[HIGH COURT OF AUSTRALIA.]

THE COLLECTOR OF IMPOSTS (VICTORIA) APPELLANT;
RESPONDENT,

AND

CUMING CAMPBELL INVESTMENTS PROPRIETARY LIMITED . . . . RESPONDENT.
APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 29-31.

SYDNEY, *Aug.* 19.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Stamp Duty (Vict.)—Instrument of transfer of real property—No adequate pecuniary consideration—No benefaction intended or conferred—Instrument chargeable as transfer on sale—Not as deed of gift—Stamps Act 1928 (*Vict.*) (*No.* 3775), *Third Schedule, Headings VI. and IX.*

The Third Schedule to the *Stamps Act* 1928 (Vict.) provides that there shall be charged and paid upon the several instruments thereinafter specified the several stamp duties thereinafter specified. A number of instruments are then specified under separate headings, of which heading IX. is as follows :—"Settlement or Gift, Deed of—(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 in any manner whatsoever."

Held that in order that an instrument may be chargeable with duty under heading IX. it is not enough that the instrument should be made on a consideration other than a bona-fide adequate consideration: it is essential that the instrument should be one whereby a gift or benefaction is conferred.

C. agreed to sell to a proprietary company controlled by him certain land and investments for the sum of £80,000, and to transfer and deal with the property as and when the company should direct. The agreement apportioned the purchase money between the land and the investments, and fixed £50,000 as the price of the land. On the same day the company allotted to him 80,000 shares of £1 each. On the same day also, C. executed documents

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by which trusts were declared of nominal sums in favour of his sons and the trustees of the respective trusts agreed to buy the £1 shares in the company from him at a price of five shillings each. At the time of the execution of the agreements the trustees had no funds in their hands with which to discharge the sum of five shillings per share, and after C.'s death the sums owing by the trustees were shown as an asset of his estate. After his death the executors transferred the land to the company. At the date of the agreement between C. and the company the value of the land was considerably in excess of the sum agreed to be paid therefor, and at the date of the transfer the value was still greater.

Held, by *Starke*, *Dixon*, *Evatt* and *McTiernan* JJ., that as no gift or benefaction was conferred by C. on the company by the transfer the instrument was chargeable as a "transfer on sale of . . . real property" under heading VI. of the Third Schedule of the *Stamps Act* and not as a deed of gift under heading IX.

Per Latham C.J.: The transaction included, in the transfer in question, a deliberate disposition of property for less than its full value with the intention of conferring a benefit on the sons of the transferor. The instrument was chargeable under heading VI. to the extent of the expressed consideration and under heading IX. in respect of the difference between the expressed consideration and the value at the time of the agreement.

Collector of Imposts (*Vict.*) v. *Peers*, (1921) 29 C.L.R. 115, discussed.

Decision of the Supreme Court of Victoria (*Gavan Duffy* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

Pursuant to the provisions of sec. 33 of the *Stamps Act* 1928 (Vict.) the Collector of Imposts for Victoria stated a case for the opinion of the Supreme Court of Victoria. The facts as stated were substantially as follows:—

1. On 17th September 1931, Cuming Campbell Investments Pty. Ltd. was registered as a company under the *Companies Act* 1928 (Vict.) with a nominal capital of £100,000 divided into 100,000 shares of one pound each.

2. By an agreement in writing dated 17th September 1931, Edward Campbell, the governing director of the company, purported to sell and the company purported to purchase the real and personal property set forth in the schedule thereto as from 1st July 1931 for the sum of £80,000. The sale price of the land was stated at £50,000 and of the other property at £30,000. In the agreement Edward Campbell declared that he held the properties, shares and investments and all rents, profits, interest and dividends accrued or to accrue thereon

on behalf of the company and he agreed to transfer and deal with the properties, shares and investments and all rents, profits, interest and dividends as the company should direct.

3. On 17th September 1931 Edward Campbell executed three trust deeds in similar terms whereby he settled an amount of £10 on the trustees of each deed in favour of his sons, James Cuming Campbell, Edward Campbell junior and Robert Burns Cuming Campbell, respectively. The trustees of each settlement were Edward Campbell himself, James Cuming Campbell and Edward Campbell junior, and provision was made for the vesting by the settlor in the trustees of other real or personal property.

4. On 17th September 1931, 80,000 shares in the company were allotted to Edward Campbell. On the same day, one share in the company was allotted to each of the three sons. No money was paid to the company by Edward Campbell in respect of the 80,000 shares.

5. Also on the 17th September 1931, Edward Campbell executed three agreements in similar terms whereby he purported to sell and the respective trustees of the three trust deeds purported to buy 75,000 of the 80,000 shares for 5s. per share. At the time of the execution of the agreements the trustees had no funds in their hands other than the three several sums of £10 referred to in par. 3 hereof.

6. Edward Campbell having died on 7th December 1931, his executors lodged a statement for duty under the *Administration and Probate Act* 1928 (Vict.) in which the estate of the deceased was sworn at a net value of £26,151, the main asset being a debt of 5s. per share shown as owing to the deceased on the 75,000 shares in the company amounting to £18,750.

7. On 28th July 1937, the surviving executors and trustees of Edward Campbell deceased executed an instrument of transfer to the company of all the lands specified in the schedule to the agreement of 17th September 1931. In the instrument of transfer the consideration was expressed as follows : " The sum of fifty thousand pounds paid to the said Edward Campbell deceased during his lifetime by Cuming Campbell Investments Pty. Ltd."

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8. In the valuation register kept by the Commissioner of Taxes under the provisions of the *Land Tax Act* 1928 (Vict.) the valuation of the lands as at 17th September 1931, the date of the agreement, appeared as £89,515. The valuation represented the true value of the lands as at that date.

9. In the valuation register the valuation of the lands as at 28th July 1937, the date of the instrument of transfer, appeared as £101,718. The valuation represented the true value of the lands as at that date.

10. On 11th August 1937 the solicitors for the company produced the instrument of transfer to the Collector of Imposts and required his opinion with respect to such instrument:—(*a*) Whether it was chargeable with any duty; (*b*) With what amount of duty it was chargeable.

11. On 23rd November 1938, the Collector of Imposts, being of the opinion that the instrument of transfer was chargeable with the duty specified under heading IX., "Settlement or Gift, Deed of", in the Third Schedule to the *Stamps Act*, assessed duty at £5,085 18s., being a sum calculated at the rate of five per cent on the sum of £101,718.

12. On 5th December 1938, the solicitors paid the amount of stamp duty assessed by the Collector of Imposts (whereon the instrument of transfer was stamped under the *Stamps Act*) and on 9th December 1938 by notice informed him that they were dissatisfied with the assessment of duty of the said instrument of transfer and required him to state and sign a case setting forth the questions upon which his opinion was required and the assessment made by him.

The questions for the opinion of the court were:—

(*a*) Was the said instrument of transfer chargeable with any duty?

