

[HIGH COURT OF AUSTRALIA.]

HOOPER & HARRISON (QUEENSLAND) }
 LIMITED } APPELLANT;

AND

COMMISSIONER OF STAMP DUTIES }
 (QUEENSLAND) } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF
 QUEENSLAND.

H. C. OF A.
 1924.

BRISBANE,
 June 19, 27.

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

Stamp Duty (Q.)—"Conveyance on sale"—Company—Reconstruction and voluntary winding up—Formation of new companies—Agreement for sale of merchandise of old company to new company for stated price—Price not payable in cash but applicable towards payment for shares in new company—Construction—Distinct transactions—Stamp Acts 1894-1918 (Q.) (58 Vict. No. 8—9 Geo. V. No. 11), sec. 49.

Sec. 49 of the *Stamp Acts* 1894-1918 (Q.) provides that "For the purposes of this Act the expression 'conveyance on sale' includes every instrument . . . whereby any property, or any estate or interest in any property, upon the sale thereof, is transferred to or vested in a purchaser or any other person on his behalf or by his direction," &c.

A company having for the purpose of reconstruction gone into liquidation and a new company having been incorporated in Queensland, an agreement was entered into between the old company and its liquidator and the new company, whereby it was agreed (1) that the old company should sell and the new company should purchase the merchandise of the old company in connection with its business for £54,121 10s.; (2) that the old company should also pay £6,484 10s. to the new company; and (3) that in payment and satisfaction of the sum mentioned in clause 1 and in consideration of the sum mentioned in clause 2 every member of the old company should, in respect of every ten shares therein held by him, be entitled as of right to claim six shares in the new company with £1 credited as paid up on each share, and the new company should allot the shares so claimed.

Held, that clause 1 of the agreement was a "conveyance on sale" within the ambit of sec. 49, and that the transaction evidenced by clauses 2 and 3 was distinct from that evidenced by clause 1.

Commissioners of Stamps v. Queensland Meat Export Co., (1917) A.C. 624, distinguished.

Decision of the Supreme Court of Queensland (Full Court): *Hooper & Harrison (Queensland) Ltd. v. Commissioner of Stamp Duties*, (1924) S.R. (Q.) 102, affirmed.

H. C. OF A.
1924.

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HOOPER &  
HARRISON  
(QUEENS-  
LAND) LTD.  
v.  
COMMIS-  
SIONER OF  
STAMP  
DUTIES  
(Q.).  
———

APPEAL from the Supreme Court of Queensland.

By a case stated for the opinion of the Full Court of the Supreme Court of Queensland, under sec. 24 of the *Stamps Acts* 1894-1918 (Q.), the facts were set out by the Commissioner of Stamp Duties (Q.) substantially as follows:—

1. Prior to the date of the instruments hereinafter mentioned Hooper & Harrison Ltd. (hereinafter called "the old company"), a company duly incorporated in the State of New South Wales and carrying on business in Queensland, was the owner of property and interests in Queensland, including, among other things, realty, chattels real and the business of soft goods warehousemen and the goodwill thereof, choses in action, goods, wares and merchandise.

2. By a special resolution of the old company, duly passed on 18th May 1920 and duly confirmed on 2nd June 1920, it was resolved (1) that it is desirable to reconstruct the company, and accordingly that the company be wound up voluntarily and that Harold Wilson Anderson be and he is hereby appointed liquidator for the purpose of such winding up; (2) that the said liquidator be and he is hereby authorized to consent to the registration in New South Wales of a new company to be named "Hooper & Harrison Ltd." and of a new company in Queensland to be named "Hooper & Harrison (Queensland) Ltd.," with respective memorandums and articles of association which have already been prepared with the privity and approval of the directors of the present company; (3) that the draft agreements submitted to this meeting, and made respectively between this company and its liquidator of the one part and Hooper & Harrison Ltd. (new company) of the other part and this company and its liquidator of the one part and Hooper & Harrison (Queensland) Ltd. of the other part, be and



H. C. OF A.  
1924.

HOOPER &  
HARRISON  
(QUEENS-  
LAND) LTD.

v.

