[HIGH COURT OF AUSTRALIA.]

BUZZA AND OTHERS . . . . . APPELLANTS;

AND

COMPTROLLER OF STAMPS (VICTORIA) . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1951.

MELBOURNE, *March* 14, 15.

SYDNEY, *April* 27.

Latham C.J. Dixon, McTiernan, Williams, Webb and Fullagar JJ.

Stamp Duties (Vict.)—"*Deed of settlement*"—*Settlement*—"*Pecuniary*" *consideration—Agreement between life tenant and remainderman varying trusts of will—Extent of property settled—Stamps Acts* 1946-1949 (*No.* 5204—*No.* 5390) (*Vict.*), *s.* 17, *Third Schedule, Heading IX.* (1).

The Third Schedule to the *Stamps Acts* 1946-1949 (Vict.) specifies, under the heading "IX. Settlement or Gift, Deed of", as an instrument charged with stamp duty: "(1) Any instrument . . . whether voluntary or upon any good or valuable consideration other than a *bona fide* adequate pecuniary consideration . . . whereby any property is settled or agreed to be settled in any manner whatsoever or is given or agreed to be given or directed to be given in any manner whatsoever". The duty specified is a percentage of "the value of the property".

A testator by his will directed his trustee to hold his residuary estate on trust to pay one-third of the income to his widow and, subject thereto, on trust as to capital and income for his children as tenants in common; and he empowered the trustee to use the residuary estate for the purchase or lease of a dwelling for the use of the widow and also to sell or dispose of such dwelling at any time. By an indenture expressed to be between the widow, the children and the trustee, it was recited that the widow and children had agreed that the residuary estate should be administered as thereinafter appeared and it was witnessed that the trustee undertook to administer the residuary estate as if the will had provided that the residue should be held on trust as to realty to hold the same to the use of the widow with remainder to the children in equal shares as tenants in common, provided that, if the income therefrom was less than a stated annual amount, the deficiency should be raised for the benefit of the widow and charged on the realty, and that subject thereto the remainder of the residuary estate and the income thereof

should be appropriated and distributed forthwith among the children in equal shares.

Held, by *Latham* C.J., *Dixon*, *Williams*, *Webb* and *Fullagar* JJ. (*McTiernan* J. dissenting), that the indenture was an instrument whereby property was "settled" within the meaning of heading IX. (1) of the Third Schedule to the *Stamps Acts*; by *Latham* C.J., *Dixon*, *Williams* and *Webb* JJ. (and also by *Fullagar* J., if the instrument was executed upon consideration within the meaning of heading IX. (1), as to which *quaere*), that it was not upon a "pecuniary" consideration; by *Dixon*, *Williams*, *Webb* and *Fullagar* JJ. (*Latham* C.J. dissenting), that it was a settlement, not merely of the realty, but of the whole of the residuary estate, and, accordingly, the "value of the property" on which duty was charged was the value of the whole of the residue.

Decision of the Supreme Court of Victoria (*Sholl* J.), (1950) A.L.R. 747, affirmed.

APPEAL from the Supreme Court of Victoria.

Under the *Stamps Acts* 1946-1949 (Vict.) the Comptroller of Stamps stated for the opinion of the Supreme Court a case which was substantially as follows:—

1. By his will (dated 9th January 1924) Thomas Henry Buzza, hereinafter called the "testator", after making certain specific and pecuniary bequests, devised and bequeathed all his real and personal estate not by the will specifically devised or bequeathed unto the National Trustees Executors and Agency Co. of Australasia Ltd. (hereinafter called the "trustee") upon trust to sell call in and convert the same into money in so far as it should not consist of investments of a kind in the will authorized and after payment of his debts, funeral and testamentary expenses and bequests and sundry other payments therein specified to hold his residuary estate as therein defined upon trust to pay one-third of the income thereof to his widow during her life so long as she remained his widow and subject as aforesaid upon trust as to both the capital and income of such residuary estate for his children in equal shares as tenants in common. The will empowered the trustee "if in its absolute discretion it shall think necessary to invest any part of the trust moneys forming part of my residuary estate in the purchase or lease of a dwelling house for the use of my said wife so long as she remains my widow . . . with full power to my trustee to sell and dispose of such dwelling house at any time" it thought fit.

2. By an indenture described as an agreement and release (dated 3rd June 1949), expressed as being made between the widow, the children and the trustee, which recited the terms of

H. C. OF A. 1951. BUZZA v. COMPTROLLER OF STAMPS (VICT.).

the will and that the children were desirous of having a present distribution of their respective presumptive interests in the residuary estate and that doubts had arisen whether on the true construction of the will such distribution could lawfully be presently made and that the widow and children were all of age, and, in order to avoid litigation delay and expense and to facilitate the desire of the children for a present distribution on account of their interests in the residuary estate, had agreed that such residuary estate should be administered in the manner thereinafter appearing to which at their request the trustee had agreed upon having the release and indemnity in the indenture contained, it was witnessed that:

1. In pursuance of the agreement between the widow and children and in consideration of the premises the trustee undertakes and agrees to administer the said residuary estate of the testator as if without otherwise affecting the provisions of the said will it had therein been provided that the trustee should hold such residuary estate upon and subject to the following trusts, namely:—(*a*) Upon trust as to the freehold properties and effects set out in the schedule hereto to hold the same to the use of the widow during her life or widowhood with remainder to the children in equal shares as tenants in common. Provided, however, that should during such term the net income to be derived from such properties be less than the sum of Three hundred and forty pounds in any year the amount of such deficiency shall be raised for the benefit of the widow and charged upon the freehold property in the said schedule firstly described. And that subject thereto the remainder of the said residuary estate and the income thereof should be appropriated and distributed forthwith among the children in equal shares as tenants in common.

[The will and indenture were exhibits to the case; and further details of their provisions appear in the judgments hereunder.]

3. On 14th June 1949 Messrs. A. C. Secomb and Tibb, duly appointed solicitors for the parties to the indenture, produced the same to the Comptroller of Stamps and required his opinion with respect to such indenture:—(*a*) whether it was chargeable with any duty; (*b*) with what amount of duty it was chargeable.

4. On 20th July 1949 Messrs. A. C. Secomb and Tibb produced for the Comptroller of Stamps a statement verified by statutory declaration dated 19th July 1949 showing that the value of the property comprised in such indenture was £29,594 18s. 8d., that the approximate gross annual income thereof was £1,163 14s. 0d. and the approximate net annual income thereof was £895 18s. 0d., and that the widow was born on 29th June 1881.

5. On 28th August 1949 Messrs. A. C. Secomb and Tibb lodged a further statutory declaration dated 24th August 1949 correcting an error in the statutory declaration lodged on 20th July 1949 in regard to the amount of the net annual income derived from the property comprised in the above indenture and stating that the net annual income of the said property during the preceding three years had been as follows :—For the year ended 30th June 1947—£1,034 ; for the year ended 30th June 1948—£1,033 ; for the year ended 30th June 1949—£1,037.

6. On 8th March 1950 the Comptroller of Stamps, being of the opinion that the indenture was chargeable with the duty specified under heading IX., " Settlement or Gift, Deed of ", in the Third Schedule to the *Stamps Acts* 1946-1949, assessed the amount of duty at £887 17s. 0d., being a sum calculated at the rate of three per cent of £29,594 18s. 8d.

