[HIGH COURT OF AUSTRALIA.]

HORSFALL AND OTHERS . . . . APPELLANTS;

AND

THE COMMISSIONER OF TAXES FOR VICTORIA . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 28; *March* 1, 6, 7, 20.

Barton, Gavan Duffy and Rich JJ.

Probate Duty—Gift of property within one year before death of donor—Disposition operating as immediate gift inter vivos—Settlement upon successive interests—Property dutiable—Victorian estate of testator—Debts owing on specialty and simple contracts—Administration and Probate Act 1915 (*Vict.*) (*No.* 2611), *secs.* 5, 143, 146.

Sec. 143 of the *Administration and Probate Act* 1915 (Vict.) provides that "Every conveyance or assignment gift delivery or transfer of any real or personal property, whether made before or after the commencement of this Act, purporting to operate as an immediate gift *inter vivos* whether by way of transfer delivery declaration of trust or otherwise shall—(*a*) if made within twelve months immediately before the death of the donor; or (*b*) if made at any time relating to any property of which property *bonâ fide* possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise, be deemed to have made the property to which the same relates chargeable with the payment of the duty payable under this Act as though part of the estate of the donor."

Held, by the Court, that the words "an immediate gift *inter vivos*" in that section mean a gratuitous alienation, otherwise than by testamentary disposition, of property under which the donor at once completely divests himself of his beneficial interest in the property alienated.

Held, therefore, that two indentures, whereby a settlor voluntarily settled certain property on trustees for the benefit of certain annuitants, life tenants

and remaindermen, purported in respect of all those classes of beneficiaries to operate as an immediate gift *inter vivos* within the meaning of the above section, and that on the death of the settlor within one year from the execution of the indentures the property within Victoria to which the indentures related was liable to duty accordingly.

The property which the settlor, who was resident in Victoria, settled consisted of bank shares and debts payable in Victoria and owing to him in respect of the sale of certain lands in New South Wales to residents of New South Wales. Some of the contracts of sale were under seal and the instruments were in Victoria, and one of the contracts was in writing not under seal. As to the debts the settlor declared that he stood possessed of the moneys owing under the contracts upon trust to pay them to the trustees and charged the lands with payment of them, reserving to himself power to deal with the lands and the purchasers and to alter, vary or rescind the contracts as if the settlement had not been executed. The trustees declared that they would hold upon the trusts of the settlement so much of the moneys as were received by the settlor and paid to them and so much as came to their hands under the charge.

Held, by the Court, that the property in respect of which duty was payable under the section included the bank shares and the debts payable under the contracts under seal, such shares and debts being, for the purposes of sec. 143, property of the donor situated within Victoria at the time of his death, but (*Gavan Duffy* J. dissenting) did not include the debt payable under the contract not under seal, that debt not being property so situated.

Decision of the Supreme Court of Victoria: *In re Horsfall's Settlements*, (1917) V.L.R., 535; 39 A.L.T., 54, varied.

APPEAL from the Supreme Court of Victoria.

A special case stated by the Commissioner of Taxes for Victoria for the opinion of the Supreme Court pursuant to sec. 124 of the *Administration and Probate Act* 1915 (Vict.) was as follows:—

1. On 15th June 1915 one John Sutcliffe Horsfall, now deceased, was entitled to 625 shares in the Union Bank of Australia Limited and was the owner in fee simple of certain lands the titles whereto were under the *Real Property Act* of New South Wales, particulars of which lands are set out in the settlements hereinafter referred to.

2. The said John Sutcliffe Horsfall prior to 15th June 1915 entered into agreements for sale of the whole of the said lands with the respective purchasers whose names appear and the lands each purchased are described in the schedule to each of the said settlements.

3. On 15th June 1915 there was owing under the said agreements

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for sale the sum of £49,621 5s. 6d. for balances of purchase-money and interest on such balances up to the said 15th June 1915.

4. On 15th June 1915 the said John Sutcliffe Horsfall duly executed two indentures of settlement, being:—(*a*) An indenture of settlement by which he settled the sum of £24,839 2s. 9d. (part of the said sum of £49,621 5s. 6d.) and 312 shares (part of the said 625 shares) upon the trusts and in the manner contained therein. A copy of this settlement marked "A" is attached hereto and is to be taken as part of this case. (*b*) An indenture of settlement by which he settled the sum of £24,782 2s. 9d. (being the remaining part of the said sum of £49,621 5s. 6d.) and 313 shares (being the remainder of the said 625 shares) upon the trusts and in the manner contained therein. A copy of this settlement marked "B" is attached hereto and is to be taken as part of this case.

5. Immediately upon the execution of the said settlements the trustees thereof acted and have ever since continued to act as such trustees and in pursuance of and in accordance with the terms of the said settlements.

6. The said indentures of settlement were submitted to the Collector of Imposts, who assessed duty under subdivision VIII. of the Schedule to the *Stamps Act* 1892 amounting to £639 7s. on the settlement marked "A" and £639 7s. on the settlement marked "B," both of which sums of duty were duly paid on 21st June 1915.