COMMISS-  
SIONER OF  
STAMP  
DUTIES  
(Q.).

the same are hereby approved, and that the said liquidator be and he is hereby authorized under sec. 261 of the *Companies Act* 1899 (N.S.W.) to enter into the agreements with such new companies when incorporated in the terms of the said drafts and to carry the same into effect, subject to any modifications which he may think expedient.

3. On 30th June 1920 Hooper & Harrison (Queensland) Ltd. (hereinafter called "the new company") was registered and incorporated under the provisions of the *Companies Acts* 1863-1913 (Q.) in pursuance of the resolution aforesaid.

4. In pursuance of the said resolution and of clause 3 of the memorandum of association and clause 3 of the articles of association, two instruments dated 9th July 1920, and made between the old company and its liquidator of the one part and the new company of the other part, were executed. (Copies of the said instruments are hereto annexed and marked C and D respectively.)

5. The instrument whereof a copy marked C is annexed hereto was presented to the Commissioner of Stamp Duties for the purpose of having the duty chargeable in respect thereof duly assessed. The said Commissioner assessed the duty on the instrument at the rate prescribed by the *Stamp Acts* 1894-1918 (Q.) to be chargeable on a conveyance or transfer on sale of any property, and such duty amounted to the sum of £406 10s.

6. The new company is dissatisfied with the assessment of duty made with respect to the last-mentioned instrument, and contends that the said instrument only attracts the duty of 10s. as an agreement under seal.

7. The instrument whereof a copy is hereto annexed and marked D was also presented to the Commissioner of Stamp Duties for the purpose of having the duty chargeable in respect thereof duly assessed. The said Commissioner assessed such duty at £129 15s., and the new company does not dispute such assessment.

8. The questions submitted for the decision of the Court are as follows:—

- (1) Is the instrument mentioned in par. 5 hereof chargeable with duty in accordance with the assessment of the said Commissioner?



- (2) If not, with what amount of duty is the said instrument chargeable ?

(3) How should the costs of this case be borne and paid ?