The questions for the opinion of the Court were :—

(*a*) Is the said indenture chargeable with any duty ?

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

Sholl J. answered the questions :—1. The above-mentioned indenture is chargeable with duty. 2. It is chargeable with £887 17s. duty.

From this decision the parties to the indenture appealed to the High Court.

H. Walker, for the appellants. If the indenture here in question is a " settlement " within the meaning of the relevant provision of the *Stamps Acts*, it is submitted that it is, nevertheless, not dutiable, because the consideration was " pecuniary " within the meaning of the exception in that provision. The comptroller has not contended that the consideration, if pecuniary, was not bona fide or adequate. The question, therefore, is as to the meaning of the word " pecuniary " in the context here concerned. The expression " *bona fide* adequate pecuniary " is used by way of contrast with " good " and " valuable " consideration. Good consideration is a consideration based merely on ties of blood (*Maitland's Equity*, 2nd ed. (1936), p. 33). A consideration which is of very small value may constitute a valuable consideration (*Chitty* on *Contracts*, 20th ed. (1947), pp. 46, 47). " Pecuniary " consideration here means—it is submitted—a consideration having a value that can be calculated in terms of money ; that is to say, it covers money or *money's worth*. A further submission is that the indenture was a bona-fide compromise of threatened litigation ;

H. C. OF A. 1951.

BUZZA v. COMPTROLLER OF STAMPS (VICT.).

in such a case it is generally recognized that there is a bona-fide adequate pecuniary consideration. [He referred to *Harbin* v. *Masterman* (1); *Collector of Imposts* (*Vict.*) v. *Peers* (2); *Chirnside* v. *Collector of Imposts* (3).] It is submitted, however, that the word " settlement " is not apt to describe this indenture at all. It contains no disposition by way of settlement of corpus. So far as the children are concerned, the effect of the indenture is to alter the terms of the will so that the children receive the residuary personalty immediately. That is not a settlement. Otherwise, all that the indenture does is to give the widow a new security for her income : see *Inland Revenue* v. *Oliver* (4), which is indistinguishable. The substituted provision for the widow is a mere appropriation (with the consent of all parties concerned) within the meaning of s. 41 of the *Administration and Probate Acts* 1928-1950 (Vict.). It is certainly not appropriate to refer to the indenture as " a settlement ". If there is any settlement of property at all, there is a multiplicity of settlements, each of the parties dealing only with his or her own interest under the will. If there is a settlement on which duty is payable, the duty should be assessed only on the value of the widow's life interest or, at most, the value of the realty. The personalty was not the subject of a settlement ; it is, therefore, not dutiable. [He referred to *Davidson* v. *Armytage* (5) ; *Collector of Imposts* (*Vict.*) v. *Cuming Campbell Investments Pty. Ltd.* (6).]

A. D. G. Adam K.C. (with him *R. L. Gilbert*), for the respondent. The indenture in question is a " settlement " because it creates new equitable rights of a proprietary character. All the parties to the indenture are settlors (*Carmichael* v. *Commissioner of Stamp Duties* (*Q.*) (7)). The instrument is a resettlement of the whole of the residue ; under it the widow and the children all acquire proprietary rights which the will did not give them. The instrument was not a compromise of any litigation, actual or threatened. Even if it was, it would not on that account cease to have the essential characteristics of a settlement. There was no " pecuniary " consideration for the settlement. " Pecuniary " here means an actual monetary consideration (*Cuming Campbell Case* (8)). The instrument is dutiable on the whole value of the residue (*Carmichael's Case* (7)). This proposition does not necessarily depend on the submission that the instrument is a resettlement of the whole of

(1) (1896) 1 Ch. 351.
(2) (1921) 29 C.L.R. 115, at pp. 120, 121, 124.
(3) (1908) V.L.R. 433, at pp. 448, 449.
(4) (1909) A.C. 427.
(5) (1940) 63 C.L.R. 619, at p. 640.
(6) (1906) 4 C.L.R. 205.
(7) (1926) 38 C.L.R. 465.
(8) (1940) 63 C.L.R., at pp. 629, 640.

the residue. That is to say, the instrument is at least a settlement of the whole of the realty; and, even if it is not a settlement of the personalty, the latter is nevertheless disposed of by the instrument which is a settlement. The "value of the property", for the purposes of the *Stamps Acts*, is the value of all the property disposed of by the instrument. [He referred to *Spensley* v. *Collector of Imposts* (1); *Moffat* v. *Collector of Imposts* (2); *Davidson* v. *Armytage* (3); *Chirnside* v. *Collector of Imposts* (4).]

H. Walker, in reply.

Cur. adv. vult.

April 27.

LATHAM C.J. This is an appeal from an order of the Supreme Court of Victoria (*Sholl* J.) made upon a case stated under the *Stamps Acts* 1946-1949 (Vict.), s. 33. The case submitted for the decision of the Court two questions—(1) whether an indenture dated 3rd June 1949 was chargeable with any duty under the Acts?—and (2) with what amount of duty was it chargeable? It was held that the indenture was a settlement within the meaning of the *Stamps Acts*, Third Schedule, Part IX., which is as follows:—"Settlement or Gift, Deed of—(1) Any instrument other than a will or codicil whether voluntary or upon any good or valuable consideration other than a *bona fide* adequate pecuniary consideration and whether revocable or not whereby any property is settled or agreed to be settled in any manner whatsoever or is given or agreed to be given or directed to be given in any manner whatsoever, such instrument not being made before and in consideration of marriage."

The amount of duty payable is to be ascertained by taking a percentage of "the value of the property". *Sholl* J. held that the indenture was dutiable and that duty was payable upon the value of the whole of the property to which the indenture related even if it were the case that only part of that property was settled or agreed to be settled.

By his last will and testament Thomas Henry Buzza, who died on 26th April 1930, appointed the National Trustees Executors and Agency Co. of Australasia Limited his executor and trustee and bequeathed certain legacies. He then gave all his real and personal estate to his trustee upon trust to sell and convert, and, after paying debts &c.—(a) upon trust to pay one-third of the income of the estate to his wife so long as she should remain his widow; (b) subject to the wife's interest upon trust as to capital and

(1) (1898) 24 V.L.R. 53.
(2) (1896) 22 V.L.R. 164.
(3) (1906) 4 C.L.R., at p. 210.
(4) (1908) V.L.R. 433.

H. C. OF A. 1951.

BUZZA v. COMPTROLLER OF STAMPS (VICT.).

Latham C.J.

income for his children, including his adopted daughter Eileen Buzza, who being sons should attain the age of twenty-one years or being daughters should have attained that age or previously married, as tenants in common. The will empowered the trustee, if in its absolute discretion it should think necessary, to invest any part of the trust moneys forming part of the testator's residuary estate in the purchase or lease of a dwelling house for the use of his wife so long as she should remain his widow. The trustee was given full power to sell and dispose of any such dwelling house at any time it should think fit.

The estate was duly administered and in 1949 the position was that the only persons who had any claims with respect to the estate were the widow and the four children. They were all *sui juris*. The trustee had bought a house in which the widow was residing. She was entitled to one-third of the income of the whole estate during widowhood and also had the right to live in the house which, however, the trustee could sell at any time. The children were entitled to the other two-thirds of the income, and to the whole of the estate as tenants in common after the death of the widow.

