[HIGH COURT OF AUSTRALIA.]

CUMING CAMPBELL INVESTMENTS PROPRIETARY LIMITED . . . . } APPELLANT;
PROSECUTOR,

AND

THE COLLECTOR OF IMPOSTS (VICTORIA) RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 10, 11; *Nov.* 3.

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

Mandamus—Stamp duty (Vict.)—Assessment—Transfer of land pursuant to agreement—Agreement not submitted for assessment—Refusal by Collector of Imposts to assess transfer unless agreement submitted—Land valued by collector at higher amount than disclosed in transfer—Mandamus to assess transfer as at value disclosed therein—Discretion of collector—Stamps Act 1928 (*Vict.*) (*No.* 3775), *secs.* 32, 36.

Sec. 32 (read with sec. 36) of the *Stamps Act* 1928 (Vict.) provides, by sub-sec. 1, that the Collector of Imposts "may be required by any person to express his opinion with reference to any executed instrument upon the following questions:—(*a*) Whether it is chargeable with any duty: (*b*) With what amount of duty it is chargeable," and, by sub-sec. 3, that, if the collector "is of opinion that the instrument is chargeable with duty, he shall assess the duty with which it is in his opinion chargeable."

A transfer of real property executed in 1937 was produced to the Collector of Imposts pursuant to sec. 32. The transfer was made in pursuance of an agreement executed in 1931 which had not been assessed for duty. The collector stated that the agreement was the principal instrument and should be assessed for duty and that the value of the land comprised in the agreement and in the transfer was considerably in excess of the value of £50,000 at which it was shown in the two instruments; he refused to express any opinion upon the transfer until the duty chargeable upon the agreement had been paid. The transferee applied to the Supreme Co urt of Victoria for a writ of mandamus

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commanding the collector to assess and accept payment of the stamp duty payable in respect of the transfer of the land calculated upon a consideration of the value of £50,000. The application was refused, the collector giving an undertaking which was recited in the court's order as being that he would give a reply within twenty-one days to the applicant's request for an expression of opinion under sec. 32 as to whether the transfer was chargeable with duty, and, if so, what the amount of the duty should be.

Held, on appeal to the High Court, that the writ as sought was rightly refused: its mandate would be an interference with the collector's discretion under sec. 32; and (*Rich* J. dissenting) that in the circumstances of the case a mandamus should not issue commanding the collector to perform his duty under sec. 32. The recital in the order appealed from of the collector's undertaking was varied so as to express the undertaking precisely in terms of the section.

R. v. *War Pensions Entitlement Appeal Tribunal*; *Ex parte Bott*, (1933) 50 C.L.R. 228, referred to.

Decision of the Supreme Court of Victoria (*Martin* J.) affirmed subject to a variation.

APPEAL from the Supreme Court of Victoria.

Cuming Campbell Investments Pty. Ltd., a company incorporated in Victoria, was formed in 1931 for the purpose of purchasing property from Edward Campbell. The capital of the company was £80,003, of which Edward Campbell held 80,000 fully paid £1 shares. The other three shares were allotted to three of his sons. On 17th September 1931 Edward Campbell agreed to sell, and the company agreed to purchase, the real and personal property set forth in the schedule to the agreement. No money passed between the vendor and the company, but the 80,000 shares above mentioned were allotted to Edward Campbell and accepted by him in satisfaction of the purchase money payable under the agreement. In the schedule to the agreement, and in the resolution of the company that the property be purchased by the company from the vendor, values were attributed to the six parcels of land included in the transaction, the total value so attributed being £50,000. The remainder of the property transferred consisted of shares, Commonwealth bonds, and certain deposits, which made up the balance of £80,000 which was stated as the price or value of the property in both the agreement and the resolution. The agreement of 17th September 1931 was not stamped. Edward Campbell, the vendor,

died on 7th December 1931, and on 28th July 1937 his executors, in pursuance of the agreement, executed a transfer of the land mentioned in the agreement. The transfer was expressed to be made in consideration of the sum of £50,000 paid to Edward Campbell during his lifetime. For the purposes of sec. 32 of the *Stamps Act* 1928 (Vict.) the transfer (but not the agreement) was produced by the company to the Collector of Imposts. The collector refused to express an opinion with reference to the transfer unless the agreement of 1931 was also produced to him for an expression of opinion. The company refused to produce the agreement. The collector stated that in his opinion the land transferred was worth about £76,000 in 1931 and that the agreement was a settlement or deed of gift and taxable as such under par. IX. (1) of the Third Schedule to the Act.