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

Gavan Duffy J. was of the opinion that the instrument was chargeable with duty as a "Transfer on Sale of . . . Real Property" and not as a "Settlement or Gift, Deed of" and accordingly assessed duty at the sum of £500 under heading VI. and not under heading IX. of the Third Schedule of the *Stamps Act* 1928.

Under heading VI., the rate of duty was ten shillings for each £50 or part thereof of the amount or value of the consideration for the sale. Under heading IX. the rates were variable, beginning at one per cent and rising to five per cent where the value of the property exceeded £100,000.

The Collector of Imposts appealed from the decision of *Gavan Duffy* J. to the High Court.

Fullagar K.C. and *A. D. G. Adam*, for the appellant.

Fullagar K.C. There are three possible views of the manner in which this instrument should be charged with stamp duty, viz. :— (*a*) The instrument is dutiable as " a transfer on sale of real property " on a consideration of £50,000 ; (*b*) The instrument is dutiable as a transfer on sale of real property for the true value of the consideration, which at the date of the contract was £89,515 and at the date of the transfer £101,718 ; (*c*) The instrument is dutiable as a deed of gift at the percentage rate set out under heading IX. in the Third Schedule of the *Stamps Act* 1928. The consideration expressed in the transfer was not an adequate bona-fide consideration. The definition under heading IX. enlarges the meaning of " Settlement or Gift, Deed of " to include any transaction where the consideration is not bona fide or adequate. The difficulty arises in the definition. The idea of " settlement " is not inconsistent with a consideration, but the concept of " a gift " is inconsistent and the difficulty can only be resolved by giving a wide interpretation to the word " give." The meaning of " give " in the context must be " assure " or " transfer." The words " bona fide " and " adequate consideration " have been considered by the Victorian Supreme Court in *In re Officer's Transfer* (1) and *Kelly* v. *Collector of Imposts* (2). " Adequate " does not mean commensurable with actual value, but is used in the sense of two men at arm's length in a commercial transaction fixing a fair price to pay. It admits of bad bargains. If the consideration is inadequate in that sense, then heading IX. applies (*Davies* v. *Collector of Imposts* (3)).

[DIXON J. referred to *Duckett* v. *Collector of Imposts* (4).]

(1) (1918) V.L.R. 607, at p. 614.
(2) (1907) 29 A.L.T. 91.
(3) (1908) V.L.R. 272.
(4) (1927) V.L.R. 457.

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Duffy J. in the court below did not properly apply the test laid down by *Rich* J. in *Collector of Imposts (Vict.)* v. *Peers* (1). "Gift" really means any benefit or bounty obtained as a result of the transaction. Under sec. 34 of the *Stamps Act* the collector can call for evidence.

[LATHAM C.J. referred to sec. 68 (6) of the *Stamps Act* 1928; *Davidson* v. *Chirnside* (2).]

The headnote there is too widely expressed. One must go outside the document to find out if there is mala fides. For the consideration to be "bona fide," it must really and truly be a pecuniary consideration. If it is not "adequate" it is not "bona fide." The consideration may be adequate although there is a discrepancy between price and value (*Campbell* v. *A Collector of Stamp Duties* (3)). It is only where there is an adequate money consideration that a transfer escapes from heading IX. *Peers'* *Case* (4) is not exhaustive of the possibilities under heading IX. It does not go far enough: "will be" or "would be" should be substituted for "may." All instruments are deeds of gift unless they are made for adequate pecuniary consideration. After the case of *Cobar Corporation Ltd.* v. *Attorney-General for New South Wales* (5) New South Wales and Queensland altered the law, but this was not done in Victoria till 1938, when the Crown probably was given the right to recover stamp duty from the individual.

Adam. "The law upon the subject of stamps is altogether a matter *positivi juris*. It involves nothing of principle or of reason, but depends altogether on the language of the legislature" (per *Taunton* J. in *Morley* v. *Hall* (6)). In this case Edward Campbell had sought to benefit his sons and avoid payment of stamp duty. By taking shares in the proprietary company he knows he can control the company's assets to do himself or anyone else a good turn. If shares are left out of the matter the controller's case is clear, because the consideration is set out at £50,000 which is an inadequate consideration for land valued at £100,000. There is nothing in the *Stamps Act* 1928 which requires the controller to

(1) (1921) 29 C.L.R. 115, at p. 124.
(2) (1908) 7 C.L.R. 324, at p. 340.
(3) (1930) 25 Tas.L.R. 121, at p. 125.
(4) (1921) 29 C.L.R., at pp. 121, 122.
(5) (1909) 9 C.L.R. 378.
(6) (1834) 2 Dowl. 494.

assess duty on the consideration set out in the instrument but he assesses it on the true value of the consideration (*Stamps Act* 1928, sec. 34).

Ham K.C. (with him *H. Walker*), for the respondent. The fact that there is a one-man company, which has made the collector suspicious, is immaterial, as the company and Edward Campbell are distinct legal personalities (*Salomon* v. *Salomon & Co.* (1); *Inland Revenue Commissioners* v. *Sansom* (2)). There is no scheme here upon which the law frowns. What the vendor does with the company's shares is immaterial to this transaction between the vendor and the company. Secs. 71 and 72 of the *Land Tax Act* 1928 have nothing to do with the question and the controller cannot rely on them. Sec. 71 can be used to find the value of land when there is a deed of settlement but here he uses the section to find the true value of the land to show that the transaction is a settlement. If the instrument sets out the consideration at £50,000 and there is no other evidence of what the value of the land is then the court should accept the value at £50,000. The onus is on the controller to show that that value is wrong. Under sec. 72 he must go on valuation at the time of the transaction. It is immaterial if another valuation is given and that is what is given in this case. The date of the transfer is 28th July 1937, but the valuations given are not for that date. There is no evidence that the consideration was inadequate because there is no evidence of what the real value of the property was. The cases show that the court can look behind the document (*Davidson* v. *Chirnside* (3); *The Crown* v. *Bullfinch Pty. (W.A.) Ltd.* (4)). If you are considering whether the transaction is a gift or not you must go beyond the instrument. But you cannot consider whether Campbell gave away the shares or not. The only evidence is that he sold £50,000 worth of land for £50,000 and bought 80,000 shares for £80,000. It may be a matter of suspicion that he sold these shares for five shillings each, but it is immaterial to what duty is chargeable on the transfer. [Counsel referred to sec. 80 of the *Stamps Act* 1928.] If there is a difference

(1) (1897) A.C. 22, at pp. 30, 31.
(2) (1921) 2 K.B. 492, at pp. 512, 513.
(3) (1908) 7 C.L.R. 324.
(4) (1912) 15 C.L.R. 443, at pp. 447, 448, 450, 451.