7. The said John Sutcliffe Horsfall died on 11th June 1916, being at the date of his death and at all times material to this case domiciled in Victoria.

8. On 8th September 1916 probate of the will of the said John Sutcliffe Horsfall was granted by the Supreme Court of Victoria to Richard Ernest Horsfall, Oliver Morrice Williams and Sidney Vere Stead, the executors named therein.

9. The said executors filed a statement for duty containing particulars of the Victorian real and personal property owned by the said John Sutcliffe Horsfall at the date of his death, but did not in such statement include any of the property the subject matter of either of the settlements in par. 4 hereof mentioned.

10. The Commissioner contends that the said settlements, having

been made by the said testator within the twelve months immediately preceding his death, come within the provisions of sec. 143 (*a*) of the *Administration and Probate Act* 1915, but on this point the Commissioner has agreed to state this case for the opinion of the Court.

11. The executors contend that the said settlements do not come within the provisions of the said sec. 143 (*a*).

The question for the opinion of the Court is :

Should the said settlements or either of them be regarded as coming within the provisions of sec. 143 (*a*) of the *Administration and Probate Act* 1915, and should accordingly all or any and what part of the property to which they or either of them respectively relate be included in the statement to be filed by the executors of the said testator ?

The two agreements marked "A" and "B" were, except as to the beneficiaries, in substantially the same terms. That marked "A," so far as is material, was substantially as follows :—

"This indenture made 15th June 1915 between John Sutcliffe Horsfall of 'Orrong' Clendon Road Toorak Victoria grazier (hereinafter referred to as 'the settlor') of the one part Richard Ernest Horsfall of Sydney New South Wales Esquire Oliver Morrice Williams of Collins Street Melbourne Victoria General Manager of the London Bank of Australia Limited and Sidney Vere Stead of William Street Melbourne aforesaid Inspector for The Australian Mercantile Land and Finance Company Limited of the other part Whereas the settlor was entitled to the shares mentioned in the schedule hereto and has by transfers of even date herewith transferred such shares to the said Richard Ernest Horsfall Oliver Morrice Williams and Sidney Vere Stead and whereas the settlor has entered into agreements for sale with the persons mentioned in the said schedule hereto of the lands particulars of which are set out in the said schedule opposite the names of the respective purchasers which lands are all under the provisions of the *Real Property Act* 1900 of New South Wales and stand in the name of the settlor and whereas at the request of John Ross one of the purchasers mentioned in the said schedule the settlor executed three transfers under the

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said *Real Property Act* 1900 to Neil Ross Donald Ross and John Ross Junior respectively which transfers comprise the whole of the lands comprised in the agreement for sale to the said John Ross and such transfers and the titles to the lands comprised therein have been lodged as an escrow subject to the payment of the purchase-money and interest under the agreement for sale to the said John Ross and whereas there is now owing under the said agreements for sale the sum of £49,621 5s. 6d. for balances of purchase and interest on such balances up to the date of these presents and whereas by an indenture bearing even date and executed contemporaneously with these presents the settlor has settled (*inter alia*) the sum of £24,782 2s. 9d. being part of the said sum of £49,621 5s. 6d. owing for balances of purchase money and interest as aforesaid and whereas the settlor in consideration of the natural love and affection which he has for the persons intended to be benefited by these presents and for divers other good causes and considerations has agreed to settle the said shares and the sum of £24,839 2s. 9d. being the balance of the said sum of £49,621 5s. 6d. in manner hereinafter appearing Now this indenture witnesseth as follows :—

"1. The settlor hereby declares that he stands possessed of the sum of £24,839 2s. 9d. part of the moneys owing under the said agreements for sale for balances of purchase-money and interest as aforesaid and the interest to accrue due for the same or any part thereof upon trust to pay such sum and interest to the said Richard Ernest Horsfall Oliver Morrice Williams and Sidney Vere Stead and the survivors and survivor of them and the executors or administrators of such survivor or other the trustees or trustee for the time being of these presents (all of whom are hereinafter referred to as 'the trustees') to be held by them upon the trusts hereinafter contained and the settlor hereby charges the said lands with the payment of the said sum of £24,839 2s. 9d. and interest but so that in point of charge the said sum and interest shall rank *pari passu* with the said sum of £24,782 2s. 9d. and interest thereon settled and charged by the said indenture of even date herewith on the same lands Nevertheless the settlor his executors or administrators shall have full power to deal with the said lands

and the purchasers thereof and to alter vary and rescind the said agreements for sale or any of them and to make any compromise with the said purchasers thereof or with any other person or persons in like manner in all respects as if these presents had not been executed.