The company obtained an order nisi calling upon the Collector of Imposts to show cause why he should not assess and accept payment of the stamp duty payable in respect of the transfer of the land calculated upon a consideration of the value of £50,000. *Martin* J. dismissed the order nisi upon the undertaking of the Collector of Imposts that he would give a reply within twenty-one days to the company's request for an expression of opinion under sec. 32 of the *Stamps Act* 1928 as to whether the transfer was chargeable with duty and if so what the amount of duty should be.

From that decision the company appealed to the High Court.

Wilbur Ham K.C. and *Walker*, for the appellant.

Fullagar K.C. (with him *Adam*), for the respondent. There is a preliminary objection to this appeal. There is no appeal as of right in this case. There is no amount to the extent of £300 involved. The collector refused to express his opinion unless some prior instruments were submitted to him, because he thought that there had been some evasion of duty. The order nisi must be discharged because it asks the collector to express an opinion in a particular way. It might have issued to compel him to express an opinion on the two matters required, but it could not require him to express

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a particular opinion. The collector has offered an undertaking to express an opinion. The collector is bound to express an opinion, but says nothing as to what that opinion will be and, therefore, it cannot be said that an amount exceeding £300 is involved.

Wilbur Ham K.C. The appellant is more than £300 worse off if he loses the appeal. The collector is asked, not merely to express an opinion, but to express an opinion diametrically opposite to that previously expressed by him both in correspondence and in court. Until the collector expresses his opinion the land cannot be transferred. The only debate is whether there is an adequate monetary consideration expressed or whether the transaction is a gift. The amount involved is the difference in duty between considerations of £50,000 and £106,000. The appellant has a right to have duty assessed as upon a transfer on sale.

LATHAM C.J. The court will reserve its decision on the preliminary objection and will hear the substantive appeal.

Wilbur Ham K.C. The allotment of shares amounted to a payment in cash (*J. C. Williamson's Tivoli Vaudeville Pty. Ltd.* v. *Federal Commissioner of Taxation* (1); *Spargo's Case* (2)). The legislature has expressly approved of the formation of one-man companies, and it is no part of a public officer's business to say that such companies are formed for the purpose of evading duty. The collector should assess the consideration. He should not value the property. He says that, looking back to the relevant time, the property was worth £106,000. The collector is entitled to consider whether there is a fraud or whether the consideration is illusory or is only part of the consideration (*Pettett* v. *Collector of Imposts* (3)). Where a real consideration is stated in a real contract the court will not say it is illusory without evidence of the fact (*J. C. Williamson's Tivoli Vaudeville Pty. Ltd.* v. *Federal Commissioner of Taxation* (4); *Spargo's Case* (5); *The Crown* v. *Bullfinch Pty. (W.A.) Ltd.* (6)). All the evidence shows that there was a sale, and there is no evidence to show that the

(1) (1929) 42 C.L.R. 452.
(2) (1873) 8 Ch. App. 407.
(3) (1918) V.L.R. 163; 39 A.L.T. 154.
(4) (1929) 42 C.L.R., at pp. 475-480.
(5) (1873) 8 Ch. App., at p. 414.
(6) (1912) 15 C.L.R. 443.

consideration expressed in the contract was false. The onus is on the collector definitely to show that the consideration was clearly inadequate (*J. C. Williamson's Tivoli Vaudeville Pty. Ltd.* v. *Federal Commissioner of Taxation* (1); *Brett* v. *Collector of Imposts* (2); *Atkinson* v. *Collector of Imposts* (3); *Davidson* v. *Chirnside* (4); *Collector of Imposts (Vict.)* v. *Peers* (5)). The only material before the court being that in the appeal book and the collector not having contradicted any of it, he should be ordered to determine the matter in the manner required by the appellant. There is no suggestion that the collector considered the transaction as only colourable. *Martin* J. should have ordered the collector to assess under sec. 33 of the *Stamps Act* and should have made the respondent pay the costs. This was not a gift. A gift must be an act of benevolence, or at least must contain some element of benevolence. A transaction may constitute a gift even if there is some consideration for it as long as there is some benefit accruing over and above the amount of the consideration (*Collector of Imposts (Vict.)* v. *Peers* (5); *Davidson* v. *Chirnside* (4)). It appears that the whole basis of the collector's doubts arose from the facts that this is a family company and that in the circumstances the consideration stated is not correct (*Salomon* v. *Salomon & Co.* (6); *Inland Revenue Commissioners* v. *Sansom* (7)).