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between the consideration and the valuation there is no evidence that it was a gift (*Collector of Imposts (Vict.)* v. *Peers* (1); *Cuming Campbell Investments Pty. Ltd.* v. *Collector of Imposts (Vict.)* (2); *Pettett* v. *Collector of Imposts* (3); *Atkinson* v. *Collector of Imposts* (4)). Although in that case there was no adequate pecuniary consideration it was held that it did not come under heading IX. because it did not have the elements of a gift (*Castlemaine Brewery Co. Ltd.* v. *Collector of Imposts* (5)). [Counsel referred to sec. 78 of the *Stamps Act* 1928.] In assessing duty one must concentrate on the instrument, not on the transaction. This is a tax on documents, not transactions. What was done with the property after the transfer is irrelevant to the case (*Thompson* v. *Collector of Imposts* (6)). A deed of gift must be under seal (*Howard-Smith* v. *Comptroller of Stamps* (7)). This transfer is not under seal; therefore it is not a deed (*J. C. Williamson's Tivoli Vaudeville Pty. Ltd.* v. *Federal Commissioner of Taxation* (8)).

Adam, in reply. This is a registered transfer and is, therefore, of the same effect as a deed (*Transfer of Land Act* 1928, sec. 124; *Roberts* v. *Collector of Imposts* (9)). For the purpose of deciding on the adequacy of the consideration the court must look at the facts existing at date of the agreement.

Cur. adv. vult.

Aug. 19.

The following written judgments were delivered:—

LATHAM C.J. The question which arises upon this appeal from the Supreme Court of Victoria is whether a transfer of certain lands by the executors of the late Edward Campbell to the respondent company expressed to be in consideration of the sum of £50,000 is dutiable under the Victorian *Stamps Act* 1928 as a conveyance or transfer on sale of real property under div. VI. (A) of the Third Schedule to the Act or as a deed of gift under div. IX. (1) of that schedule. Upon a case stated by the Collector of Imposts it was

(1) (1921) 29 C.L.R. at p. 122.
(2) (1938) 60 C.L.R. 741, at p. 753.
(3) (1918) V.L.R. 163.
(4) (1919) V.L.R. 105, at p. 113.
(5) (1896) 22 V.L.R. 4, at pp. 5, 6, 13.
(6) (1899) 25 V.L.R. 529.
(7) (1935) V.L.R. 387.
(8) (1929) 42 C.L.R. 452, at pp. 474, 480.
(9) (1919) V.L.R. 638, at p. 651.

held by *Gavan Duffy* J. that the instrument was dutiable as a transfer and not as a deed of gift.

The late Edward Campbell on 17th September 1931 made an agreement with the respondent company, which was a proprietary company entirely under his own control, whereby he agreed to sell and the company agreed to purchase certain land and other property. In a schedule the sale price of the land was stated at £50,000 and of the other property at £30,000. On the same day he executed three deeds in which he declared in favour of his three sons trusts of sums of £10 paid to the trustees and of other property which he might thereafter vest in the trustees. On the same day 80,000 shares in the company were allotted to Edward Campbell. On the same day also the trustees of each of the three several deeds agreed to purchase from Edward Campbell 25,000 shares in the company at a price of 5s. a share. It is not disputed that the value of the shares was more than 5s. a share. Edward Campbell died on 7th December 1931. The main asset in his estate was a debt of 5s. a share shown as owing to him on the 75,000 shares in the company sold to the trustees. On 28th July 1937 the surviving executors and trustees of Edward Campbell executed an instrument of transfer to the company of all the land specified in the schedule to the agreement of 17th September 1931. It is stated as a fact in the case that the true value of the land on 17th September 1931 was £89,515: See *Cuming Campbell Investments Pty. Ltd.* v. *Collector of Imposts* (1). It is also stated as a fact that the true value of the land at the date of the transfer was £101,718. The question which arises is whether the instrument of transfer is chargeable with duty under the *Stamps Act* 1928, and, if so, with what amount of duty. It was held by the Supreme Court that the instrument was chargeable as a transfer upon the amount of £50,000, the consideration stated therein, and not as a deed of gift. The Collector of Imposts appeals to this court from that decision.

The *Stamps Act* 1928, sec. 17, imposes duties upon the instruments specified in the schedule. Sec. 78 and following sections relate to the duties chargeable upon deeds of settlement and deeds of gift under div. IX. of the Third Schedule. That division, so far as it

(1) (1940) V.L.R. 153.

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is relevant, is in the following terms :—" 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 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. Where the value of the property does not exceed £1,000—10s. per cent " &c.

Under Act No. 4430 (which is applicable to the transfer in question) the rates of duty chargeable begin at one per cent, rising to five per cent where the value of the property exceeds £100,000. The duties imposed upon conveyances and transfers under div. VI. are ten shillings for each £50 of the amount or value of the consideration for the sale. Thus the duties imposed upon deeds of gift (where the value of the property exceeds £1,000) are much heavier than those imposed upon transfers.

The courts have not succeeded in finding any satisfactory meaning for the provisions of div. IX., which have often been described as confused and almost unintelligible. The sections of the Act (e.g., sec. 78) and the heading of the division refer to deeds of settlement and deeds of gift, but it has been decided that the subsequent words in the first sub-clause of the division produce the result that documents which are not deeds are nevertheless subject to duty under the division: See *Howard-Smith* v. *Comptroller of Stamps* (1). This decision is in accordance with long-established practice.

In *Castlemaine Brewery Co. Ltd.* v. *Collector of Imposts* (2) it was held by *a'Beckett* J. and by the Full Court of Victoria that the words of the heading, " Settlement or Gift, Deed of ", constituted a " governing description " and that no instrument was dutiable thereunder unless it could " by reasonable intendment be brought within the definition of ' Settlement or Gift, Deed of.' " It was said that sub-clause 1 did not " create new subjects of taxation which cannot, by any reasonable intendment, come under the description of ' deeds of settlement or gift ' " : See the report (3). This decision

(1) (1935) V.L.R. 387.
(2) (1896) 22 V.L.R. 4.
(3) (1896) 22 V.L.R., at p. 8, per *a'Beckett* J.; at pp. 12, 13, in the judgments of the Full Court.

was approved in the case of *Collector of Imposts (Vict.)* v. *Peers* (1), but it was there interpreted as deciding not that the heading controlled the first sub-clause, but, on the contrary, that the sub-clause extended and enlarged the meaning of the words in the heading so as to make those words cover documents which they would not ordinarily include (2). This must be so in some sense, because div. IX. under the heading of " Deeds of Gift " does include instruments which are given upon valuable consideration if that consideration is not bona fide, adequate, and pecuniary. It is plain that such transactions cannot be described in any ordinary sense as gifts, although the legislature says that in some manner or in some degree instruments giving effect to them are to be taxed as if they were gifts.

Sub-clause 1 of div. IX. excludes wills and codicils and instruments made before and in consideration of marriage. The sub-clause includes cases where valuable consideration is given for a transfer of property (real or personal) made by an instrument unless the consideration is bona fide, adequate, and pecuniary. It is difficult to reconcile some of the decisions with the words of the sub-clause. For example, in *Atkinson* v. *Collector of Imposts* (3) the consideration for a transfer of land was the compromise of a contested will case, including the withdrawal of a caveat. Such a consideration was plainly not pecuniary, but nevertheless it was held that the instrument was not a deed of gift within the meaning of div. IX. If that division applies to transfers of property upon any consideration which is not pecuniary, the decision was plainly wrong. In fact, the decision went upon the ground that there was no benevolence in the transaction—a ground which it is now impossible to maintain after the decision in *Collector of Imposts* v. *Peers* (1).