H. C. OF A.  
1924.  
~~~~~  
HOOPER &
HARRISON
(QUEENS-
LAND) LTD.
v.
COMMIS-
SIONER OF
STAMP
DUTIES
(Q.)

By the instrument marked C it was agreed (*inter alia*) as follows :—

“(1) The old company with its liquidator shall sell and the new company shall purchase as on 30th June 1919 all the merchandise of the old company in connection with its said business for the sum of £54,121 10s. (2) The old company and its liquidator shall also pay to the new company the sum of £6,484 10s. (3) In payment and satisfaction of the said consideration of £54,121 10s. and in consideration of the payment provided by clause 2 hereof of the said sum of £6,484 10s. every member of the old company shall in respect of every ten ordinary shares therein held by him be entitled as of right to claim an allotment to himself or herself or to his or her nominee or nominees of six ordinary shares in the capital of the new company with the sum of one pound credited as having been paid up on each of such shares and the new company shall allot the shares so claimed.”

By the instrument marked D it was agreed that the old company and its liquidator should transfer and the new company should take over, as from 13th June 1919, for the price of £6,206 10s. 8d. (*inter alia*) the goodwill of the business theretofore carried on by the old company in Queensland, and the unexpired residue of leases held by the old company in connection with that business ; that “ the old company and its liquidator shall sell and the new company shall purchase as on 30th June 1919 ” certain land and buildings and certain plant, machinery and office furniture ; and that (clause 6) : “ The old company and its liquidator shall as soon as conveniently may be execute and do at the expense of the new company all such assurances and things as shall be reasonably required by the new company for vesting in it the said property hereby agreed to be transferred or any part thereof and giving to it the full benefit of this agreement.”

The Supreme Court of Queensland decided that the instrument was chargeable with duty as a conveyance on sale: *Hooper & Harrison (Queensland) Ltd. v. Commissioner of Stamp Duties* (1).

(1) (1924) S.R. (Q.) 102.

H. C. OF A. 1924. From that decision Hooper & Harrison (Queensland) Ltd. now appealed to the High Court.

HOOPER &
HARRISON
(QUEENSLAND) LTD.
v.
COMMISSIONER OF
STAMP
DUTIES
(Q.).

Real, for the appellant. The two instruments by which the scheme of reconstruction was effected must be regarded separately for the purpose of assessing stamp duty. The accomplishment of the reconstruction may have been effected by any number of instruments, and each instrument must be singly examined to ascertain whether it attracts stamp duty: it is the instrument itself which attracts stamp duty (*Hamwood v. Commissioners of Stamps* (1)). [He referred to the *Stamp Acts* 1894-1918 (Q.), secs. 4, 15, 49, 54.] No property was transferred by this instrument; the property in the merchandise passed only when the scheme of reconstruction was completed (*Commissioners of Stamps v. Queensland Meat Export Co.* (2)). The Supreme Court overlooked the fact that the agreement, although made on 6th July 1920, related to a sale "as on 30th June 1919." On a proper construction the agreement is not a conveyance on sale (*Sale of Goods Act of 1896* (Q.) (60 Vict. No. 6), secs. 21, 22; *Measures Bros. Ltd. v. Commissioners of Inland Revenue* (3); *Alpe on Stamp Duties*, 15th ed., p. 103), and attracts stamp duty at 10s. only as a "conveyance or transfer of any kind not hereinbefore described" (First Schedule). Even if the instrument was effective as a contract or agreement for sale, it is not chargeable with duty as a conveyance on sale; for it dealt solely with a sale of goods, wares or merchandise (sec. 54 (1) (b) (ii)).

Stumm K.C. (with him *Fahey*), for the respondent. On the proper construction of the agreement the property in the merchandise immediately passed to the new company. The two agreements were separate and distinct; the parties created them as independent documents. Considering the agreement by itself, it is taxable under sec. 49 of the *Stamp Acts* 1894-1918 as a conveyance on sale. But if the agreements could be read together as forming parts of one larger transaction—namely, the transfer of all the assets of the

(1) (1900) 10 Q.L.J. 57. at p. 58.

(2) (1917) A.C. 624.

(3) (1900) 82 L.T. 689.

old to the new company—the instrument would be chargeable with the same *ad valorem* duty as if it were an actual conveyance on sale under sec. 54 (1) (b) (ii.); for in that case it would not be an agreement for a sale solely of goods and merchandise, because it would be inextricably associated with other transactions, e.g., the allotment of shares of the new company. The amendment of sec. 54 made in 1918 by sec. 54 (1) (b) (ii.) has nullified the authority of *Commissioners of Stamps v. Queensland Meat Export Co.* (1).

H. C. OF A.
1924.

HOOPER &
HARRISON
(QUEENS-
LAND) LTD.
v.

COMMISS-
SIONER OF
STAMP
DUTIES
(Q.).

Cur. adv. vult.

THE COURT delivered the following written judgment :—

June 27.