[RICH J. referred to *E.B.M. Co. Ltd.* v. *Dominion Bank* (8).]

Mandamus will lie even though there is another remedy available.

[DIXON J. referred to *R.* v. *H. Beecham & Co.*; *Ex parte R. W. Cameron & Co.* (9).]

Fullagar K.C. The question in the case is not whether there is a more convenient remedy than mandamus. The whole question is: What is the duty of the collector? His only duty is that imposed by sec. 32, that is, to express an opinion and assess the duty.

[DIXON J. referred to *Armytage* v. *Wilkinson* (10).]

(1) (1929) 42 C.L.R. 452.
(2) (1896) 22 V.L.R. 29, at p. 32; 18 A.L.T. 8, at p. 9.
(3) (1919) V.L.R. 105, at p. 112; 40 A.L.T. 131, at p. 134.
(4) (1908) 7 C.L.R. 324.
(5) (1921) 29 C.L.R. 115.
(6) (1897) A.C. 22, at p. 30.
(7) (1921) 2 K.B. 492, at p. 516.
(8) (1937) 3 All E.R. 555.
(9) (1910) V.L.R. 204; 31 A.L.T. 183.
(10) (1878) 3 App. Cas. 355.

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There is no duty imposed on the collector under the Act or at common law except that imposed by sec. 32. All the collector says is that he will not assess the duty on the transfer until the duty on the agreement has been assessed and paid. This case is not put on the footing that the transaction is a deed of gift or settlement. Mandamus does not lie in such a case as this (*R.* v. *War Pensions Entitlement Appeal Tribunal*; *Ex parte Bott* (1)).

[RICH J. referred to *Metropolitan Gas Co.* v. *Federal Commissioner of Taxation* (2).]

Cur. adv. vult.

NOV. 3.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from a judgment of *Martin* J. discharging an order nisi obtained by the appellant as prosecutor by which the respondent, the Collector of Imposts under the *Stamps Act* 1928 of Victoria, was ordered to show cause why he should not assess and accept payment of the stamp duty payable in respect of a transfer of certain pieces of land dated 28th July 1937 calculated upon a consideration of the value of £50,000.

The transfer was made by the executors of the late Edward Campbell to the appellant company. The company was formed in 1931 for the purpose of purchasing property from Edward Campbell. The capital of the company was £80,003, of which Edward Campbell held 80,000 shares. The other three shares were allotted to three of his sons, who thereby became qualified to act as directors. On 17th September 1931 Edward Campbell agreed to sell, and the company agreed to purchase, the real and personal property set forth in the schedule to the agreement. No money passed between the vendor and the company, but 80,000 shares of a face value of £1 each were allotted to Edward Campbell and accepted by him in satisfaction of the purchase money payable under the agreement. In the schedule to the agreement, and in a resolution of the company that the property be purchased by the company from the vendor, values were attributed to the six parcels of land included in the transaction. The total value so attributed was £50,000. The remainder of the property transferred consisted of shares,

(1) (1933) 50 C.L.R. 228, at pp. 242, 243, 245. (2) (1932) 47 C.L.R. 621.

Commonwealth bonds, and certain deposits, which made up the balance of the £80,000 which was stated as the price or value of the property in both the agreement and the resolution. The agreement of 17th September 1931 was not stamped. Edward Campbell, the vendor, died on 7th December 1931. On 28th July 1937 his executors, in pursuance of the agreement, executed a transfer of the land mentioned in the agreement. The transfer was expressed to be made in consideration of the sum of £50,000 paid to Edward Campbell deceased during his lifetime.

The transfer (but not the agreement) was produced by the company to the Collector of Imposts, who by virtue of sec. 36 of the *Stamps Act* 1928 performs the functions of the Comptroller of Stamps under the five sections preceding sec. 36. Sec. 32 provides that the Comptroller of Stamps (that is, the Collector of Imposts) may be required by any person to express his opinion with reference to any executed instrument upon the following questions: (*a*) Whether it is chargeable with any duty; (*b*) With what amount of duty it is chargeable.

