or agree to settle" the property, and must, without settling or agreeing to settle the property (that is, either by way of trust, or dispositions or otherwise), nevertheless contain the necessary trusts or dispositions to satisfy the second limb, and make it a "settlement" within the definition, what strange sort of contract is it to be?

Taking the construction as pressed by the respondents, that the trusts must be in some contract, though not a contract within the first limb, it may be a contract for building a house or for the purchase of sheep, and, if only the "trusts or dispositions" of the property referred to in sub-sec. 2 (A) (*a*) be contained in it, that is a good settlement; but the same trusts or dispositions, standing by themselves, do not amount to a settlement. That view strongly presses itself, if we give proper weight to the fact that the phrase in sub-sec. 2 (A) (*a*) is "Settlement containing any trust &c." and not "Contract or agreement containing any trust &c." The construction I have suggested, if correct, reconciles the whole Act, removes the anomaly admitted by all, and works reasonably and justly with respect to par. (*a*) and par. (*e*) and the Schedules.

But suppose it to be said that the second limb of the definition as I have framed it, requires the introduction of the word "settlement" or "instrument." My first answer is that it is there by necessary implication. My next answer is that if it must be regarded as absent, that simply leaves a blank, because it is too absurd to imagine instead a "contract or an agreement" which does not "settle or agree to settle the property," and which yet is to be regarded as a "settlement." And, if a blank is left, the Court is then thrown upon the ordinary meaning of the term as used in sub-sec. 2 (A) (*a*), and that admittedly includes the present deed.

On the true construction of the definition, therefore, my opinion is that the present case is one of those expressly provided for by the definition, and, therefore, under sub-sec. 2 (A) (*a*), in the events that have happened the Crown should succeed.

But suppose, as has been contended, that the deed in the present case is outside that definition, does sub-sec. 2 (A) (*a*) of sec. 49

apply? I now deal with the matter on the assumption that the definition is limited to "contracts or agreements" throughout.

(2) *Non-application of Statutory Definition.*—In my opinion, both the context and the subject matter of sub-sec. 2 (A) (*a*) not only indicate but require that "settlement" should not, in relation to that paragraph, be limited to "contract or agreement" even if it be so limited otherwise. What appears to me to be the most convincing and decisive consideration as to the *context* is that occasioned by the concluding words of the sub-section, namely, "under any authority enabling that person to dispose of the same by will or deed, as the case may be."

The "estate," to be dutiable, must not only be "disposed of," but must be disposed of by (1) a "will" or (2) a "settlement containing any trust &c." But if disposed of by "will," that will must be one which is made "under any authority &c.," generally called "a power of appointment." A contract to make a will might certainly be made in the case of a general power, but the appointment, if made accordingly, would not be "under the authority" of the contract but of the power. "Authority" connotes permission given to the actor by another, and not the will of the actor himself. Where there is a power to make an appointment by will, even general, a contract to make such an appointment, it must be remembered, is not specifically enforceable, and does not dispose of the property, even in equity. The "authority" must be followed. The same words, however, qualify the "settlement." Both the "will" and the "settlement," being made "under the authority," must conform to it, as is shown by the final words "as the case may be." So that the "settlement" is the "deed" that is authorized by the power, just as the will is the "will" authorized by the power. *The power is to be the source or basis of the will or the settlement, as the case may be*; and whether the disposing instrument is a will or a settlement, the "authority" may be given by will or by deed. And it is essential to observe that the "deed" in that case is not required to be a "contract or agreement." This fundamental condition that the source or basis of the will or settlement must be the "power" is, upon the assumption made by the respondent's