"2. The settlor and the said Richard Ernest Horsfall Oliver Morrice Williams and Sidney Vere Stead hereby declare that the trustees shall hold the said shares upon trust at their discretion either to retain the same or any of them unsold or from time to time to sell them or any of such shares as to them may seem fit and that the trustees shall hold the said shares and any proceeds of sale thereof and so much of the said sum of £24,839 2s. 9d. received by the settlor under the said agreements for sale and by him paid to the trustees and of all moneys coming to the hands of the trustees under the charge hereinbefore created as represents capital (which shares and proceeds sums and capital moneys are hereinafter referred to as the 'trust fund') as and when the same shall be received by the trustees upon the trusts hereinafter declared of and concerning that fund and shall hold all such moneys as represent interest or income including any income or dividends from the said shares or from any investment of any proceeds thereof as and when the same shall be received by the trustees upon the same or the like trusts as are hereinafter declared of and concerning the income of the trust fund.

"3. The trustees shall stand possessed of the trust fund upon trust (subject as to the said shares to the discretionary power as aforesaid to allow the same to remain unsold) to invest the said trust fund in manner hereinafter authorized and out of the income therefrom to pay by such periodical payments as shall to the trustees from time to time seem most convenient the following annuities namely: To Agnes the beloved wife of the settlor during her life five hundred pounds To Lilian Horsfall daughter of the settlor during her life eight hundred pounds To Isabel Lippe daughter of the settlor during her life six hundred pounds To Emily Sutcliffe eldest daughter of the settlor's cousin the late Charles Sutcliffe during her life sixty pounds.

"7. After the death of Emily Sutcliffe daughter of the settlor's

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cousin the late Charles Sutcliffe the capital fund of the annuity hereinbefore directed to be paid to her and the income thereof to accrue due after her death shall be held by the trustees upon trust for such of her sisters as shall be living at her death in equal shares if more than one.

"8. Subject to the payment of the whole of the aforesaid annuities and to the trusts and powers hereinbefore contained and as to any capital or income the beneficial interest wherein is not by such trusts or by the exercise of any of such powers effectually disposed of the trust fund shall be held by the trustees upon the following residuary trusts that is to say upon trust as to two equal third shares thereof (hereinafter referred to as 'the Horsfall shares') for the said Richard Ernest Horsfall son of the settlor and as to the remaining one-third share thereof (hereinafter referred to as the 'Carington share') for Rupert Victor John Carington grandson of the settlor but subject as to the Horsfall shares and the Carington share to the trusts hereinafter declared concerning the same respectively.

"9. The trustees shall stand possessed of the Horsfall shares upon trust to pay the net annual income thereof by such periodical payments as shall from time to time to the trustees seem most convenient to the said Richard Ernest Horsfall during his life or until such cesser or determination as hereinafter mentioned but if he shall do or cause or suffer to be done any act or thing or some event shall happen whereby all or any part of such income if payable to him absolutely would whether by the act or deed of the said Richard Ernest Horsfall or by operation of law or otherwise howsoever become vested in or payable to any other person or persons then the foregoing trust for the payment of income to the said Richard Ernest Horsfall during his life shall cease and determine and during the remainder of the life of the said Richard Ernest Horsfall the trustees shall stand possessed of the income which but for such cesser would have been payable to the said Richard Ernest Horsfall upon trust in the discretion of the trustees from time to time to pay or apply the same in or towards the maintenance and support or otherwise for the benefit of all or any one or more exclusively of the following persons namely the said Richard Ernest

Horsfall or his child or children (if any) or other the persons or person who would for the time being be entitled to such income if the said Richard Ernest Horsfall were then dead and any unapplied income shall be added as capital to the Horsfall shares.

"10 Subject to the trusts aforesaid the trustees shall stand possessed of as well the capital as the income of the Horsfall shares upon trust for all or any one or more exclusively of the children or remoter issue of the said Richard Ernest Horsfall (such remoter issue being born in his lifetime) in such proportions for such interests and generally in such manner as the said Richard Ernest Horsfall shall from time to time by deed with or without power of revocation and new appointment or by will appoint but no child in whose favour or in favour of whose issue an appointment shall be made shall in default of appointment to the contrary participate under the trust next hereinafter contained in the unappointed portion without bringing the benefit of such appointment into hotchpot and in default of appointment and subject to any partial appointment in trust for such of the children of the said Richard Ernest Horsfall as attain the age of twenty-one years or in case of females marry under that age in equal shares if more than one but if there shall not be any object who shall live to acquire an absolutely vested interest under the last preceding trust then the capital as well as the income of the Horsfall shares shall be held upon the same or the like trusts and with and subject to the same or the like powers and provisions as are herein declared and contained of and concerning the Carington share or such of the same trusts as shall be then subsisting and capable of taking effect and if none of such trusts shall be subsisting or capable of taking effect or in so far if at all as the operation of such trusts shall at any time become incapable of taking further effect then the capital as well as the income of the Horsfall shares shall be held by the trustees upon trust for such of the following persons as shall then be living and in equal shares but subject as hereinafter provided namely for (*a*) the said Lilian Horsfall (*b*) the said Isabel Lippe (*c*) the child or children of the settlor's sister Mrs. Louisa Parker (*d*) the child or children of the settlor's sister Mrs. Emily Sutcliffe (*e*) the child or children of Henry Sutcliffe (a now deceased cousin of the settlor) (*f*) the child or children

