[HIGH COURT OF AUSTRALIA.]

THE COMPTROLLER OF STAMPS (VICTORIA) APPELLANT;
RESPONDENT,

AND

HOWARD-SMITH . . . . . RESPONDENT.
APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE *Mar.* 3.

SYDNEY, *April* 27.

Starke, Dixon, and McTiernan JJ.

Stamp Duty (Vict.)—"*Settlement or gift, Deed of*"—*Instrument whereby property is settled or given—Equitable interest—Letter of directions—Payment of specified sums to named persons directed—Stamps Act* 1928 (*Vict.*) (*No.* 3775), *secs.* 17, 78-83, *Third Schedule, Item IX.*

The residuary beneficiary in his deceased wife's estate wrote a letter to a trustee company which was the executor and trustee of her will and also his attorney under power, requesting the company to pay out of his interest as residuary beneficiary in his wife's estate the amounts set out in the letter to the persons named therein. The company paid the amounts in the manner directed. The Comptroller of Stamps assessed the letter to duty under Item IX. of the Third Schedule to the *Stamps Act* 1928 (Vict.).

Held that the letter was not an instrument whereby property was settled or given, within that provision, and was accordingly not dutiable.

Decision of the Supreme Court of Victoria (Full Court): *Howard-Smith* v. *Comptroller of Stamps*, (1935) V.L.R. 387, affirmed.

APPEAL from the Supreme Court of Victoria.

A case stated by the Comptroller of Stamps under sec. 33 of the *Stamps Act* 1928 (Vict.) upon an assessment for stamp duty was substantially as follows:—

1. On 25th June 1934 Harry Bellingham Howard-Smith executed and forwarded to the manager of the Equity Trustees Executors

and Agency Co. Ltd. a letter of directions. The company was the executor named in the will of his wife who was then deceased and the company also held a power of attorney from Harry Bellingham Howard-Smith. The letter stated:—"Upon the issue of probate of the will of my late wife—V. V. Howard-Smith—I have to request you, as trustees and executors of her will and estate and as my attorney under power, to pay out of my interest as residuary beneficiary in such estate, either in shares or money at your discretion, to the persons and institutions hereunder mentioned, the amounts set out opposite to their names or titles respectively. I desire that all such payments shall be made free of gift and stamp duty (if any) and if for any reason my interest in the said estate shall not be sufficient to make all such payments in full, then I direct that all such payments shall abate proportionately. All allotments of shares hereunder shall be made at the values placed thereon respectively in the statement of my said wife's estate as passed for duty on the issue of probate of her will by the Supreme Court of Victoria." [Then followed a list of the names of the beneficiaries with the amount payable to each.]

2. Harry Bellingham Howard-Smith was the residuary beneficiary in the estate of his wife and the Equity Trustees Executors and Agency Co. Ltd. after the issue of probate of the will, which was issued by the Supreme Court of Victoria on 26th June 1934, transferred shares and made cash payments in accordance with the letter of directions.

3. On 25th June 1935 Messrs. Krcrouse, Oldham & Bloomfield, solicitors for Harry Bellingham Howard-Smith, produced the letter of directions to the Comptroller of Stamps and required him to express his opinion with reference to such letter of directions upon the questions:—

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

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

4. On 22nd July 1935 the Comptroller of Stamps gave his opinion that the letter of directions was chargeable with duty and assessed the amount of stamp duty with which it was chargeable at £8,760, being duty at the rate of £5 per centum on £175,200, the value of shares and cash distributed pursuant to the letter of directions to

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persons and institutions not charitable, together with a further sum of £20 as a penalty for late payment of such duty and £379 12s. interest on such duty.

5. On 31st July 1935, Harry Bellingham Howard-Smith being dissatisfied with the assessment of the Comptroller of Stamps, Messrs. Krcrouse, Oldham & Bloomfield on his behalf paid the amount of stamp duty so assessed to the Comptroller of Stamps, and on 1st August 1935 for the purpose of appealing against the assessment to the Supreme Court of Victoria required the Comptroller of Stamps to state and sign a case setting forth the questions upon which his opinion was required and the assessment made by him.

6. The Comptroller of Stamps thereupon stated a case for the determination by the Supreme Court of the following question:

Was the Comptroller of Stamps right in making the said assessment?

The Supreme Court answered the question in the negative.

From that decision the Comptroller of Stamps now appealed to the High Court.