A limited company formed in New South Wales and called Hooper & Harrison Ltd., the present appellant, was carrying on business as merchants and warehousemen in Queensland, and was there the owner of real and personal property, including merchandise. On 18th May 1920 the company by special resolution, confirmed on 2nd June 1920, resolved to reconstruct and to wind up. Two new companies were formed—one in New South Wales and called “Hooper & Harrison Ltd.,” and the other in Queensland and called “Hooper & Harrison (Queensland) Ltd.” The liquidator of the old company was, by the resolutions mentioned, authorized to enter into the agreement the subject of this appeal.

In July 1920 the liquidator in the name of the old company made an agreement with the new Queensland company, whereby, after reciting the resolutions and the incorporation of the new Queensland company, and that by the articles of association of the new company it was provided that that company should “forthwith enter into the agreements,” it was agreed :—[Clauses 1, 2 and 3 of the agreement marked C were here set out.]

If the provisions of clause 1 bring the instrument within sec. 49 of the *Stamp Acts* 1894-1918, the agreement is admittedly dutiable as a “conveyance on sale.” Sec. 49 is as follows : “For the purposes of this Act the expression ‘conveyance on sale’ includes every instrument . . . whereby any property, or any estate or interest in any property, upon the sale thereof, is transferred to or vested in

H. C. OF A.

1924.

HOOPER &
HARRISON
(QUEENS-
LAND) LTD.

v.

COMMISS-
SIONER OF
STAMP
DUTIES
(Q.).

a purchaser or any other person on his behalf or by his direction.” There are provisoes, which are irrelevant to this case. The effect of the three clauses of the agreement above quoted is as follows:— Clause 1 is a sale to the new company of merchandise, already in existence and conventionally still in existence, belonging to the old company, for the fixed price of £54,121 10s. That is complete in itself; and if nothing more were said, there would be a debt of that amount payable in cash, concurrently with delivery. But the two succeeding clauses provide that the price is not to be paid in cash. A further sum of £6,484 10s. is to be handed by the old company to the new company, and that sum and the sum of £54,121 10s. owing by the new company are together to be applied by the new company to paying £1 per share on certain shares in that company, to which, not the old company, but its members are to be entitled as of right to claim. The two transactions are distinct. The immediate importance of the second or share transaction is to show that, as the shares are obviously to be issued at once and must be paid for at once, the sum of £54,121 10s. must necessarily be at once applicable, and, therefore, an instant debt. But that would be impossible unless the proprietary interest in the merchandise were instantly transferred to the new company. This is in accordance with what we understand to be the ordinary normal meaning of the first clause. That clause, then, both from its primary meaning and from its context, is one which brings the instrument within the ambit of sec. 49 as a “conveyance on sale.” We were invited to say that, when that agreement is read with a contemporaneous agreement of sale of freehold land, leases, goodwill, trade marks, &c., it should be construed as other than a “conveyance on sale.” But there are formidable objections to this argument. The agreements are in fact distinct and independent. The parties have physically severed them. They do not incorporate each other. The second agreement, by clause 6, expressly contemplates future acts of vesting, while the agreement under consideration contains no such provision.

The case of *Commissioners of Stamps v. Queensland Meat Export Co.* (1) was one where two features appeared, both of which are absent

from the agreement we are dealing with. Those features were : (1) it contained expressions of future vesting, as “shall transfer” and “shall take over”; (2) those expressions were applied to land, shares, &c., which it was obviously contemplated required future formal acts of assurance.

The appeal should be dismissed with costs.

Appeal dismissed. Appellant to pay costs of appeal.

Solicitors for the appellant, *Feez, Ruthning & Baynes.*

Solicitors for the respondent, *H. J. H. Henchman*, Crown Solicitor for Queensland.

J. L. W.

H. C. OF A.
1924.
HOOPER &
HARRISON
(QUEENS-
LAND) LTD.
v.
COMMIS-
SIONER OF
STAMP
DUTIES
(Q.)

[HIGH COURT OF AUSTRALIA.]

LAFFER APPELLANT;
PLAINTIFF,

AND

MINISTER FOR JUSTICE (WESTERN AUSTRALIA) } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
WESTERN AUSTRALIA.

Public Service (W.A.)—Superannuation—Staff of Education Department—Qualification for superannuation allowance—Reference to Public Service Board—Decision in favor of claimant—Claim for superannuation allowance—Refusal to grant—Discretion of Crown—Superannuation Act 1871 (W.A.) (35 Vict. No. 7), secs. 1, 12—Public Service Act 1904 (W.A.) (No. 41 of 1904), secs. 5, 83—Public Service Appeal Board Act 1920 (W.A.) (No. 14 of 1920), secs. 6, 10, 18.

Sec. 83 of the *Public Service Act 1904* (W.A.) enacts that “the provisions of the *Superannuation Act* shall not apply to any person appointed to the Public Service after the commencement of this Act.”

H C. OF A.
1924.
PERTH,
Sept. 9, 13.
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Isaacs A.C.J.,
Gavan Duffy
and Starke JJ.