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of Edward Sutcliffe (a now deceased cousin of the settlor) (*g*) the child or children of Charles Sutcliffe (a now deceased cousin of the settlor) Provided however that if either or both of them the said Lilian Horsfall and Isabel Lippe shall not be then living and shall have left any child or children then living such child or children shall be entitled in equal shares if more than one to the share to which the said Lilian Horsfall or Isabel Lippe would have been entitled if then living Provided also that each of the trusts hereinbefore expressed to be for the child or children then living of a named sister or deceased cousin of the settlor shall be for such child or children regarded as taking one share per stirpem and if more than one equally as between themselves.

"11. The trustees shall stand possessed of the Carington share upon trust to pay the net annual income thereof by such periodical payments as shall to the trustees from time to time seem most convenient to the said Rupert Victor John Carington during his life or until such cesser or determination as hereinafter mentioned but if he shall do or cause or suffer to be done any act or thing or some event shall happen whereby all or any part of such income if payable to him absolutely would whether by the act of the said Rupert Victor John Carington or by operation of law or otherwise become vested in or payable to any other person or persons then the foregoing trust for the payment of income to the said Rupert Victor John Carington during his life shall cease and determine and during the remainder of the life of the said Rupert Victor John Carington the trustees shall stand possessed of the income which but for such cesser would have been payable to the said Rupert Victor John Carington upon trust in the discretion of the trustees to pay or apply the same in or towards the maintenance and support or otherwise for the benefit of all or any one or more exclusively of the following persons namely the said Rupert Victor John Carington his wife (if any) his child or children (if any) or other the person or persons who would for the time being be entitled to such income if the said Rupert Victor John Carington were then dead and any unapplied income shall be added as capital to the Carington share.

"12. Subject to the trusts aforesaid the trustees shall stand

possessed of the capital as well as the income of the Carington share in trust for all or any one or more exclusively of the children or remoter issue of the said Rupert Victor John Carington (such remoter issue being born in his lifetime) in such proportions for such interests and generally in such manner as the said Rupert Victor John Carington shall from time to time by deed with or without power of revocation and new appointment or by will appoint but no child in whose favour or in favour of whose issue an appointment shall be made shall in default of appointment to the contrary participate under the trust next hereinafter contained in the unappointed portion without bringing the benefit of such appointment into hotchpot and in default of appointment and subject to any partial appointment in trust for such of the children of the said Rupert Victor John Carington as attain the age of twenty-one years or in case of females marry under that age in equal shares if more than one but if there shall not be any object who shall live to acquire an absolutely vested interest under the last preceding trust then the Carington share shall be added to and thenceforth be held upon the same or the like trusts and with and subject to the same or the like provisions as are herein declared and contained of and concerning the Horsfall shares or such of the same trusts as shall be then subsisting and capable of taking effect."

The bank shares mentioned in the settlements were at all material times Victorian property.

All the agreements for sale mentioned in the settlements except that to John Ross were in the same form, they were executed under seal by both parties, they were at all times material kept in Victoria by the settlor or his executors, and in each case the purchaser was at all material times a resident of New South Wales. At the date of the settlor's death there remained owing in respect of these contracts about £14,731.

As to the agreement with John Ross, it was not under seal but was made by letters written in New South Wales and afterwards slightly varied by letters, some written in New South Wales and some in Victoria. John Ross and the three persons to whom, as stated in the settlements, transfers were executed by the settlor were at all material times resident in New South Wales. At the date of

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the settlor's death there remained owing under this agreement about £30,977.

The Supreme Court answered the question asked by the special case as follows: Both the settlements should be regarded as coming within the provisions of sec. 143 (*a*) of the *Administration and Probate Act* 1915, and all the property to which they respectively relate should be included in the statement to be filed by the executors of the said testator: *In re Horsfall's Settlements* (1).

From that decision the executors now appealed to the High Court.

Weigall K.C. (with him *Pigott*), for the appellants. Sec. 143 of the *Administration and Probate Act* 1915 does not apply to instruments such as these settlements. The language of the section is not apt to describe a settlement creating successive interests in property. Neither of these settlements purports to operate as an immediate gift *inter vivos*, which is the important part of the section. Each of them purports to be a settlement, not to be a gift.

[RICH J. referred to *Attorney-General* v. *Jacobs-Smith* (2).]