The collector refused to express an opinion with reference to the transfer unless there was produced to him also for an expression of opinion the agreement of 1931. The company refused to produce this agreement and apparently did not have the agreement in its possession, but the collector obtained it from another source. He then stated that in his opinion the land transferred was worth about £76,000 in 1931 and that the agreement was a settlement or deed of gift and taxable as such under the Third Schedule to the Act, clause IX., sub-clause 1, as being an instrument upon a good or valuable consideration other than a bona-fide adequate pecuniary consideration whereby property was settled or agreed to be settled or given or agreed to be given. The agreement provided that the property mentioned in it should be held by Edward Campbell on behalf of the company and that he should transfer and deal with the property as the company should direct (clause 2 of the agreement). Thus it was also possible to contend that the agreement fell under sub-clause 2 of clause IX. of the Third Schedule, "Any instrument declaring that the property vested in the person executing the same shall be held in trust for the person or persons mentioned therein."

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The collector indicated his view, without purporting to determine the matter (as the agreement was not strictly before him), that the agreement was a principal instrument of conveyance which should be charged with duty under sec. 70 of the Act, with the result that, when full duty had been paid upon the agreement as a principal instrument (as being a settlement or deed of gift) no duty would be chargeable upon the transfer. Sec. 80 provides that where several instruments are executed for effecting the settlement or gift of the same property, one only of the instruments is to be charged with *ad-valorem* duty. The opinion of the collector evidently was that the agreement was the instrument which should be charged. The collector stated to the solicitor for the company that the agreement should be taxed as a settlement or deed of gift at a value of £106,000 and that penalties should be paid as provided in sec. 78 of the Act. This result would be brought about by increasing the value of the land from £50,000 to £76,000. But, as the agreement had not been produced by any person to the collector under sec. 32, he did not express any opinion as to the agreement under that section. He wrote a letter in which he refused to express any opinion upon the transfer until the duty chargeable upon the agreement had been paid.

The company produced declarations to the collector in which it was declared that the true value in 1931 of the land to which the transfer referred was £50,000. Upon the collector refusing to express an opinion as to the dutiability of the transfer the company obtained an order nisi for mandamus. The order nisi did not require the collector to show cause why he should not express an opinion with reference to the transfer as required by sec. 32 of the Act. If the order nisi had adopted this form the collector would have had no answer. Indeed, upon the return of the order nisi, the collector admitted by his counsel that he had been wrong in refusing to perform his functions under sec. 32 with reference to the transfer, and he undertook to give a reply within twenty-one days to the request for an expression of opinion under sec. 32. This undertaking is included in the order of the Supreme Court, but, as the company appealed against that order to this court, no action has been taken in pursuance of it. The undertaking should, I think,

have been expressed in words more closely following those of sec. 32. It is admitted by both parties that what the collector undertook to do was to express an opinion and to act as required by sec. 32.

No amendment was made in the order nisi, and the company pressed its contention that, upon the evidence before the court, it was the duty of the collector to assess the transfer as upon a value of £50,000. The collector did not submit evidence to support the view, which he had stated in correspondence, that the property was in 1931 of a higher value. The contention of the company, therefore, was that, upon the facts before the court, it was the duty of the collector to assess the stamp duty as upon a value of £50,000 and that the court should direct him to assess the duty accordingly. The learned judge refused to make the order absolute in the form sought, and, in the absence of any amendment of the order nisi and of any application by the prosecutor for an order absolute in any other form, the order nisi was discharged upon the giving of the undertaking already mentioned.

Upon this appeal the only question with which this court can deal is whether or not the order of the learned judge was right. This court can make only such an order as the learned judge could properly have made. The question for decision is whether, in view of the specific provisions of the *Stamps Act* to which reference will be made, the Supreme Court can properly direct the collector to assess stamp duty upon a particular basis. It has been suggested that it would be convenient for this court to determine the whole matter, that is, to determine which instrument is to be dutiable and to fix the amount of duty payable; but (apart from the fact that the collector has not adduced any evidence either as to value or as to the circumstances of the making of the agreement of 1931) the provisions of the *Stamps Act*, in my opinion, prevent the adoption of any such procedure.

