Appl *BL & M Grollo Homes Pty Ltd* v *Comptroller of Stamps* [1983] 1 VR 445
Appl *Backstop Nominees* v *Goscor Pty Ltd* 20 ATR 1104
Cons *Bell Resources Pty Ltd* v *ACT Revenue Collections* 22 FCR 178
Appl *State Authorities Super Board* v *Comr of State Taxation for WA* (1996) 71 ALJR 56
Appl *Coles-Myer Ltd* v *Comr of State Revenue* (1997) 35 ATR 1
Refd to *Coles Myer Ltd* v *Comr of State Revenue* [1998] 4 VR 728
Foll *Coles Myer Ltd* v *Comr of State Revenue* (1998) 147 FLR 191
Refd to *Comr of State Taxation* v *Extos Pty Ltd* (2000) 46 ATR 5
Cons *Browne* v *Comr of State Revenue* [2004] 1 QdR 116

[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF STAMP DUTIES (QUEENSLAND) . . . . . } APPELLANT;

AND

HOPKINS . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1945.

BRISBANE, *June* 15, 19.

SYDNEY, *Aug.* 3.

Latham C.J., Rich, and Dixon JJ.

Stamp Duty—Settlement—Indenture—Declaration of trust—Property not then vested in trustee—Executed in Queensland by intended trustee—Executed later in England by settlor—Document brought to Queensland many years later—Duty—The Stamp Acts 1894 *to* 1942 (*Q.*) (58 *Vict. No.* 8—6 *Geo. VI. No.* 26), *ss.* 2, 4, 4A, 22, 23, 26, 61.

A document expressed to be an indenture recited, *inter alia*, that the person therein named as the settlor intended to transfer certain shares and money on loan to a company to a person therein named as trustee, to be held by the latter upon certain trusts to the intent that the settlement thereby made should be irrevocable. The document was executed by the trustee in Queensland on 18th May 1907 and by the settlor in London in September 1907. The shares and money were transferred to the trustee on 22nd May 1907. The document was kept in England by the settlor until his death in 1919 and was brought to Queensland by the trustee in 1920.

Held, by *Rich* and *Dixon* JJ. (*Latham* C.J. dissenting) that the document was a settlement within the meaning of *The Stamp Acts* 1894 *to* 1942 (Q.) and was dutiable as such.

Held, also, by the whole Court, that the document was chargeable with duty under the law in force in Queensland in 1907 and not under that in force in 1920.

Held, further, by the whole Court, that extrinsic evidence is admissible in order to determine the real nature of the transaction to which an instrument relates and to ascertain the amount of duty payable; *per Latham* C.J.: the

H. C. OF A. 1945.

COMMISSIONER OF STAMP DUTIES (Q.) v. HOPKINS.

dictum of *Griffith* C.J. in *Davidson* v. *Chirnside*, (1908) 7 C.L.R. 324, at p. 340, is too widely stated.

The meaning of a "settlement" discussed.

Decision of the Supreme Court of Queensland (Full Court): *Hopkins* v. *Commissioner of Stamp Duties*, (1945) Q.S.R. 162, affirmed in part and by majority reversed in part.

APPEAL from the Supreme Court of Queensland.

This was a case stated by the Commissioner of Stamp Duties for the opinion of the Supreme Court under the provisions of *The Stamp Acts* 1894 *to* 1942 (Q.). The case was substantially as follows:—

1. A paperwriting dated 18th May 1907, made between Thomas Hollis Hopkins (therein called the settlor) of the one part and Spenser McTaggart Hopkins (therein called the trustee) of the other part was prepared in England and sent to Queensland, where it was signed and sealed by Spenser McTaggart Hopkins on 18th May 1907.

2. On 18th May 1907, the paperwriting had not been signed or sealed by the said Thomas Hollis Hopkins.

3. Immediately after the signing and sealing of the paperwriting by Spenser McTaggart Hopkins, it was forwarded by him to Thomas Hollis Hopkins in England.

4. In or about the month of September 1907, the paperwriting was executed in England by Thomas Hollis Hopkins and was stamped with the duty in force under the law in England.

5. After its execution by Thomas Hollis Hopkins, the paperwriting (hereinafter called the indenture) was retained by Thomas Hollis Hopkins, in England, where he was then domiciled.

6. The indenture was retained by Thomas Hollis Hopkins in England until his death in the month of October 1919.

7. Spenser McTaggart Hopkins, when visiting England on an occasion subsequent to the death of Thomas Hollis Hopkins, discovered and took possession of the indenture as the executor of the will of Thomas Hollis Hopkins and as the trustee referred to in the indenture.

8. Spenser McTaggart Hopkins on his return to Queensland in the year 1920 brought with him into that State the indenture, which was then and thereafter availed of by him as trustee for the purpose of the execution of the trusts shown therein.

9. The indenture relates to property wholly situated in Queensland.

10. On 24th November 1943, the indenture was forwarded by the solicitors for Spenser McTaggart Hopkins to the Deputy Commissioner of Stamp Duties at Townsville with a request for an assessment of the stamp duty payable thereon.

11. The Deputy Commissioner of Stamp Duties assessed the duty with which the indenture was in his opinion chargeable and by letter dated 4th January 1944, addressed to the solicitor for Spenser McTaggart Hopkins, gave notice that he had assessed the indenture with £504 duty.

12. Spenser McTaggart Hopkins, as trustee under the indenture, being dissatisfied with the assessment, did on 2nd February 1944, by letter written by his solicitors to the Deputy Commissioner of Stamp Duties, Townsville, give notice of his intention to appeal against the assessment and paid the amount of the assessment and the sum of £20 as security for the costs of the appeal.

13. The value of the shares referred to in the indenture is and was at all relevant times £6,080 and the debt referred to is and was at all relevant times worth £4,000.

14. If the indenture is chargeable with duty under the law in force in Queensland in the year 1907 the duty payable thereon would be £25 4s., but if the indenture is chargeable with duty under the law in force in Queensland in the year 1920 the duty payable thereon would be £504, as assessed.

15. The questions submitted for the decision of the court were :—

(*a*) Is the indenture dated 18th May 1907 chargeable with duty under the law in force in Queensland in the year 1907 ?

(*b*) Is the indenture chargeable with duty under the law in force in Queensland in the year 1920 ?

(*c*) With what amount of duty is the indenture chargeable ?

(*d*) By whom should the costs of and incidental to this case be borne and paid ?

The following facts were admitted by the respondent Commissioner subject to all just exceptions as to the admissibility and relevancy thereof :—

1. That, on 22nd May 1907, the 6,400 shares referred to in the document set out in the special case were registered in the books of Hollis Hopkins & Co. Ltd. in the name of Spenser McTaggart Hopkins.

2. That, on 22nd May 1907, instructions were given by the directors of Hollis Hopkins & Co. Ltd. on a request by Thomas Hollis Hopkins to transfer from him to Spenser McTaggart Hopkins £4,000 lent by Thomas Hollis Hopkins to the company.

The relevant parts of the indenture were as follows :—

" This Indenture made the eighteenth day of May one thousand nine hundred and seven Between Thomas Hollis Hopkins of No. 67 Mount Park Road Ealing in the County of Middlesex and Townsville Queensland Australia Merchant (hereinafter called ' the Settlor ')

H. C. OF A. 1945. COMMISSIONER OF STAMP DUTIES (Q.) v. HOPKINS.

of the one part and Spenser McTaggart Hopkins of Townsville aforesaid and No. 67 Mount Park Road Ealing aforesaid Merchant of the other part Whereas the Settlor is absolutely entitled to six thousand four hundred shares of one pound each in 'Hollis Hopkins & Co. Limited' of Townsville aforesaid and London and also to the sum of four thousand pounds now on loan to the said Hollis Hopkins & Co. Limited at the current rate of Bank interest *And whereas the settlor intends forthwith to transfer the said shares and sum of money into the name of the said Spenser McTaggart Hopkins* to be held by him upon the trusts and with and subject to the powers and provisions hereinafter declared and contained and to the intent that the settlement hereby made shall be irrevocable Now this indenture witnesseth as follows :—

1. In consideration of the natural love and affection of the Settlor for his children the said Spencer McTaggart Hopkins Kathleen Stanier (the wife of Charles Edward Stanier) Thomas Hollis Hopkins the younger Walter Donald Hopkins Winifred May Hopkins Lilian Hopkins George Henry Stanton Hopkins and Ruth Elizabeth Hopkins and for divers other good causes and considerations the Settlor *doth hereby declare* that the said Spenser McTaggart Hopkins and his executors or administrators or other the Trustee or Trustees for the time being of these presents (hereinafter called the Trustee) *shall after the said intended transfer stand possessed of the said shares and sum of money Upon trust* that the Trustee shall allow the same to remain in the actual state of investment thereof so long as shall be reasonable for the purposes of the trusts hereof or shall at the discretion of the trustee sell call in or convert into money the same or any part thereof . . .