Fullagar K.C. (with him *Herring* K.C.), for the appellant. There are two ways of transferring equitable interests, one by assignment, and the other by a direction given to the trustee. Either of these methods is clearly effective. There is no need for a deed and no specific form is necessary in order to carry out either course. The words here show a clear intention to make a gift of the respondent's interest in the residue of his wife's estate. If the intention is insufficiently expressed the whole matter is at an end. If the intention is sufficiently expressed there is nothing further to be considered. There is no need for consideration or communication to the new beneficiary. The doctrines of equity relating to the assignment of legal choses in action are quite irrelevant in this case: equity is here dealing with its own affairs. As to equitable interests created out of a legal interest, if equity can find the creation of a true equitable interest such as an executed trust, equity does not require consideration or communication of the trust (*Hanbury, Modern Equity*, (1935), p. 105). And where equity found

a trust created by dealing with a legal chose in action, it did not require consideration or that the new donee should be in any way privy to the transaction (*McFadden* v. *Jenkyns* (1); *Paterson* v. *Murphy* (2); *Moore* v. *Darton* (3)). As to equitable interests created out of equitable interests, as long as the creation of the equitable interest was complete no consideration was necessary nor was any communication to the donee necessary (*Donaldson* v. *Donaldson* (4); *Kekewich* v. *Manning* (5)). A person who owns the equitable interest can effectively dispose of it by assignment. A mere direction to hold for a new beneficiary is sufficient (*Maitland, Equity*, (1909), pp. 72, 73; *Rycroft* v. *Christy* (6); *Bentley* v. *Mackay* (7); *Tiernay* v. *Wood* (8)). The Supreme Court was in error in applying rules relating to trusts for creditors, which stand on a different footing. The methods of transferring an equitable interest and the history of such transactions are dealt with in *Spence, Equitable Jurisdiction* (1846), vol. 1, pp. 444, 449, 454; *Maitland, Equity* (1909), p. 81; *Holdsworth's History of English Law*, vol. IV., p. 442; vol. VII., pp. 535, 536.

Wilbur Ham K.C. (with him *Tait*), for the respondent. It is admitted that consideration and notice to the trustee may not be necessary, but the only case where notice to the beneficiary is not required is the case of trusts created by deed. The cases cited by the appellant are not relevant, because a deed is operative by being signed, sealed and delivered. A written paper which is signed does not become operative forthwith. The alternative to its being irrevocable by its being acted on is its being under seal. The document is not operative by its own force (*Crichton* v. *Crichton* (9); *Welford and Otter-Barry* on *Fire Insurance*, 3rd ed. (1932), at p. 80; *Roberts* v. *Security Co.* (10)). There is nothing in this document to suggest that it creates a trust. An imperfect gift will not be construed as a trust (*Anning* v. *Anning* (11)). There is a distinction

(1) (1842) 1 Hare 458, at pp. 460, 462, 463; 66 E.R. 1112, at pp. 1113, 1114.
(2) (1853) 11 Hare 88; 68 E.R. 1198.
(3) (1851) 4 DeG. & Sm. 517; 64 E.R. 938.
(4) (1854) Kay 711, at p. 718; 69 E.R. 303, at p. 306.
(5) (1851) 1 DeG. M. & G. 176; 42 E.R. 519.
(6) (1840) 3 Beav. 238; 49 E.R. 93.
(7) (1851) 15 Beav. 12; 51 E.R. 440.
(8) (1854) 19 Beav. 330; 52 E.R. 377.
(9) (1930) 43 C.L.R. 536, at pp. 562, 563.
(10) (1897) 1 Q.B. 111.
(11) (1907) 4 C.L.R. 1049, at p. 1056.

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between cases where the intention is communicated and acted on and cases where it is not. An assignment requires the concurrence of two minds, but a declaration of trust does not (*Lewin* on *Trusts*, 13th ed. (1928), p. 72). The only thing which the respondent could presently give was an equitable chose in action, and he did not intend to do that. If the document could be regarded as a creation of trust, the beneficiaries would take as from the date of the declaration of trust or of the death. *Smith* v. *Warde* (1) should be contrasted with *Bentley* v. *Mackay* (2). In *Rycroft* v. *Christy* (3) the Court held that the trustee had done everything possible to transfer the interest. The letter indicates a wish that, at a later time, when probate is granted, the writer's attorney under power, being also his trustee, is to distribute the property to these various people. This did not create a trust. Under the *Stamps Act* duty is levied on " deeds " and on nothing else.

Fullagar K.C., in reply. The intention of the respondent is plain. He intended to give something then and there. New trusts are created by the letter under which the trustees are to hold the property (*Horton* v. *Jones* (4); *Lambe* v. *Orton* (5)).