The words "purporting to operate as an immediate gift *inter vivos*" mean that the donor holds himself forth as making an immediate gift *inter vivos*. The section contemplates a donee who immediately upon the gift takes the beneficial enjoyment of the property purported to be given, and it does not matter whether there is a trustee or not. The second alternative (*b*) in sec. 143 shows that what is given must be capable of being immediately taken possession of by the donee. If it can be said of every voluntary settlement such as those in this case that it purports to be an immediate gift *inter vivos* so as to be taxable under sec. 143, then every voluntary settlement which falls within and is taxable under sec. 146 also falls within and is taxable under sec. 143. The burden is upon the respondent of clearly establishing that these settlements are within the terms of sec. 143 (*R.* v. *Atkinson* (3); *Commissioners of Stamps (Qd.)* v. *Wienholt* (4)). [Counsel also referred to *In re Meares* (5); *Simms* v. *Registrar of Probates* (6); *Payne* v. *The King* (7).]

(1) (1917) V.L.R., 535; 39 A.L.T., 54.
(2) (1895) 1 Q.B., 472; (1895) 2 Q.B., 341, at p. 347.
(3) 3 C.L.R., 632, at p. 639.
(4) 20 C.L.R., 531, at p. 541.
(5) (1905) V.L.R., 4, at pp. 7, 8; 26 A.L.T., 82.
(6) (1900) A.C., 323.
(7) (1902) A.C., 552.

Mitchell K.C. (with him *Schutt*), for the respondent. Sec. 143 covers every case where a person parts with the beneficial interest in any property without consideration. It does not matter whether there are more than one beneficiary, or whether there are trustees, or whether no beneficiaries may come into existence for several years. The test is: Of what does the donor divest himself? A gift purports to be immediate if the donor's interest is immediately divested. The term *inter vivos* does not mean that the gift is to a living person, but is used to distinguish the transaction from a testamentary disposition. No argument can be drawn from the second alternative in the section which will limit the generality of the words "any real or personal property" or "otherwise." In *Lang* v. *Webb* (1) *Griffith* C.J. and *Barton* J. were of opinion that the section applies to gifts in remainder and in reversion. See also *Earl Gray* v. *Attorney-General* (2); *In re Cochrane* (3), in reference to similar provisions in the *Customs and Inland Revenue Act* 1881 (44 & 45 Vict. c. 12), sec. 38 (2), as amended by the *Customs and Inland Revenue Act* 1889 (52 & 53 Vict. c. 7), sec. 11. [Counsel also referred to *Hanson's Death Duties*, 6th ed., pp. 99, 103.]

Weigall K.C., in reply, referred to *Davidson* v. *Chirnside* (4); *Attorney-General* v. *Johnson* (5); *Hanson's Death Duties*, 6th ed., p. 96.

Cur. adv. vult.

March 6.

BARTON J. In this case we have come to the conclusion that these indentures are, at least in part, within sec. 143 of the *Administration and Probate Act* 1915, so that the claim of the respondent is to that extent sustainable. The property and the interest covered in law by the section as applied to the indentures are the remaining subjects for argument which must therefore be heard.

Argument then proceeded.

Mitchell K.C. The property is to be taken as at the time of the execution of the settlement, and the nature of what was then given

(1) 13 C.L.R., 503, at pp. 510, 512.
(2) (1900) A.C., 124, at p. 126; (1898) 2 Q.B., 534, at p. 540.
(3) (1905) 2 I.R., 626; (1906) 2 I.R., 200.
(4) 7 C.L.R., 324, at p. 348.
(5) (1902) 1 K.B., 416, at p. 423.

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must be determined (*Heward* v. *The King* (1)). That being so, there is no dispute that the shares were Victorian assets. As regards the rest of the property, what was given to the beneficiaries were equitable choses in action. What the trustees got were equitable choses in action against the settlor and his Victorian executors, and the beneficiaries got equitable choses in action against the trustees. The moneys being payable by the purchasers in Victoria and the settlor and the trustees being resident in Victoria, the choses in action were Victorian assets. See *In re Smyth*; *Leach* v. *Leach* (2); *Attorney-General* v. *Johnson* (3); *Lord Sudeley* v. *Attorney-General* (4). The rule that the inquiry must be whether the property is such that the grant of Victorian probate would have given the executors power to administer it, which is found in *Blackwood* v. *The Queen* (5) and *Commissioner of Stamps* v. *Hope* (6), has no application. That rule only applies in probate matters. The question here is what was given to the beneficiaries, and not the kind of property out of which that which was given was carved. Even if the rule applies, the debt in respect of Ross's purchase is a simple contract debt payable in Melbourne, and the Victorian executors have nothing to do except to receive payment of it, and the grant of Victorian probate would give them the right to administer it. See *Payne* v. *The King* (7); *Whyte* v. *Rose* (8); *In re Income Tax Acts* [*No.* 3] (9); *Smelting Co. of Australia Ltd.* v. *Commissioners of Inland Revenue* (10). The test of whether the disposition is within the section being whether the donor has divested himself of everything, it does not matter, where there is a trustee, that the beneficiaries are unborn.

Weigall K.C. The words "any real or personal property" mean Victorian property, and the words "estate of the donor" mean Victorian estate of the donor (*Commissioner of Taxes (Vict.)* v. *Currie* (11)).