2. The Trustee shall hold the said six thousand four hundred shares Upon Trust for all the said eight children of the *Settlor in equal shares* but so that the part or share of any such child shall not be paid over or transferred to him or her during the lifetime of the said Spenser McTaggart Hopkins it being the express wish and intention of the Settlor that the said shares shall remain invested in the name of the Trustee during the life of the said Spenser McTaggart Hopkins unless the Trustee in his absolute discretion shall see fit to sell or otherwise realise the said shares in the lifetime of the said Spenser McTaggart Hopkins in which case upon such sale and realization being completed the Trustee shall forthwith pay and divide the proceeds of such shares unto and equally between the said eight children . . .

3. The Trustee shall hold the said sum of four thousand pounds and the investments for the time being representing the same Upon

Trust for all the said eight children in equal shares but so that the share of any such child therein shall not be paid over to him or her before he or she shall have attained the age of twenty-three years it being the wish of the Settlor that they shall leave their respective shares in the said sum of four thousand pounds invested in the hands of the Trustee until such time as they respectively shall have actual occasion to use the capital thereof . . .

4. The power of appointing new Trustees hereof shall be vested in the Settlor during his life. And after his death in the son of the Settlor who shall for the time being be the eldest son living."

The Full Court (*Macrossan* A.C.J., *E. A. Douglas* and *Philp* JJ.) held that, although the instrument was dutiable in accordance with the law in force in 1907 and not in 1920, and, *Macrossan* A.C.J. dissenting that the instrument was not a settlement and was liable to duty only as a deed : *Hopkins* v. *Commissioner of Stamp Duties* (1).

From this decision, the Commissioner of Stamp Duties appealed to the High Court.

Fahey, for the appellant. The document is a settlement within the meaning of the *Stamp Acts* (Q.). The transfer of the shares and the moneys makes the document a settlement. There is one object, namely, a settlement of the shares resulting from a series of transactions. The indenture is a charter of rights. It settled property and operated as a settlement. As soon as it was executed it affected property and became a charter of future rights : *Davidson* v. *Chirnside* (2). The instrument declares the trusts on which property is to be held on its transfer to trustees. The test is whether there is one transaction : *Commissioner of Stamps* v. *Parbury Estates Ltd.* (3) ; *Commissioner of Stamps* (*Q.*) v. *Wienholt* (4) ; *Cohen and Moore* v. *Commissioners of Inland Revenue* (5). A document is executed within the meaning of the Acts when it is executed as an operative document or as a binding contract. It does not become liable to duty on the day it is signed by one party : *Ex parte Burrows* (6). The document was not liable to stamp duty before the year 1920 or the date later than 1920 when it was tendered for stamp duty : *Russell* v. *Commissioners of Inland Revenue* (7). [He also referred to *Dent* v. *Moore* (8) ; *Collector of Imposts for Victoria* v. *Peers* (9) ; *Union Trustee Co. of Australia Ltd.* v. *Commissioner of Stamp Duties* (10).]

(1) (1945) Q.S.R. 162.
(2) (1908) 7 C.L.R. 324.
(3) (1913) 16 C.L.R. 521.
(4) (1915) 20 C.L.R. 531.
(5) (1933) 2 K.B. 126.
(6) (1906) 6 S.R. (N.S.W.) 606 ; 23 W.N. 183.
(7) (1902) 1 K.B. 142, at p. 152.
(8) (1919) 26 C.L.R. 316.
(9) (1921) 29 C.L.R. 115, at p. 124.
(10) (1922) Q.S.R. 1.

H. C. OF A. 1945. COMMISSIONER OF STAMP DUTIES (Q.) v. HOPKINS.

McGill K.C. (with him *Mack*), for the respondent. The document was first executed when the first party signed it. The law applicable is the law in force when it was first signed, i.e. in 1907. The words "first executed" in s. 4A of the Acts suggest a second execution and should be read as "first signed." The Acts must be interpreted according to the definitions. The case is distinguishable from *Ex parte Burrows* (1). The instrument is not a settlement. It has not transferred any property; there is no proof that the shares were transferred or the debts assigned. No trusts can be established on this document alone. It shows an intention to do things when the shares are transferred. The document does not settle any property: *Davidson* v. *Chirnside* (2); *Halsbury's Laws of England*, 2nd ed., vol. 28, p. 474.

Fahey, in reply.

Cur. adv. vult.

Aug. 3. The following written judgments were delivered:—

LATHAM C.J. The question raised by this appeal is whether a certain instrument, being an indenture dated 18th May 1907 and made between Thomas Hollis Hopkins, then residing in England, and his son Spenser McTaggart Hopkins, then residing in Queensland, is subject to any and what stamp duty under the Queensland *Stamp Acts* 1894 *to* 1942.

The document was prepared in England and sent to Queensland, where it was signed and sealed by S. McT. Hopkins on 18th May 1907. It was then sent to T. H. Hopkins in England. In September 1907, it was signed in England by T. H. Hopkins. The document remained in England until after the death of T. H. Hopkins in 1919. It was brought into Queensland by S. McT. Hopkins in the year 1920.

It was unanimously held by the Full Court of the Supreme Court that the instrument was dutiable in accordance with the law in force in 1907 and not under the law as it existed in 1920. *E. A. Douglas* and *Philp* JJ. held that the instrument was not a settlement and was liable to duty only as a deed, the amount of duty payable being ten shillings. *Macrossan* A.C.J. was of opinion that the instrument was a settlement, the amount of duty payable being £25 4s.

The instrument recites that T. H. Hopkins, described as the settlor, is absolutely entitled to 6,400 shares in a company of Townsville and London, and also to a sum of £4,000 then on loan to the

(1) (1906) 6 S.R. (N.S.W.) 606; 23 W.N. 183.

(2) (1908) 7 C.L.R. 324.

company. There was a further recital in the following words :— "Whereas the Settlor intends forthwith to transfer the said shares and sum of money into the name of the said Spenser McTaggart Hopkins to be held by him upon the trusts and with and subject to the powers and provisions hereinafter declared and contained and to the intent that the settlement hereby made shall be irrevocable."

The indenture witnessed that, in consideration of his love and affection for his eight named children, the settlor declared that S. McT. Hopkins and his executors or administrators, or other the trustee or trustees for the time being of the indenture, "shall after the said intended transfer stand possessed of the said Shares and sum of money" upon the trusts declared in the indenture. The trustee was authorized to allow the said property to remain in its actual state of investment or to sell call in or convert it into money. As to the 6,400 shares, it was declared that the trustee should hold them "upon trust for all the said children of the Settlor in equal shares but so that the part or share of any such child shall not be paid over or transferred to him or her during the lifetime of the said Spenser McTaggart Hopkins," it being the wish of the settlor that the shares should remain invested in the name of the trustee during the life of his said son unless the trustee should see fit to sell or realize and in that case the trustee was forthwith to pay and divide the proceeds of the shares equally between the said eight children. It was further provided that upon the death of the said S. McT. Hopkins, if the shares had not been previously sold, they should be sold and the proceeds divided equally between the said children. It was declared that, until such sale, realization or transfer, the said children should be entitled to and be paid the income or proceeds of the shares in equal proportions.

As to the sum of £4,000, the indenture declared that the trustee should hold the said sum upon trust for all the said eight children in equal shares, so that the share of any such child should not be paid over to him until he had attained the age of 23 years, and that the income or interest of the said sum should in the meantime be paid to the said children in equal proportions. The case states that the instrument related to property wholly situated in Queensland.

Before the Supreme Court, it was admitted that on 22nd May 1907 the 6,400 shares in the company were registered in the name of S. McT. Hopkins, and that, on the same date, instructions were given by the directors of the company, on a request by T. H. Hopkins, to transfer from him to S. McT. Hopkins the £4,000 lent by him to the company.

H. C. OF A. 1945.

COMMISSIONER OF STAMP DUTIES (Q.) v. HOPKINS.