Cur. adv. vult.

April 27. The following written judgments were delivered :—

STARKE J. Harry Bellingham Howard-Smith was the residuary beneficiary under the will of his wife. Her residuary estate was of considerable value. She appointed the Equity Trustees Executors and Agency Co. Ltd. the executor of her will, and H. B. Howard-Smith had also, under a power of attorney, appointed the company his attorney. About June of 1934 H. B. Howard-Smith forwarded to the company a document in the following form :—" 25th June 1934. The Manager, The Equity Trustees Company Limited, 472 Bourke Street, Melbourne, C.1. Dear Sir, In the Estate of V. V. Howard-Smith deceased. Upon the issue of probate of the will of my late wife—V. V. Howard-

(1) (1845) 15 Sim. 56; 60 E.R. 537.
(2) (1851) 15 Beav. 12; 51 E.R. 440.
(3) (1840) 3 Beav. 238; 49 E.R. 93.
(4) (1935) 53 C.L.R. 475, at pp. 486, 487.
(5) (1860) 1 Dr. & Sm. 125; 62 E.R. 325.

Smith—I have to request you, as executors and trustees of her will and estate, and as my attorney under power, to pay out of my interest as residuary beneficiary in such estate, either in shares or money at your discretion, to the persons and institutions hereunder mentioned, the amounts set out opposite to their names or titles respectively. I desire that all such payments shall be made free of gift and stamp duty (if any) and if for any reason my interest in the said estate shall not be sufficient to make all such payments in full, then I direct that all such payments shall abate proportionately. All allotments of shares hereunder shall be made at the values placed thereon respectively in the statement of my said wife's estate as passed for duty on the issue of probate of her will by the Supreme Court of Victoria." [Here followed the names of the persons and institutions with amounts set opposite to their names or titles respectively.] The company, pursuant to this document, transferred shares and made cash payments to the various persons and institutions mentioned therein.

The *Stamps Act* 1928 of Victoria, sec. 17, imposes a stamp duty upon certain instruments, including:—"(IX.) Settlement or Gift, Deed of—(1) Any instrument other than a will or codicil whether voluntary or upon any good or valuable consideration other than a bona fide adequate pecuniary consideration whereby any property is settled or agreed to be settled . . . or is given or agreed to be given in any manner whatsoever, such instrument not being made before and in consideration of marriage. (2) Any instrument declaring that the property vested in the person executing the same shall be held in trust for the person or persons mentioned therein, but not including religious, charitable, or educational trusts."

The Comptroller of Stamps was of opinion that the document was chargeable with stamp duty under this provision, and assessed the same, but stated a case for the opinion of the Supreme Court of Victoria, which decided that the document was not so chargeable. The Comptroller has appealed to this Court.

The question is whether the document operates as a gift of any property to the persons and institutions mentioned therein, or declares any trust in their favour. A man may voluntarily dispose of his equitable estates or interests if he choose to do so. No

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particular form of words is required for the purpose, but he must make clear his intention that he divests himself of the property and gives it over to another, or that he creates a trust in the property in favour of another. A mere mandate from a principal to his agent gives no right or interest in the subject of the mandate. Now, all we have to go on in this case is the letter from H. B. Howard-Smith to the executor of the will of his wife and his own attorney. It simply " requests " the executor and attorney to pay certain amounts out of his residuary interest (*Ex parte Hall*; *In re Whitting* (1)). It is left to the discretion of the executor and attorney whether the payment shall be in shares or in money. And, so far as appears from the facts stated in the case, the document, when executed, was not communicated to the persons or institutions named as the recipients of Howard-Smith's bounty. The absence of communication suggests that the appropriation was not irrevocable (*In re Cozens*; *Green* v. *Brisley* (2)). The document, it appears to me, operates as an authority to the executor and attorney to make the payments mentioned, and is not a transfer or assignment of any interest to the persons or institutions named, nor the creation of any trust in their favour. The fact that the authority contained in the document has been acted upon is irrelevant to the question whether the document itself operated as a gift or constituted a trust in favour of the persons or institutions therein named.

The judgment of the Supreme Court is therefore correct and should be affirmed.

DIXON J. The question which this appeal raises for decision is whether a certain document under hand amounts to an equitable assignment. The appellant claims on behalf of the Crown that it is an instrument liable to stamp duty under item IX. of the Third Schedule of the *Stamps Act* 1928 (Vict.). His claim cannot succeed unless by the instrument itself equitable interests were made over to the various persons and bodies intended to benefit.

