[HIGH COURT OF AUSTRALIA.]

CARMICHAEL AND OTHERS . . . . APPELLANTS;

AND

THE COMMISSIONER OF STAMP DUTIES FOR QUEENSLAND . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1926.

BRISBANE, *June* 22, 29.

Knox C.J., Higgins, Gavan Duffy and Starke JJ.

Stamp Duty (Queensland)—"*Settlement*"—*Deed of family arrangement*—*Property comprised therein*—*Portion settled on trust*—*Whole dutiable*—*Stamp Acts* 1894-1918 (*Q.*) (58 *Vict. No.* 8—9 *Geo. V. No.* 11), *secs.* 2, 4, *Sched.* 1.

By sec. 4 of the *Stamp Acts* 1894-1918 (Q.) it is provided that stamp duties to be charged, levied and collected upon the several instruments specified in the First Schedule shall be the several duties in the said Schedule specified. The Schedule 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"; and specifies *ad valorem* duty at varying rates per cent on "the amount or value of such property." 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."

An indenture of family arrangement dealing with certain property contained a provision whereby a portion of the property was settled upon certain trusts.

Held, by *Knox* C.J., *Higgins* and *Gavan Duffy* JJ. (*Starke* J. dissenting), that the whole instrument was a "settlement" within the meaning of sec. 2, and that the amount of duty payable under sec. 4 and the First Schedule was to be determined by the value of the whole of the property comprised in the instrument.

Decision of the Supreme Court of Queensland (Full Court): *Carter* v. *Commissioner of Stamp Duties*, (1926) S.R. (Q.) 117, affirmed.

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By his will James Carmichael (who died in 1923) gave all his estate to trustees upon trust for sale and conversion into money of those parts which did not consist of money, and after payment of his debts, &c., directed his trustees to stand possessed of the residue of his estate upon trust to pay the income and profits thereof to his wife for life and on her death upon trust to divide the same amongst his children (the children of a child predeceasing him to receive their parent's share). One of the testator's daughters, Annie Wright, predeceased him, leaving two infant children. The widow and the other children, who were *sui juris*, survived the testator.

By an indenture of family arrangement made on 4th March 1925 between the children, the widow and the trustees—after reciting (*inter alia*) the terms of the will, and that the widow, the children and the two grandchildren were the only persons beneficially entitled under the will, and that it had been agreed, by way of family arrangement, to divide the assets—it was witnessed that the value of the assets should be deemed to be the amounts stated in a schedule; that the trustees should pay to the widow for her own use absolutely £2,000 in cash or, if she desired, by appropriating to her assets of that value; that the children should enter into a joint and several covenant with the widow that they, or some one or more of them, would pay to the widow during her life the sum of £17 each calendar month; that the trustees should, after the payment or satisfaction of the sum of £2,000, appropriate the sum of £1,572 0s. 6d., or Government securities of that value, and hold the same upon trust for the two grandchildren, the two children of Annie Wright, in equal shares as tenants in common; that subject thereto the whole of the assets should belong to the children of the testator who survived the testator in equal shares as tenants in common, and the trustees should hold the same as bare trustees for them, in equal shares, with power to the trustees to appropriate any part of the assets in satisfaction of any share or shares of any of the children, according to the value in the schedule; and that the indenture should have no effect until the opinion, advice and direction of the Supreme Court should have been obtained to the

effect that the trustees could deal with the assets in accordance with the terms of the indenture.

In an action brought by the trustees against the two grandchildren, appearing by their guardian *ad litem*, and one of the testator's children (who had become insane) by guardian *ad litem*, the Supreme Court approved of the indenture, and directed the trustees to execute it and to distribute according to its terms.

By another indenture, made between the widow and all the children of the testator, except the one who was insane, and the trustees, it was witnessed that in consideration of the trustees dividing the assets according to the terms of the indenture they would be indemnified against any claim in respect of the share of the insane child, and they were authorized to pay that share to the Curator in Insanity.

The value of the whole of the assets as shown in the schedule was £17,292; and this included £2,000 paid to the widow, £1,572 appropriated as the share of the infant grandchildren and certain costs and commissions, leaving a balance for distribution amongst the children entitled under the indenture of £13,221.

For the purposes of assessment of stamp duty the Commissioner accepted the values stated in the schedule, and assessed the duty chargeable on the indenture at the rate of 5 per cent on £17,292 5s. 6d. —being the duty chargeable on a settlement of that sum.