Latham C.J.

Section 4A of *The Stamp Acts* 1894 *to* 1930 (Q.) provides as follows: —"An instrument chargeable with stamp duty (whether under this Act or under any prior Act) executed in Queensland, or relating if executed outside Queensland to any property situated or to any matter or thing done or to be done in Queensland, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed or first brought into Queensland if executed outside Queensland." This provision requires the dutiability of instruments to be determined either in accordance with the existing law, or, if a prior law applied to them, in accordance with that prior law. The relevant prior law is the law in force at the time of the first execution of the instrument, or, if it was "executed outside Queensland," the law in force at the time when it is first brought into Queensland.

The words "first executed" show that the section is intended to apply to instruments which have been executed by several parties. The section can be applied only if each such execution is regarded as an execution of the instrument. If an instrument was completely executed by all parties outside Queensland and then was brought into Queensland, the law applicable is the law which was in force at the time when it was first brought into Queensland. If it was first executed by one party outside Queensland, and then by other parties in Queensland, the section would appear to apply the law which was in force when the document was first brought into Queensland—but this question does not arise in the present case. In this case, the instrument was first executed in Queensland by the son, and subsequently executed outside Queensland by the father. I agree with the unanimous decision of the Full Court that the law which is applicable is the law in force at the time when the instrument was first executed, that is, the law which was in force on 18th May 1907 when it was signed and sealed by the son.

The next question which arises is whether the instrument is dutiable as a settlement under the law in force in 1907. In that year, the relevant legislation in force was contained in *The Stamp Act* 1894 (Q.) and *The Stamp Act Amendment Act of* 1904 (Q.). *The Stamp Act* 1894, s. 4, provided that the stamp duties to be charged upon the instruments specified in the First Schedule should be the duties specified in the schedule. In the First Schedule, the following appears:—

"SETTLEMENT—Any instrument whether voluntary or upon any good or valuable consideration other than a *bona fide* pecuniary consideration, whereby any definite and certain principal sum of

money (whether charged or chargeable on lands or other hereditaments or not, or to be laid out in the purchase of lands or other hereditaments or not), or any definite and certain amount of stock or any security is settled or agreed to be settled in any manner whatsoever."

This provision does not constitute a true definition of the term "settlement," because its application depends upon the meaning of the words "settled or agreed to be settled." The "definition" limits the application of the term "settlement" in the statute by confining it to settlements of the character stated in the "definition" that is, they must be voluntary or upon a good or valuable consideration other than a bona-fide pecuniary consideration; they must be settlements of a definite and certain principal sum of money or of a definite and certain amount of stock or any security. The definition only has the effect, therefore, (1) of excluding from the operation of the Act other settlements than those mentioned, and (2) of including an agreement for a settlement, as well as an actual settlement itself, within the term "settlement."

His Honour *Philp* J., with whom *E. A. Douglas* J. agreed, analysed closely and in a most informative manner the history of stamp duty, showing that stamp duty legislation began by requiring certain documents to be written only upon vellum or paper which had previously been stamped. The liability to duty, therefore, depended upon the character of the instrument, irrespective of its execution; that is to say, an instrument would be dutiable when, if completely executed, it was, i.e. would become, e.g., a receipt, an agreement, a bill of lading. This principle is still to be found in the Queensland Act, s. 26. This section provides that if any person signs or executes any instrument liable by law to any stamp duty before it is duly stamped, he shall be liable on conviction to pay the duty and a penalty of £50, with a proviso which introduces certain exceptions in the case of receipts, cheques, agreements, bills of lading, charter parties, and certain bills of exchange and promissory notes. It is not very easy to reconcile the principle applied in s. 26 with the provision contained in s. 22, which enables any person to require the Commissioner to express his opinion with reference to any *executed* instrument upon the following questions: "(*a*) Whether it is chargeable with any duty; (*b*) With what amount of duty it is chargeable." Section 22 assumes that a document may be executed before it is stamped, and that the Commissioner may then be required to give his opinion whether it should be stamped. Section 26, on the other hand, makes it an offence to execute any instrument which is liable to any stamp duty before it is duly stamped. Section 26, however,

H. C. OF A. 1945 COMMISSIONER OF STAMP DUTIES (Q.) v. HOPKINS. Latham C.J.

contains provisions for remission of penalty which in practice remove the difficulties which suggest themselves.

His Honour Mr. Justice *Philp* accordingly said :—

" It is true that an instrument unexecuted by the settlor cannot be enforced against him as a settlement and so in that sense is not a settlement ; but liability to stamp duty, as I have shown, does not depend upon what the document evidences in any particular stage of its execution, but upon what it would evidence if fully executed. What then would the subject document evidence if fully executed ? " (1).

I agree that the reasoning of the learned judge shows that this is the relevant question.

In *Davidson* v. *Chirnside* (2), *Griffith* C.J., referring to the Victorian *Stamps Act* 1892, said :—" The question whether an instrument is or is not within the Act must, in my judgment, be determined by examination of the instrument itself, and not upon extrinsic evidence." I have suggested in *Cuming Campbell Investments Pty. Ltd.* v. *Collector of Imposts* (*Vict.*) (3) that this proposition is too widely stated, and the authorities cited in *Halsbury's Laws of England*, 2nd ed., vol. 28, p. 447, note (*d*), show that in many cases the courts have heard extrinsic evidence in order to determine the real nature of the transaction to which the instrument relates and to ascertain the amount of duty payable. See also ss. 22 (2) and 23 of the Act, which enable the Commissioner to inquire into facts and circumstances not appearing upon the face of an instrument. It is true that, as has often been said, the *Stamp Duty Acts* impose duties upon instruments and not upon transactions. It is obvious that you can stick a stamp or impress a stamp upon an instrument, but not upon a transaction. But, in order to determine whether an instrument is dutiable, it is nevertheless necessary to ascertain the legal operation of the instrument, i.e., to determine the nature of the transaction which it accomplishes. Thus, for example, if a person purported to make a conveyance or settlement of land in which he had no interest whatever, the instrument would not be dutiable as a conveyance or settlement, because it would not produce any legal effect whatever in relation to the property with which it purported to deal : See per *Rich* A.C.J. in *Wedge* v. *Acting Comptroller of Stamps* (*Vict.*) (4) ; *Kent* v. *Commissioner of Stamps* (5) ; *Alpe, Law of Stamp Duties*, 19th ed. (1929), p. 249 :—" A settlement must effect a disposition of property " ; *Massereene* v. *Commissioners of Inland Revenue* (6).

(1) (1945) Q.S.R. 162, at p. 174.
(2) (1908) 7 C.L.R. 324, at p. 340.
(3) (1938) 60 C.L.R. 741.
(4) (1941) 64 C.L.R. 75, at p. 79.
(5) (1927) Q.S.R. 398, at p. 408.
(6) (1900) 2 I.R. 138.

In the first place, I consider the instrument in itself independently of any extrinsic evidence and ask what would be the legal operation of the instrument if fully executed. The instrument recites an intention of the father to transfer certain property to the son to be held by him upon the trusts mentioned therein. It does not contain any agreement (either with the son or with the proposed beneficiaries) to settle the property, but only states an intention to do so. If the father had changed his mind and had refused or merely failed to transfer the property to the son, neither the son nor the proposed beneficiaries (who were volunteers) could have compelled him to do so. It is a common practice for an intending settlor to execute a deed containing or referring to an agreement to settle property owned by him and declaring the intended trusts thereof, the property to be transferred upon or immediately after the execution of the deed: See *Davidson* v. *Chirnside* (1). Such a document does not itself settle any property, but, as an agreement to settle property, it would be a settlement within the meaning of the Act. The instrument now in question cannot be brought within the Act as being an agreement to settle property.

Further, the document itself does not transfer any property to any person. It does not itself affect the right or title of any person to any property. The document states that the father, described as the settlor, declares that the son shall hold the property upon certain trusts, but it does not in itself (i.e. apart from the extrinsic fact of transfer of the property) give any rights to any person in respect of the property.

If a party to legal proceedings had desired to put the instrument in evidence, in my opinion it would not have been proper for the judge, upon consideration of the instrument itself, to rule that the instrument was not admissible. Similarly, if immediately after the son had executed the instrument he had been prosecuted under s. 26, the prosecution should, in my opinion, have failed, because it would not appear, upon a consideration of the instrument, that it was liable by law to any stamp duty. (It is unnecessary in the present case to consider the provisions of s. 4B (introduced into the Act by *The Stamp Acts Amendment Act of* 1926 (Q.)), which creates a personal liability to pay stamp duty by all persons who execute dutiable instruments.)