The document is expressed as a letter to the manager of a trustee company. The company occupied two situations in relation to the signatory of the letter. It was his attorney under power and it

(1) (1879) 10 Ch. D. 615, at p. 620. (2) (1913) 2 Ch. 478, at p. 486.

was the executor and trustee under the will of his late wife. Her will bequeathed the whole of her residuary property to her husband. The letter was dated the day before probate of the will issued. Appended to the body of the letter was a long list of individuals and of charitable institutions with a substantial sum of money set opposite each name. The letter was headed—"In the estate of" the deceased's wife, and was expressed as follows :—"Upon the issue of probate of the will of my late wife . . . I have to request you, as executors and trustees of her will and estate and as my attorney under power, to pay out of my interest as residuary beneficiary in such estate, either in shares or money at your discretion, to the persons and institutions hereunder mentioned, the amounts set out opposite to their names or titles respectively. I desire that all such payments shall be made free of gift and stamp duty (if any) and if for any reason my interest in the said estate shall not be sufficient to make all such payments in full, then I direct that all such payments shall abate proportionately. All allotments of shares hereunder shall be made at the values placed thereon respectively in the statement of my said wife's estate as passed for duty on the issue of probate of her will by the Supreme Court of Victoria." Then followed the list of persons and amounts.

As residuary legatee, the husband was not entitled to specific items of property, but to an equitable interest in the entire mass (see *Vanneck* v. *Benham* (1) ; *Barnardo's Homes* v. *Special Income Tax Commissioners* (2) ; *Baker* v. *Archer-Shee* (3) ; *Archer-Shee* v. *Garland* (4) ; *Horton* v. *Jones* (5)). There is thus no question of an assignment of a legal chose in action. The property dealt with was simply an equitable interest. Further, there is no question of consideration. The distribution directed by the letter was by way of gift.

A voluntary disposition of an equitable interest may take one of at least three forms. It may consist of an expression or indication of intention on the part of the donor that he shall hold the equitable interest vested in him upon trust for the persons intended to benefit. In that case he retains the title to the equitable interest, but

(1) (1917) 1 Ch. 60.
(2) (1921) 2 A.C. 1.
(3) (1927) A.C. 844.
(4) (1931) A.C. 212.
(5) (1935) 53 C.L.R., at p. 486.

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constitutes himself trustee thereof, and, by his declaration, imposes upon himself an obligation to hold it for the benefit of others, namely, the donees.

In the second place, the disposition may consist of a sufficient expression of an immediate intention to make over to the persons intended to benefit the equitable interest vested in the donor, or some less interest carved out of it. In that case communication to the trustee or person in whom the legal title to the property is vested is not required in order effectually to assign the equitable property. Notice to the trustee may be important to bind him to respect the assignment and in order to preserve priorities. But it is not a condition precedent to the operation of the expression of intention as an assignment. Nor does it appear necessary that the intention to pass the equitable property shall be communicated to the assignee. What is necessary is that there shall be an expression of intention then and there to set over the equitable interest, and, perhaps, it should be communicated to someone who does not receive the communication under confidence or in the capacity only of an agent for the donor.

In the third place, the intending donor for whom property is held upon trust may give to his trustee a direction requiring him thenceforth to hold the property upon trust for the intended donee.

A beneficiary who is *sui juris* and entitled to an equitable interest corresponding to the full legal interest in property vested in his trustee may require the transfer to him of the legal estate or interest. He may then transfer the legal interest upon trust for others. Without going through these steps he may simply direct the existing trustee to hold the trust property upon trust for the new beneficiaries. He cannot without the trustee's consent impose upon him new active duties. But he may substitute a new object, at any rate in the case of any passive trust. Accordingly, a voluntary disposition of an equitable interest may be effected by the communication to the trustee of a direction, intended to be binding on him, thenceforward to hold the trust property upon trust for the donee. But it must be a direction, and not a mere authority revocable until acted upon. Such an authority is not in itself an assignment. It may, it is true, result in a transfer of an equitable interest. For the trustee acting

upon it may make an effectual appropriation of the trust property to the new beneficiary, or may acknowledge to him that he holds the trust property thenceforward on his behalf. If the authority contemplates or allows such a method of imparting an equitable interest to the donee, the action of the trustee may be effectual to bring about the result. But, in such a case, it is not the donor's expression of intention which *per se* constitutes the assignment. It is the dealing with the trust property under his authorization. The distinction is, of course, of great importance in considering whether a document is itself an assignment, and, as such, liable to stamp duty.