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argument, absolutely inconsistent with the definition (and particularly with regard to a special or limited power); because on that assumption the source or basis of the actual disposition by will or deed, where there is a contract or agreement "whereby the property is" (not "settled," but) "agreed to be settled," is necessarily the personal "contract" or "agreement" of the settlor. Consequently the source or basis of a voluntary settlement is, upon that argument, assumed to be the voluntary agreement itself. But, as I understand the law—and I regard this as going to the root of this matter,—a voluntary agreement has no force whatever, at law or in equity, to pass property, unless fully executed. No executory agreement, voluntary or for value, passes property, even in equity, unless it is specifically enforceable, and a voluntary agreement is never specifically enforceable. In the recent case of *Central Trust and Safe Deposit Co.* v. *Snider* (1) the Privy Council expressly stated the law on this subject with reference to agreements to settle land, and I need not further refer to that case. The House of Lords in *Stickney* v. *Keeble* (2) laid down the same doctrine as also applicable to trusts. For the earlier authorities see *Farwell on Powers*, 3rd ed., pp. 314, 315, where a general power to appoint is treated for this purpose as equivalent to a man's own property. So that even a contract for valuable consideration whereby property, though belonging to the settlor, is agreed to be settled does not necessarily satisfy the requirement of "settlement" in the sense of actually "disposing" of the property either at law or in equity.

When the *subject matter* is considered along with the context, the position becomes, as I respectfully think, quite plain. The cardinal fact in this connection is that the property which is the subject matter of the sub-section is *not the property of the settlor.* He settles it under an "authority," that is, "a power" bestowed on him by another, and that "power" is either general or limited.

The Act of 1904 (No 24), by sec. 20, declares that sub-sec. 2 (A) (*a*) "shall be deemed to have extended and shall extend" to limited powers of appointment. (See *Brunton's Case* (3).) The present appointment took place in 1914. Sec. 1 requires the Act to be

(1) (1916) 1 A.C., 266. (2) (1915) A.C., 386.
(3) (1913) A.C., at p. 756.

construed with the Act of 1898, and the *Interpretation Act of* 1897 (No. 4 of 1897), sec. 12, prescribes that every amending Act shall, in the absence of contrary intention, be construed "as part" of the Act it amends. If, therefore, the assumed statutory definition of "settlement" as requiring a contract or agreement in all cases applies to sub-sec. 2 (A) (*a*), so as to control the word "settlement" in that sub-section, it applies both to a general power and a limited power.

In *Tatnall* v. *Hankey* (1) it is said: "Now the principle which governs the constitution of powers, and their very nature, is this, that whatever is given by the donor" (? donee) "of a power in execution of that power, passes to the appointee, or the party in whose favour the power is executed by the donor" (? donee), "but is conveyed, not by force of the appointment, *or by any act of the donee*, but by the act of the donor of the power, *by virtue in fact of the power, and not of the appointment* under it."

But how can a definition such as the respondent insists on apply to a limited power, which simply prescribes a "deed" as the method of appointment? Suppose a contract made by the donee of the power for valuable consideration to himself, which it is assumed the definition includes as a possible case. It would be a fraud on the power. Suppose, instead, a voluntary agreement that the property is "to be settled"; what would it amount to? It would be unenforceable. Bearing in mind the law already stated, that no contract that property is to be settled passes any interest in it unless the contract is specifically enforceable, the following passage from *Farwell on Powers*, at p. 315, is important: "Specific performance cannot be granted of a contract to exercise a *limited*" power, nor can damages be awarded, "for to enforce such a contract in any way would be inconsistent with preserving that duty of free choice which the fiduciary nature of a limited power is held to impose upon the donee." The learned authors cite the authorities, and also refer to a matter upon which the respondent relied very much in argument, but which really is beside the present question. The donee of a power, though unable to fetter his judgment in the affirmative exercise of the power, is held by judicial authority to be competent to forego his power in whole or in part. He may *release*

(1) 2 Moo. P.C.C., 342, at p. 350.

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altogether, or may fetter it so as *pro tanto* to release it, and this release, total or partial, may prevent him from fully exercising the power. And, if he exercises the power, subject to the release he has agreed to, it may be good.