(1) 3 C.L.R., 117.
(2) (1898) 1 Ch., 89.
(3) (1907) 2 K.B., 885, at p. 895.
(4) (1896) 1 Q.B., 354; (1897) A.C., 11.
(5) 8 App. Cas., 82.
(6) (1891) A.C., 476.
(7) (1902) A.C., at p. 560.
(8) 3 Q.B., 493.
(9) 27 V.L.R., 304; 23 A.L.T., 70.
(10) (1897) 1 Q.B., 175, at p. 183.
(11) 21 C.L.R., 157, at pp. 162, 164.

[RICH J. referred to *Elder's Trustee and Executor Co. Ltd.* v. *Registrar of Probates* (*S.A.*) (1).]

What was settled, apart from the shares, was debts owing by the purchasers, and in the case of that owing in respect of Ross's purchase it was not Victorian property of the settlor (*Commissioner of Stamps* v. *Hope* (2); *R.* v. *Lovitt* (3)). If the settlement had not been made that debt would not have been dutiable as Victorian estate of the settlor. Even if the settlements are within sec. 143 so far as regards the life estates and the annuities, they are not within it so far as regards the estates in remainder.

[RICH J. referred to *Attorney-General* v. *Smyth* (4).]

That decision depends on the language of the English Acts and their history, which are different from those of the Victorian Act.

Mitchell K.C. in reply.

Cur. adv. vult.

March 20.

The following judgments were read.—

BARTON J. At the date of the settlements in question in this case John Sutcliffe Horsfall, now deceased, was entitled to certain shares in the Union Bank of Australia Limited, and was the owner in fee of certain lands in New South Wales the titles of which were under the *Real Property Act* of that State. He had entered into agreements for the sale of the whole of the lands, certain of these agreements being under seal, and the remaining agreement being by an unsealed written contract with one John Ross, a resident of New South Wales. There was owing under these agreements taken together £49,621. Approximately half of the bank shares and half of the aggregate debt were included in each settlement. The trustees of the settlements are the same persons who have brought this appeal in their capacity of executors. The terms of the settlements are set out in the exhibits to the special case. They are substantially identical save in respect of the personality of the beneficiaries. John Sutcliffe Horsfall died on 11th June 1916 within a year of the execution of the settlements, and probate of his will was

(1) 23 C.L.R., 169.
(2) (1891) A.C., at p. 481.
(3) (1912) A.C., 212, at p. 218.
(4) (1905) 2 I.R., 553.

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granted to the appellants in the following September. The Commissioner of Taxes contends and the executors deny that the settlements come within sec. 143 (*a*) of the *Administration and Probate Act* of 1915 (Vict.).

The question for the opinion of the Supreme Court of Victoria was this: Should the said settlements or either of them be regarded as coming within the provisions of sec. 143 (*a*), and should accordingly all or any and what part of the property to which they or either of them respectively relate be included in the statement to be filed by the executors? That question was answered by the Supreme Court as follows: The settlements come within the provisions of sec. 143 (*a*), and all the property to which they relate should be included in the statement to be filed by the executors. This is an appeal from that decision.

Sec. 143 (*a*) is as follows: "Every conveyance or assignment gift delivery or transfer of any real or personal property, whether made before or after the commencement of this Act, purporting to operate as an immediate gift *inter vivos* whether by way of transfer delivery declaration of trust or otherwise shall (*a*) if made within twelve months immediately before the death of the donor . . . be deemed to have made the property to which the same relates chargeable with the payment of the duty payable under this Act as though part of the estate of the donor."

We have decided already that the indentures are at least in part within the section. Each settlement is a "conveyance or assignment gift delivery or transfer" of personal property. Each purports to operate, and indeed does operate, as "an immediate gift *inter vivos*" by way of declaration of trust. I understand the term "*inter vivos*" to apply to assurances not made by will, and the term "immediate gift" to mean something immediately given in the sense that the giver completely divests himself of the property therein at once, that is to say, that it operates *eo instanti* against him to the full extent to which he purports to give over his interest. "Gift" in the section, whatever it may mean in some other connection, obviously means beneficial gift. On that test these settlements "made within twelve months immediately before the death

of the donor" are clearly within the section. They are both voluntary.

I have already described the property to which the indentures relate. As sec. 143 (*a*) operates upon it, John Sutcliffe Horsfall must "be deemed to have made the property . . . chargeable with the payment of the duty" payable under the Act "as though part of the estate of the donor."

It will be observed that the duty is to be charged not upon any individual gift but upon the whole property to which the deeds relate, and it is to be treated for the purposes of the section, though for those only, as part of the estate of the donor. This seems to me to confine our consideration in this regard to two questions: First, what is the nature of the property comprised in the deeds? and next, would all or any part of it be subject to probate duty in Victoria?