In my opinion, if the document is regarded apart from any extrinsic evidence, it is not a settlement within the meaning of the First Schedule to *The Stamp Act* 1894.

(1) (1908) 7 C.L.R. 324, at p. 340.

H. C. OF A. 1945. COMMISSIONER OF STAMP DUTIES (Q.) v. HOPKINS. Latham C.J.

In the present case, however, extrinsic evidence was admitted in the Supreme Court for the purpose of determining the dutiability of the instrument. I refer to the admissions made with respect to the transfer of the shares and of the debt made by the father on 22nd May 1907, that is, four days after the son had signed the instrument in Queensland, but several months before the father signed it in England.

It has not been suggested that the son is the settlor under the alleged settlement. If nothing more had taken place than his execution of the document, it would be impossible to describe the document as a settlement, for the reason that it would not have settled any property or contained any agreement by any person to settle any property. When the son signed the document, he had no interest in the property to which the document referred. If there be a settlor, the settlor must be the father. But, when the father executed the instrument, he no longer had any interest in the property, and therefore he did not settle the property by virtue of the instrument. The true position was that the father had transferred property to the son, who was a volunteer. The document signed by the son excluded the possibility of regarding the transaction as a gift to him, and, accordingly, when the property became vested in the son he held it upon the trusts declared in the document. Those trusts became operative as soon as the property was so vested, but they did not become operative by virtue of execution of the document by the father—which had not then taken place. As the execution of the document by the father produced no effect whatever in relation to the property to which the document referred, it should not, in my opinion, be held that the father by the document settled the property.

Accordingly, in my opinion, for the reasons stated, the instrument should not be held to be a settlement, whether or not extrinsic evidence is taken into account.

An argument for the Commissioner has been founded upon s. 61 of the Act. This provision is in the following terms :—

"61. (1) Where several instruments are executed for effecting the settlement of the same property, and the *ad valorem* duty chargeable in respect of the settlement of the property exceeds ten shillings, one only of the instruments is to be charged with *ad valorem* duty.

(2) Where a settlement is made in pursuance of a previous agreement upon which *ad valorem* settlement duty exceeding ten shillings had been paid in respect of any property, the settlement is not to be charged with *ad valorem* duty in respect of the same property.

(3) In each of the aforesaid cases the instruments not chargeable with *ad valorem* duty are to be charged with the duty of ten shillings."

It is argued that the effect of this section is that, if several instruments bring about the result of effecting a settlement, then some one of those instruments must be charged with *ad valorem* duty—any other instrument being charged with the duty of ten shillings.

Different opinions have been expressed as to the effect of such a provision. But, whatever may be the true view of its meaning, it cannot apply in the present case because it does not appear that, even if a settlement has been effected, several instruments were executed for effecting it. The only instrument of which the Court has any knowledge is the indenture of 18th May 1907. Other instruments may or may not have been executed for the purpose of transferring the shares and the debt, but there is no evidence that any such instruments were executed. For this reason, therefore, the section has no application in the present case.

But, further, I do not agree with the suggestion that the section means that if the result of a transaction is the same as the result which would have been brought about by the execution of a settlement, it follows that some document or other must be stamped as a settlement, even though it is not itself a settlement. The object of s. 61 (1) is to require " one only of the instruments " to be charged instead of several instruments being charged. The section applies only in cases where, apart from the provision which it makes, more than one instrument might have been charged in relation to " the settlement of the same property," as e.g., where there is a deed of settlement and other documents conveying or transferring property to the trustees of the settlement.

Apart from special provisions, no instrument can be dutiable under the Act unless that instrument itself falls within the description of dutiable instruments—whatever the total effect of the instrument and some other " act in the law " may be. In *Minister of Stamps* v. *Townend* (1), the Privy Council considered certain provisions in a Stamp Act, dealing with deeds of gift. A transaction of gift was carried out by means of a power of attorney, under which a daughter was given control of her father's property. He also verbally authorized her to retain and apply for her own benefit moneys which she received by means of the exercise of the power of attorney. She sold the land belonging to her father ; she received repayment of mortgage moneys due to him ; and invested moneys so obtained in mortgages in her own name. It was contended that the transactions were carried out by written instruments, that the

(1) (1909) A.C. 633.

H. C. OF A. 1945. COMMISSIONER OF STAMP DUTIES (Q.) v. HOPKINS. Latham C.J.

result of what was done was that a gift to the daughter was effected, and that therefore the deeds used were dutiable as deeds of gift. The argument was rejected by the Privy Council, Lord *Loreburn* L.C. saying (1): "Here there was no gift by any document, and therefore there is no duty payable." It was immaterial that the effect of the transactions in the course of which the documents were used was to make a gift. In the same way in the present case, if the instrument in question is not itself a settlement, it does not become dutiable as a settlement by reason of the fact that it was used for the purpose of bringing about the same result as a settlement. This principle is not affected by s. 61, which applies only where there are several instruments, each of which would, apart from the section, be dutiable. I therefore agree with the statement of *Philp* J. that s. 61 "is not designed to alter the basic principle that the duty on each document used to effect a settlement is to be determined upon the face of each document itself, but it is designed to relieve the subject in the case of settlements from the harsh effect which that basic principle would impose" (2). In my opinion, it is not clear that this view is inconsistent with the statement of *Collins* M.R. in *Russell* v. *Inland Revenue Commissioners* (3) that a corresponding section in English legislation "contemplated one transaction by way of settlement of property effected at the same time by several documents, not a series of documents effecting at different stages different dispositions with regard to settled property." It is plain enough, I should have thought, that a series of documents dealing in different ways at different times with the same property would be dutiable separately, and that the execution of such a series could not possibly be regarded as falling within the description of "the execution of several instruments for effecting the settlement of the same property." The words used by the Master of the Rolls may, in my opinion, be read as meaning no more than that the section contemplates one settlement in the making of which more than one document may be used (as in the example already given of a deed of settlement and a conveyance or transfer), and that the section was not intended to apply in the case of separate settlements which at different times dealt with the same property.

For the reasons stated, I am of opinion that the Supreme Court rightly held that the document was not a settlement, and was dutiable only as a deed, the duty being ten shillings. In my opinion, this conclusion is in no way inconsistent with the decision in *Davidson* v. *Chirnside* (4). In that case, the document which

(1) (1909) A.C., at p. 639.
(2) (1945) Q.S.R. 162, at p. 178.
(3) (1902) 1 K.B. 142, at p. 152.
(4) (1908) 7 C.L.R. 324.

was held to be a settlement was a document executed by the trustees of a will who held the legal estate in the property of which trusts were declared in the deed. In the present case, the trusts became operative before the person alleged to be the settlor signed the document in question, and that person had no interest in the trust property when he signed the instrument. In the case of *Ansell* v. *Commissioners of Inland Revenue* (1), the document was executed by the owner of the property in question. There was no argument in that case as to whether the document was a settlement or not (see statement of facts (2)), and the only matter decided in the case was that one document (admitted to be a settlement) dealt with distinct matters within the meaning of s. 4 of the *Stamp Act* 1891 (Imp.), which provided that, except where express provision to the contrary was made, an instrument relating to several distinct matters was to be separately and distinctly charged as if it were a separate instrument in respect of each of the matters.

In my opinion, the decision of the Supreme Court was right and the appeal should be dismissed.

RICH J. The questions which arise for determination in the present appeal are whether a certain document, on which admittedly some stamp duty is payable under the Queensland *Stamp Acts*, is dutiable according to the law in force in Queensland in 1907 or in 1920, and to what category the document should be assigned for the purpose of assessment of duty.

The document is expressed to be an indenture made the 18th day of May 1907 between T. H. Hopkins (thereinafter called the settlor) and his son S. McT. Hopkins. It recites that T. H. Hopkins owns 6,400 shares in a company and also £4,000 lent by him to the company (all of which property is admitted to have been locally situated in Queensland), and that he intends forthwith to transfer this property into the name of S. McT. Hopkins to be held by him upon the trusts thereinafter declared " to the intent that the settlement hereby made shall be irrevocable." The settlor goes on to declare that S. McT. Hopkins (thereinafter called the trustee) shall, after the said intended transfer, stand possessed of the shares and money upon trust to hold or to realize and convert. The trustee shall hold the shares for the settlor's eight children (including S. McT. Hopkins) in equal shares, and the money for the eight children in equal shares but the share of a child shall not be paid over until he or she shall have attained the age of 23. The power of

(1) (1929) 1 K.B. 608. (2) (1929) 1 K.B., at p. 609.