The residuary estate included real estate, being pieces of land upon which were erected a weatherboard dwelling, two brick shops, and the house in which the widow was living, together with some vacant lots of land. The total value of the real estate was £12,781. The residuary personal estate consisted of Australian consolidated stock, Commonwealth Government stock and other securities of a value of £16,813.

The provisions of the will did not allow the children to get any of the capital of the estate during the life of the widow. The widow had a right to live in the house purchased by the trustee, but the trustee could sell the house at any time. She was entitled to one-third of the income of the estate, which one-third, during the three years from 30th June 1946 to 30th June 1949 had averaged £344. In the circumstances stated it was agreed by all interested that the widow, instead of receiving one-third of the whole income, should be entitled, during her life or widowhood, to the income of the real estate (except the vacant lots). The children agreed that if that income fell below £340 in any year the deficiency could be charged upon the real estate to the income of which she was to be entitled. Subject to these provisions it was agreed that the remainder of the residuary estate and the income thereof should be distributed forthwith among the children in equal shares as tenants in common. Thus the widow under this agreement became

entitled to a sum certain instead of a sum uncertain, and obtained an assured tenure of her home instead of being subject to the risk of the trustee selling the house in which she was living. The children assured the widow of an immediate income of £340 a year, and obtained the advantage of an immediate distribution of the personalty, with remainder after the death of the widow in the realty.

Having made an agreement to the effect stated, the widow, the children, and the trustee executed the indenture dated 3rd June 1949. The indenture recites the relevant terms of the will of the testator, his death, and the grant of probate. The indenture proceeds as follows :—" And whereas the children are desirous of having a present distribution of their respective presumptive interests in the said residuary estate and whereas doubts have arisen whether on the true construction of the testator's Will such distribution could lawfully be presently made and whereas the widow and children are all of age and in order to avoid litigation delay and expense and to facilitate the desire of the children for a present distribution on account of their said interests in the said residuary estate have agreed that such residuary estate should be administered in manner hereinafter appearing to which at their request the Trustee has agreed upon having such release and indemnity as are hereinafter contained now this indenture witnesseth as follows :—

1. In pursuance of the agreement between the widow and children and in consideration of the premises the Trustee undertakes and agrees to administer the said residuary estate of the testator as if without otherwise affecting the provisions of the said Will it had therein been provided that the Trustee should hold such residuary estate upon and subject to the following trusts namely :—(a) Upon trust as to the freehold properties and effects set out in the Schedule hereto to hold the same to the use of the widow during her life or widowhood with remainder to the children in equal shares as tenants in common provided however that should during such term the net income to be derived from such properties be less than the sum of Three hundred and forty pounds in any year the amount of such deficiency shall be raised for the benefit of the widow and charged upon the freehold property in the said Schedule firstly described and that subject thereto the remainder of the said residuary estate and the income thereof should be appropriated and distributed forthwith among the children in equal shares as tenants in common."

H. C. OF A. 1951.

BUZZA v. COMPTROLLER OF STAMPS (VICT.).

Latham C.J.

Clause 2 of the indenture provides for a release and indemnity to the trustee. The schedule specifies the real property the income from which is to belong to the widow.

Sholl J. held that the assessment of the comptroller was correct. In the first place he held that the transaction was not a gift. There was no element of benefaction and therefore there was no gift (see *Collector of Imposts (Vict.)* v. *Cuming Campbell Investments* (1)). It is plain that the transaction was a business transaction in the ordinary sense and that it cannot properly be described as a gift. His Honour, quite rightly I think, rejected an argument that some element of benefaction was necessary in order to constitute a settlement or an agreement for a settlement within the meaning of the relevant provision of the Third Schedule.

It was argued for the appellants, and this argument was strongly pressed upon the appeal, that in this case a bona-fide adequate pecuniary consideration was present and that therefore the indenture fell within the exception for which Part IX. (1) of the Third Schedule provides. I agree with his Honour in holding that there was no pecuniary consideration in this case. A pecuniary consideration is a consideration in money, not in money's worth. The widow gave up the chance of obtaining a larger income than £340 and acquired the greater degree of security which has already been mentioned. What she acquired did not amount to a pecuniary consideration. Similarly the children for what they gave up obtained an immediate right to the distribution of the residue of personalty instead of a postponed right. The consideration, however, was not pecuniary in the sense of money moving from a beneficiary under a settlement or an agreement for a settlement to a settlor. Accordingly the indenture is not within the exception as being made for a bona-fide adequate pecuniary consideration.

It was held in the Supreme Court that the indenture created new rights of a proprietary character and was therefore a deed of settlement, even though the right which the children acquired was a right to immediate distribution of the residue of personalty.

It has often been pointed out that the *Stamps Acts* impose duty upon instruments, and not upon transactions independently of instruments. If a transaction is carried through without the use of any documents, no stamp duty is payable in respect of it. In the present case the comptroller contends that the indenture of 3rd June 1949 is a settlement. The indenture is expressed to be made in pursuance of an agreement which had been made between the parties before the execution of the indenture, by which prior

(1) (1940) 63 C.L.R. 619.

agreement the parties had agreed that the residue of the testator's estate should be disposed of in a particular manner. The terms of that agreement are repeated in the indenture, but the indenture is not itself that agreement. The indenture was made in order to perform and carry out that agreement, which may or may not have been made in writing. Thus no question arises as to liability for duty in respect of the prior agreement. But a further agreement was made by the indenture. The trustee agreed with the widow and children to hold the real estate for the widow for life with remainder to the children. The trustee therefore became a trustee of the real estate for the widow and children upon the terms of the indenture. I agree that there was a settlement of the real estate.

But the position with respect to the personalty is quite different *Sholl* J. felt bound by authority to hold that if a document settles any property at all, duty is chargeable upon the value of that property and also upon the value of any other property "dealt with" by the document whether by way of settlement or not. On this point his Honour referred to the judgment of *Higgins* J. in *Carmichael* v. *Commissioner of Stamp Duties* (*Q.*) (1), and to the judgments of the Full Court of Victoria in *Spensley* v. *Collector of Imposts* (2) and *In re Austin's Settlement* (3).

The indenture provides that the trustee shall appropriate and distribute the personalty forthwith among the children as tenants in common. The personalty is not to be held upon any trust for any persons. The effect of the transaction was that the personalty should immediately be transferred to the children so that they could each dispose of what they received as full owners. A transfer of property which immediately gives a full right of disposition of the whole interest in the property cannot be described as a settlement. Thus, in my opinion, the personalty was not settled. The trustee could not retain it—he was to transfer it at once. A provision for immediate transfer of the whole interest in property to an existing person absolutely cannot possibly make that property "settled" property. Such property is necessarily and essentially property which is *not* settled.

Duty is chargeable under the relevant provision only in respect of "the value of the property". It is the fact that property is settled or agreed to be settled, by a document, which makes it liable to duty. The duty is determined by "the value of the property". The only property to which the provision refers, or

(1) (1926) 38 C.L.R. 465.
(2) (1898) 24 V.L.R. 53.
(3) (1901) 27 V.L.R. 408.

H. C. OF A. 1951.

BUZZA v. COMPTROLLER OF STAMPS (VICT.).

