[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF STAMP DUTIES FOR QUEENSLAND . . . . . } APPELLANT;

AND

CHAILLE AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1924.

BRISBANE, *June* 23, 24.

Isaacs A.C.J., Rich and Starke JJ.

Stamp Duty—"*Settlement*"—"*Deed of any kind not described in Schedule*"—*Will*—*Deed of family arrangement*—*Stamp Acts* 1894-1918 (*Q.*) (58 *Vict. No.* 8—9 *Geo. V. No.* 11), *secs.* 2, 4, *First Schedule.*

Sec. 4 of the *Stamp Acts* 1894 to 1918 (Q.) provides that stamp duties are to be paid upon the several instruments specified in the First Schedule, which includes "Settlement, Deed of Gift, or Voluntary Conveyance (not being the appointment merely of a new trustee) of any property containing any trust, or any Declaration of Trust having the effect of such settlement, deed, or conveyance, *ad valorem* duty as hereunder," &c. By sec. 2 "the expression 'settlement' means any contract, deed, or agreement (whether voluntary or upon any good or valuable consideration other than a bona fide pecuniary consideration) whereby any property (real or personal) is settled or agreed to be settled in any manner whatsoever."

By his will, which contained no power of sale, conversion or investment, a testator gave all his property to trustees upon trust to pay the rents, profits and income to his wife for life and upon her death in trust for his children in equal shares. By indenture the widow and children (who were all *sui juris*) empowered the trustees to sell, call in and convert the estate, to invest the proceeds and to pay the annual income to the widow for life; the indenture also provided that no gift made by the testator in his lifetime to any child

should be treated as an advancement or brought into hotchpot, and that on the death of the widow the children should be entitled to the whole estate in equal shares as tenants in common.

Held, that stamp duty was payable on the instrument as a settlement.

Decision of the Supreme Court of Queensland: *Chaille* v. *Commissioner of Stamp Duties*, (1924) Q.W.N. 1, reversed.

APPEAL from the Supreme Court of Queensland.

By the will of James Mapon Chaille deceased, who died on 6th August 1922, which contained no power of sale, conversion or investment, trustees were directed to stand possessed of the testator's property upon trust to pay the rents, profits and income to his widow during her life and after her decease in trust for all his children living at his death. On 7th December 1922 probate of the will was granted to the testator's widow, Charlotte Anne Chaille, and two of his sons, the executors and trustees named in the will. By an indenture made on 31st December 1922 between the testator's widow and children, who were all *sui juris*, and the trustees of the will, the trustees were directed and empowered to sell, call in, convert the estate into money and to invest the proceeds. The indenture also witnessed that certain gifts made by the testator in his lifetime to his children should not be brought into hotchpot for the purpose of making a division between the children, but that they should be entitled to the testator's estate in equal shares as tenants in common on the death of the widow.

The Commissioner of Stamp Duties assessed the stamp duty payable on the indenture at the amount payable on a settlement within the meaning of the *Stamp Acts* 1894-1918 (Q.), namely, £464 7s., being at the rate of 5 per cent on £9,287.

On appeal to the Full Court of Queensland, brought by way of a case stated by the Commissioner of Stamps under sec. 24 of the said Acts, that Court assessed the duty at ten shillings as on a deed of a kind not otherwise described in the Schedule to the said Acts: *Chaille* v. *Commissioner of Stamp Duties* (1).

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

(1) (1924) Q.W.N. 1.

