[HIGH COURT OF AUSTRALIA.]

WEDGE . . . . . APPELLANT;
APPLICANT.

AND

THE ACTING COMPTROLLER OF STAMPS (VICTORIA) . . . . . RESPONDENT.
RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1941.

MELBOURNE, *Feb.* 18, 28.

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

Stamp Duties—"Settlement or gift, Deed of"—Transfer of trust property under will to beneficiary—Undertaking by beneficiary to hold property subject to trusts—Whether settlement—Stamps Act 1928 (*Vict.*) (*No.* 3775), *Third Schedule, Heading IX.*

Where all the beneficiaries (being *sui juris*) request a trustee under a will to transfer the trust property to the residuary beneficiary and the latter undertakes in writing to hold the trust property subject to the trusts of the will, the document containing the undertaking is not an "instrument whereby . . . property is settled or agreed to be settled" within the meaning of the provisions under heading IX. of the Third Schedule to the *Stamps Act* 1928 (Vict.).

Davidson v. *Chirnside*, (1908) 7 C.L.R. 324, distinguished.

Decision of the Supreme Court of Victoria (*Lowe* J.) reversed.

APPEAL from the Supreme Court of Victoria.

Charles Upton Wedge died on 7th June 1922, leaving him surviving his widow, Marie Josephine Wedge, and his son, Ian Charles Wedge. By his will, the testator appointed the Trustees Executors and Agency Co. Ltd. the executor and trustee thereof. By the terms of the will, after making various bequests, the testator directed his trustee to appropriate out of the capital of his estate a sum not exceeding £1,200 to purchase therewith a house and land to be

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selected or approved by his wife and to permit her to have the full use and enjoyment thereof during her life so long as she should remain a widow and unmarried, subject to the payment by her of all rates, taxes, insurance premiums, the cost of all necessary repairs and other outgoings, and upon her death, or in the event of her remarriage, he directed that such house and land should fall into and become part of his residuary estate. He then provided for his wife an annuity of £234 so long as she remained unmarried and a widow, and, in the event of her remarriage, an annuity of £78 during her life. Subject to the trusts in favour of his wife, the testator directed the trustee to stand possessed of his residuary estate upon trust in equal shares for such of his children as should survive him and should have attained or should attain the age of twenty-five years, and, if there were only one such child, then upon trust for such child. In the execution of the trust the testator empowered his trustee to appropriate portions of his estate to satisfy annuities, to postpone any sale or conversion of the trust property, to lease any part of his real estate, to invest in authorized securities, to raise money by mortgage or charge and to accumulate moneys for the benefit of the children until they attained twenty-five. By a codicil, the testator also empowered his trustee at its discretion to appropriate out of his estate set aside for her annuity any sum to assist his wife in the event of her serious or prolonged illness, and until such appropriation to pay the expenses thereof out of the income of his residuary estate.

The son, Ian Charles Wedge, attained the age of twenty-five years on 23rd May 1939. By an instrument which, though bearing date 6th December 1939, was in fact executed on 25th October 1939 by the widow of the testator and the son, being the only beneficiaries then entitled under the will, it was provided as follows: "I Ian Charles Wedge of Werribee in the State of Victoria theological student being of the full age of twenty-five years and entitled to the residuary estate under the last will of Charles Upton Wedge deceased, subject only to the bequests therein provided for the benefit of my mother Marie Josephine Wedge in consideration of her agreeing to the transfer by the executor and trustee of the said will to me of the whole of the residuary estate undertake to hold same subject in every respect to the trusts in the said will contained for her benefit and further to execute all assurances reasonably required for that purpose." At the date of this instrument, the value of the residuary estate of the testator in Victoria, comprising both realty and personalty, was £10,255. The real estate was transferred by the Trustees Executors and Agency Co. Ltd. to the

son, Ian Charles Wedge, by an instrument of transfer dated 9th April 1940. In the instrument the consideration was stated as follows: "In consideration of an arrangement made between the said Marie Josephine Wedge and the said Ian Charles Wedge whereby the said Ian Charles Wedge is entitled to be registered as the proprietor of an estate in fee simple."