The appellants (Philip Carmichael and other parties to the indenture of 4th March 1925) being dissatisfied with so much of the assessment as related to settlement duty, the Commissioner stated a case which, after setting out the above facts, submitted for the decision of the Supreme Court the following questions (*inter alia*):—

(1) Is the indenture chargeable with duty in accordance with the said assessment?

(2) If not, with what amount of duty is the indenture chargeable?

The Supreme Court (Full Court) decided that the indenture was a settlement within the meaning of the *Stamp Acts* 1894-1918, and affirmed the assessment: *Carter* v. *Commissioner of Stamp Duties* (1).

(1) (1926) S.R. (Q.) 117.

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

Stumm K.C. (with him *Graham*), for the appellants. A settlement essentially involves some modification of absolute proprietary rights over property and usually, though not necessarily, creates successive estates therein (*Bythewood and Jarman*, 4th ed., vol. VI., p. 127; *Bedwell's Australasian Judicial Dictionary, sub* "Settlement"; *Vaizey on Settlements*, vol. I., pp. 1-2; *Onslow* v. *Commissioners of Inland Revenue* (1)). Giving to the word "settlement," in the Stamp Acts, its ordinary meaning, the indenture is not a settlement (*Micklethwait* v. *Micklethwait* (2)). The true character and meaning of the instrument is the test (*Davidson* v. *Chirnside* (3)). The meaning of a "settled" estate, whether in legal or popular language, as contradistinguished from an estate in fee simple is understood to be one in which the powers of alienation, of devising and of transmission according to ordinary rules of descent are restricted by the limitations of the settlement. By this indenture, however, the widow, children and grandchildren have terminated and extinguished the trusts created by the will, and have made an immediate division of the testator's property. All that property is discharged from those trusts created by the will and is converted into free property, and a partition was made thereof (see *Underhill on Trusts*, Aust. ed., pp. 355, 360; *Rippon* v. *Norton* (4); *Encyclopædia of Forms*, vol. IX., p. 425; *Bythewood and Jarman*, (1915), vol. II., p. 35; *Inland Revenue* v. *Oliver* (5); *In re Player*; *Ex parte Harvey* (6); *In re Plummer* (7); *Jack* v. *Smail* (8); *Davey* v. *Danby* (9)). The indenture itself declares that the children's shares are held by the trustees "as bare trustees." If the indenture creates any settlement it is a settlement only of the interest of the grandchildren, and duty is payable on the value of that interest only (*Attorney-General* v. *Fairley* (10)).

(1) (1891) 1 Q.B. 239.
(2) (1858) 28 L.J. C.P. 121, at p. 127; 4 C.B. (N.S.) 790, at p. 858.
(3) (1908) 7 C.L.R. 324, at pp. 340, 348.
(4) (1839) 2 Beav. 63.
(5) (1909) A.C. 427.
(6) (1885) 15 Q.B.D. 682.
(7) (1900) 2 Q.B. 790.
(8) (1905) 2 C.L.R. 684, at p. 700.
(9) (1887) 13 V.L.R. 957, at p. 965; 9 A.L.T. 163, at p. 164.
(10) (1897) 1 Q.B. 698, at p. 701.

Henchman, for the respondent. The Court had only to consider what was the legal effect of the instrument at the time of its execution. By the instrument property was "settled or agreed to be settled," in a certain manner (see definition of "settlement," sec. 2). It is not necessary that interests in succession be created (*Kane* v. *Kane* (1)). By it new interests and different rights were created—e.g., the power to pay £2,000 to the widow and the power to distribute among the children—and the trust for sale created by the will is destroyed; by it the instrument and not the will became the charter of the rights of the beneficiaries; it deals with the whole of the property settled by the will and makes a resettlement of it (*Moffat* v. *Collector of Imposts* (2); *Castlemaine Brewery Co.* v. *Collector of Imposts* (3); *Davidson* v. *Chirnside* (4); *Commissioner of Stamp Duties* (Q.) v. *Chaille* (5)). Although the instrument describes the trustees as "bare trustees" of the balance of the estate, it does in fact impose on them many active duties. [Counsel also referred to *Davidson* v. *Armytage* (6) and *Wiseman* v. *Collector of Imposts* (7).]

Cur. adv. vult.

June 29.