But, as already indicated, the source of the exercise of the power is the authority of the donor of the power, and not the release or abandonment of that power assented to by the donee. This is forcibly shown by the rule of law that a contract by an appointor under a limited power for a benefit to himself must not even be the *reason*, much less the basis of the appointment (see per Lord *Westbury* in *Cuninghame* v. *Anstruther* (1)). The contract or agreement referred to in the statutory definition, being one whereby the property is settled or agreed to be settled, is manifestly not a contract or agreement which is only permitted to operate negatively as an agreement *not* to settle property. The case of *In re Evered*; *Molineux* v. *Evered* (2) bears out the whole position (see particularly pp. 156-157, per Lord *Cozens-Hardy* M.R., and p. 161, per *Buckley* L.J., now Lord *Wrenbury*). This last consideration applies as much to a general as to a limited power. The principle is forcibly stated by Lord *Hardwicke* in the passage quoted by Lord *Buckmaster* L.C. in *O'Grady* v. *Wilmot* (3). The position is further accentuated when the power is in the nature of a trust. (See the authorities collected in *Farwell on Powers*, at p. 525.)

The subject matter, therefore, considered along with the context —for the two are naturally in harmony—demands that the statutory definition, assuming the present deed is not within it, should not govern sub-sec. 2 (A) (*a*). On the further argument, specially directed to this branch of the case, Mr. *Knox's* principal arguments were two: first, he said, a settlement by contract or agreement if by deed might be "under the authority" of the power; next, he said, if the definition were not to apply to sub-sec. 2 (A) (*a*) double taxation would in some cases ensue. The double taxation was said to arise in such a case as the following. If the donee of a general power contracted by deed for pecuniary consideration to sell the remainder after his death, then not only the "settlement," as it

(1) L.R. 2 H.L., Sc., 223, at p. 238.
(2) (1910) 2 Ch., 147.
(3) (1916) 2 A.C., 231, at p. 246.

is called, would, on his death, render the property taxable under the sub-section, but, if he left property, probate duties on his estate might be so much the more by reason of the consideration he had received.

As to the first, it is possible that an appointment by deed of sale where there is a general power of appointment would be considered as an effective exercise of the power. I do not stop to consider whether that is universally true. I rather think it confuses the exercise of the power with the " property " which results from it. (See per Lord *Sumner* in *O'Grady* v. *Wilmot* (1).) But, however it may be with regard to a general power, what I have already said as to the non-enforceability of contracts to exercise limited powers establishes that as to them at least such a contract cannot be said to be " under the authority " of a power. And no argument on this point can be sound that applies the definition of " settlement " in the sub-section to general powers and refuses it to limited powers. The suggested instance of a marriage settlement does not alter the case. A marriage settlement itself based on a contract to marry is not within the sub-section, because it is not made under any " authority." The exercise of any power of appointment contained in such a settlement is in the same position as if the power were contained in any other document.

With respect to the argument as to double duty, it presents no real difficulty. There is no real double duty. Double duty means two duties on the same thing. The suggested case is not that. If it were, then there is double income tax duty whenever money constituting profits of one man passes on to constitute profits of another. Similarly, there would be double duty in every case of sale: the conveyance is taxed, and the consideration money goes to swell income and is taxed, and again, if in the seller's hands when he dies, is once more taxed. The argument is unsound. But in any case it could not prevent the natural meaning of the words " under the authority " &c. being applied to them.

There is, however, a more direct answer based on one of the provisions of the Act already quoted, namely, the reference to " settlement " in Schedule I. of the Act of 1904. Supposing " settlement "

(1) (1916) 2 A.C., at p. 271.

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there means what the respondent contends, it is clear that for the last thirteen years the Legislature has contemplated (*a*) probate duty on the consideration money, if it still exists as part of the settlor's estate, (*b*) an ad valorem duty as on sale upon the property sold, (*c*) probate duties under sec. 49 upon the settled property—deducting therefrom what may be paid under (*b*). The matter seems to me (I say with deep respect) to be divested of any substantial difficulty or doubt.