But the acceptance of the proposition that a transfer for consideration is a gift is only one of the difficulties presented by sub-clause 1. The words of the sub-clause further require (wherever there is a pecuniary consideration) a decision as to whether the consideration is bona fide. Even if a consideration is adequate and pecuniary, so that full value is given for the property transferred, but in some

(1) (1921) 29 C.L.R. 115. (2) (1921) 29 C.L.R., at p. 121.
(3) (1919) V.L.R. 105.

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sense the transaction is not bona fide, then the transfer may possibly be dutiable as a deed of gift. It is difficult to conceive a transaction consisting in a transfer of property for adequate pecuniary consideration which can be described as not bona fide in any sense relevant to a revenue Act. It may, however, possibly be the case that the legislature intends to penalize, by a specially high rate of duty, transactions which have associated with them some kind of fraudulent intent, even although full pecuniary consideration should be given for any property transferred.

The presence of some, or even of some substantial, pecuniary consideration plainly does not relieve an instrument transferring property from dutiability under div. IX. Even if there is a pecuniary consideration, but it is not adequate, the instrument may be charged under sub-clause 1. In *Kelly* v. *Collector of Imposts* (1), a father transferred to his son a piece of land the admitted value of which was £9,000. The consideration for the transfer was the payment of about £5,500 to the father and a verbal promise to pay £400 to a brother of the transferee and to maintain an aged father for his life. The transaction was held to be bona fide; there was a pecuniary consideration, but the pecuniary consideration was not adequate. It was, on this ground, held by the Full Court of Victoria that the instrument of transfer was dutiable under sub-clause 1 of div. IX. In *In re Officer's Transfer* (2) the Full Court of Victoria dealt with a case where land of the value of £15,284 was transferred in consideration of £14,000 and of natural love and affection. On the admitted facts the pecuniary consideration was not adequate, and it was held upon this ground that the instrument of transfer was dutiable under div. IX. and not under div. VI. In each case duty was charged upon the full value of the property transferred.

It has been said, on the authority of *Davidson* v. *Chirnside* (3), that the question whether an instrument is dutiable under div. IX. must be determined by an examination of the instrument itself and not upon extrinsic evidence. This rule was enunciated in the case cited in relation to the question whether the provisions of an instrument were such as to bring it within the word "settlement" in the

(1) (1907) 29 A.L.T. 91.
(2) (1918) V.L.R. 607.
(3) (1908) 7 C.L.R. 324.

schedule. It is obvious that, in order to determine whether a consideration is bona fide or adequate, it is necessary to go beyond the terms of the instrument, and that, for this purpose, extrinsic evidence must be admitted.

In the present case it is stated as a fact in the case that the value of the land transferred was, at the date of the agreement to transfer, £89,515, and at the date of transfer, £101,718. The consideration for the transfer was a pecuniary consideration, namely, £50,000. According to the decisions in *Kelly's Case* (1) and *Officer's Case* (2), and according to the plain meaning of the words of the sub-clause, the pecuniary consideration was not in this case an adequate consideration. It has nevertheless been held in the Supreme Court that the transfer is not dutiable as a deed of gift under div. IX. If div. IX., however, applies to all transfers of property if they are made for a pecuniary consideration which is not adequate, then I am unable to concur in the view that the decision of the Supreme Court is correct.

There is really no meaning in describing as a gift the transfer of property for consideration unless the consideration is merely illusory. Accordingly, the words of div. IX., as they have hitherto been construed, contain an inherent contradiction in terms. The question arises whether it is not possible to adopt an interpretation of the words which does not involve self-contradiction and which will produce a result which is more reasonable than that brought about in, for example, *Officer's Case* (2). In that case a deficiency in price as compared with value (and not a very great deficiency) exposed the parties to a bona-fide transfer of property to duty upon the full value of the property at a much higher rate than would have been applicable if the transaction had been treated either as a transfer, or partly as a transfer and partly as a gift. In my opinion it is possible to interpret the words in such a manner as to avoid these results in the case of deeds of gift.

The difficulty arises from the introduction of words relating to gifts into a provision which was originally drafted for the purpose of dealing with settlements and settlements only. Div. IX. first appeared in the *Stamps Act* 1892. It was evidently based upon the

(1) (1907) 29 A.L.T. 91. (2) (1918) V.L.R. 607.

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English *Stamp Duties Act* 1870 (33 & 34 Vict. c. 97), and taken from the New-Zealand *Stamp Act* 1882, Third Schedule. By the New-Zealand statute duty was imposed under the head of "Settlement, Deed of" upon "(1) any instrument whether voluntary or upon any good or valuable consideration other than a bona-fide pecuniary consideration whereby any property is settled or agreed to be settled in any manner whatsoever." Such a provision is quite intelligible in a scheme for the taxation of settlements. In Victoria, however, the words from the New-Zealand Act, which were based upon words in the English Act of 1870, were applied also to gifts, and they at once became very difficult to interpret because they are quite inapt to describe gifts. The reference to gifts was inserted in the heading, and words were added to the first sub-clause so as to make it apply to instruments whereby property "is given or agreed to be given in any manner whatsoever." It was suggested in the case of *Peers* v. *Collector of Imposts* (1), in the judgment of the Full Court of Victoria, that the words "a bona-fide adequate consideration" applied specially to settlements and agreements for settlements, as they appeared to be "redundant to gifts and agreements for gifts." Instead of the words "redundant to" I should have preferred to use the words "inconsistent with the nature of" or some similar words. When the case came before the High Court this suggestion was not developed, although there it was apparently agreed that in the case of any gift "the donor must not receive consideration from the donee" (2). In my opinion it will never be possible to obtain a coherent meaning for the words of div. IX. as far as deeds of gift are concerned so long as they are interpreted as applicable to all transfers of property where there is consideration, but not pecuniary consideration, or where there is pecuniary consideration but not adequate consideration, or where there is adequate pecuniary consideration but it is not bona fide.

In my opinion the difficulty has arisen by failure to give full effect to the words "given or agreed to be given." Reference has been made to the importance of these words in the *Castlemaine Case* (3) and *Atkinson's Case* (4), but no real effect has been given to them in

(1) (1920) V.L.R. 516, at p. 521.
(2) (1921) 29 C.L.R., at p. 121.
(3) (1896) 22 V.L.R. 4.
(4) (1919) V.L.R. 105.

decisions of the courts. In my opinion it is possible to get rid of the difficulties and inconsistencies which I have mentioned by regarding these words as the most important part of the sub-clause.