It is a well-established principle that mandamus will go to compel the performance of a public or quasi-public legal duty which the person who is subject to the duty has refused to perform and the performance of which cannot be enforced by any other adequate legal remedy. When it is the duty of a public officer to exercise a

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discretion, the court may order the officer to perform his duty by exercising his discretion, but it will not control the exercise of the discretion by directing that it be exercised in a particular manner not expressly required by law. "A mandamus goes to set a party in motion to do a thing, but not to prescribe the way in which it shall be done" (*R.* v. *Overseers of Halifax* (1); see also *R.* v. *War Pensions Entitlement Appeal Tribunal*; *Ex parte Bott* (2), per *Starke* J., and cases there cited).

The appellant in this case asks that mandamus should issue directing the Collector of Imposts not to give his opinion under sec. 32 of the Act, but to decide the matter by giving a particular opinion, namely, that the transfer is taxable as a conveyance on sale as upon a consideration of £50,000. What is asked is that the collector be ordered to arrive at a particular decision in the appellant's favour. In my opinion the court can do no more than direct the collector to perform his statutory duty. He will perform the whole of his statutory duty if he considers the instrument submitted to him and expresses an opinion whether it is chargeable with any duty and with what amount of duty it is chargeable.

If any person is dissatisfied with the assessment made by the collector he is entitled under sec. 33 to appeal against the assessment to the Supreme Court. If he does so appeal, the collector is bound to state and sign a case setting forth the question upon which his opinion was required and the assessment made by him (sec. 33 (1)). Upon the hearing of the case the court determines the question submitted, and, if the instrument in question is in the opinion of the court chargeable with any duty, the court assesses the duty with which it is so chargeable. Sec. 34 entitles the collector to require evidence to be furnished "in order to show to his satisfaction whether all the facts and circumstances affecting the liability of the instrument to duty or the amount of duty chargeable thereon are fully and truly set forth therein"; and the collector may refuse to proceed upon any application for his opinion until the evidence which he requires is provided. Thus the statute expressly provides a specific method of putting the collector right if he goes wrong. The court is not authorized by the statute to make an original

(1) (1841) 10 L.J. M.C. 81.

(2) (1933) 50 C.L.R., at p. 245.

assessment of duty. The court is authorized to make an assessment only after the collector has assessed and when the court has the benefit of the opinion of the collector. (Cf. *R.* v. *Mayor &c. of Stepney* (1).) The statute shows the intention of the legislature that the court should engage in the assessment of duty only upon an appeal from the collector. It would, in my opinion, be wrong for the court, when this specific remedy by way of appeal is given, to utilise mandamus proceedings so as to exclude the collector from the exercise of the function entrusted to him by the statute, and at the same time, to enable the court to make an original assessment of duty which is not contemplated by the Act.

In my opinion, for the reasons stated, the appeal should be dismissed.

A preliminary objection was taken that there is no appeal as of right in the present case because it does not appear that there is any sum or matter at issue amounting to or of the value of three hundred pounds. As the order of the court is that the appeal should be dismissed, it is not necessary to consider this objection in the present case. The appellant persisted throughout in endeavouring to obtain an order in a particular form to which, according to the judgment of the court, he is not entitled. In my opinion the appellant should pay the costs of the appeal.

RICH J. The relevant law with regard to the issue of a mandamus has been stated recently by this court (*Bott's Case* (2)), and I take leave to repeat what I said in *Ex parte Falkiner* (3) :—" If, having properly understood the section and applied their minds to the evidence before them, the board are not satisfied, mandamus will not go to compel them to be satisfied. But if they have not understood the section or have not considered the evidence, or have allowed considerations foreign to the question before them to intrude and distract them from the duty confided to them, mandamus will go to compel them to hear and determine the matter before them according to law."

The only question in this matter is what order should be made in the circumstances. In the Supreme Court and before us, counsel

(1) (1902) 1 K.B. 317, at p. 321. (2) (1933) 50 C.L.R., at p. 242.
(3) (1929) A.L.R. 303, at p. 305.

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for the collector frankly and rightly admitted that he had not acted in accordance with sec. 32 of the Act. *Martin* J., instead of directing the issue of a writ of mandamus commanding the collector to give his opinion pursuant to sec. 32, accepted an undertaking by his counsel. Unfortunately the undertaking, as it appears in the order, is ill expressed, but that does not relieve the collector from performing his duty in accordance with sec. 32. We have not the advantage of any expression of his opinion, notwithstanding that, as was acknowledged before *Martin* J., he rests under a still unfilled duty to state it. The time for the performance of his undertaking was extended, it seems, by consent, which perhaps is unfortunate in view of the difficulty which evidently faces him in giving effect to the views he has foreshadowed.