This would be sufficient for the present case; but as the majority in the Supreme Court decided also that, assuming the Legislature used the word "agreement" to cover sub-sec. 2 (A) (*a*), still the deed in this case was not in the circumstances an "agreement" in any sense, I think it highly desirable to say that I am not prepared to concur in that view, and therefore propose to deal with that view also.

3. *Agreement.*—Par. (*e*) of the same sub-sec. 2 (A) is affected as well as par. (*a*). If the respondent rests on the strict legal meaning of voluntary "agreement"—which must be larger than "contract"—then the question is: What in law amounts to a voluntary agreement by which property is settled so as to dispose of it by way of trust on the death of the settlor? I may note in passing that the word "containing" may, if necessary, be read as "including" (*Henfrey* v. *Henfrey* (1)). Now, to test the matter, suppose the appointees had signed at the foot of the deed a formal acceptance of the gift, what then would have been the position? Clearly, I should say, an "agreement" on the face of the document. Does, then, assent otherwise given make any difference in law? In my opinion, No. (*Reuss* v. *Picksley* (2).) If it were necessary for me to come to any decided opinion on this, I should, in view of par. 6 of the case, feel greatly disposed to hold that there was an "agreement" within the meaning of the definition as applied to the class of instruments which the definition was dealing with. The authorities bearing on the point are principally *London and County Banking Co. Ltd.* v. *London and River Plate Bank Ltd.* (3), particularly the joint judgments of Lord *Lindley* and Lord *Bowen* (then Lords

(1) 4 Moo. P.C.C., 29.
(2) L.R. 1 Ex., 342.
(3) 21 Q.B.D., 535.

Justices) and the passage in *Butler and Baker's Case* (1) there referred to; *Hill* v. *Wilson* (2), per *Mellish* L.J.; *Townson* v. *Tickell* (3), per *Bayley* J.; *Baker* v. *Yorkshire Fire and Life Assurance Co.* (4), and *Thakur Umed Singh* v. *Sobhag Mal Dhadha* (5).

I do not, of course, express any final opinion as to par. (*e*) of the sub-section, because that has been examined in argument only incidentally so as to compare it with par. (*a*), and a final view must await a relevant occasion. But the result of that examination so far as it has gone is to make it difficult for me at present to give the paragraph any substantial effect if the view of the majority of the Supreme Court on this point be adhered to.

On both grounds, as applied to par. (*a*), I hold that the appeal should be allowed.

GAVAN DUFFY J. On 8th July 1910 Amelia Curtis executed a deed poll in exercise of a general power of appointment contained in the will of her father. The question for our consideration is whether the property passing by that deed is subject to taxation under the provisions of sec. 49 (2) (A) (*a*) of the *Stamp Duties Act* 1898 as amended by the *Stamp Duties* (*Amendment*) *Act* 1904, and the answer to the question depends upon the meaning of the word "settlement" in that sub-section. The word "settlement," as far as I am aware, occurs only in five places in the *Stamp Duties Act* 1898, namely, in secs. 3, 49, 58, and in the Second and Third Schedules. The definition of the word "settlement" in sec. 3, the whole of sec. 58, the exemption with respect to certain instruments of appointment in the Second Schedule, and the Third Schedule so far as it relates to settlements, are taken from the *Stamp Duties Act of* 1880. Sec. 49 (2) (A) (*a*) is taken from 57 Vict. No. 20, sec. 2 (1) (*a*), and sec. 49 (2) (A) (*e*) from 57 Vict. No. 20, sec. 2 (1) (*e*). When the then existing law was consolidated in the *Stamp Duties Act* 1898, the draftsman made the definition of the word "settlement" applicable throughout the whole of the Act instead of only to the provisions taken from the *Stamp Duties Act of* 1880. Were I at liberty to assume that the intention of the Legislature in enacting the *Stamp Duties Act* 1898 was to reproduce the existing law and

(1) 3 Rep., 25a.
(2) L.R. 8 Ch., 888.
(3) 3 B. & Ald., 31, at p. 38.
(4) (1892) 1 Q.B., 144.
(5) L.R. 43 Ind. App., 1.