Authority for the principles stated above will be found in the following references: *Rycroft* v. *Christy* (1); *Bentley* v. *Mackay* (2); *Kekewich* v. *Manning* (3); *Voyle* v. *Hughes* (4); *Wilkinson* v. *Wilkinson* (5); *Lambe* v. *Orton* (6); *Re Way's Trusts* (7); *Cowper* v. *Plaisted* (8); *Harding* v. *Harding* (9); *In re Fitzgerald*; *Surman* v. *Fitzgerald* (10); *Bowman* v. *Secular Society Ltd.* (11); *Crichton* v. *Crichton* (12); *Timpson's Executors* v. *Yerbury* (13); *Godefroi, Trusts and Trustees*, 5th ed. (1927), pp. 37-40; *Ashburner's Equity*, 2nd ed. (1933), p. 95; *Hanbury, Modern Equity* (1935), p. 99.

In the present case, the question is whether the document is no more than an authorization having no dispositive effect until the trustee acts upon it by distributing the shares and money. It is evident upon its face that it cannot operate as a declaration of trust by the husband constituting himself trustee for the persons and bodies intended to benefit. But the document comes very near to expressing an immediate intention to make over an interest to each of the named persons and bodies, and very near to conveying

(1) (1840) 3 Beav. 238, at pp. 241, 242; 49 E.R. 93, at p. 94.
(2) (1851) 15 Beav. 12, at pp. 19, 21; 51 E.R. 440, at p. 442, 443.
(3) (1851) 1 DeG.M. & G. 176, at pp. 188, 189, 198; 42 E.R. 519, at pp. 524, 528.
(4) (1854) 2 Sm. & Giff. 18; 65 E.R. 283.
(5) (1857) 4 Jur. (N.S.) 47.
(6) (1860) 1 Dr. & Sm. 125, at pp. 127, 128; 62 E.R. 25, at pp. 326, 327.
(7) (1864) 2De G.J. & S. 365, at p. 372; 46 E.R. 416, at p. 419.
(8) (1868) 5 W.W. & a'B. (L.) 88.
(9) (1886) 17 Q.B.D. 442, at pp. 444, 445.
(10) (1904) 1 Ch. 573, at p. 591.
(11) (1917) A.C. 406.
(12) (1930) 43 C.L.R. 536, at pp. 562, 563.
(13) (1936) 154 L.T. 283.

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to the trustee a direction thenceforward to hold the residue upon new trusts. Upon consideration, however, I have come to the conclusion that it fails to do either of these things. The reasons for this conclusion consist in indications appearing in the text of the document, which, while none of them is in itself decisive, combine to show that it was not the intention of the proposing donor then and there to impart an interest to any of the intended donees. His intention, in my opinion, was that they should take on distribution by the trustee company and not before. In the first place, it is to be noticed that each is to receive a definite sum of money or an equivalent in shares. It is to be received out of an undefined mass, the administration of which is only about to begin. The trustee company is to determine the precise form in which each intended donee is to take the gift, and, in case of a deficiency, is to make a proportionate abatement. Then it is not unimportant that the language is that of request. Finally, the trustee is addressed in its character of attorney under power of the signatory of the document, as well as in that of executor of his wife's estate.

The nature of the gifts intended, the very different character of the interest of the intending donor, the language of the request and the reference to his power of attorney, all support the view that the letter means to convey an authorization and no more. If, before probate actually issued, or before the trustee company acted under the letter, the intending donor desired to modify or recall any part of his instruction, I think he might have done so quite consistently with all that the letter expresses.

For these reasons I do not think it amounted to an assignment.

In my opinion the appeal should be dismissed with costs.

McTIERNAN J. I agree that the letter of 25th June 1934 is not an instrument liable to stamp duty under item IX. of the Third Schedule to the *Stamps Act* 1928 of Victoria. The letter was, in my judgment, no more than a mandate from the sender to the trustee company, requesting it as his attorney and the executor and trustee of his late wife's estate to pay out of his interest as residuary beneficiary in her estate, upon grant of probate of her will, either in shares or in money at its discretion, to the persons and institutions mentioned in the

letter, the amounts set opposite their names respectively. The letter has no dispositive force *per se*: it does not operate as a settlement or gift or declaration of trust. The intention which it expresses is that the intended donees should take the amounts mentioned upon distribution of the estate: but before distribution the letter could have been altered or withdrawn. I concur in the reasons of my brother *Dixon* for these conclusions and do not consider it necessary to add anything.

I agree that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant, *F. G. Menzies*, Crown Solicitor for Victoria.

Solicitors for the respondent, *Krcrouse, Oldham & Bloomfield.*

H. D. W.