Latham C.J.

which has any possible significance, is the property which has been settled or agreed to be settled. The words "the property" in the phrase "the value of the property" cannot mean other property which for some reason or other happens to be dealt with by the same document but which has not been settled or agreed to be settled. The unreason and injustice of the contrary view are evident. The view which I have expressed is, in my opinion, established by *Davidson* v. *Armytage* (1)—a decision sometimes misunderstood. *Griffith* C.J. (2) gave an example of a settlement of a *term of years* in land. His Honour said: "It could not be contended that the value of the *land* was the subject of the settlement" (my italics). It was held by the Court that "the actual interest dealt with in the settlement is the only thing intended to be taxed". This decision means that it is the value of the property which is actually settled or agreed to be settled which is to be taken into account in determining the duty which is chargeable. The legislation, at least on this point, seems to me to be so clear that the Court should take this opportunity of overruling the decisions to the contrary in *Carmichael's Case* (3); *Spensley* v. *The Collector* (4); *In re Austin's Settlement* (5).

In my opinion the appeal should be allowed and the questions in the case should be answered by declaring that the indenture is chargeable with duty in respect of the value of the real estate therein mentioned—i.e., £12,781, less £100, the value of the vacant lots.

DIXON J. The question for decision upon this appeal is whether an indenture made on 3rd July 1949 between the beneficiaries entitled to the residue of the estate of a testator named T. H. Buzza and the trustee of his will is liable to stamp duty as a settlement under par. IX. of the Third Schedule of the *Stamps Acts* 1946-1949 (Vict.). The relevant portion of that paragraph, which is headed "Settlement or Gift, Deed of", is sub-par. (1). The instruments which it makes dutiable are described by the sub-paragraph thus:—"Any instrument other than a will or codicil whether voluntary or upon any good or valuable consideration other than a *bona fide* adequate pecuniary consideration and whether revocable or not whereby any property is settled or agreed to be settled in any manner whatsoever or is given or agreed to be given or directed to be given in any manner whatsoever, such instrument not being made before and in consideration of marriage".

(1) (1906) 4 C.L.R. 205.
(2) (1906) 4 C.L.R., at p. 214.
(3) (1926) 38 C.L.R. 465.
(4) (1898) 24 V.L.R. 53.
(5) (1901) 27 V.L.R. 408.

The provision has caused some difficulty because of the apparent self contradiction in the conception of a transaction which is a gift notwithstanding that it is upon a good or valuable consideration. But to an extent a reconciliation has been effected judicially between on the one hand the expressions " gift " and " given or agreed to be given " and on the other hand the expression " upon any good or valuable consideration other than a *bona fide* adequate pecuniary consideration ". It has been done by treating the words " gift " and " given " as the dominant words and as importing benefaction as an element in the transaction and the words relating to consideration as meaning that, so long as it is not bona-fide adequate and pecuniary, the presence of consideration shall not be enough in itself to take the transaction out of the category of a gift. " The real meaning of the schedule is that a deed of gift shall not escape taxation merely because there is some good or valuable consideration therefor ", per *Hood* J., *Atkinson* v. *Collector of Imposts* (1). The matter was fully discussed in *Collector of Imposts (Vict.)* v. *Cuming Campbell Investments Company* (2).

The result is that the presence of consideration is not to be treated for the purpose of duty as inconsistent with the transaction embodied in the instrument being a gift. It may be a gift although the instrument is made upon a good or valuable consideration unless it be a consideration which is not only bona fide but is adequate and pecuniary. "Still, the dominant words of the schedule suggest an instrument whereby some benefaction is intended and conferred ". " It cannot be pretended that this conclusion is satisfactory, for it affords no clear rule and requires the consideration of the facts of each particular case ", per *Starke* J. (3).

But all this relates to the prima-facie contrariety between the notion of a gift and of a valuable consideration. It has no relation to the word " settlement ". There is no logical or legal contradiction between the conception of a settlement and the existence of good or valuable consideration for the transaction. Cf. per *Latham* C.J. (4). At a stage in the present case reliance appears to have been placed upon the authorities establishing that some element of benefaction must exist before a transaction can fall within the category of a gift under par. IX. and the instrument embodying it be for that reason liable to stamp duty. But in the Supreme Court *Sholl* J., before whom the case stated was argued, negatived the idea that some element of benefaction is necessary before an instrument can be a settlement and dutiable as such

(1) (1919) V.L.R. 105, at p. 113.
(2) (1940) 63 C.L.R. 619.
(3) (1940) 63 C.L.R., at p. 641.
(4) (1940) 63 C.L.R., at pp. 631, 632.

H. C. OF A. 1951.

BUZZA v. COMPTROLLER OF STAMPS (VICT.).

DIXON J.

under par. IX. Of the correctness of this view I think that there can be no doubt.

Another matter depending wholly on the meaning of the provision was raised. It was contended that a consideration might be pecuniary although it was neither expressed nor satisfied in money or the equivalent of money. Such an interpretation of the words "pecuniary consideration" is not admissible. Pecuniary consideration means a consideration consisting of or having relation to money.

The appeal, in my opinion, depends on the question whether the indenture is an instrument whereby property is settled or agreed to be settled and, if that is decided against the appellant, upon the further questions whether duty should be charged on the whole of the property with which the indenture deals or on a given part of it only and how the duty is to be calculated.

The indenture is expressed to be made between the widow of the testator of the first part, his four children of the second part, and the trustee of his will of the third part. It recites the effect of the provisions of the will in favour of the widow and children, the death of the testator on 26th April 1930 and the grant of probate. The recitals then proceed—"And whereas the children are desirous of having a present distribution of their respective presumptive interests in the said residuary estate And whereas doubts have arisen whether on the true construction of the testator's Will such distribution could lawfully be presently made And whereas the widow and children are all of age and in order to avoid litigation delay and expense and to facilitate the desire of the children for a present distribution on account of their said interests in the said residuary estate have agreed that such residuary estate should be administered in manner hereinafter appearing to which at their request the Trustee has agreed upon having such release and indemnity as are hereinafter contained".

It is now necessary to turn to the will before stating the manner in which the operative part of the indenture affected the testamentary dispositions made by the testator. In the events which happened the residuary estate was devised and bequeathed upon the following trusts: as to one-third of the income to pay it to the testator's widow during widowhood; subject thereto as to both capital and income for the children in equal shares as tenants in common. The will conferred power upon the trustee to invest any part of the trust moneys of the residuary estate in the purchase of a dwelling house for the use of the widow during widowhood and this power was exercised. The clause directed that the rates,

taxes and outgoings of the dwelling should be paid out of the estate but empowered the trustee to sell it at any time the trustee thought fit. At the time of the making of the indenture the value of the assets forming the residuary estate appears to have been about £29,600, producing an annual income averaging over the prior three years about £1,034. Of this one-third, or about £345, would be payable to the widow. Of the capital about £16,720 was invested in forms of personalty readily convertible into money. The remaining value of the residue was represented by realty, including the dwelling purchased for the widow. In this situation the operative part of the indenture provided that in pursuance of the agreement between the widow and children and of the premises, the trustee undertook and agreed to administer the residuary estate as if, without affecting the other provisions, it had provided that the trustee should hold the residuary estate on the trusts which it proceeded to set out. Those trusts are as to the realty to the use of the widow for life during widowhood and after her death to the children in equal shares as tenants in common, with a proviso that if in any year the amount of the net income from the realty should be less than £340 the deficiency should be raised for the widow's benefit and charged on certain of the realty. Subject to this trust the remainder of the residuary estate (that is the personalty) and the income thereof " should be appropriated and distributed forthwith among the children in equal shares as tenants in common ". There follows a release of the trustee from the trusts created by the will and an indemnification. It will be seen that this rearrangement accomplished more than one object. Because the widow's share of income under the will was one-third of the whole income of the estate it was difficult to appropriate to the children any specific part of the estate as representing their shares. The rearrangement removed this difficulty. In the next place the widow is given a full life estate during widowhood in the whole of the realty, including the purchased residence. None of the realty is subject to a trust for conversion and the residence is no longer subject to the power of the trustee to sell it, a power which would have meant that the proceeds fell back into residue. In the third place the widow is assured of a net income of £340 per annum by a charge upon the land. In the fourth place the future interest or remainder to the children is restricted to the realty and the personalty is released from the widow's life estate. In the fifth place it is to be held upon a trust in their favour as tenants in common in equal shares for immediate appropriation and distribution among them. I am unable to see any escape from the

H. C. OF A. 1951.

BUZZA v. COMPTROLLER OF STAMPS (VICT.).