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nothing else, I should have no difficulty in coming to the conclusion that this was a slip in drafting, but I am not at liberty to make any such assumption. I must gather the meaning of the Legislature from its language. Sec. 3 says: "In this Act, unless the context or subject matter otherwise indicates or requires, . . . 'settlement' means any contract or agreement (whether voluntary or upon any good or valuable consideration other than a *bonâ fide* pecuniary consideration) whereby any property, real or personal, is settled or agreed to be settled, or containing any trusts or dispositions to take effect after the death of any person." It is conceded by the respondent that the deed poll executed by Amelia Curtis is a settlement as that term is understood by conveyancers, but it is said that it is not a settlement within the meaning of the definition, and that there is nothing in the context or subject matter which indicates or requires that any meaning should be given to the word "settlement" in sec. 49 (2) (A) (*a*) other than that prescribed by the definition. To this the appellant's counsel answer that in this case there was such an agreement as is required by the definition, because the beneficiaries could take nothing under the deed poll unless by means of an acceptance expressed or implied, and that the appointment and the acceptance constituted an agreement. In my opinion the collocation of the two words "will" and "settlement" in sec. 49 (2) (A) (*a*) and the limitation of the word "settlement" afforded by the phrases "containing any trust in respect of that estate" &c., and "under any authority enabling that person to dispose of the same by will or deed, as the case may be," indicate that the word "settlement" in the sub-section means an instrument, and that the sub-section refers only to disposition of property by an instrument which is either a will or a deed, and that if the settlement must be a contract or agreement the whole of such contract or agreement must be contained in the deed. It is said that if this is so, the context or subject matter indicates or requires that the word "settlement" should here have a meaning other than that provided by the definition, because it is impossible to exercise a power of appointment by means of an agreement or contract; that an agreement or contract may accompany such an exercise, or that a power may be exercised in pursuance of an agreement or contract, but that the contract itself cannot be the exercise of the power. The deed which is known

to the common law as an indenture is itself a contract, and such a deed is within the terms of sec. 49 (2) (A) (*a*) if it contains a trust to take effect after the death of the person disposing of the property, &c. I agree that an indenture is an awkward and unusual vehicle for the exercise of a special or limited power of appointment, but I see no difficulty, much less impossibility, in the donee of a power disposing of property by means of an indenture whenever, to use the words of the sub-section, he is authorized to dispose of the same by deed. Next it is said that the enactment will become valueless if its applicability depends not on the substance of the transaction, but on the form of instrument used, and that Parliament could never have intended that a transaction carried out by means of a deed poll should escape taxation while the same transaction would be taxable if carried out by means of an indenture. Such a result is somewhat startling, but the sub-section is in fact open to a similar criticism whatever meaning be given to the word "settlement" in it, for it operates only on settlements made under an authority enabling the settlor to dispose of the property by will or deed, and unless the power of appointment is directed to be exercised by one or other of these ways, the sub-section is not applicable. It seems to me impossible to say that Parliament might not have intended to impose a tax on property passing by will or indenture, and on that only. On the other hand it is not improbable that the draftsman of the *Stamp Duties (Amendment) Act* 1904 overlooked the definition section in the *Stamp Duties Act* 1898; it is possible that he erroneously imagined that when introduced into the consolidating Act it would not have any application to provisions introduced into the *Stamp Duties Act* 1898 from sources other than the *Stamp Duties Act of* 1880. If Parliament has not expressed its true intention it may correct the error, as it has already done with respect to the same sub-section by sec. 20 of the *Stamp Duties (Amendment) Act* 1904.

Appeal dismissed with costs.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor for the respondent, *Hughes & Hughes.*

B. L.