H. C. OF A. 1945. COMMISSIONER OF STAMP DUTIES (Q.) v. HOPKINS. Rich J.

appointing new trustees shall be vested in the settlor during his life and after his death in his eldest son for the time being living.

The document had been prepared in England (no doubt under instructions from T. H. Hopkins, although this fact is not before us), and was sent to S. McT. Hopkins in Queensland, who executed it there under seal on 18th May 1907, the date which it bears. On 22nd May 1907, the shares were registered in the books of the company in the name of S. McT. Hopkins, and, on the same date, upon request made by T. H. Hopkins, the directors of the company gave instructions to transfer to S. McT. Hopkins £4,000 lent by T. H. Hopkins to the company. In September 1907, T. H. Hopkins executed the document under seal in England. After he had so executed it, he kept it there until his death in 1919. He had appointed S. McT. Hopkins executor of his will. When the latter visited England after his father's death, he found the document there, and in 1920 took it back to Queensland with him, where it has since been availed of by him as trustee for the execution of the trusts shown therein.

By the case stated to the Supreme Court of Queensland, it was agreed that, if the indenture was chargeable with duty under the law in force in Queensland in the year 1907, the duty payable thereon would be £25 4s., but, if under the law in force in 1920, £504 (the amount assessed by the Commissioner). The Supreme Court held that it was assessable on the former basis, but the majority, taking the view that on this basis it was liable to duty only as a deed, held that the amount payable was 10s. and not £25 4s. as the appellant to the Supreme Court had conceded. In the appeal to this Court, it is contended for the Commissioner that the indenture is assessable on the latter basis, in which case it is not disputed that his assessment of £504 would be correct.

The first matter to be considered is the nature and operation of the document taken by itself. The problem involved in this is an instance of a type of question which arises from time to time in courts of justice when it has to be determined whether an arrangement between two persons which has some of the forms of a transaction known to the law was intended to constitute such a transaction and to bring into existence the legal rights appropriate thereto, or was made for some other purpose. Thus, in the realm of contract, questions sometimes arise, often of considerable difficulty, as to whether a particular arrangement constitutes a binding contract, or amounts to no more than an agreement between two persons that if they choose to enter into particular types of contract with one another in the future (they not undertaking any obligation to

do so), certain terms and conditions then agreed upon are to be deemed to be included in the contracts. *Great Northern Railway Co.* v. *Witham* (1), *Milne* v. *Municipal Council of Sydney* (2), and *J. Kitchen & Sons Pty. Ltd.* v. *Stewart's Cash and Carry Stores* (3) are instances of cases in which such a question arose. In the present case, the first question is whether a document, which has some of the forms of a settlement, and was executed by a person who is described in it as the settlor, was in law a settlement.

The nature of a settlement has been discussed in such cases as *Davidson* v. *Chirnside* (4), *Archibald* v. *Commissioner of Stamp Duties (Q.)* (5), and *Wedge* v. *Acting Comptroller of Stamps (Vict.)* (6). In order that a document may constitute a settlement, it is essential (subject to any artificial meaning which may be attributed to the word by statute) that it should at least operate or contribute to cause property, in the sense of some right or interest of a proprietary nature, to become, either at law or in equity, vested in some person or devoted to some charitable purpose. There are various ways in which a person who has both the legal and the equitable title to property may vest legal or equitable interests therein in other persons ; and my brother *Dixon*, in *Comptroller of Stamps (Vict)* v. *Howard-Smith* (7), has indicated various ways in which a person who has only an equitable interest in property may confer equitable interests therein upon others. There is, however, nothing in the indenture here in question, taken by itself, which operates as a settlement of the shares or the debt, nothing to cause any legal or equitable right or interest of a proprietary nature in these items to become vested in Spenser Hopkins as trustee or in any of Thomas Hopkins' eight children as beneficiaries. It is plain, on the face of the document, so far as the shares and the debt themselves are concerned, that what the settlor intends to do is to transfer them, in the very near future, to Spenser Hopkins as trustee on the terms that after the intended transfer has taken place he is to hold them upon the trusts specified. But it does not follow from the fact that the indenture does not of itself settle the shares and the debt that it does not of itself settle anything. The recitals state that " the settlor intends forthwith to transfer the said shares and sum of money into the name of the said Spenser McTaggart Hopkins to be held by him upon the trusts and with and subject to the powers and provisions hereinafter declared and contained and to the intent that the

(1) (1873) L.R. 9 C.P. 16.
(2) (1912) 14 C.L.R. 54.
(3) (1942) 66 C.L.R. 116.
(4) (1908) 7 C.L.R. 324, at pp. 340, 341.
(5) (1930) 44 C.L.R. 243, at pp. 250-251.
(6) (1941) 64 C.L.R. 75.
(7) (1936) 54 C.L.R. 614, at pp. 621-623.

H. C. OF A. 1945. COMMISSIONER OF STAMP DUTIES (Q.) v. HOPKINS. Rich J.

settlement hereby made shall be irrevocable." A statement to a person of an intention to make him a present, accompanied by an intimation that the intention is to be regarded as irrevocable, contains all the essentials of a promise of the present, and, coupled with an acceptance, constitutes all the essentials of an agreement (though not of a contract). The document in question was executed as a deed. No formal words are necessary to make a covenant in a deed. A statement of a binding intention may be " as good a covenant as could be made by the most formal words " : *Mackenzie* v. *Childers* (1). Numerous instances of this are to be found in the authorities cited in *Norton* on *Deeds*, 2nd ed. (1928), pp. 532-536. And if a recital in a deed appears to be intended to operate as a covenant by one of the parties, the recital is just as effective a covenant as if a covenant to the effect of the recital appeared in the operative part : *Hollis* v. *Carr* (2) ; *Farrall* v. *Hilditch* (3) ; *Mackenzie* v. *Childers* (4). In the present case, I am of opinion that the settlor, in the recital which I have quoted, meant to commit himself irrevocably to making the intended transfers. It would be inconsistent with his language to assume that he meant merely that, when a settlement of the shares and debt should be made thereafter by the transfers, there should be no power of revocation attached to the trusts of the settlement. It is what he says he is doing by way of a settlement made by the deed itself that he says he intends to be irrevocable. I am of opinion, therefore, that this recital amounts to a covenant by Thomas Hopkins with Spenser Hopkins to transfer the shares and debt, to be held by him upon the trusts specified.

A voluntary covenant by one person to transfer property to another to be held by him in trust for third parties is not specifically enforceable (*Jefferys* v. *Jefferys* (5)), and therefore does not vest in the covenantee any interest of a proprietary kind in the property the subject of the covenant : *Howard* v. *Miller* (6). But this is only the position in equity. The covenant itself is a perfectly good covenant, and, if the covenantor fails to comply with it, an action may be maintained against him at common law for its breach. In the contemplation of a court of common law, the execution of such a voluntary covenant vests in the covenantee a chose in action, namely the right to require the covenantor to perform his covenant or, failing compliance, to pay damages. Hence, in the case now

(1) (1889) 43 Ch. D. 265, at p. 275.
(2) (1676) Rep. Temp. Finch 261 [23 E.R. 143]; 2 Freeman 3 [22 E.R. 1017].
(3) (1859) 5 C.B. (N.S.) 840, at pp. 852-855.
(4) (1889) 43 Ch. D. 265.
(5) (1841) Cr. & Ph. 138, at p. 141 [41 E.R. 443, at p. 444].
(6) (1915) A.C. 318, at p. 326.

before us, if Thomas Hopkins had not already transferred the property on 22nd May 1907 before he executed the indenture in September 1907, the execution of the indenture by him would have vested in Spenser Hopkins a valuable chose in action enforceable by him as trustee for the eight children of Thomas (*Fletcher* v. *Fletcher* (1)), although a mere voluntary promise not under seal to the same effect would not have been enforceable either at law or in equity, and therefore would not have vested even a chose in action in the promisee: *Marler* v. *Tommas* (2).