I am therefore of opinion that an order should now be made directing him to consider the application for his opinion, express his opinion on the question submitted and assess the duty with which the transfer is, in his opinion, chargeable under the section. As this litigation was occasioned by the failure of the collector to pursue the course prescribed by sec. 32 he should pay the costs here and below.

DIXON J. The purpose of this appeal is to obtain an order in the nature of mandamus commanding the Collector of Imposts, who is the respondent, to assess stamp duty upon a transfer of certain lands to the prosecutor, which is the appellant, and to do so upon the footing of its being a transfer on sale at the consideration named therein. The instrument is expressed as an ordinary transfer in consideration of a payment of £50,000. In fact it was made in fulfilment of an agreement under seal made some years before between the registered proprietor of the lands and the prosecutor, which is a proprietary company. By the agreement the company acknowledged that it purchased the lands and some personal property at prices set out in a schedule, amounting to £80,000. The sale prices assigned to the lands amounted to £50,000, the sum stated as the consideration for the transfer. The registered proprietor or vendor declared by the agreement that he held the properties on behalf of the company and agreed to transfer and deal with them as the company should direct. The company allotted to the vendor

80,000 shares of £1 each in its capital, fully paid, and thus satisfied the price. On inquiries made the Collector of Imposts formed the view that the value of the lands at the time of the agreement was a great deal more than £50,000. He adopted £76,000 as the estimated value. He expressed an intention or desire of charging the instrument described as an agreement with stamp duty as a deed of settlement or gift.

Under par. IX. of the Third Schedule of the *Stamps Act* 1928 (Vict.) duty is imposed under this heading upon documents falling under either of two clauses, which have been found very difficult of application. They are as follows:—"(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 whereby any property is settled or agreed to be settled in any manner whatsoever, or is given or agreed to be given in any manner whatsoever, such instrument not being made before and in consideration of marriage. (2) Any instrument declaring that the property vested in the person executing the same shall be held in trust for the person or persons mentioned therein, but not including religious, charitable, or educational trusts."

The collector manifested a preference for including the agreement under the first clause, no doubt on the view that the consideration, if pecuniary, was inadequate. But it is easy to see that the words of the second clause, if taken literally and without qualification, also give him a foothold.

The first clause, which has often been under judicial consideration, was examined in this court in *Collector of Imposts (Vict.)* v. *Peers* (1). The judgments in that case should be read with the reasons given in the Supreme Court for the decision that was reversed (2). Stated generally, their effect is that, although to fall under the first clause of par. IX., an instrument must be one "whereby . . . property is settled or agreed to be settled . . . or is given or agreed to be given," yet the meaning of these expressions is enlarged by the preceding reference to good or valuable consideration. The judgments do not, however, go the length of suggesting that clause 1 of par. IX. includes a transaction otherwise presenting

(1) (1921) 29 C.L.R. 115.

(2) (1920) V.L.R. 516; 42 A.L.T. 87.

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the features which would bring the transfer or conveyance carrying it to completion under par. VI. (*a*) as a "conveyance or transfer on sale of real property" whenever it is found that the pecuniary consideration is inadequate or that it has been deliberately understated or, that, in such a case as the present case where its low monetary expression is possibly of not much substantial importance or consequence to the party, the consideration has been fixed at a low figure.

The second clause of par. IX. has not received the same consideration in the courts. But it is apparent that arguments may be advanced against including under it not merely voluntary trusts but all declarations of trust, although forming part of a business transaction and made for valuable consideration.

The company had submitted the transfer to the Collector of Imposts for assessment of duty thereon. This was done under secs. 32 and 36. Under those provisions, where an application is made to him, it becomes his duty to express his opinion whether the instrument is chargeable with duty and with what amount of duty it is so chargeable. When the collector has assessed the duty in accordance with his opinion, the instrument may be stamped with a particular stamp denoting that it is duly stamped, and this is conclusive for all purposes.