Dixon J.

conclusion that the instrument, effecting as it does this rearrangement of trusts is a settlement. It may be called a resettlement, but it is not because of that description any less a settlement. It takes trust property and, leaving the property vested in the trustee, it limits equitable estates in succession. It is true that the remaindermen under the old trusts held substantially the same interests. But the life tenant did not and these are fresh limitations. The personalty, which was subject to successive interests under the old trusts, is released from them, but it is made subject to a trust and an active trust. It may be that if the personalty had been free and had for the first time been subjected to a trust for distribution among the four beneficiaries and that had been done by an instrument confined to the purpose, it would not have been a settlement. But the case is quite otherwise when the instrument deals as a whole with assets held by a trustee and defines the trusts with respect to different descriptions or parts of the assets. Here the instrument deals with the whole trusts and expresses an indivisible transaction as part of which the trust of personalty is made a trust for distribution. The creation of new trusts, the inclusion of trusts to persons in succession and the restriction involved in all the trusts upon the enjoyment which would arise from full ownership mark the instrument out as a settlement. Even the trust to appropriate and distribute involves a departure from the rights of enjoyment which full and immediate ownership would give the children. It is notoriously difficult to define a settlement, but that does not mean that it is difficult to recognize one. This instrument appears to me to be well within the conception, even if the limitation of interests in succession were an indispensable attribute, which it is not.

The widow and the four children combine to effect the settlement of the full interest in the residuary estate. It is true that the proprietary interest in virtue of which each joins in the collective settlement of the whole is that given to him or her by the will. But it is not that interest which is settled. It is not settled as a distinct proprietary interest: all the beneficiaries join so that there may be a resettlement of the sum of interests in the residuary estate, making up full equitable ownership. It is, I think, impossible to adopt the view for which the appellants contended that the four children really assigned their share in the realty (other than the dwelling) to the widow and that the dutiable value should be calculated on their interests so assigned treating it as a settlement by them, while the widow should be considered similarly as having assigned to them her one-third interest in the income of the

remainder of the assets, and the value of the interest she so assigned should be ascertained and duty upon it calculated on the footing that she settled that only.

The instrument contains and effects a transaction which cannot be split up in that way. The instrument cannot be considered a settlement upon a bona-fide adequate consideration because, assuming that the consideration consists in the passing of interests from one beneficiary to another in turn, it is not a pecuniary consideration.

There is no doubt more to be said for the view that the final trust to which the instrument subjects the personalty is a severable part of the instrument and that the trust does not " settle " the personalty which therefore should not be considered part of the dutiable property. But, for reasons which already appear, I am unable to adopt this view. The instrument deals with the whole residuary estate and redefines the trusts as an indivisible legal operation. It is, of course, impossible to treat it as two " instruments ", and it was not contended that it should be so treated. But in my opinion it is also impossible to treat the trusts of the personalty as a distinct disposition of property falling outside the settlement. It is part of the process of resettling the residuary estate.

For these reasons I think that the judgment of *Sholl* J. is correct and that the appeal should be dismissed.

McTiernan J. The indenture as to which the question of liability for stamp duty arises deals with the administration of the trusts of the testator's residuary estate. He created, by his will, trusts of his residuary estate in favour of his widow and children. His widow was entitled to one-third of the income of the whole residuary estate until her death or remarriage : the children were entitled, subject to the trust in favour of the widow, to the income and capital of the residuary estate. Thus their enjoyment of any part of this estate, whether capital or income, was apparently postponed until the death or remarriage of the widow, although she was entitled to nothing more than one-third of the income. She and the children were the only persons with any interest in the residuary estate. Being *sui juris*, after the testator's death, the widow and children and the trustee agreed by the aforementioned indenture to change the manner of administering the residuary estate provided by the will. They agreed that it was to be administered by the trustee " as if without otherwise affecting the provisions of the said will it had therein been provided tha

H. C. OF A. 1951. BUZZA v. COMPTROLLER OF STAMPS (VICT.). McTiernan J.

the trustee should hold such residuary estate upon and subject to " the trusts contained in the indenture. The trustee joined in the indenture in consideration of the release and indemnity which the wife and children gave in respect of the departure, which the indenture involves, from the trusts of the will. The instrument is entitled " Indenture of Agreement and Release ". The parties to it thereby agree to set aside a specific part of the residuary estate which is described in the Schedule. According to the arrangements to which they agreed, the trustee, instead of holding the residuary estate upon the trusts in the will, undertook by the indenture to make a present distribution equally among the children of the other part of the residuary estate : each child taking an absolute share. In regard to the widow the trustee undertook to hold the part of the residuary estate set aside by the indenture upon trust for the widow until her death or remarriage, with remainder to the children, but their interest is made subject to a condition which guarantees the widow a minimum annual income of £340, so that, if the income which she derives from such part of the residuary estate is less in any year than that amount, it could be mortgaged to raise the money necessary to provide her with that annual sum.

It was decided that this indenture is a settlement within the meaning of Part IX. of the Third Schedule of the *Stamps Acts* 1946-1949 (Vict.) and accordingly liable to duty and liable in an amount calculated upon the value of the whole residuary estate.

The first condition of this indenture being a settlement is that property is " settled " or " agreed to be settled " by it. The word " settled " is not defined by the Act. The word " settlement " in its ordinary sense means a disposition of property for the benefit of some person or persons, usually through the medium of trustees. There cannot be a settlement without a disposition of property, but a mere disposition of property is not a settlement. The creation of a trust of property may not be sufficient to settle the property on the beneficiary. It is necessary for the instrument to " settle " the property. In *Hubbard (Otherwise Rogers)* v. *Hubbard* (1) the property was assigned to the trustee upon trust to assign it to the assignor's wife absolutely and the trustee did so. The Court of Appeal held that the property was not settled. The Court based its decision upon the ground that the deed assigning the property was " not a settlement in any sense ". The trustee is bound by the present indenture to hold the residuary estate, other than the part included in the schedule, upon trust

(1) (1901) P. 157.

to distribute it immediately among the children, each of them taking the share absolutely.

