

[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF STAMPS (WESTERN AUSTRALIA) } APPELLANT ;

AND

L. WHITEMAN LIMITED RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF
WESTERN AUSTRALIA.

Stamp Duty—Transfer of land—Fixtures on land—Intended by parties to pass as chattels—Consideration in transfer excluding value of fixtures—Whether value of fixtures chargeable with duty on transfer of land—Stamp Act 1921-1931 (W.A.) (No. 10 of 1922—No. 39 of 1931), secs. 16, 31, 62. H. C. OF A. 1940. MELBOURNE, Oct. 28.

A person transferred to a company his brickmaking business, which was carried on upon land in Western Australia and the assets of which consisted of goodwill, the land, machinery and plant thereon. The machinery was bolted to cement pillars on the land and roofed over, but it was intended at some future time when the clay was exhausted on the land to shift it to another site. The total consideration for the transaction was analysed by the assignment of portions thereof for the goodwill, land, and machinery and plant, and in the instrument of transfer of the land the unimproved value thereof was inserted as the consideration for the transfer of the land. The Commissioner of Stamps of Western Australia, however, charged *ad-valorem* duty on the value of the machinery as well as the unimproved value of the land.

Held that, in view of the degree and object of the annexation, the machinery was affixed to and became part of the land, and, consequently, was rightly assessed by the commissioner in respect of stamp duty as part of the land.

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

Decision of the Supreme Court of Western Australia (*Dwyer J.*) varied.

APPEAL from the Supreme Court of Western Australia.
Lewis Whiteman prior to 15th April 1937 carried on business as a brickmaker under the firm name of The Middle Swan Brickworks. On 15th April 1937 L. Whiteman Ltd. was incorporated under the

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1940.	was expressed to be to acquire the business of Lewis Whiteman.
COMMISSIONER OF STAMPS (W.A.)	On 15th April 1937 Lewis Whiteman made an arrangement with the company to sell the assets of his business to it for the sum of £24,000. The assets were as follows :—
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	(a) Stock on hand—bricks £1,900
	firewood 250
	(b) Sundry debtors 4,250
	(c) Plant, including drying sheds 6,400
	Plant, special 3,400
	(d) Kilns, new yard 700
	(e) Goodwill 5,000
	(f) All that piece of land comprised in certificate of title vol. 1040, fol. 898 2,100
	£24,000

On 31st March 1939 an instrument of transfer bearing date 14th March 1939 was lodged at the Office of Titles for registration. The consideration expressed in the transfer was £2,100, the unimproved value of the land. Stamp duty amounting to £21 was paid thereon, but subsequently the Commissioner of Titles referred the instrument to the Commissioner of Stamps to assess stamp duty under sec. 31 of the *Stamp Act* 1921-1931 (W.A.). He then assessed duty at £126 on the following consideration :—

Land	£2,100
Plant, including drying sheds	6,400
Plant, special	3,400
Kilns, new yard	700
	£12,600

At the request of the company the commissioner stated a case for the opinion of the Supreme Court of Western Australia as to whether the instrument was properly assessed. It came on for hearing before *Dwyer J.*, who varied the assessment of the commissioner by disallowing, by consent, the assessment on the item "plant, special, £3,400," and disallowing the assessment in respect of brickmaking machinery, £4,040, which formed part of the item "plant, including drying sheds, £6,400." *Dwyer J.* fixed the duty at £51 15s. It appeared from the special case and affidavits filed on behalf of the parties that portion of the above-mentioned machinery had been used in brickmaking by Whiteman on another

site before being brought to the land upon which it was when sold to the company. At the date of the transfer of the business the machinery was bolted to concrete beds in the soil and was easily removable. It was solely used for making bricks, and it was intended when the clay on the site had been exhausted to remove it elsewhere. It was housed in by a wooden and iron erection which, if the machinery were removed, would have to be pulled down. It was contended by the company that, as the parties had intended to remove this machinery, it was not affixed to the soil and was in law a chattel. *Dwyer J.* upheld this contention.

By special leave, the Commissioner of Stamps appealed to the High Court.

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Dunphy, for the appellant. By sec. 62 of the *Stamp Act* 1921-1931 (W.A.) "Conveyance on sale" is defined to include an instrument of transfer. Sec. 16 of the Act provides for the payment of *ad-valorem* duty as set out in the Second Schedule. Duty on a transfer of land under the *Transfer of Land Act* 1893 (W.A.) is prescribed at £1 per £100. The consideration for a transfer of land would include the value of fixtures unless actually severed. Fixtures pass on conveyance without mention therein, and the amount paid for them must be included in the statement of the consideration. [He referred to *Halsbury's Laws of England*, 2nd ed., vol. 20, p. 100.] The point under discussion here was decided by the Full Court of Queensland in *Great Fitzroy Mines Ltd. v. Commissioners of Stamps* (1). The commissioner is not bound by the way in which the parties regard the machinery. They may regard it as chattels, but for stamp-duty purposes it is part of the land (*Craven v. Geal* (2)). The purpose of the fixing was to complete the use of the building, and it was not put there for any enjoyment of the freehold (*Reynolds v. Ashby & Son* (3); *Hobson v. Gorringer* (4); *Crossley Brothers Ltd. v. Lee* (5)). The fixtures formed part of the land and should be charged with stamp duty.