For the reasons which I have stated, I am of opinion that the indenture bearing date 18th May 1907, taken by itself, when executed by T. H. Hopkins, would have constituted a settlement according to the ordinary significance of the word, because it would have vested in S. McT. Hopkins a chose in action, a covenant to transfer to him certain shares and a debt, the value of the chose in action being the amount of the damages which S. McT. Hopkins could have recovered for a breach of the covenant—prima facie the value of the shares and the debt. When one turns to the provisions of the Queensland *Stamp Act of* 1894 as amended up to the year 1907, one finds that, for the purposes of the Act, "settlement" is defined (so far as the definition is relevant) as a voluntary instrument whereby any definite and certain principal sum of money or any definite and certain amount of stock or any security is settled or agreed to be settled in any manner. It is not disputed that, within the meaning of this definition, the debt was a "principal sum of money" and the shares were "stock." I am of opinion, therefore, that the indenture, at least when it was executed by T. H. Hopkins in September 1907, of itself and apart from anything having been done to implement it, would have become a settlement within the meaning of the Queensland *Stamp Act* as then in force, because of itself it was a voluntary instrument by which a definite and certain principal sum of money and a definite and certain amount of stock were agreed to be settled. In my opinion, also, on this footing, the duty payable on the instrument would have been the duty which it would then have attracted as a settlement, namely £25 4s.

But the document does not stand by itself, and to treat it as doing so would give a wrong idea of the nature and course of the transaction of which it formed only a part. To understand the transaction, it is necessary to take into account certain matters extrinsic to the document. First, the document was evidently prepared under instructions from the settlor; but, since the parties have neglected

(1) (1844) 4 Hare 67 [67 E.R. 564]. (2) (1873) L.R. 17 Eq. 8, at pp. 12-13.

H. C. OF A. 1945. COMMISSIONER OF STAMP DUTIES (Q.) v. HOPKINS. Rich J.

to say so in terms in the stated case, we cannot take this fact into consideration. Second, it was executed by the trustee on 18th May 1907, the date which it bears. Third, four days afterwards, on 22nd May 1907, the property was transferred by the settlor to the trustee, as provided for by the document. Fourth, the document is incorrect in saying that it was executed by the settlor on 18th May 1907 : it was not so executed until some four months afterwards, in September. As to the second of these matters, the execution of the document by the trustee on 18th May 1907 provided strong evidence that he did not intend to disclaim any property which subsequently might be transferred to him for the purposes of the settlement for which the document provides. As to the third, upon the transfer of the property by the settlor to the trustee on 22nd May 1907, the document operated as the written charter by which the beneficial interests in the property became apportioned amongst, and vested in, the eight children of the settlor. As to the fourth, the subsequent execution of the document by the settlor in September 1907 provided evidence that the transfers made in May had been his deliberate acts and were intended by him to vest beneficial interests in all eight children as provided by the document, not in the transferee alone ; whilst the fact that the property had already been transferred reduced the operation of the covenant to that of a covenant for further assurance, available to the trustee in case the transfers should turn out to have been in any way defective. Regarded in the light of these matters, the document is seen to be one factor in a process of settlement, of which the first step that is before us was the execution of the document under seal by the trustee as an indenture on 18th May 1907, and the second and crucial step was the transfer by the settlor on 22nd May 1907 of the property referred to in the document to the trustee to be held by him upon the trusts of the document. It follows, in my opinion, that, if not on 18th May 1907, at the latest on 22nd May 1907, the document became an instrument by which the property was " settled " within the meaning of the statutory definition clause then in force. I have had the advantage of reading the reasons of my brother *Dixon,* and agree with his reasons for concluding that the instrument is dutiable as a settlement according to the rate of duty in force in 1907.

The answers of the Supreme Court should be varied by substituting the agreed sum of £25 4s. for the sum of ten shillings stated in the answer to question (*c*), and save to this extent the appeal should be dismissed. The costs should be paid by the Commissioner.

DIXON J. The questions upon this appeal are whether a document executed in 1907 amounts to a settlement so as to be liable for stamp duty and, if so, at what rate.

The question whether it amounts to a settlement does not depend upon the nature of the trusts it declares, but upon the circumstance that it is not expressed to transfer or impart to the trustee the property to be settled but, on the contrary, contains a recital to the effect that the settlor intended forthwith to transfer the property into the name of the trustee.

The question concerning the rate or amount of stamp duty arises from the fact that the document was signed and sealed by the trustee in Queensland before it was executed by the settlor, who resided in England, where it was then sent to be executed by him. It was not brought into Queensland again until 1920, thirteen years after its execution had been completed, and, in the meantime, the rates of duty had been greatly increased.

The two questions are by no means independent, as will appear. But they are governed by the precise facts of the case. The material facts are these. T. H. Hopkins (now deceased), who in 1907 lived in England, was possessed of 6,400 shares in a company called Hollis Hopkins & Co. Ltd., and, in addition, he had lent the company a sum of £4,000. He caused a document to be prepared in London in the form of an indenture between himself and a son named S. McT. Hopkins. In the indenture, the father was referred to as " the settlor " and the son was called " the trustee." The document recited that the settlor was absolutely entitled to the shares and the loan, and that he intended forthwith to transfer the shares and the sum of money into the name of the son to be held by him upon the trusts and with and subject to the powers and provisions hereinafter declared and contained to the intent that the settlement thereby made should be irrevocable. It then proceeded to declare the trusts upon which the trustee should hold the shares and the money.

The document was sent to S. McT. Hopkins in Queensland, where he signed and sealed it on 18th May 1907. Four days later, viz. on 22nd May 1907, the shares were registered in the books of Hollis Hopkins Ltd. in his name, and instructions were given by the directors of that company, on a request by T. H. Hopkins, the settlor, to transfer from him to S. McT. Hopkins the £4,000 lent by T. H. Hopkins to the company.

It may be supposed that T. H. Hopkins had been advised by cable of the execution of the document by S. McT. Hopkins in Queensland. But the matter comes before us on a case stated and

H. C. OF A. 1945. COMMISSIONER OF STAMP DUTIES (Q.) v. HOPKINS. Dixon J.

we cannot draw inferences of fact. The case does not say where the company was registered, where the share-register was kept, or where the board of directors met. It does not even say that there was an instrument of transfer of the shares or a written request to transfer the loan. But the case stated does contain a paragraph saying that the indenture relates to property wholly situated in Queensland. However, it seems clear that the shares and the debt were vested in the trustee before the document described as a settlement was executed by the settlor. After signature by the trustee, the document was returned to England, where the settlor executed it on 30th September 1907. He continued to live in London until his death in October 1919. It was not until after his death that the trustee obtained the document. Apparently he was his father's executor, and, on a visit to England after his father's death, he found it among the latter's papers. He brought it to Queensland in 1920. He did not submit it to the Commissioner of Stamp Duties until 1943. The Commissioner considered it was liable to duty as a settlement and that, by virtue of s. 4A of the *Stamp Act* 1894-1942 of Queensland, it was to be stamped in accordance with the law in force in 1920, when it was first brought into the State.

That section, which was enacted in 1918, provides that "an instrument chargeable with stamp duty" (whether under the Act of 1894 or any prior Act) "executed in Queensland, or relating if executed outside Queensland to any property situated . . . in Queensland shall not . . . be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed or first brought into Queensland if executed outside Queensland."

It is evident from its terms that this provision applies to instruments executed before it was enacted, if they are already chargeable with stamp duty. In 1907, the chargeability of the instrument depended upon the definition of settlement contained in the first schedule of the Act of 1894, the material part of which made dutiable "Any instrument . . . whereby any definite and certain principal sum of money . . . or any definite and certain amount of stock or any security is settled or agreed to be settled in any manner whatsoever." In this provision, the word "stock" apparently included shares in a joint stock company, though the definition of the word in s. 2, which is founded on s. 122 of the *Stamp Act* 1891 of the United Kingdom, was not adopted until 1918. It does not seem to be disputed that the loan constituted a definite and certain principal sum of money within the provision.

In 1918, a definition of "settlement" was enacted which made a settlement of any form of property dutiable; but I do not think that this amendment would operate retrospectively to make the instrument completed in 1907 "chargeable" within the meaning of s. 4A: *Abrahams* v. *Skinner* (1); *Suffield (Lord)* v. *Commissioners of Inland Revenue* (2); *Richardson* v. *Commissioner of Stamps* (3).