In *Vaizey* on *Settlements* (1887-1888), vol. 1, pp. 1 & 2, it is said that "the homely word 'settlement' has been put to various technical uses in the language of our law"; and that the author used the word to mean "a legal act designed to regulate during a specified period the enjoyment of property, and to provide during the same period for the safe custody and prudent management of the subject-matter". The author contradistinguishes a settled estate, whether in legal or popular language, from an estate in fee simple. He said that the former is understood to be one "in which the powers of alienation, of devising, and of transmission according to the ordinary rules of descent, are restrained by the limitations of the settlement". He quotes the passage in *Micklethwait* v. *Micklethwait* (1), in which it is said that "it would be a perversion of language to apply the term 'settled' to an estate taken out of settlement and brought back to the condition of an estate in fee-simple". It is added that "this passage must not be understood to mean that during the continuance of the settlement the settled land cannot be sold. It can always be sold, and the money produced will become instead subject to the settlement. It is the perpetual interest in this variable subject-matter which cannot be alienated". The learned author refers to *Kelland* v. *Fulford* (2), which says that in s. 69 of the *Land Clauses Consolidation Act* 1845 (Imp.) (8 Vict. c. 18) "settled" simply means "standing limited". In *Bythewood & Jarman's Conveyancing*, 4th ed., 1884-90, vol. VI., p. 127, this exposition of the meaning of "settlement" is adopted: and the authors add:— "Settlements thus essentially involve some modification of absolute proprietary right over property, and they usually, though not necessarily, create successive estates or interests therein". In the *Encyclopaedia of Forms and Precedents*, 2nd ed., vol. 16, p. 4, it is said that the forms given for the creation of settlements "determine from their dates, first, how during the subsistence of the settlement the benefit yielded from time to time by the settled property shall be apportioned among the objects of the settlor's care; secondly, upon whom at the close of the settlement the settled property shall devolve; and thirdly, the means whereby, while the settlement subsists, the property settled may be managed and possibly changed in a husbandlike manner". In the same work, at p. 9, it is said: "The foundation of a settlement of

(1) (1859) 4 C.B. (N.S.) 790, at p. 858 [140 E.R. 1302].

(2) (1877) 6 Ch. D. 491.

H. C. OF A. 1951. BUZZA v. COMPTROLLER OF STAMPS (VICT.). McTiernan J.

personalty is the vesting of the whole legal interest in and power of disposition over the property to be settled in competent and trustworthy persons, whose duty it will be to guard and administer that property for the benefit, according to the settlement of the several persons in existence, and to come into existence, in whose interest the settlement is made. In a realty settlement the same duty is imposed on the tenant for life as estate owner, subject, as regards capital moneys, to the security afforded by the trustees". In the case of *Williams* v. *Lloyd* (1), which was a case under s. 94 of the *Bankruptcy Act* 1924-1932 (Cth.), *Dixon* J. cited the definition of a settlement given by *Cave* J. in the case of *In re Player; Ex parte Harvey* (2). That case was under s. 47 of the *Bankruptcy Act* 1883 (Imp.) (46 & 47 Vict. c. 52), from which s. 94 is derived. There it is said: "The end and purpose of the thing must be a settlement, that is, a disposition of property to be held for the enjoyment of some other person. . . . But where the gift of money is to be expended at once, the transaction is not, in my opinion, within sec. 47 of the Act of 1883".

The meaning of "settlement" under the *Stamp Act* 1891 (Imp.) (54 & 55 Vict. c. 39) is discussed in *Massereene* v. *Commissioners of Inland Revenue* (3). There the question was whether a deed was an instrument whereby property was "settled or agreed to be settled in any manner whatsoever". These are the same words as those upon which the instant case turns. *Palles* C.B. said: "This description comprises such instruments only as, by their own force, either by actual transfer or by agreement therein contained, impose, or agree to impose, trusts upon property which previously was free from the same". He said: "It is essential to such an instrument that there shall be—1, such free property, by which I mean property which is then 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". In that case there had been a marriage settlement and the husband and wife executed a deed appointing a new trustee. The operative part of the deed, besides doing that, declared that all the estate and interest of the surviving trustee, as such, should vest in him and the new trustee jointly upon the trusts applicable thereto "by the settlement or otherwise"; also that they should hold various investments mentioned

(1) (1934) 50 C.L.R. 341, at p. 375.
(2) (1885) 15 Q.B.D. 682, at p. 687.
(3) (1900) 2 I.R. 138, at p. 317.

in the schedule to the deed upon the trusts and subject to the powers and provisions applicable thereto " by virtue of the settlement or otherwise ". When this deed came into force it would seem that it became the " charter " of the beneficiaries' rights and interests. But the Court held that it was not an instrument whereby property was settled or agreed to be settled. *Palles* C.B. could not find that any of the three elements which, in his opinion, are needed to make a settlement was present. He said that at the date of the deed there was no " free property " in the sense in which he used the word; secondly, " there was no settlor " because the husband and wife were the only persons who had any beneficial interests in the property and " they had no more than limited interests " as appeared by the marriage settlement; and, thirdly, " the instrument does not purport to impose new trusts upon the property ". In relation to the third matter the Chief Baron said: " No doubt it (the instrument) contains a declaration that the property shall be held, by the continuing and new trustee, upon the trusts of the settlement; but the prior part of the instrument shows that the reason of that declaration is not the bringing into the settlement additional property not theretofore subject to the trusts, but the introduction of a new trustee, who thereby admits the identity of the stocks with those purchased with the trust funds ".

In the instant case, the indenture does not apply to any property other than the residuary estate. The operative part of the indenture is that whereby the trustee agrees with the widow and children to administer the residuary estate as if the will contained the trusts set forth in the indenture. The recitals in the indenture are not disputed. They declare in brief that the widow and children agreed to this new manner of administering the residuary estate to facilitate the desire of the children to have a present distribution on account of their respective presumptive interests without delay or litigation involving the construction of the will. In order to determine whether the indenture is chargeable with stamp duty and if it is, with what amount, it is necessary to ascertain " its real and true meaning " (*Limmer Asphalt Paving Co.* v. *Inland Revenue Commissioners* (1)). If the indenture is chargeable as a settlement, it is immaterial that its object could have been realized by other means; that consideration would not relieve it of duty.

The residuary property was already subject to the settlement made by the will. The indenture is not strictly a resettlement because the testator of course is not a party to it. As regards the

(1) (1872) L.R. 7 Ex. 211.

H. C. OF A. 1951. BUZZA v. COMPTROLLER OF STAMPS (VICT.). McTiernan J.

indenture the testator is not the settlor. If it is a settlement, the question is: Who is the settlor? In *Massereene* v. *Commissioners of Inland Revenue* (1), *Madden* J. said: "Mr. Price suggested the true test when he asked who was the settlor in the instrument which we are asked to treat as a settlement. Certainly not the tenant for life; and as certainly not the trustees, from whom the declaration proceeds, but who have no beneficial interest in the property. The moneys which represented the settled land were as truly and effectually settled property before the execution of the appointment as they are at the present moment". The trustee of the will is not the settlor. The trustee could not be a settlor because it had no beneficial interest in the residuary property or any power other than as trustee of this will. The widow and children both had limited interests in the testator's residuary estate. The widow's interest did not enable her to "settle" or agree to "settle" the properties mentioned in the indenture upon herself for an estate for life with the power to mortgage and upon the children in remainder. The children's interest was also limited and it did not enable them to "settle", or agree to "settle", the residuary estate. The indenture really took out of the settlement made by the will the part of the residuary estate not included in the schedule in the indenture: it did not "resettle" that part of the residue, but authorized the trustee to distribute it among the children. The properties to which the indenture refers remained "settled" but subject to the change in the manner of administration to which the widow, children and trustee agreed by the indenture. That instrument did not resettle those properties. The indenture may be called a fresh charter of the rights of these beneficiaries. A charter is not as such chargeable with duty. It is not chargeable as a settlement unless it fulfils the primary condition of being an instrument whereby property is settled or agreed to be settled in any manner whatsoever. In my opinion this indenture does not satisfy this condition.