The following judgments were delivered:—

KNOX C.J. My brother *Gavan Duffy* and I are of opinion that the answers given by the Supreme Court to questions submitted by the special case are correct. We think that the Act of Parliament imposes a duty on every instrument whereby property is settled or agreed to be settled if such instrument contains a trust, and that the amount of duty is determined by the value of the property settled. The indenture in question in this case is an instrument whereby property is settled, and it contains a trust. There remains the question whether the whole or only a portion of the property to which it refers is settled within the meaning of the statute. We think the whole of the property specified in its schedule is so settled.

(1) (1880) 16 Ch. D. 207.
(2) (1896) 22 V.L.R. 164; 18 A.L.T. 144.
(3) (1896) 22 V.L.R. 4; 17 A.L.T. 282.
(4) (1908) 7 C.L.R. 324, at p. 340.
(5) (1924) 35 C.L.R. 166.
(6) (1906) 4 C.L.R. 205, at pp. 207-208.
(7) (1896) 21 V.L.R. 743; 17 A.L.T. 251.

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For these reasons we are of opinion that the appeal should be dismissed.

HIGGINS J. In my opinion the decision of the Full Court, on this case stated by the Commissioner, is right. The difficulties seem to me to vanish when it is realized clearly (1) that this stamp duty is a tax on instruments—written or printed documents (sec. 4; sec. 2, "instrument")—not a tax on property or on property settled; (2) that the expression "settlement" means any deed whereby *any* property—not *all* the property therein comprised—is settled or agreed to be settled (sec. 2); and in the deed in question here some at least of the property comprised in the deed is settled—the sum of £1,572 0s. 6d. for the Wright infants; (3) that an instrument which is a settlement of *any* property containing *any* trust is liable to *ad valorem* duty at 5 per cent if the property exceed £9,000 in amount or value (First Schedule, "settlement"); and this instrument contains a trust—contains trusts; and the property in the settlement—in the instrument called a "settlement"—exceeds £9,000. Amalgamating sec. 2 and the Schedule as to settlement, I read the words of the Schedule as if they were "Any instrument whereby *any* property is settled or agreed to be settled, if it contain *any* trust, is liable to duty at 5 per cent on the amount or value of *all* the property comprised in the instrument if the amount or value of that property exceed £9,000." For the purpose of the stamp duty the Act makes no distinction between property which is settled and property which is not settled, provided that the property is comprised in an instrument which comes within the definition of "settlement," and which contains some trust.

It should be understood that our duty is confined to the question asked of the Supreme Court; and I do not wish to be understood as either affirming or denying the validity of the indenture as to all the nominal parties thereto.

STARKE J. The duty imposed by sec. 4 of the *Stamp Act* 1894 is a tax upon instruments, that is, upon any written or printed document (see sec. 2, "instrument"), and I agree that the instrument of 4th March 1925 settles the fund of £1,572 in favour of the infant

children of Annie Wright. It ties up that fund during infancy and subjects it to trusts in favour of the infants (cf. *Massereene* v. *Commissioners of Inland Revenue* (1)), but the directions to pay the sum of £2,000 to Eliza Carmichael, and to hold the " balance of the assets as bare trustee for the children " of James Carmichael, do not, in my opinion, constitute any settlement of that property. It discharges that property from the trusts to which it was subjected under Carmichael's will and converts it, in substance, into free as distinguished from settled property.

The remaining question is whether the duty imposed by the *Stamp Act* is upon the value of all the property comprised within the instrument of settlement or only upon the property settled or agreed to be settled by that instrument. The latter view is, in my opinion, the natural and the only reasonable meaning of the words contained in the Schedule to the *Stamp Act*. The observations of *Pring* J. in *Perpetual Trustee Co.* v. *Commissioner for Stamps* (2) tend to confirm this construction. Consequently, in my opinion, the judgment of the Supreme Court should be varied, but it is unnecessary for me to consider, in view of the opinion of the majority of the Court, whether any and what amount of duty is payable in respect of the unsettled property under other headings of the Schedule to the *Stamp Act*; such, for example, as bond, covenant or instrument of any kind whatever, declaration of trust, and so forth.

Appeal dismissed with costs.

Solicitors for the appellants, *McGregor & Given*.

Solicitor for the respondent, *H. J. H. Henchman*, Crown Solicitor for Queensland.

J. L. W.

(1) (1900) 2 I.R. 138.

(2) (1910) 10 S.R. (N.S.W.) 550, at p. 553.