Being of opinion that the first-mentioned instrument was chargeable with duty as a deed of settlement upon the value of the residuary estate of the testator in Victoria, the Acting Comptroller of Stamps of Victoria on 29th May 1940 assessed duty thereon at £256 7s. 6d., together with £25 12s. 9d. penalty, and £3 3s. interest. On 4th June 1940 the solicitors for the parties to the instrument paid the duty and penalty and interest, and on the same day, by letter, informed the Acting Comptroller that the parties to the instrument were dissatisfied with his assessment and required him to state and sign a case for the opinion of the Supreme Court of Victoria. In compliance with this requisition and pursuant to sec. 33 of the *Stamps Act* 1928 (Vict.) William Edward Camier, the Acting Comptroller of Stamps, stated a case, setting out therein the facts as above, and asked the opinion of the court on the following questions:—

(*a*) Was the instrument chargeable with any stamp duty?

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

The case came on for hearing before *Lowe* J. on 24th October 1940, and he answered the questions: (*a*) "Yes"; (*b*) "With the amount assessed by the Comptroller of Stamps," having held that by the instrument the son agreed to hold the property for the benefit of his mother and himself on certain trusts, and, feeeling himself bound by the decision of *Davidson* v. *Chirnside* (1), found that the instrument was a settlement or agreement to settle within the meaning of the Third Schedule to the *Stamps Act* 1928.

By special leave, the son appealed to the High Court.

Walker, for the appellant. The result of this transaction is that there is nothing but a mere change of trustees (*Encyclopædia of Forms and Precedents*, 2nd ed., vol. 18, p. 101). There is no settlement unless there is a settlor and property to be settled by the settlor. There must be some disposition. Here the trusts are settled by the will, not by the instrument. The beneficiary settles nothing belonging to himself or anyone else. *Davidson* v. *Chirnside* (1) is clearly distinguishable, as the instrument which was charged there clearly settled property. The effect of the decision of *Lowe* J. is that every

(1) (1908) 7 C.L.R. 324.

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transfer of trust or appointment of new trustee is a deed of settlement (*Inland Revenue* v. *Oliver* (1); *Massereene* v. *Commissioners of Inland Revenue* (2)). *Palles* C.B. correctly defines "settlement" in the latter case (*Collector of Imposts* (*Vict.*) v. *Peers* (3)).

Ham K.C. (with him *A. D. G. Adam*), for the respondent. This is not a mere substitution of one trustee for another. The settlor in the instrument is the son. It may be that it is a joint settlement by mother and son. There are differences between the will and the duties under the instrument. Further, there are no powers set out in the instrument. *Davidson* v. *Chirnside* (4) establishes that, where another charter of rights is substituted for an original charter, then the later document is a settlement. That case is indistinguishable from this. Neither *Oliver's Case* (1) nor *Massereene's Case* (5) touches the question, because in neither case was there a substitution of one charter for another.

Walker, in reply.

Cur. adv. vult.

Feb. 28.

The following written judgments were delivered :—

RICH A.C.J. This is an appeal from an order of *Lowe* J. by which an instrument annexed to a case stated was held to be chargeable with stamp duty.

The respondent contends that the instrument in question falls within the words of part IX. of the Third Schedule of the *Stamps Act* 1928 (Vict.) as being an instrument other than a will or codicil "whereby . . . property is settled or agreed to be settled . . . such instrument not being made before and in consideration of marriage."

The relevant facts are substantially that the appellant is entitled under his father's will to the residuary estate devised by it subject to an annuity to his mother and that he was entitled to have the property transferred subject to his mother's interest. The instrument the subject of this appeal is as follows :—"To whom it may concern—I Ian Charles Wedge of Werribee in the State of Victoria theological student being of the full age of twenty-five years and entitled to the residuary estate under the last will of Charles Upton Wedge deceased, subject only to the bequests therein provided for the benefit of my mother Marie Josephine Wedge in consideration

(1) (1909) A.C. 427.
(2) (1900) 2 I.R. 138, at pp. 146, 147, 150.
(3) (1921) 29 C.L.R. 115, at p. 121.
(4) (1908) 7 C.L.R. 324.
(5) (1900) 2 I.R. 138.

of her agreeing to the transfer by the executor and trustee of the said will to me of the whole of the residuary estate undertake to hold same subject in every respect to the trusts in the said will contained for her benefit and further to execute all assurances reasonably required for that purpose. Dated the sixth day of December One thousand nine hundred and thirty-nine.—Marie J. Wedge.—Ian Charles Wedge." Subsequently the trustees of the will transferred the property in which the appellant and his mother were interested to the appellant.