Section 4A does make an instrument, if executed outside Queensland, liable to the rate of duty and to other provisions of the law in force at the time it is first brought into Queensland, but only if the instrument is already chargeable with stamp duty.

The section advances a further step the principle embodied in s. 26 which, after requiring that an instrument liable by law to any stamp duty shall be duly stamped before it is signed or executed, proceeds by a proviso to relieve the parties of any penal consequences if the instrument is stamped within thirty days after the date thereof, if executed within Queensland, or within thirty days after the receipt thereof within Queensland, if it was executed abroad. Cf. s. 15 (2) (*a*) and (3) (*a*) of the *Stamp Act* 1891 and s. 15 (2) (*a*) and (*b*) of the *Stamp Act* 1870 of the United Kingdom.

The difficulty of the present case arises from the fact that, when the document was signed, sealed and delivered in Queensland by the trustee on 18th May 1907, it could not operate to effect a settlement of the shares and money because those items of property were not vested in him, and the document itself was expressed as a statement of the trusts to attach made before and in anticipation of a subsequent transfer of the property. On the other hand, when on 30th September 1907 the instrument was executed by the settlor in London, the property had been vested in the trustee and the trusts had attached; the intent expressed in the recital that, in consequence of the transfer of the shares and money into the name of the trustee, the settlement should be irrevocable had been fulfilled. The execution by the settlor really operated to confirm the constitution of the trusts and to authenticate it as the expression of the settlor's intentions. The transfer of the shares and the assignment or novation of the debt had effectively completed the settlement.

In these circumstances, can it be said that it is an instrument *whereby* the shares and the money were settled or agreed to be settled? If so, did the execution by the trustee make it an instrument executed in Queensland within the meaning of s. 4A, or is it an instrument executed outside Queensland and first brought into Queensland in 1920?

(1) (1840) 12 Ad. & E. 763 [113 E.R. 1003].
(2) (1908) 1 K.B. 865, at pp. 891, 892.
(3) (1885) N.Z.L.R. 4 S.C. 219.

H. C. OF A. 1945. COMMISSIONER OF STAMP DUTIES (Q.) v. HOPKINS. Dixon J.

In dealing with these questions, s. 61 (1) must be considered. That sub-section, which is taken from s. 106 (1) of the English *Stamp Act* 1891, is as follows :—" Where several instruments are executed for effecting the settlement of the same property, and the *ad valorem* duty chargeable in respect of the settlement of the property exceeds ten shillings, one only of the instruments is to be charged with *ad valorem* duty." It is clear enough upon the language of this sub-section that its purpose is to relieve the parties from a liability to stamp duty on more than one instrument. But, in doing so, it is equally clear that it implies that a liability exists " where several instruments are executed for effecting the settlement of the same property." Two rival views are taken of the meaning of this implication.

One is that it contemplates the case of two or more instruments, each of which, considered alone, would be dutiable as an instrument " whereby property is settled or agreed to be settled." The other is that it implies that where a combination of instruments effect a settlement, then although of no one of them could it be predicated that it is an instrument whereby property is settled, yet collectively they are or may be dutiable.

In the present case, the majority of the Supreme Court placed the first meaning on the sub-section. *Philp* J., who dealt at length with the question, summarized this interpretation by saying :—" In my view that section is not designed to alter the basic principle that the duty on each document used to effect a settlement is to be determined upon the face of each document itself, but it is designed to relieve the subject in the case of settlements from the harsh effect which that basic principle would impose " (1).

On the other hand, in *Russell* v. *Commissioners of Inland Revenue* (2), *Rowlatt* as counsel for the Crown is reported to have said :—" The provisions of s. 106 of the *Stamp Act*, 1891, contemplate a case where a settlement of property is effected, as one transaction taking place at the same time, by means of several instruments " ; and *Collins* M.R. said (3) :—" I think that this point was effectively met by the answer given by the counsel for the Crown, who said that the section contemplated one transaction by way of settlement of property effected at the same time by several documents, not a series of documents effecting at different stages different dispositions with regard to settled property."

The matter was again referred to in *Ansell* v. *Commissioners of Inland Revenue* (4), a case in which the instrument held dutiable as

(1) (1945) Q.S.R. 162, at p. 178.
(2) (1902) 1 K.B. 142, at p. 148.
(3) (1902) 1 K.B., at p. 152.
(4) (1929) 1 K.B. 608.

a settlement recited an intention to transfer certain shares and debentures in companies, certain municipal and dominion stock, and some government victory bonds and conversion stock, but did not operate as a transfer of those securities. They were transferred subsequently by separate instruments. Voluntary transfers are dutiable in the United Kingdom as conveyances on sale, the amount of the duty being calculated on the value of the property as if it were the consideration; and, where an instrument is chargeable with stamp duty as a settlement and as a voluntary disposition, it bears the latter duty and is relieved of the former duty (s. 74 (1) and (4) of 10 Edw. VII. c. 8 (Imp.)). Accordingly, the Inland Revenue Commissioners considered that stamp duty was exigible in respect of the securities (except the victory bonds and conversion stock) as upon voluntary dispositions, and they impressed the stamps upon the transfers, except the transfers of certain shares in respect of which the Commissioners assessed the instrument of settlement at the request of the settlor, who found himself unable to produce the transfers.

So far the liability was undisputed. The matter in question was the liability of the instrument of settlement for stamp duty in respect of the victory bonds and conversion stock. It concerned the effect of an exemption from all stamp duties conferred by the first schedule of the *Stamp Act* 1891 on "Transfers of shares in the Government or Parliamentary stocks or funds." It was conceded that the exemption relieved the transfers of the victory bonds and conversion stock of liability as voluntary dispositions. But it was held that, as a consequence, with respect to the bonds and stock, the instrument of settlement remained exposed to the liability with which a settlement is chargeable. In other words, the settlement of the victory bonds and government stock was considered to be a distinct subject matter assessable separately from the settlement and transfers of the shares, debentures, &c.

The materiality of the case is:—(1) that it decided that the instrument declaring the trusts and reciting an intention afterwards to transfer the property to be settled was dutiable as a settlement, although the actual instruments of transfer from the settlor to the trustee were exempted from duty; (2) that s. 106 (1) (corresponding to s. 61 (1)) was referred to by counsel as inapplicable to the case in dispute, but as the provision upon which the Commissioners acted with reference to the shares, debentures, &c. (1); (3) that as to the latter, *Rowlatt* J. said (2):—"With regard to those investments, this document" (scil. the instrument of settlement) "*ex*

(1) (1929) 1 K.B., at pp. 615, 616. (2) (1929) 1 K.B., at p. 616.

H. C. OF A. 1945. COMMISSIONER OF STAMP DUTIES (Q.) v. HOPKINS. Dixon J.

facie only declares the trusts and constitutes a settlement: there have to be formal transfers which transfer the legal title to the trustees."

In *Davidson* v. *Chirnside* (1), the indenture held dutiable as a settlement, after reciting the will upon the trusts of which the legacy or fund appropriated from the estate was to stand settled, went on to recite "further that the will trustees would forthwith, on the execution of the indenture by the settlement trustees, pay to them the said legacy or fund." In the same way as in the present case, so in *Chirnside's Case* (1) the instrument described the trusts in anticipation of the transfer of the trust property to the trustees.

The recital is noticed by *Griffith* C.J. in his statement of the facts (2), and I think that he has the point in mind when he says (3):— "In order that an instrument may be a settlement in the ordinary acceptation of that term it is clearly not necessary that the instrument should itself operate as a transfer of the property settled. For instance, in the very common case of a settlement of money, or shares, or stock the transfer is ordinarily not effected by the deed of settlement, which merely declares and defines the trusts upon which the settled property is to be held."

So too, I think, did *Higgins* J. (4) when he speaks of the two headings in the Victorian description of documents dutiable as settlements or deeds of gift (*Stamps Act* 1892, the schedule, par. VIII.). He says that the first heading seems to relate to settlements or deeds of gift which either transfer or *accompany* a transfer of property. A little later he says:—"To constitute a settlement the subject thereof need not be transferred by the instrument itself" (5).

It is interesting to notice that s. 4 of the English *Settled Land Act* 1925, which requires that every settlement of a legal estate in land *inter vivos* shall be effected by two deeds, namely a vesting deed and a trust instrument, specially provides that the trust instrument shall bear any *ad valorem* stamp duty which may be payable (whether by virtue of the vesting deed or otherwise) in respect of the settlement.