Div. VI. of the schedule deals with conveyance or transfer on sale of any real property, and div. IX. deals with deeds of settlement and deeds of gift of any property whether real or personal. The duty in the case of div. VI. is imposed upon " the amount or value of the consideration for the sale." In div. IX. the duty is imposed upon " the value of the property " at a percentage rate. What is the property the value of which determines the amount of duty ? Surely the property settled or given. It is only in so far as property is settled or given by an instrument that duty under div. IX. is imposed. An illustration will, I think, help to make this clear. If, by the same instrument, certain chattels were sold for a stated price and certain other chattels were declared to be given by a donor to a donee, surely the position would be that duty under div. IX. would be charged upon the value of the latter chattels only. No duty would be chargeable upon the value of the chattels sold, because there is no provision in the Act which imposes duty in the case of sale of chattels. In such a case it would probably be conceded that duty under div. IX. was chargeable on the instrument only to the extent to which the instrument operated by way of gift. If this be so, then it must be admitted that duty is chargeable on any instrument as a deed of gift only to the extent to which property is *given* by the instrument.

Hitherto the courts have proceeded upon the basis of an assumption that a document may be a transfer (div. VI.) or a deed of gift (div. IX.), but that it cannot be both. Surely the contrary is the case. For example, in the Queensland *Gift Duty Act of* 1926, sec. 2, it is provided that if a disposition of property is made for a consideration in money or money's worth, which consideration is determined by the commissioner or on appeal to be inadequate, the disposition shall be deemed to be a gift to the extent of that inadequacy, and gift duty is assessable accordingly. This provision affords an illustration of the proposition that there is no inherent difficulty in determining in any particular case the extent to which a single transaction dealing

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with a single property is a transaction by way of gift and the extent to which it is a dealing for consideration.

In my opinion div. IX. can be interpreted, and the court should now interpret it, as meaning that, in so far as property is given (that is, by way of benefaction—a term which is not identical with " benevolence ") by an instrument, that instrument is dutiable under div. IX., but that, in so far as property is not so given by the instrument, the instrument is not dutiable under that division. If the property with which the instrument deals is real property it may be that the instrument is dutiable under both div. VI. and under div. IX. If, for example, a father, being minded to benefit his son, transfers to him for £4,000 land admittedly worth £10,000, then the transaction takes the form of a sale for £4,000. The transaction is a transaction of sale because it is a transfer of property for a money price, though for a very low and very inadequate price. The instrument is accordingly dutiable under div. VI. on the amount of the pecuniary consideration for the sale, that is, upon £4,000. But there is also an element of benefaction in the transaction which the instrument effectuates. Property to the value of £6,000 has been *given*, and not sold, to the son. Div. IX. imposes a duty—a very much higher duty than in the case of a sale—upon the instrument in relation to the element of gift which it records, that is, upon £6,000, which is the value of the property and the whole value of all the property which is *given* by the instrument.

There is no actual decision that this method of interpreting div. IX. is wrong, though many cases have been decided upon an unargued and unexamined assumption that such an interpretation is not open. The method which I now suggest of applying the provisions of div. IX. is more intelligible and is fairer than that which has hitherto been adopted. It is more intelligible because it removes the contradiction involved in treating as a gift, and only as a gift, a transaction in which value is given for the property transferred—a transaction which, therefore, is obviously not a gift. But it also provides a rational explanation for exacting duty as upon a gift in some cases notwithstanding the presence of consideration. That explanation is provided by the fact that, though there may be consideration for a transfer, there may also be an element of gift in the transfer. It

limits the application of div. IX. to gifts of property, just so far as they are gifts of property, and imposes duty accordingly. The view suggested is fairer than that hitherto adopted because it avoids the result that a small inadequacy of consideration in a bona-fide transaction exposes a party to a very heavy rate of duty upon the whole value of the property without any satisfactory reason.

It is, in my opinion, a mistake to regard div. VI. as applying only to cases where adequate value is given for property and div. IX. as applying to all cases where the value given is not adequate. Not all persons are moved solely by the impulses of the economic man, who sells only at a maximum price and buys only at a minimum price. This fact was recognized by *Cussen* J. in *Davies* v. *Collector of Imposts* (1), where it was held, as I think rightly, that there could be a sale without any preliminary higgling or bargaining. (The contrary view had previously been taken by a court of which *Cussen* J. was a member in *Kelly* v. *Collector of Imposts* (2)—see end of judgment.) Whenever an instrument gives effect to a transaction which is a sale in fact, even though it is shown that the seller might, if he had tried, have extracted a higher price from some buyer, div. VI., in my opinion, applies, but if the transaction is shown to be in fact a gift, and simply a gift, then div. IX. and not div. VI. applies. If the transaction is only in part a gift, then div. IX. applies to the relevant instrument by imposing a duty upon the value of the property which is *given*, and div. VI. applies by imposing a distinct duty at a lower rate upon the amount or value of the consideration for any real property which is sold or agreed to be sold by the same instrument.

As at present advised I can see only one substantial objection to the view which I have suggested. That objection is that, even upon that view, it would be necessary to impose duty under div. IX. upon the full value of any property transferred for a good or valuable consideration which was not pecuniary, even though that consideration were admittedly a fully adequate consideration, because such a transaction would be a " gift " within the meaning of sub-clause 1. I agree that this would be the result upon the words of sub-clause 1 if such a case could ever be found. The objection is, I think, answered

(1) (1908) V.L.R. 272. (2) (1907) 29 A.L.T. 91.

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by the fact that no such case could ever be found, because it ought to be held in such a case that no property was *given* or agreed to be *given* by the instrument. If, for example, land worth £5,000 were transferred in exchange for sheep worth £5,000, there would be no element whatever of gift in the transaction, and no duty should be imposed under div. IX. Duty should be paid under div. VI., not upon the "amount" of consideration, because there would be no pecuniary amount of consideration, but upon the "value of the consideration" in accordance with the explicit terms of div. VI.

I now proceed to apply these principles to the present case. The instrument in question is a transfer, under the *Transfer of Land Act*, of land in consideration of the sum of £50,000. In my opinion it is quite immaterial that the vendor agreed (as he did) to accept the consideration in the form of shares. His subsequent dealings with those shares are also, I think, quite immaterial. If a man sells land for £100 the dutiability of the instrument of transfer cannot depend upon what he may do with the £100 after he receives it. The transfer is a transfer upon sale. The sale was a real sale, that is, the title to the property was intended to be transferred, and actually was transferred, to the purchasing company. The instrument is accordingly dutiable under div. VI. upon "the amount of the consideration," namely, upon £50,000. The transfer was made in pursuance of a prior agreement for a sale. At the time when the transfer was executed the value of the land was £101,718. The consideration for the sale expressed in the agreement, and not the value of the property at the time of transfer, is the consideration which is to be regarded in assessing stamp duty under a provision such as div. VI. (*The Crown* v. *Bullfinch Pty. (W.A.) Ltd.* (1))—and see *J. C. Williamson's Tivoli Vaudeville Pty. Ltd.* v. *Federal Commissioner of Taxation* (2).