His Honour the primary judge, considering that the case was governed by a decision of this court (*Davidson* v. *Chirnside* (1)), decided that the instrument in question was a settlement or agreement to settle within the meaning of the schedule to the *Stamps Act*. In my opinion the facts of the case of *Davidson* v. *Chirnside* (1) are altogether different from those in this case. There the testator directed a settlement to be executed, and when this was done it contained a succession of interests and the rights, obligations and trusts with respect to the property comprised in it. And any question subsequently arising with regard to the property would be determined by reference to this document and this document only. In *Davidson* v. *Chirnside* (1) observations were made to the effect that certain elements were not indispensable though not immaterial. The judgment then under appeal, which was written by *Cussen* J. (2), contains an elaborate examination of the question of what amounts to a settlement for the purposes of the provision under consideration. Though it is true that the judgment of the Supreme Court was affirmed on different grounds and that a different view was taken of the nature of the specific instrument, the value of this general exposition of *Cussen* J. is not diminished. No inclusive and exclusive definition can be given of what constitutes a settlement. The question must be determined by construing the particular instrument, which, of course, includes the transaction set forth in that instrument (*Collector of Imposts (Vict.)* v. *Peers* (3)), and examining its legal effect. The subject instrument contains no disposition or agreement to dispose of property belonging to the appellant but is merely an acknowledgment or recognition that he is not the absolute owner of the property comprised in the instrument and preserves other trusts or rights affecting it. No new beneficial interest is created in favour of the appellant or anybody else, and the property remains subject to the same trusts as it did before the instrument was executed.

(1) (1908) 7 C.L.R. 324.
(2) (1908) V.L.R. 433.
(3) (1921) 29 C.L.R., at p. 124.

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For these reasons I am of opinion that the appeal should be allowed and the order of the Supreme Court discharged and in lieu thereof an order made answering question *a* : No, and ordering the respondent to pay the appellant's costs in this court and in the court below.

STARKE J. This appeal, I agree, should be allowed.

The appellant, in the events which have happened, is entitled to the residuary estate of the testator, into which ultimately falls a house and land provided by the testator for the use of his wife until her death or remarriage. But the appellant could not obtain a conveyance of the residuary estate until the death or remarriage of his mother without her consent. So an arrangement was made and reduced to writing whereby the mother consented to the executor and trustee of the testator transferring the residuary estate to the appellant subject to the trusts in the testator's will for her benefit, and the appellant undertook to hold the same subject in every respect to such trusts.

In my opinion, the document does not resettle or create any new trusts in respect of the residuary estate but provides for the execution of the trusts of the will in favour of the appellant sooner than otherwise would have been possible under the will of the testator and for the observance of the trusts in the will of the testator in favour of the appellant's mother. The learned judge from whom this appeal is brought would, I gather, have reached the same conclusion but for the reasoning of this court in *Davidson* v. *Chirnside* (1). But in that case the trustees executed a document the legal effect of which was to settle or resettle the testator's estate in accordance with the directions of the testator, which is not, I think, the legal effect of the instrument in the present case. This view is supported by the cases of *Massereene* v. *Commissioners of Inland Revenue* (2) and *Turnbull's Trustees* v. *Inland Revenue* (3), and is not in conflict with the decision of this court in *Davidson* v. *Chirnside* (1).

WILLIAMS J. Charles Upton Wedge, hereinafter called the testator, died on 7th June 1922, leaving him surviving his widow, Marie Josephine Wedge, and one child, a son, Ian Charles Wedge. This son attained the age of twenty-five years on 23rd May 1939. By his last will, dated 24th October 1921, and a codicil thereto, dated 28th November 1921, the testator appointed the Trustees Executors and Agency Co. Ltd. his executor and trustee, and, after providing

(1) (1908) 7 C.L.R. 324.
(2) (1900) 2 I.R. 138.
(3) (1909) S.C. 248 ; *sub nom. Inland Revenue* v. *Oliver*, (1909) A.C. 427.