I think the deduction to be made from the foregoing references is that where a "settlement" of property is effected by an instrument declaring or describing the trusts and another accompanying instrument transferring the property to the trustees, the former is to be regarded as liable to stamp duty as a settlement, that is, unless

(1) (1908) 7 C.L.R. 324.
(2) (1907) 7 C.L.R., at p. 338.
(3) (1908) 7 C.L.R., at p. 340.
(4) (1908) 7 C.L.R., at p. 347.
(5) (1908) 7 C.L.R., at p. 348.

some such provision as s. 74 of 10 Edw. VII. c. 8 applies to substitute another duty or to exempt the instrument.

It does not appear to matter whether the property is transferred to the trustees before or after the trust instrument takes effect. Such a result may be reached by interpreting s. 61 (1) as implying that a settlement may be constituted of two documents, one of which must be stamped as such, though neither of them by itself would be effective to settle the property. But it may also be reached by treating the words "whereby property is settled" as satisfied by a definitive declaration of trusts amounting to a settlement when and if the property is subjected to them, coupled with an intention, or expression of intention, of at once vesting it in the trustee to that end.

Some of the observations I have quoted appear to suggest one of these views and some the other. For instance, I think that *Griffith* C.J. and *Higgins* J. both use language more appropriate to the second, while *Collins* M.R., and perhaps *Rowlatt*, both as counsel and judge, appear to adopt the first.

In *Ansell's Case* (1), in which the Commissioners clearly had adopted the first view, counsel for the Crown says (2) that the trust instrument does not operate as a transfer: "it is however a declaration of trust." This I take to mean that the settlor, by declaring or defining the trusts on which the trustees were to hold the settled property when vested in them, had declared himself to be a trustee of the property, pending vesting. That, however, could not be the position in *Davidson* v. *Chirnside* (3).

In any case, it would seem better to regard such a transaction for the purpose of liability to stamp duty as remaining *in fieri* until the execution of the second of the two instruments or sets of instruments: See *Jones* v. *Jones* (4); *Spicer* v. *Burgess* (5).

A difficulty arises from the absence from the case stated of any express statement that the shares and the debt were transferred in writing. When the case stated was prepared, it was not intended to raise the question whether the instrument was a settlement, and this explains the deficiency.

But even if the vesting in the trustee of the shares and the debt was accomplished without the settlor's executing a transfer or assignment in writing, I think that the indenture should be considered a settlement.

(1) (1929) 1 K.B. 608.
(2) (1929) 1 K.B., at p. 615.
(3) (1908) 7 C.L.R. 324.
(4) (1833) 1 C. & M. 721 [149 E.R. 589].
(5) (1834) 1 C.M. & R. 129, at pp. 134, 135 [149 E.R. 1023, at p. 1025].

H. C. OF A. 1945.

COMMISSIONER OF STAMP DUTIES (Q.) v. HOPKINS.

DIXON J.

An instrument is a settlement because it creates trusts and contains limitations which restrict or affect alienation and transmission, according to the course provided by law for estates in fee simple or a full ownership: See *Micklethwait* v. *Micklethwait* (1); *Hubbard* v. *Hubbard* (2); *Chirnside* v. *Collector of Imposts* (3), per *Cussen* J.; *Wedge* v. *Acting Comptroller of Stamps* (*Vict.*) (4), per *Rich* A.C.J. It is true that trusts cannot come into operation until the trustee obtains title to a control of the trust property. But the vesting of the trust property in the trustee may be regarded as a condition of the operation of the settlement, rather than as an essential characteristic of the " settling " of the property. Apparently that was the view taken in *Davidson* v. *Chirnside* (5). But, however that may be, the condition was fulfilled on 22nd May 1907 before the indenture was executed by the settlor. When the settlor executed the instrument, he confirmed and authenticated his intention to create the trusts amounting to a settlement and, because the property had then been vested in the trustee, the settlement was operative.

To the objection that this view involves looking outside the instrument, it may be answered that to ascertain the operation of the instrument some facts must always be taken into account, as, for instance, the existence and identity of the parties, and of the objects and subjects referred to. The very sweeping statements on this matter in *Gatty* v. *Fry* (6) go too far. Some years ago I had occasion to examine the subject with which that case deals, and I adhere to what I then said: *Edwards, Dunlop & Co. Ltd.* v. *Harvey* (7).

The rule is very carefully stated in par. 955 of the second edition of *Halsbury's Laws of England*, vol. 28, p. 447, as follows:—" The question whether an instrument is duly stamped, or as to what stamp is required, is in general determined by what appears upon the face of it to be its legal operation when first executed so as to be capable of that operation, but the Court is not bound by the apparent tenour of an instrument, and will decide according to the real nature of the transaction, receiving, if necessary, extrinsic evidence."

Examples will be found in the authorities referred to in the notes. But, in any event, it seems to follow inevitably from the authorities to which I have referred that it is proper to look outside the instrument assessed as a settlement to ascertain whether the trust property has been vested in the trustee.

(1) (1858) 4 C.B. (N.S.) 790, at p. 858 [140 E.R. 1302, at p. 1331].
(2) (1901) P. 157, definition cited *arguendo*, at p. 159.
(3) (1908) V.L.R. 433, at pp. 447 et seq.
(4) (1941) 64 C.L.R. 75, at p. 79.
(5) (1908) 7 C.L.R. 324.
(6) (1877) L.R. 2 Ex. D. 265.
(7) (1927) V.L.R. 37, at pp. 47-54.

The view that the document became a settlement, not later at all events, when the settlor executed it in London on 30th September 1907 supplies a foundation for the contention on the part of the Crown that it should be regarded as an instrument executed outside Queensland for the purpose of s. 4A.

Section 4A, however, is very difficult to apply to instruments which were not wholly executed outside Queensland or wholly within Queensland. Indeed, until you come to the word "first" in the expression "first executed" it reads as if it contemplated only those two cases, and did not take into account the possibility of one party executing the instrument outside the State, and the other or another executing it within Queensland.

So far as the legal operation of the instrument is concerned, it must be borne in mind that its trust came into effectual operation by reason of the trustee having executed it, and of the subsequent vesting in him of the trust property. As *Philp* J. has pointed out, the theory of the Act is that liability to stamping may be determined when a document is prepared and before it is executed. No doubt s. 26 is based on this theory. But when the operation of an instrument depends, as it sometimes must, on circumstances, the liability of the unexecuted paper must be judged on the operation it is capable of having.

On the authority of *Ex parte Burrows* (1), it was contended that we should regard the first signature which turned the instrument into an effectual settlement as the execution to which s. 4A and s. 26 referred. It was assumed that the settlor's execution in England was the first execution to satisfy this test.

For the reasons already given, it is doubtful whether either signature can be regarded as fulfilling it. The trustee's execution gave the instrument conditional efficacy, conditional on vesting. The settlor's execution confirmed the trusts after vesting.

On the whole, I have come to the conclusion that s. 4A ought not to be interpreted as postponing the date as at which an instrument is assessable to duty, if any party whose execution is material to its operation executes it in Queensland. I am therefore of opinion that the instrument is assessable to duty as a settlement and should be stamped according to the law in force in Queensland on 18th May 1907.

It is perhaps desirable to draw attention to *Re Estate of Macartney* (2), the decision in which appears to mean that when the respective parties to a deed imposing reciprocal obligations execute it in two

(1) (1906) 6 S.R. (N.S.W.) 606; 23 W.N. 183.

(2) (1933) N.I. 1.

H. C. OF A. 1945.

COMMISSIONER OF STAMP DUTIES (Q.) v. HOPKINS.

Dixon J.

different countries, in each of which the provisions of s. 14 (1) and (4) of the *Stamp Act* 1891 (Imp.) are in force or transcribed, it is dutiable in both countries.

I think that the questions in the case stated should be answered—(*a*) Yes, (*b*) No, (*c*) £25 4s., (*d*) By the Commissioner.

I think that the answer given by the Supreme Court to the question lettered (*c*) should be altered accordingly and, subject thereto, the appeal to this Court should be dismissed with costs.

Order of Supreme Court varied by striking out the answer to Question (c) and substituting therefor "£25 4s." Order otherwise affirmed and appeal dismissed with costs.

Solicitor for the appellant, *W. G. Hamilton*, Crown Solicitor for Queensland.

Solicitors for the respondent, *Connolly, Suthers & Walker*, Townsville, by *Morris, Fletcher & Cross*.

B. J. J.