I should therefore allow this appeal on the ground that the indenture is not an instrument by which property is "settled" or agreed to be "settled".

WILLIAMS J. This is an appeal from an order of the Supreme Court of Victoria (*Sholl* J.) made in a case stated by the comptroller pursuant to s. 33 of the *Stamps Acts* 1946-1949 (Vict.). The case stated contains two questions for the opinion of the Court, the first whether the indenture of 3rd June 1949 referred to in the case is

(1) (1900) 2 I.R., at pp. 151, 323.

chargeable with duty, and the second with what amount of duty is it chargeable. His Honour answered the first question that the indenture is chargeable with duty and the second question that it is chargeable with £887 17s. 0d. duty. The appellants are Rose Ann Buzza, the widow of Thomas Henry Buzza, Emily Genevieve Ryan, Sybil Monica Connellan, Eileen Lever and Thomas Joseph Buzza, the three children and adopted daughter of Thomas Henry Buzza, and they have appealed against both these answers. The respondent is the Comptroller of Stamps.

The material facts are in a small compass:—Thomas Henry Buzza died on 26th April 1930. By his will dated 9th January 1924 he appointed the National Trustees Executors and Agency Co. of Australasia Ltd., his executor and trustee. After bequeathing certain specific and pecuniary legacies and an annuity, he devised and bequeathed his residuary real and personal estate to his trustee upon trust so far as it did not consist of authorized investments to sell, call in and convert the same into money, with power to postpone conversion, and after payment thereout of his debts &c. to stand possessed of his residuary estate upon trust to pay one-third of the income thereof to his wife during her widowhood, and subject thereto upon trust as to both the capital and income for all and every his children and his adopted daughter Eileen Buzza who being sons attained twenty-one or daughters attained that age or married and if more than one in equal shares as tenants in common. The testator empowered his trustee in its absolute discretion to invest any part of the trust moneys forming part of his residuary estate in the purchase or lease of a dwelling house for the use of his widow during her widowhood, she permitting such of his children including his adopted daughter as should for the time being be unmarried and under the age of twenty-one years to reside therein with her, all rates, taxes and outgoings in respect of such property to be paid out of his estate with full power to his trustee to sell and dispose of any such dwelling house at any time it thought fit.

By an indenture made on 3rd June 1949 between the testator's widow Rose Ann Buzza of the one part, the children and adopted daughter of the testator of the second part, and the trustee company of the third part, after reciting the trusts of residue and that the children were desirous of having a present distribution of their respective presumptive interests in the residuary estate of the testator, and that doubts had arisen whether on the true construction of the will such distribution could lawfully be presently made, and that the widow and children were all of age and had agreed

H. C. OF A. 1951. BUZZA v. COMPTROLLER OF STAMPS (VICT.). Williams J.

that the residuary estate should be administered in manner thereinafter appearing, it was witnessed that the trustee agreed to administer the residuary estate as if, without otherwise affecting the provisions of the will, it had therein been provided that the trustee should hold such estate, upon trust as to the freehold properties and effects set out in the schedule thereto to hold the same to the use of the widow during her life or widowhood with remainder to the children in equal shares as tenants in common, provided, however, that should the net income to be derived from such properties during such term be less than the sum of £340 in any year the amount of such deficiency should be raised for the benefit of the widow and charged upon the freehold properties in the said schedule, and that subject thereto the remainder of the residuary estate and the income thereof should be appropriated and distributed forthwith among the children in equal shares as tenants in common. The schedule to the indenture comprised real estate Nos. 129 and 131 Nicholson Street, Footscray, 3 Dane Street, Footscray, and 72 Monash Avenue, Ascot Vale, together with the furniture, household effects and piano therein contained.

It will be seen that under the will during the widowhood of the testator's wife the children could not, without her consent, require the trustee to distribute any part of the corpus of residue amongst them because she was entitled to one-third of the income of the whole residuary estate and this income could fluctuate from time to time, and also because of the provision authorizing the trustee in its discretion at any time during the widowhood to invest any part of the residue in the purchase of a dwelling house. The purpose of the indenture was, therefore, as the recitals stated, to allow the children to have a present distribution of part of the corpus of residue. Accordingly, by agreement between the widow and children, including the adopted daughter, they being all *sui juris* and the only persons entitled to residue, the trusts of the indenture were substituted for the trusts of the will and the trustee agreed to administer the residue upon the trusts of the indenture in place of the trusts of the will. These trusts differed materially from the trusts of the will because under the indenture the widow was confined to the income of the real estate included in the schedule with the right to resort to the corpus if the net income in any year was less than £340, and the trustee no longer had a discretion to invest part of the corpus of residue in the purchase of a dwelling house for the widow. The children became entitled to an immediate distribution of the residue other than the real and personal property in the schedule. They became entitled to

the property in the schedule as tenants in common in equal shares in remainder upon the death or remarriage of the widow. The trust for conversion contained in the will was eliminated and the children became entitled to equal shares in the existing property *in specie*. The most usual form of settlement is an instrument which settles the enjoyment of property on persons in succession but an instrument can be a settlement, although the proprietary interests which it creates are not interests in succession (*Kane* v. *Kane* (1); *Lloyd* v. *Prichard* (2); *Re Berens' Settlement Trusts*; *Berens* v. *Benyon* (3); *Davidson* v. *Armytage* (4); *Davidson* v. *Chirnside* (5)).

The Comptroller of Stamps claims that the indenture is dutiable under Part IX. (1) of the Third Schedule to the *Stamps Acts*, which provides, so far as material, that duty shall be payable upon an instrument other than a will or codicil, whether voluntary or upon any good or valuable consideration other than a bona-fide adequate pecuniary consideration and whether revocable or not whereby any property is settled or agreed to be settled in any manner whatsoever, such instrument not being made before and in consideration of marriage. This Part provides for duty on the value of the property at so much per cent on an ascending scale. The value of the whole of the assets comprised in the residue on 3rd June 1949 was £29,594 and the sum of £887 17s. 0d. is the amount of duty payable under the Part on this value.

The indenture of 3rd June 1949 is, in my opinion, an instrument whereby property is settled in a certain manner within the meaning of the Part. The settlors are all the parties to the indenture other than the trustee. Under the will these parties each had an equitable interest in the residuary estate of the testator. The legal estate was in the trustee which had active duties to perform during the widowhood of the widow and on her remarriage or death. But it lay within the power of the widow and children collectively to determine these trusts and require the trustee to dispose of the residue in any manner they thought fit. They could have required the trustee to make an immediate distribution of the property amongst themselves. But they did not do so. They exercised their collective power in the manner set out in the indenture. Under this instrument the legal estate remained in the trustee. The trustee still had active duties to perform. But they were different duties to those required by the will and the beneficial

(1) (1880) 16 Ch.D. 207.
(2) (1908) 1 Ch. 265.
(3) (1888) 59 L.T. 626.
(4) (1906) 4 C.L.R. 205, at pp. 210, 211.
(5) (1908) 7 C.L.R. 324, at pp. 339, 348.

