

[HIGH COURT OF AUSTRALIA.]

JAMES CLARK AND COMPANY . . . APPELLANT;
PLAINTIFF,

AND

AUGUST STANG RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
WESTERN AUSTRALIA.

Contract—Sale of ship—Delivery—Transfer—Time of essence of contract.

The defendant agreed to purchase a schooner from the plaintiff by a contract of which one of the terms was that she should leave a certain port on a certain date and on arrival at a certain other port should be delivered to the defendant. As the plaintiff was unable to complete the transfer on her arrival at that other port, the defendant refused to proceed with the purchase of the vessel.

Held, that time was of the essence of the contract, and that, the stipulation with regard thereto not having been complied with, the contract was not enforceable against the defendant.

Decision of the Supreme Court of Western Australia (*McMillan C.J.*) affirmed.

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1920.

PERTH,

Sept. 13.

KNOX C.J.,
GAVAN DUFFY
and RICH J.J.

APPEAL from the Supreme Court of Western Australia.

An action was brought in the Supreme Court by James Clarke & Co. against August Stang in which the plaintiff claimed £1,200 damages for breach of contract, being the difference between the contract price of £3,200, for which the schooner *Wanetta* was sold to the defendant, and the market price of £2,000, which was realized

H. C. OF A. by the sale of the schooner after the refusal of the defendant to take
1920. delivery thereof.

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The defence (so far as material to this report) was that time was of the essence of the contract and that the plaintiff was unable to deliver and did not deliver the vessel within the contract time, and that at all material times the plaintiff was not the registered owner of the vessel and was unable to give the defendant possession of and a title to the vessel; and that, consequently, the defendant had refused to proceed with the purchase of the vessel.

The contract was contained in certain letters and telegrams in which there was a stipulation that the vessel should leave Broome on a certain date, and on arrival at Fremantle should be delivered to the defendant. The vessel arrived at Fremantle on 28th December 1918. At that time she was registered in Sydney in the name of Reginald Hocking, and the plaintiff had not taken, as it might have done, steps to put itself in a position to give a legal title to the defendant. The defendant refused to take delivery.

The action was heard by *McMillan* C.J., who, at the conclusion of the evidence, held that on the construction of the documents which had passed between the parties and from the nature of the transaction itself, time was of the essence of the contract; and that, as the plaintiff was not, on the arrival of the vessel at Fremantle, in a position to give the defendant a good title, the defendant was not bound to take delivery. His Honor, therefore, gave judgment for the defendant.

From this decision the plaintiff now appealed to the High Court.

Downing (*Draper*, A.-G. for W.A., with him), for the appellant. The Court below should not have held that time was of the essence of this contract. If on the true construction of the documents the plaintiff was under an obligation to give title contemporaneously with delivery of the vessel, it was the duty of the defendant to tender the requisite bill of sale for execution by the plaintiff; in other words, the plaintiff's duty was to sign, the defendant's duty was to prepare, the instrument of transfer. As the defendant had not done this, it was immaterial whether the plaintiff could or could not have procured

its execution at the time the defendant refused to accept delivery of the vessel itself.

[Counsel referred to *Merchant Shipping Act* 1894 (57 & 58 Vict. c. 60), secs. 56, 57; *Fry on Specific Performance*, 6th ed., sec. 1075.]

Pilkington K.C. and *Stavell*, for the respondent, were not called upon.

PER CURIAM. In our opinion the judgment appealed against is correct, and the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Unmack & Unmack*.

Solicitors for the respondent, *Stone, James & Pilkington*.

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Deed Imposts,
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(Vic) v Cum-
mings Campbell
Investments
Pty Ltd (1940)
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[HIGH COURT OF AUSTRALIA.]

THE COLLECTOR OF IMPOSTS FOR VIC- }
TORIA } APPELLANT;

AND

PEERS AND ANOTHER RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

Stamp Duties—Deed of gift—Transfer of land from husband to wife—Consideration—Antenuptial agreement—Benevolence—Amount of duty—Transfer subject to mortgage—Covenant by husband to pay mortgage debt—Deduction of mortgage debt—Stamps Act 1915 (Vict.) (No. 2728), sec. 82, Third Schedule, cl. IX.

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1921.
MELBOURNE,
Feb. 24;
Mar. 16.

The Third Schedule to the *Stamps Act* 1915 (Vict.) provides that there shall be charged and paid upon the several instruments thereafter specified the several stamp duties thereafter specified. A number of instruments are then specified in separate clauses, of which clause IX. is as follows:—

KNOX C.J.,
GAVAN DUFFY,
Rich and
Starke JJ.