As the value of the land was over £89,000 and the consideration was only £50,000 it is clear that the pecuniary consideration was not adequate. As I have already said, in my opinion this fact is not in itself sufficient to bring the instrument within div. IX. But the facts stated in the case show that the owner of the property was engaged in making an arrangement to benefit his sons. There is clear evidence of an intention to make a benefaction to the extent of

(1) (1912) 15 C.L.R. 443. (2) (1929) 42 C.L.R. 452.

the difference between the expressed consideration of £50,000 and the real value of the property. The case is not simply a case of a sale at a low price. Such a transaction would fall under div. VI. and not under div. IX., not because the consideration was deemed to be adequate, though inadequate in fact, but because the transaction was really a sale and because no element of benefaction was involved. But in the present case the element of benefaction is clearly present. The transaction includes, in the transfer in question, a deliberate disposition of property for less than its full value with the intention of conferring a benefit on the sons of the transferor. The transferor is a donor—See *Stamps Act* 1928, sec. 78—as well as a transferor. The property was not merely transferred; it was to the extent of £39,515 *given* to the company for the purpose of making a gift. To the extent of £39,515, therefore, the instrument should be charged with duty under div. IX.

Accordingly, in my opinion, the appeal of the Collector of Imposts should be allowed and the questions asked in the case should be answered by stating that the instrument of transfer is chargeable with duty and that the amount of duty with which it is chargeable is, in accordance with the rates fixed by Act No. 4430, £500 under div. VI. of the Third Schedule of the Act (10s. per £50 of the consideration of £50,000), and £1,185 9s. under div. IX. of the Third Schedule (£3 per cent where the value of the property given, viz., £39,515, exceeds £25,000 and does not exceed £50,000).

STARKE J. Appeal from a decision of the Supreme Court of Victoria upon a case stated by the Collector of Imposts pursuant to sec. 33 of the *Stamps Act* 1928 of the State of Victoria.

Edward Campbell owned certain properties, shares and investments. About the year 1931, Campbell was minded to make provision for his family and also, I should think, to avoid the burden of death duties; both perfectly legitimate objects. The steps he took to achieve these objects were as follows:—

1. He agreed to sell to Cuming Campbell Investments Pty. Ltd. and the company agreed to buy the properties, shares and investments and to take over all rents and profits, interest and dividends accrued or to accrue thereon as from 1st July 1931 for the sum of

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£80,000. By an agreement dated 17th September 1931 the company acknowledged that the properties, shares and investments were purchased as from the 1st July 1931 and Campbell declared that he held the same and all rents &c. on behalf of the company and agreed to transfer the same as the company should direct. On the same day, 80,000 fully paid shares in the company were allotted to Campbell and one share to each of three sons. No money was paid to the company, but I take it that the shares were allotted in satisfaction of the sale price or sum of £80,000 mentioned in the agreement already set forth. Campbell died in December 1931. In July of 1937 his executors and trustees, in "consideration of the sum of £50,000 paid to Campbell deceased during his lifetime" transferred to the company certain real property mentioned in the agreement of September 1931 between Campbell and the company. The sum of £50,000 was the portion of the sale price attributed to the real properties set forth in the agreement, but those properties were in fact of a value between £89,000 and £101,000. The balance of the £80,000 was represented by other investments.

2. By three trust deeds of the same date, September 1931, it was recited that Campbell, referred to as the settlor, had placed three several sums of £10 to the credit of certain accounts to be held upon trusts expressed therein and might from time to time hand over to the trustees other property real or personal as and by way of addition to the trust fund. The several deeds provided that the trustees mentioned therein should be entitled to the several sums of £10 and the full benefit thereof and any additions made to the trust fund from time to time upon trust to accumulate the net income until Campbell ceased to be a trustee but with power to make payments for the benefit or maintenance of the beneficiaries under the deed and thereafter, after certain portions were set aside by his sons, then as to the residue of the trust fund and the income thereon for the benefit of his sons and their families. The trustees were authorized with the consent of the settlor to invest any moneys of the trust in the purchase of fully paid-up shares in any company incorporated in any State of the Commonwealth. A power was also reserved to the settlor, with the consent in writing of the trustees, to revoke,

alter or vary any of the trusts, powers or provisions contained in the trust deeds.

3. By three several agreements, also of September 1931, the trustees of each of the trust deeds agreed to purchase from Campbell 25,000 shares in the company at a price of five shillings per share or in all 75,000 fully paid shares of the 80,000 shares which had been allotted and issued to Campbell in satisfaction of the purchase money before mentioned. At the time of the execution of these agreements, the trustees had no funds in their hands with which to discharge the sum of five shillings per share and it appeared as a debt owing to Campbell deceased in the statement of his assets and liabilities lodged for probate purposes.

The collector on these facts stated for the opinion of the court the question whether the instrument of transfer of the properties from the executors and trustees of Campbell to the company " in consideration of the sum of £50,000 " was chargeable with any and what amount of duty under the *Stamps Act* 1928.

The contest between the parties to this appeal is whether the transfer should be charged with stamp duty under the Act as a conveyance or transfer on sale of any real property (Third Schedule, item VI.) or as a settlement or gift, deed of (Third Schedule, item IX.) under which heading is included " 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."

The substance of the various transactions which have been mentioned is that Campbell transformed or changed his properties and investments into shares of the company and then handed over shares to trustees for his family for a nominal sum which had no relation to the value of the shares and which was not paid by them but remained a debt at the time of his death. In short, he made provision for his family without receiving any adequate pecuniary consideration therefor. But he achieved his end by several steps. The first was by a sale to the company of his properties, shares and investments

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and the completion of that sale, so far as it included real properties, by means of an instrument of transfer. The transaction was not a sham; Campbell intended and made a sale. The instrument of transfer effectuated and completed that sale. According to its legal operation and effect the instrument was a transfer on sale and prima facie so dutiable.

But the collector contends that the instrument of transfer is nevertheless dutiable as a gift (which carries a higher duty) because of the explicit provision of the schedule already mentioned. According to this contention, any instrument (with certain exceptions which are inapplicable to the present case) upon good and valuable consideration other than a bona-fide adequate pecuniary consideration whereby property is given or agreed to be given in any manner whatsoever falls within the description "Gift, Deed of" in the Third Schedule, item IX. The case states that the true value of the properties transferred was on the date of the agreement of sale £89,515 and on the date of the instrument of transfer £101,718.

It is not easy to suggest any limitation upon the words of the schedule. But limitation it must have, otherwise the disposition of property in the ordinary course of business, other than for an adequate pecuniary consideration, would fall within the terms of the schedule. Parties who genuinely negotiated the sale of property would fall within the description if it appeared that the consideration was not a pecuniary one or was not in fact adequate. That view is opposed, I think, to the opinion given by this court in *Collector of Imposts (Vict.)* v. *Peers* (1), and clearly to the decision of *Hood* J. in *Atkinson* v. *Collector of Imposts* (2), which was approved in *Peers' Case* (1). It was decided in *Atkinson's Case* (2) that the transfer there in question was not an instrument of gift, though the consideration was not a pecuniary one. It bore no resemblance, said *Hood* J., to what is ordinarily known as a deed of gift.