Under sec. 33 a person dissatisfied with his opinion may appeal to the Supreme Court. The procedure is not very satisfactory. But it is clear that a means is given of obtaining a judicial determination of the liability of an instrument to stamp duty and of the amount for which it is liable. A condition imposed by sec. 33 upon the right of appeal is that the duty assessed by the collector should first be paid. The collector refused to express an opinion in respect of the transfer submitted. He so refused on the ground that it was the antecedent agreement which ought to be stamped. This, however, the taxpayer refused to submit for his opinion.

No way of compelling the company to bring in the agreement for his opinion appears to be available to the collector, but no doubt he considered that, by refusing to stamp the transfer, he would constrain the company to submit the agreement. The company, however, obtained an order nisi for a mandamus. The mandate of the

writ sought was not to proceed with the duty imposed on the collector by sec. 32 and express an opinion as to the liability of the transfer and assess duty upon it. The order nisi was for a writ of mandamus commanding the collector to assess and accept payment of stamp duty payable in respect of the transfer calculated upon a consideration of the value of £50,000. In *R.* v. *Caledonian Railway Co.* (1) *Campbell* C.J. said :—" Before we can grant a peremptory mandamus, the prosecutor is bound to satisfy us that there is a legal duty imposed upon the defendant to comply with all that is commanded in the writ. We consider it quite settled that, if any part of what is demanded by a peremptory mandamus goes beyond the legal obligation, the whole writ must be set aside."

When a judicial discretion or authority to adjudicate is reposed in a body or person a mandamus may direct performance of the duty, but the court never commands the person or body to do more than hear and determine or consider the matter. The writ never directs the authority charged with the determination how he is to decide the case (*Ex parte Cook* ; *Re Dyson* (2)). In *R.* v. *Dayman* (3) *Crompton* J. said : " It is clear that a writ of mandamus never went to a justice, ordering him to decide in a particular way : if he has not heard and decided, it goes to order him to hear and determine according to his conscience and judgment, not according to that of this court."

In the present case the only duty of the collector was to form and express his opinion according to the best of his judgment and to assess duty upon the transfer in pursuance of that opinion. Sec. 32 imposes upon him a duty of considering matters of law, and it is part of his function to arrive at a conclusion upon any legal question the solution of which is necessary for the purpose of assessing what appears to him to be the correct amount of duty to which the instrument submitted to him is liable. If, in the course of performing this duty, he forms a mistaken opinion upon any matter of law or misconstrues the provisions of the Act which prescribe the rates of duty and the classification of instruments, the party aggrieved must appeal under sec. 33. The error of the collector does not

(1) (1850) 16 Q.B. 19, at p. 30 ; 117 E.R. 782, at p. 787.
(2) (1860) 2 E. & E. 586, at p. 590 ; 121 E.R. 221, at p. 222.
(3) (1857) 7 E. & B. 673, at p. 679 ; 119 E.R. 1395, at p. 1397.

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vitiate or avoid the exercise of his authority. It does not go to his power and render his attempt to perform his function nugatory. The result is not that his ostensible determination ceases to be a real performance of the duty imposed by law upon him (See *R.* v. *War Pensions Entitlement Appeal Tribunal*; *Ex parte Bott* (1)). The result is simply that an error of law is made in the course of the performance of his duty and his ostensible determination remains real and effective.

In refusing to enter upon or complete the duty of assessing the amount to which the transfer was liable, the collector took up a position which his counsel admits was untenable. In the Supreme Court an undertaking was given on behalf of the collector that he would proceed under sec. 32 in respect of the transfer. But the company is entitled to rely upon his refusal and upon the grounds which he gave for it, notwithstanding this undertaking. It may be said that, having refused to fulfil the duty of determination imposed upon him by sec. 32, the collector cannot rely upon the pendency of the application before him to relieve him of the duty of stamping the transfer with the correct amount for which it is liable, if such an independent obligation or duty rests upon him. But I do not think that, at all events unless the correct amount of duty is tendered to him with an instrument, the collector is under any absolute duty to stamp an instrument. It may be suggested that the grounds of his refusal, involving as they do a question of law, namely, the applicability of par. IX. of the Third Schedule to either of the documents, entitle the court to include in the mandate of its writ directions upon this legal question. For instance, if in point of law no view of the facts could make that paragraph applicable, it might be thought that the mandate of the writ should or might direct him to assess the duty on the transfer without regard to that paragraph. If so, we should be justified in deciding now whether it was possible to bring the transfer, or for that matter the agreement, under par. IX. But, although he has not yet expressed an opinion under sec. 32 and by his refusal has exposed himself to a mandamus commanding him to give his opinion and to assess duty upon the transfer, I do not think that the court can give him any legal