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Woolcock (with him *Real*), for the appellant. Before the execution of the indenture the trustees, in order to carry out the provisions of the will, would have been bound to keep the estate intact except in so far as the realty might have been disposed of under the *Settled Land Act of* 1886; and doubts have arisen concerning whether certain gifts should be brought into hotchpot. The indenture created proprietary rights not previously existing. It is literally within the definition of "settlement": it was a deed not made for a bona fide pecuniary consideration whereby the testator's property was settled, and it created a trust for sale, conversion and investment. It was a settlement of existing money, of the proceeds of sale and of the investments of all those moneys; and it was also a settlement of the property of the children on the widow's death in equal shares, for it was possible that on a distribution pursuant to the will the shares might not have been equal. Under it the beneficiaries took interests in a converted fund instead of interests in specified real and personal property. It created a new charter of rights applying to the whole of the property comprised in it, and granted the usual powers in a settlement. (See *Davidson* v. *Chirnside* (1); *Halsbury's Laws of England*, vol. xxv., p. 526; *Encyclopædia of the Laws of England*, 2nd ed., vol. xiii., p. 301; *In re Laing's Trusts* (2); *Re Chamberlain* (3); *In re Childs' Settlement* (4).) It is not essential that the instrument should create any new beneficial interest in some person in whom it did not previously exist. Alternatively, the duty should be assessed upon a sum not greater than the value of the widow's life estate (*Spensley* v. *Collector of Imposts* (5)).

McGill, for the respondents. The instrument is not a settlement; it does not create or re-create any beneficial interest in any person in whom no such interest existed previously. It does not purport to be a charter of rights; the interests of the beneficiaries arise from the will as their charter; the declaration of trusts in the instrument, so far as they relate to the rights of property are only

(1) (1908) 7 C.L.R. 324, at p. 345.
(2) (1866) L.R. 1 Eq. 416.
(3) (1875) 23 W.R. 852.
(4) (1907) 2 Ch. 348.
(5) (1898) 24 V.L.R. 53; 19 A.L.T. 243.

a reiteration of the interests existing by virtue of the will. (See *Davidson* v. *Chirnside* (1).)

[ISAACS A.C.J. Does not the instrument give the widow her right to claim the proceeds from the converted property during her life ?]

The trusts are those declared by the will ; the power of conversion is an ancillary grant of power but is not a creation of any right.

[ISAACS A.C.J. The instrument goes further than a grant of power ; it settles the rights of the children and disposes of the doubt whether any advancements made should be brought into hotchpot. Surely, to ascertain the rights of the beneficiaries reference must be made to this instrument ?]

The instrument is consequential upon the dispositions made by the will, and shows a paramount intention to preserve the will as the charter of rights with the additional and subsidiary grant to the "executors and trustees" of those powers of sale, conversion and investment which are usual ; powers are granted but no trusts are created by the instrument.

THE COURT delivered the following judgment :—

The Court has already considered this matter, and has come to the conclusion that the appeal should be allowed.

This case turns on the meaning of the statutory definition of the word "settlement" in the *Stamp Acts* 1894-1918 (Q.). Having regard to the terms of the deed in relation to the will, the Court is of opinion that the deed is an instrument which is a "settlement" within the meaning of that word in those statutes.

By the will the whole of the testator's property was given to trustees, and the only trusts declared were the payment of the rents, profits and income of that property to the widow for her life and on her death to the testator's children who were living at his death in equal shares. The Court, then, has to consider how it should regard the new discretionary trust imposed on the trustees of the will by the deed, and their obligations in considering the advisability of making a conversion and re-investment of the trust property, and, in the event of the trustees deciding in favour of

(1) (1908) 7 C.L.R., at pp. 340-341, 345.

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conversion and re-investment, the duties that would then be placed upon them in carrying out that project. The instrument created a trust to exercise a power at discretion, and, on a sale and re-investment made pursuant to that discretionary trust, the beneficiaries will take interests in a converted trust fund instead of interests in the real and personal property of the testator; and, further, the instrument created a trust to make a division amongst children on the death of the testator's widow irrespective of any advancement that had been made by the testator during his lifetime and without bringing any advancement into hotchpot.

Having considered these points, the Court is of opinion that the document is a "settlement," and has decided to allow the appeal with costs.

Appeal allowed, with costs.

Solicitor for the appellant, *H. J. H. Henchman*, Acting Crown Solicitor of Queensland.

Solicitors for the respondents, *McNab, Dowling & Wilson.*

J. L. W.