However, the words of the Act are controlling and if explicit they must prevail. The schedule to the Act, though, is not very explicit. It uses the words "gift" and "given" or "agreed to be given," which point to a transference of property from one person to another voluntarily and without any valuable consideration. But the

(1) (1921) 29 C.L.R. 115. (2) (1919) V.L.R. 105.

words in the schedule widen the legal conception of a gift to the transference of property for a consideration that is not bona fide, adequate and pecuniary. Still, the dominant words of the schedule suggest an instrument whereby some benefaction is intended and conferred. " The real meaning of the schedule is," as *Hood* J. said in *Atkinson's Case* (1), " that a deed of gift shall not escape taxation merely because there is some good or valuable consideration therefor." " In some cases the absence of a good bona-fide adequate pecuniary consideration may be evidence that the transaction is in reality a gift." 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. Thus the third step taken by Campbell in the present case, the handing over of 75,000 shares to the trustees under the deeds already mentioned for a nominal sum of five shillings per share, may perhaps constitute a gift for the purposes of the schedule and be dutiable. But that is a matter for further consideration if it ever arises.

In my opinion, for reasons already appearing, no gift or benefaction was intended or conferred by the instrument of transfer from Campbell to the company : it completed a genuine sale of real property and was in fact and in law a transfer on sale and is so dutiable.

The decision of *Gavan Duffy* J. in the Supreme Court was right and should be affirmed.

DIXON J. The Victorian *Stamps Act* 1928, Third Schedule, par. IX., gives an artificial definition of the expression " Deed of Settlement or Gift " and imposes a high stamp duty upon instruments falling within it. The definition was adopted nearly fifty years ago and many attempts have been made to explain its meaning and effect. But to apply it remains often difficult. The reason for this is plain enough. The definition seeks to enlarge the denotation of the word " gift " by a partial denial of an attribute which to many seems indispensable to the conception. The definition includes gifts notwithstanding that they are not voluntary but are made upon a good or valuable consideration unless it be a bona-fide adequate pecuniary consideration. *Blackstone* distinguishes gifts from grants by the

(1) (1919) V.L.R., at p. 113.

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absence or presence of consideration. " Gifts are always gratuitous, grants are upon some consideration or equivalent " (*Blackstone's Commentaries*, vol. 2, p. 440). But the essential idea of gift is the transfer of property by way of benefaction, and benefaction may be the intended effect of an assurance of property, notwithstanding that the transferor receives some benefit or recompense. Revenue legislation, for that reason, sometimes requires " that property shall be treated as taken under a ' gift,' although such gift may have been made under a contract by which the donor takes the benefit " (*Attorney-General* v. *Johnson* (1)). No doubt to allow any transaction for value to be placed under the category of gift is to abandon a definite *discrimen* and to make the classification depend upon matters of degree and perhaps to compel an inquiry into purpose. But the difficulty is not a new one. Roman law faced it in distinguishing between the institution of *donatio* and those of *emptio venditio* and *locatio conductio*. In the latter it was necessary that the price should be real. " This rule was intended to prevent evasion of rules on *donatio* by making the transaction look like a sale. It was no sale if the price was named, but there was no intention to exact it; it was *donatio* governed by the rules of *donatio*. There was some difficulty where the price was absurdly low. Where the price was derisory, ' *nummo uno* ' or the like, there was, no doubt, no sale but a masked *donatio*, but this is not stated for sale, though it is for *locatio*. But where the price was merely low here, whatever the object, it was sale, if the price was to be exacted unless the parties were husband and wife, when it was more severely scrutinized. . . . There was no rule that the price must be adequate " (*Buckland, Text Book of Roman Law*, 1st ed. (1921), p. 483).

The present appeal seems to me to be based upon a contention on the part of the Collector of Imposts to the effect that the Victorian *Stamps Act* does lay down a rule that, for a transaction to be dutiable as a sale and not as a gift, the price must be adequate. In this he is, in my opinion, mistaken. The only rule it lays down as to the adequacy of consideration is the contrary. It says that if the consideration for the transaction is pecuniary, adequate and bona

(1) (1903) 1 K.B. 617, at p. 624.

fide, then the instrument which embodied it cannot be dutiable as a gift. I need not set out the statutory definition. It is the first clause of it that contains the material part and what it does may be stated thus. It puts on one side wills and codicils and instruments made before and in consideration of marriage. They are excluded. Then, as I understand the paragraph and the construction which has been placed upon it, a test or criterion of its application is expressed by the words "any instrument . . . whereby any property is settled or agreed to be settled . . . or is given or agreed to be given." That is to say, the transaction must come within the general conception of "settlement or gift," whether executed or executory; otherwise the instrument is not dutiable under that heading. But the conception of gift or settlement intended is a wide one. The words "in any manner whatsoever" are added to show that no unexpressed conditions are implied. A parenthesis is introduced in order to exclude mere absence of consideration as a criterion:—"any instrument whether voluntary or upon any good or valuable consideration other than a bona-fide adequate pecuniary consideration." I understand this parenthesis as meaning that the existence of consideration is consistent with the transaction being a gift; that it may be a gift notwithstanding that the instrument is made upon a good or valuable consideration, provided that it is not a bona-fide adequate pecuniary consideration. But I do not understand the parenthesis as meaning that the transaction must be a gift unless the instrument is made upon a bona-fide pecuniary consideration.

The provision was construed in the way I have stated in *Collector of Imposts (Vict.)* v. *Peers* (1). "In our opinion, the effect of clause IX. (1) is to enlarge the meaning of the phrase 'deed of gift' so as to make it cover transactions which it would not ordinarily include. In order to render an instrument taxable under it, it is necessary to establish that the instrument does not depart from the nature of a deed of settlement or a deed of gift further than is permitted by the words of the sub-clause" (per *Knox* C.J., *Gavan Duffy* and *Starke* JJ. (2)). Those learned judges quote from the judgment of *Hood* J. in *Atkinson* v. *Collector of Imposts* (3) a passage which includes the

(1) (1921) 29 C.L.R. 115. (2) (1921) 29 C.L.R., at p. 121.
(3) (1919) V.L.R., at p. 113.

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following :—" 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. But the instrument, to be taxable, must be one by which property is ' given,' though it is not easy to reconcile the idea of a ' gift ' with there being good or valuable consideration." Then their Honours say : " We agree to this statement, and we think that the only effect of sub-clause 1, so far as deeds of gift are concerned, is to include in that category instruments which might otherwise have been excluded from it because of the existence of some consideration " (1). The instrument in *Peers' Case* (2) was a transfer made by a husband to a wife after marriage, in pursuance of an oral agreement between them entered into on the treaty for the marriage that he would transfer the land to her on the solemnization of the marriage. Decisions of the Supreme Court had attached to the words " gift " or " given " a meaning by which they implied " benevolence or something akin to it." Acting upon these decisions the Supreme Court had held that the transfer was not dutiable as a deed of gift " since there was nothing in the nature of benevolence, either in the original oral agreement or in the transfer made in pursuance of it " (3). The High Court reversed this decision. *Knox* C.J., *Gavan Duffy* and *Starke* JJ. referred to the expression found in earlier decisions of the Supreme Court, " the gift must be an act of benevolence or something akin to it," and said : " The phrase . . . is not very precise, but if it means more than this—that the donor must not receive consideration from the donee—we cannot accept it. There may be a good gift although no feeling of benevolence exists between donor and donee, a gift is no less a gift because by its means the donor intends to compass the moral or physical destruction of the donee" (4).