Sec. 5 of the Act of 1915 gives the Court jurisdiction "to grant probate of the will or administration of the estate of any deceased person leaving property whether real or personal within Victoria." The duty, then, is chargeable in this case upon personal property left by the donor within Victoria. Admittedly the bank shares are such property. Admittedly also the debts the subject of the sealed contracts are such property, the specialties being in Victoria, where the donor lived. But what of Ross's simple contract debt? That was owed at the date of the settlement, and, with the exception of a not very considerable part payment, at the date of the death, by a debtor resident in New South Wales to a creditor resident in Victoria. The principle on which the question must be answered seems to me to be contained in the judgment of Lord *Field*, speaking for the Judicial Committee of the Privy Council, in the case of the *Commissioner of Stamps* v. *Hope* (1). I quote these words:—"A debt does possess an attribute of locality, arising from and according to its nature, and the distinction drawn and well settled has been and is whether it is a debt by contract or a debt by specialty. In the former case, the debt being merely a chose in action—money to be recovered from the debtor and nothing more—could have no other local existence than the personal residence of the debtor, where the

(1) (1891) A.C., at pp. 481, 482.

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assets to satisfy it would presumably be, and it was held therefore to be *bona notabilia* within the area of the local jurisdiction within which he resided." Lord *Robson*, in *R.* v. *Lovitt* (1), said for the Board: "The property consisted of simple contract debts, and as such could have no local situation other than the residence of the debtor where the assets to satisfy them would presumably be: per Lord *Field* in *Commissioner of Stamps* v. *Hope*"; and it was held that the debts in question were locally situated in New Brunswick, and that for the purposes of legal representation, of collection, and of administration as distinguished from distribution, they were governed by the law of New Brunswick. The case of *Blackwood* v. *The Queen* (2) was followed, where it was held that under a similar Statute "the statement of personal property to be made by the executor . . . should be confined to that property which the probate enables him to administer." Had the simple contract debt, which was a chose in action, remained the property of Mr. Horsfall up to his death and come under his will, I do not think that the Victorian probate would of itself have enabled his executors to include it in their administration. They are therefore entitled to exclude it from their account.

A question was raised whether the reversionary interests created by the settlements could be considered to be within sec. 143 (*a*), so as to be a necessary part of the executors' account. That such is the case under the English Acts seems to have been assumed by the Courts. I am of opinion that the reversionary gifts are immediate in the sense which I have above expressed. For the purpose of duty they are part of the property to which the settlements related. The remarks on that subject, perhaps no more than dicta, of the learned Chief Justice and myself, in *Lang* v. *Webb* (3) at pp. 510 and 512 respectively, may now pass into decisions. I think the section extends not only to interests in remainder or reversion, but to incorporeal property such as choses in action as well as corporeal property. I do not think the word "immediate" is intended to apply to the time of the acquisition of mere physical possession. The section is directed at the property

(1) (1912) A.C., at p. 218. (2) 8 App. Cas., 82.
(3) 13 C.L.R., 503.

which Mr. Horsfall had a moment before he executed the settlements, and not at the interest which he created by executing them. In the words of the Chief Justice in the same case at p. 511 the term "possession" as used in sec. 143 (*b*) "means such a change of ostensible dominion as can be made having regard to the nature of the particular property, and that must vary according as the property is corporeal or incorporeal, in possession or in remainder." The law operates upon the whole of the settled property as though Mr. Horsfall had never settled it and had owned it at his death.

I propose that the appeal be allowed, and that the question be answered thus: Both the said settlements are within the provisions of sec. 143 (*a*) of the *Administration and Probate Act* 1915, and all of the property to which they relate, with the exception of the debt of John Ross, should be included in the statement to be filed by the executors.

GAVAN DUFFY J. The question for our consideration is whether two instruments executed by the late John Sutcliffe Horsfall on 15th June 1915 render the whole or any part of the property to which they relate chargeable with the payment of duty under the provision of sec. 143 of the *Administration and Probate Act* 1915.

The section so far as it is relevant to the present case is as follows: "Every conveyance or assignment gift delivery or transfer of any real or personal property, whether made before or after the commencement of this Act, purporting to operate as an immediate gift *inter vivos* whether by way of transfer delivery declaration of trust or otherwise shall (*a*) if made within twelve months immediately before the death of the donor . . . be deemed to have made the property to which the same relates chargeable with the payment of the duty payable under this Act as though part of the estate of the donor."

In my opinion the words "immediate gift" mean a gratuitous alienation of property under which the donor's beneficial interest immediately passes away from him, and the words *inter vivos* do no more than exclude testamentary dispositions from the operation of the section.