H. C. OF A. 1951.

BUZZA v. COMPTROLLER OF STAMPS (VICT.).

Williams J.

interests of the widow and children in the residue were different to those they enjoyed under the will. Thenceforth the duties of the trustee and the beneficial interests of the widow and children in the residue were entirely governed by the trusts and powers of the indenture and these trusts and powers were altogether independent of the trusts and powers contained in the will.

It would be unwise to attempt to define what instruments are settlements and what are not. But at least it can be said that when a person or persons who own property at law or in equity solely or collectively dispose of that property by vesting it in a trustee on beneficial trusts for the benefit of themselves and others, such persons settle that property. And it is immaterial that the property is already vested in the trustee when the trusts are created (as in the present case) or that the trusts are created before the property is vested in the trustee and await the vesting for their operation. In *Commissioner of Stamp Duties* (*Q.*) v. *Hopkins* (1) *Dixon* J. said: "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." In *Masserene* v. *Commissioners of Inland Revenue* (2) *Palles* C.B. said, in a passage which exactly fits the present case: "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 present case is in essence indistinguishable from *Commissioner of Stamp Duties* (*Q.*) v. *Chaille* (3). It is a stronger case than *Davidson* v. *Chirnside* (4), for there the trusts of the indenture corresponded with the trusts of the will, whereas in the present case they are different.

The consideration moving from each of the parties to the indenture of the first and second parts was that they gave up their existing equitable interests in the residue and the consideration moving to each of them was that they acquired new equitable interests in the same property. Accordingly, each gave consideration for what they received which could be described as bona fide and adequate, but to take a settlement out of Part IX. (1), it is

(1) (1945) 71 C.L.R. 351, at p. 378.
(2) (1900) 2 I.R. 138, at p. 146.
(3) (1924) 35 C.L.R. 166.
(4) (1908) 7 C.L.R. 324.

necessary that the consideration shall be pecuniary. The consideration under discussion could not, in my opinion, be said to be a pecuniary consideration. Such a consideration must be a payment in money and not a bringing into a pool of an interest in property. " The term ' pecuniary consideration ' must relate to those things which pass as money in the ordinary intercourse of life " (per *Littledale* J. in *Cumberland* v. *Kelley* (1); *Stroud's Judicial Dictionary* under title *Pecuniary Consideration*, 2nd ed. (1903)). It was urged that the widow at least gave pecuniary consideration, for she gave up the income of one-third of the residue under the will in exchange for the rents from the real estate in the schedule to the indenture. But her interest in one-third of the residue under the will could not be said to be a pecuniary interest although it produced periodical sums of money any more than an investment which produced interest or rents or dividends could be said to be the equivalent of money. It was a proprietary equitable interest in the assets comprised in the residue and in no sense a sum of money. It follows that, in my opinion, the indenture of 3rd June 1949, while it is an instrument whereby property is settled, is not an instrument whereby property is settled for a bona-fide adequate pecuniary consideration.

The further question arises whether duty is payable on the whole of the property subject to the indenture or only upon the property settled upon the widow during her widowhood and after her remarriage or death upon the children or, in other words, upon the value of the real estate comprised in the schedule. No doubt there could be an indenture which included property which was settled or agreed to be settled and property which was not settled or agreed to be settled, but the present indenture is not such an indenture. It is not merely a settlement of the property comprised in the schedule upon the widow during her widowhood and the children after her death. It is a settlement of the whole corpus of residue because, as I have said, it creates different equitable interests in the residue as a whole to those which existed under the will (*Attorney-General* v. *Seccombe* (2); *Quigley's Case* (*Commissioner of Stamp Duties* (*N.S.W.*) v. *Perpetual Trustee Co. Ltd.*) (3); *Carmichael's Case* (4).

In my opinion his Honour's answers to the questions were right and the appeal should be dismissed with costs.

(1) (1832) 3 B. & Ad. 602, at p. 610; [110 E.R. 219].
(2) (1911) 2 K.B. 688, at p. 699.
(3) (1926) 38 C.L.R. 272.
(4) (1926) 38 C.L.R. 465.

H. C. OF A. 1951. BUZZA v. COMPTROLLER OF STAMPS (VICT.).

WEBB J. I would dismiss this appeal.

I think the judgment of *Sholl* J. was right and for the reasons given by his Honour. I agree with his Honour that the whole of the residue was settled by the beneficiaries and that there was no pecuniary consideration moving to or from any party or person. There was a settlement extending to the whole of the residue because, to employ his Honour's words in adopting the argument of counsel for the comptroller, the deed " constitutes a new charter. The widow now has a right to the whole income of the freehold properties; the trust for conversion of the freeholds has gone; the widow has a right to a minimum payment of £340 per annum, with a new right to resort to the corpus of the freeholds; the trustee's discretion to sell the residence has gone; and the widow has an assured right in respect of it during widowhood. The children, on the other hand, have an immediate right to receive from the trustee the whole of the corpus apart from the freeholds and to get the freeholds at the widow's death or remarriage. All this is effected by the machinery of a trust ".

FULLAGAR J. In this case I have had the advantage of reading the judgment of my brother *Williams*, and, apart from a doubt on one point which does not affect the decision, I find myself in complete agreement with it.

It has been said again and again that liability to duty under statutes framed as are the *Stamps Acts* 1946-1949 (Vict.) depends on the nature of the instrument in question, and not on the nature of any transaction which the instrument may be intended to effectuate or in which it may play a part. Looking at the nature of the instrument in question in the present case, I do not find it possible to say that " property " is not " settled " by it, and I think that the " property settled " is the whole of the property with which the instrument deals. It is true that it does not create successive interests in respect of the whole of the property with which it deals, but only in respect of part of that property. But it is not essential to the conception of a settlement that successive interests should be created in property. It is enough, in my opinion, if, as here, new equitable interests are created and the trust is more than a " bare " trust. The " property settled " is not merely the property in which successive interests are created. The whole of residue is " settled " by the instrument.

Mr. *Walker's* main argument was really, I think, that the case is one in which a settlement is made upon a bona-fide adequate pecuniary consideration. I would agree that the settlement was

made upon consideration in the sense that each of the parties to the instrument gave consideration by consenting to an alteration in his or her own rights under the will. I doubt, however (and this is the doubt to which I have referred above), whether the instrument was executed upon consideration at all within the meaning of the statute. I think that all the parties to the instrument are " settlors " for the purposes of the statute. But it is not the case that each settles his own interest and receives consideration for so doing. It is that all join in settling the whole upon themselves. They together constitute a " settlor ", and so regarded they do not receive consideration for what they do. No consideration moves to them, or is received by them, in what may be called somewhat loosely their collective capacity. I am very much inclined to think that this is the strictly correct view of this case. I am, however, quite prepared to rest my decision on the view that, if the instrument was made upon consideration within the meaning of the statute, the consideration, though it was certainly bona fide and probably ought to be regarded as adequate, was not a pecuniary consideration.

It is curious that the trustee does not seem to have executed the instrument of 3rd June 1949, though it is named as a party and, according to the terms of the document, undertakes to hold residue upon the trusts declared. I do not think, however, that anything can turn on this. The instrument makes an effective disposition of property, and the terms of the disposition give to it the character of a s[illegible]lement.

In my opinion, the decision of *Sholl* J. was correct, and this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *A. C. Secomb & Tibb.*

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

E. F. H.