This statement plainly excludes, as essential attributes of gift, kindness or goodwill towards the donee as the motive. But it goes no further. Indeed, the reference to the donor's not receiving consideration from the donee appears to concede that there can be no gift where recompense or consideration from the transferee forms

(1) (1921) 29 C.L.R., at p. 122.
(2) (1921) 29 C.L.R. 115.
(3) (1920) V.L.R., at p. 521.
(4) (1921) 29 C.L.R., at p. 121.

the basis or foundation of the transaction. The ground of their decision is expressed by their Honours in a sentence. They refer to the view of the Supreme Court as to the absence from the transaction of anything in the nature of benevolence and say: "This is a somewhat harsh criticism on the transaction, but it is enough to say that, had there been no consideration of marriage, the instrument would undoubtedly have been a deed of gift in the ordinary acceptance of that term, and as it is not executed before the marriage the effect of sub-clause 1 is to make it taxable as a deed of gift notwithstanding the presence of such consideration" (1). The actual decision thus expressed does not touch the present case, but the observations I have quoted appear to me to govern it. For the transfer now under consideration carries into effect a business transaction, one of a not unfamiliar kind, and it has nothing about it to suggest a gift or settlement.

An owner of land and investments decided to form a company, transfer to it the land and investments in exchange for the issued share capital of the company and to parcel out the shares among his sons. He registered a company with articles of association giving him control of its management. He entered into an agreement with the company for the sale to it of the land and investments for the sum of £80,000. The agreement apportioned the purchase money among the various items of property and fixed £50,000 as the consideration for the land.

In satisfaction of the total purchase money the company issued and allotted to him 80,000 shares of £1 each. At the same time he executed documents by which trusts were declared of nominal sums of money in favour of his sons and other members of his family, and the trustees of the respective trusts agreed to buy the £1 shares in the company from him at a price of five shillings each. All this was done on the same day as the registration of the company.

The object of the whole transaction is said to have been to confer a benefit on the sons. The documents constituting the trustees and parcelling out the shares to them as on a sale of five shillings only, may or may not have formed a cloak for a transaction by way of bounty. If it amounted to a settlement or gift perhaps

(1) (1921) 29 C.L.R., at p. 123.

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some of the instruments carrying it out may have been liable to stamp duty as a deed or deeds of settlement or gift. But this seems quite irrelevant to the question whether the transfer of the land to the company is a deed of settlement or gift. That document transfers the land to the company and expresses the consideration as £50,000, that is to say, it carries out the agreement. The documents constituting the trusts and purporting to sell the parcels of shares to the trustees are concerned with the shares. The question whether a settlement or gift of the shares was effected in favour of the sons does not seem to me to affect the question whether a gift of the land was made to the company within the meaning of the definition. One object of forming a company may possibly have been to obtain shares so that they could be distributed for the benefit of the family. But if so this makes it more likely, not less likely, that the company would be required to issue shares to the value of the assets it receives and that the assets would not be "given" to the company.

The real ground upon which the collector claims that the transfer is said to amount to a gift is that the consideration is stated at £50,000 whereas, according to the statement of the collector, the land transferred was worth £89,515 at the date of the agreement and £101,718 at the date of the transfer nearly six years later. The collector considers accordingly, that there is not an adequate pecuniary consideration for the transfer, and for that reason says that it falls within par. IX. (1) of the schedule defining deed of settlement or gift. For the reasons given in the beginning, I am of opinion that the ground is insufficient to support the conclusion. Neither the transfer nor the transaction to which it gives effect bears any resemblance to a gift or to a settlement.

The instrument is dutiable as a transfer on sale and not as a deed of settlement or gift.

A further question has arisen. Is the amount of stamp duty to be calculated on the money sum of £50,000 expressed as the consideration of the transfer or on some greater amount representing the value of the shares? As an alternative to his main contention the collector puts forward the view that the transfer should be regarded as made in consideration of the 50,000 shares and not of

the money sum expressed therein. The case stated does not appear to be pointed to this question and I do not think that it contains facts which really raise it. For it all depends upon the suggestion that the true value of the shares as marketable securities substantially exceeded their face value. There is nothing to support this suggestion except the collector's statement as to the value of the land. The date at which it would be necessary to inquire into the value of the shares is September 1931. Even assuming that we can make inferences, it would indeed be a rash conclusion that because the land was, according to the opinion of the collector, of greater value than stated, therefore at that date the value of the shares of the company as marketable securities were substantially above par.

In my opinion the decision of *Gavan Duffy* J. is right and the appeal should be dismissed.

EVATT J. I have read the judgment of my brother *Dixon* and agree with it.

MCTIERNAN J. In my opinion the instrument of transfer is not dutiable as a deed of settlement or gift within the meaning of part IX. of the Third Schedule of the *Stamps Act* 1928 of Victoria.

The schedule applies to any voluntary instrument (not made before or in consideration of marriage) whereby property is settled or agreed to be settled or is given or agreed to be given and to any such instrument not voluntary but made upon any good or valuable consideration other than a bona-fide adequate pecuniary consideration. Two classes of instruments are embraced by these provisions : first, instruments of settlement or gift properly so called and instruments which though made for consideration yet are not made for a bona-fide adequate consideration. But to attract the schedule it is not enough that an instrument should be made upon a consideration other than a bona-fide adequate pecuniary consideration. The instrument must still be one whereby property is settled or agreed to be settled or is given or agreed to be given. In the case of *Collector of Imposts (Vict.)* v. *Peers* (1) their Honours quoted with approval the following explanation of the schedule which *Hood* J. gave in *Atkinson* v. *Collector of Imposts* (2) : " The real meaning of

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

(2) (1919) V.L.R., at p. 113.

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the schedule is that a deed of gift shall not escape taxation merely because there is some good or valuable consideration therefor. But the instrument, to be taxable, must be one by which property is 'given,' though it is not easy to reconcile the idea of a 'gift' with there being good or valuable consideration." Whatever may be said of the result of the whole arrangement in the present case, it cannot be truly said, in my opinion, that the instrument of transfer, made as it was in pursuance of the contract of sale of 17th September 1931, is one whereby the transferor settled or agreed to settle property on the transferee or gave or agreed to give property to the transferee.

The case stated does not contain any material which would, in my opinion, enable the court to say that the value of the shares—if that was the true consideration for the transfer of the land—exceeded the sum of £50,000, which is the amount therein expressed.

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Frank G. Menzies*, Crown Solicitor for Victoria.

Solicitors for the respondent, *Cook & McCallum.*

O. J. G.