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The declarations of trust by Mr. Horsfall in favour of the trustees of the settlement are not gifts, because the trustees take no beneficial interest under them. The trusts created in favour of the various beneficiaries are gifts purporting to operate as immediate gifts *inter vivos*, and made within twelve months immediately before the death of the donor. The property to which they relate is therefore chargeable with the payment of duty if it is property which would have been chargeable with duty had it been part of the estate of the settlor at the time of his death, that is to say, if its nature is such as to render it the subject of probate duty in Victoria. In my opinion the whole of the property to which these gifts relate would have been so chargeable, because the beneficiaries take only interests in or out of a fund derived from or constituted by bank shares, which are admitted to be Victorian property, and moneys to be paid by the settlor to the trustees in Victoria, and to be invested by them for the purpose of executing the trusts imposed on them. Until the moneys have been received by the trustees the beneficiaries have no claim against them. It is true that if the trustees had improperly neglected to insist on the payment of these moneys to them by the settlor or his personal representative, the beneficiaries might have compelled them to obtain payment, but that would have been only because it was the duty of the trustees to do all that was necessary to enable them to receive moneys in Victoria and hold them for the purpose of executing trusts there.

In my opinion the appeal should be dismissed.

RICH J. The first question we are asked to determine is whether the settlements, the subject of this special case, come within the provisions of sec. 143 (*a*) of the Victorian *Administration and Probate Act* 1915.

Mr. *Weigall* admitted that interests in reversion and remainder equally with interests in possession might be the subject of a gift within the meaning of that section, and that "a gift is a gift whether it is given directly or given through the medium of a trust." He strenuously contended, however, that the words of the sub-section were not apt to describe successive limitations of interests such as

are contained in this indenture, and he based his argument upon the words " purporting to operate as an *immediate gift inter vivos.*" I am unable to accede to this argument.

The word " gift " serves to stamp the assurance as voluntary, and this is emphasized by the use of the terms donor and donee in sub-sec. (*b*). The fact that the transaction or act is one *inter vivos* and not by will is shown by the expression *inter vivos*, which is the usual method of distinguishing such an instrument from one of an ambulatory character. The time of operation of the assurance is indicated by the words " purporting to operate as an immediate gift." Thus analysed, the words mean a voluntary settlement purporting to operate immediately *inter vivos* (*cf. Attorney-General* v. *Smyth* (1)). Construed in this way, the settlements do come within the section.

The next question asked is whether all or any or what part of the property to which the settlements relate should be included in the statement for duty to be filed by the executors. The duty is, of course, measured by the assets of the deceased over which the Victorian Probate Court has jurisdiction.

It is conceded that *quoad* the shares and specialty debts the duty is exigible. Mr. *Mitchell* has argued that the instalments of purchase-money payable in respect of the land situated in New South Wales sold by the deceased prior to the date of the settlements are also dutiable on the ground that by the terms of the gift they became equitable choses in action in Victoria. The character of the gift or the nature of the estates and interests created by it does not convert the property so as to include it within the operation of the Statute. The object of the section is to prevent the evasion of duty by substitutes for wills, and to tax property passing by semi-testamentary dispositions as if it had been disposed of by will or the deceased had died intestate in respect of it (*cf. Winans* v. *Attorney-General* [*No.* 2] (2)). This object is accomplished by treating the dispositions as nullities. For the purpose of taxation the property remains part of the estate of the deceased.

In this view it follows that the New South Wales simple contract debts are not liable to duty.

(1) (1905) 2 I.R., at p. 570.

(2) (1910) A.C., 27, at p. 36.

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I agree with the order proposed by *Barton* J.

Appeal allowed. Question answered as stated above.

Solicitors for the appellants, *Malleson, Stewart, Stawell & Nankivell.*

Solicitor for the respondent, *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.

[HIGH COURT OF AUSTRALIA.]

PETERSON . . . . . APPELLANT; DEFENDANT,

AND

KELLY AND OTHERS . . . . . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1918.

SYDNEY, *April* 9, 25.

Barton, Gavan Duffy and Rich JJ.

Local Government—Rates—Apportionment between lessor and lessee—Covenant to pay "municipal or city rates"—Sydney Corporation Act 1902 (N.S.W.) (*No.* 35 *of* 1902), *secs.* 110, 120—*Sydney Corporation* (*Amendment*) *Act* 1908 (*N.S.W.*) (*No.* 27 *of* 1908), *secs.* 4, 4A, 11A, 12—*Sydney Corporation* (*Amendment*) (*No.* 2) *Act* 1916 (*N.S.W.*) (*No.* 12 *of* 1916), *secs.* 5, 7—*Sydney Corporation* (*Declaratory*) *Act* 1918 (*N.S.W.*) (*No.* 6 *of* 1918), *sec.* 2—*Local Government Act* 1906 (*N.S.W.*) (*No.* 56 *of* 1906), *sec.* 144 (5).

Sec. 110 of the *Sydney Corporation Act* 1902 (N.S.W.) directs the Council of the City of Sydney from time to time to make an assessment of all ratable property "according to the fair average annual value of such property," and sec. 120 directs them on the assessment so made to cause a rate to be made which is to be designated the "city rate."

Sec. 4 of the *Sydney Corporation* (*Amendment*) *Act* 1908 (passed on 22nd December 1908) provides that the Council shall, for the year 1909 and in