(1) (1933) 50 C.L.R. at p. 242.

directions as to the mode in which he should determine the matter. Such a direction would go to a matter within his authority and not to the definition of his duty. It was open to the Supreme Court to mould the order absolute, notwithstanding the tenor of the order nisi, and direct the issue of a writ of mandamus commanding the collector to express according to law his opinion with reference to the transfer and assess the duty with which it is chargeable. Instead of doing so the court accepted his undertaking given by his counsel. That undertaking, however, has not been expressed in the order in proper terms. It should have been expressed as an absolute undertaking to give within a named time his opinion pursuant to sec. 32 according to law. Subject to this being done, I think the appeal should be dismissed. His obligation under the section is to express his opinion with reference to the transfer on the following questions : (*a*) Whether it is chargeable with any duty ; (*b*) with what amount of duty it is chargeable ; and, if he is of opinion that the instrument is chargeable with duty, to assess the duty with which it is, in his opinion, chargeable. I think his undertaking should be explicit in its promise to perform this duty according to law.

McTIERNAN J. In my opinion, the appeal should be dismissed. The facts are fully referred to in the reasons for judgment of other members of the court ; it is unnecessary to go into them again in detail. *Martin* J. was of opinion that, if the respondent carried out his undertaking, he would fulfil his statutory duty under sec. 32 of the *Stamps Act* 1928. This duty he had failed to perform. But his Honour discharged the order nisi because it was not based upon any duty owed by the respondent to the appellant and enforceable by mandamus at the suit of the appellant. The object of the order nisi was a writ of mandamus commanding the respondent to assess and accept stamp duty, on the instrument of transfer, calculated on a consideration of £50,000.

The question raised by the appeal is whether it was the legal duty of the respondent, when required by the appellant, to assess the duty on the transfer at the amount which a calculation on that basis would produce. It is the duty of the respondent, under the

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Stamps Act, to assess the amount of duty which is chargeable, according to the true intention of the Act, on such instruments as are dutiable. But, the question of determining what that amount of duty is, the Act leaves to the opinion of the collector, subject to an appeal, in the form provided by the Act, to the Supreme Court. It would be inconsistent with the legislative scheme for assessing and reviewing the assessment of instruments which are chargeable with duty for the court to inquire on mandamus what is the amount of duty payable on an instrument and to compel the collector to assess the duty at that amount. His statutory duties are peculiar. When an instrument is lodged to be stamped, he is required to express "his opinion" on the question whether it is chargeable, and, if, in his opinion, it is, with what amount of duty, and to assess the duty at the amount with which it is, in his opinion, chargeable (sec. 32). The result of the performance of these duties, which mandamus would lie to enforce, is that the amount of duty to which an instrument is liable is assessed in due course of law; the Supreme Court may review the assessment in the manner provided in sec. 33. It is not a necessary element in the performance or the collector's duty to give an opinion which the court would consider to be correct. The duty imposed on him is to express "his opinion"; and he performs this duty whether his opinion is right or wrong. The court will not on mandamus dictate to the respondent the opinion he must give on any of the questions which the Act leaves to his judgment. The mandamus sought would compel the respondent to make an assessment of an amount of duty which is not shown to be the amount with which, in his opinion, the transfer is chargeable. It would compel him rather to act at variance with his statutory duty than to perform it; for the mandamus, if issued, would compel him to assess the duty chargeable on the transfer at an amount less than that which it is, in his opinion, liable to bear.

Order of Supreme Court varied by striking out the recital therein of the undertaking by the Collector of Imposts and by substituting therefor the following: "And upon the said Collector of Imposts by his counsel undertaking

that he will within twenty-one days express an opinion as required by sec. 32 *of the Stamps Act* 1928 *with reference to the transfer referred to in the order nisi herein and if he is of opinion that the said transfer is chargeable with duty, will assess the duty with which it is, in his opinion, chargeable." Appeal otherwise dismissed, with costs.*

Solicitors for the appellant, *William S. Cook & McCallum.*

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

H. D. W.