certain benefits for his widow, directed that, subject to the trusts in her favour, his trustee should stand possessed of his residuary estate for such of his children as should survive him and attain the age of twenty-five years and, if there should be only one such child, then upon trust for such child. The testator directed his trustee to appropriate out of the capital of the residue a sum not exceeding £1,200 in order to purchase a house and land in one of the suburbs of Melbourne for the use and enjoyment of the widow during her life or widowhood, subject to the payment by her of certain outgoings, and to pay to her out of the income of the residue an annuity of £234, to be reduced to £78 if she remarried. The will gave the trustee power to appropriate a sum out of the capital of residue to satisfy the annuity and to pay thereout any extraordinary expenses which the widow might incur on account of a serious or prolonged illness. By the codicil the testator empowered his trustee, until such an appropriation, to pay such expenses out of the income of residue. The will contained a trust for conversion, and, pending the same, to lease the real estate; and also power to invest any moneys liable to be invested under the will in certain prescribed investments, including fully-paid-up preference shares in any banking or trading company in Australia. When the son attained the age of twenty-five years the only beneficiaries still interested in the estate of the testator were himself and the widow. On 25th October 1939 they executed the following document, which bears date 6th December 1939: "I Ian Charles Wedge of Werribee in the State of Victoria theological student being of the full age of twenty-five years and entitled to the residuary estate under the last will of Charles Upton Wedge deceased, subject only to the bequests therein provided for the benefit of my mother Marie Josephine Wedge in consideration of her agreeing to the transfer by the executor and trustee of the said will to me of the whole of the residuary estate undertake to hold same subject in every respect to the trusts of the said will contained for her benefit and further to execute all assurances reasonably required for that purpose."

Pursuant to clause 11 of the will, the trustee had purchased a home for the widow at 185 Union Road, Surrey Hills, Melbourne. The assets in the estate at the date of the document consisted of personalty valued at £4,230 and realty, including the home, valued at £6,165. The document was presented to the trustee, which proceeded to transfer the assets to the son. An instrument of transfer of the land, including the home, was executed by the trustee to the son at the request of the widow, the instrument being signed by the trustee,

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Williams J.

the widow and the son. The transfer was stated to be in consideration of an arrangement made between the widow and the son whereby he was entitled to be registered as the proprietor of an estate in fee simple in the land.

It is to be noted that the document dated 6th December 1939 only referred to the residuary estate of the testator, but, in view of the inclusion of the land purchased for the home in the instrument of transfer and the fact that upon the cesser of the widow's interest it would fall into the residue, it is evident that this land was treated as part thereof. The Acting Comptroller of Stamps claimed that the document came precisely within the words of part IX. of the Third Schedule to the *Stamps Act* of 1928 and was an instrument other than a will or codicil "whereby . . . property is settled or agreed to be settled . . . such instrument not being made before and in consideration of marriage." His claim was upheld by the Supreme Court of Victoria. The son has now appealed to this court against the decision of the Supreme Court.

In my opinion the appellant is entitled to succeed.

In *Massereene* v. *Commissioners of Inland Revenue* (1) *Palles* C.B. said: "It is essential to such an instrument that there shall be:—1, such free property, by which I mean property which then is not, according to our jurisprudence, subject to the trusts in question; 2, a settlor, who either is, or appears on the face of this instrument to be, competent to subject that free property to trusts which, until the execution of the instrument, did not bind it; and 3, an imposition by the instrument of such trusts upon such property." The document was executed by the widow as well as the son, but the undertaking which it contained was that of the son. He was therefore the only possible settlor, but he did not purport to settle or to agree to settle any property of his own for the benefit of the widow. He only acknowledged she had certain rights in the property under the trusts of the will and undertook to hold it subject to those trusts. He and the widow, as only persons interested in the property, were entitled to call upon the trustee to transfer it according to their directions. As a result of the transfer he only acquired the same beneficial interest in the property as he already had under the will. He could only create new trusts of his own property. As he did not acquire an absolute interest in any of the property which was transferred to him he could not and did not purport to create new trusts affecting such an interest corresponding to the trusts of the will. His undertaking was a mere recognition of existing trusts. The case is therefore distinguishable from that of *Davidson* v. *Chirnside* (2). In that

(1) (1900) 2 I.R., at p. 146. (2) (1908) 7 C.L.R. 324.

case the instrument, which was held liable to duty, contained such limitations as are ordinarily contained in settlements, was executed by a settlor, namely, the trustees of the will, and settled property, namely, a sum of money which the trustees had been authorized by the testator to settle. As *Griffith* C.J. pointed out (1), the rights conferred or declared by the settlement were, in a real and substantial sense, new rights. *Isaacs* J. said that the new trusts, although they corresponded to the trusts of the will, were not trusts of the will (2).

The appeal should be allowed.

Appeal allowed. Order of the Supreme Court discharged and in lieu thereof order that question a be answered: No, and that the respondent pay the appellant's costs in this court and in the court below.

Solicitor for the appellant, *Bernard Nolan.*

Solicitor for the respondent, *Frank G. Menzies*, Crown Solicitor for Victoria.

O. J. G.

(1) (1908) 7 C.L.R., at p. 340.

(2) (1908) 7 C.L.R., at p. 345.