Unmack, for the respondent. The parties to the transaction intended that the machinery was to pass as a chattel. It was easily removable, and, in fact, will be moved when the clay is exhausted. It was never intended that it should form part of the land. The parties are entitled to apportion their consideration. [He referred to *Stamps Commissioners v. Queensland Meat Export Co. Ltd.* (6);

(1) (1913) Q.S.R. 161. (4) (1897) 1 Ch. 182.
(2) (1932) V.L.R. 172. (5) (1908) 1 K.B. 86.
(3) (1904) A.C. 466, at p. 472. (6) (1917) A.C. 624.

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Holland v. Hodgson (1).] The test of whether a chattel becomes a part of the soil is: What did the parties intend?
 [RICH J. referred to *Australian Provincial Assurance Co. Ltd. v. Coroneo* (2).]
 [Counsel referred to secs. 16 and 31 of the *Stamp Act* 1921-1931.]

Dunphy, in reply. Under sec. 31 (6) of the *Stamp Act* 1921-1931 the commissioner can find out what was the true consideration. [He referred to *Halsbury's Laws of England*, 2nd ed., vol. 28, p. 461.] The argument of the respondent was put in the *Great Fitzroy Case* (3) and was there rejected. If the appeal succeeds, the duty should be £92.

The following judgments were delivered:—

RICH A.C.J. This is an appeal by special leave from an order of *Dwyer J.*, made on originating summons, by which the assessment made by the appellant on a transfer of land from Lewis Whiteman to the respondent was varied by disallowing the assessment of duty on the item “brickmaking machinery, £4,040.” The reasons of the learned judge are not incorporated in the transcript; whenever reasons are given, they should be put in the transcript for the benefit of the appeal court. I understand, however, that in this case the learned judge decided the matter in chambers and that in Western Australia it is not the practice to give reasons in chamber matters.

The material upon which the order was made consisted of a case stated by the appellant for the opinion of the Supreme Court of Western Australia, and the affidavits of Messieurs *Dunphy*, *Unmack* and *Whiteman*. It appears from this material that the facts were that a transfer of certain land and other assets was made to the respondent, and amongst such assets was machinery, portion of which was suitable to brickmaking and valued by *Whiteman* at £4,040. In making his assessment the commissioner considered that this item passed to the respondent as part of the land. The respondent, however, contends that the machinery was all of a chattel nature and the only consideration upon which duty is chargeable is that set out in the instrument, namely, the sale value of the land.

The question in the case stated was whether the commissioner's assessment was correct.

The facts on which the appellant relies are that the machinery was bolted to concrete bases and was used for making bricks from

(1) (1872) L.R. 7 C.P. 328.

(2) (1938) 38 S.R. (N.S.W.) 700; 55 W.N. (N.S.W.) 246.

(3) (1913) Q.S.R. 161.

clay. No doubt, when the clay is exhausted the machinery will be moved from its present position, but in the meantime it is affixed to the land and is essentially being used for the better enjoyment of the land. Even if the machinery is affixed, the respondent contends that the intention of the parties is required to pass it as land and that the facts show that it was not the intention of the vendor and purchaser that the machinery should be sold as fixtures or as part of the soil, but it was intended that it should be sold as chattels. But "the circumstance to show intention is the degree and object of the annexation which is in itself apparent and thus manifested the intention" (*Hobson v. Gorringe* (1)).

In this case the parties have manifested their intention as to the degree and object of the annexation by bolting the machinery to the concrete bases and enclosing the machinery in sheds which must be ruined if the machinery is removed, the object being to use the machinery for transforming clay found on the land into bricks. As Lord *Lindley* said, "the purpose for which the machines were obtained and fixed seems to me unmistakable; it was to complete and use the buildings as a factory. It is true that the machines could be removed if necessary, but the concrete beds and bolts prepared for them negative any idea of treating the machines when fixed as movable chattels" (*Reynolds v. Ashley & Son* (2)). The authorities are collected in a convenient form in *Australian Provincial Assurance Co. Ltd. v. Coroneo* (3); *North Shore Gas Co. Ltd. v. Commissioner of Stamp Duties (N.S.W.)* (4); *Great Fitzroy Mines Ltd. v. Commissioners of Stamps* (5).

In my opinion the machinery was affixed to and became part of the land. That required the commissioner to assess it as land. It is clear that he was entitled to examine the instrument to ascertain whether the consideration set out in the instrument was the real consideration for the sale.

The order that I suggest is that so much of the order of *Dwyer J.* disallowing the commissioner's assessment on the item "brick-making machinery £4,040" be set aside and the assessment of the commissioner be restored. That would increase the duty from £51 15s. to £92. Pursuant to the undertaking given on the application granting special leave, the commissioner will pay the costs of the appeal.

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(1) (1897) 1 Ch., at p. 193.
(2) (1904) A.C. 466, at p. 472.
(3) (1938) 38 S.R. (N.S.W.), at p. 712.
(4) (1940) 63 C.L.R. 52.
(5) (1913) Q.S.R. 161.

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STARKE J. I agree and have nothing to add except this. Where parties ask the commissioner to state a case, he should state all the facts clearly and explicitly for the opinion of the court. He has not done so in this case, and all parties have submitted affidavits which they agreed should be looked at. If they had not done so, we might not have looked at them.

WILLIAMS J. I agree and have nothing to add.

Appeal allowed by setting aside so much of the order of Dwyer J. as disallowed the assessment of the item "brickmaking machinery, £4,040" and in lieu thereof restoring the commissioner's assessment of such item. Matter remitted to the commissioner to be dealt with in accordance with this order. Pursuant to order on the grant of special leave commissioner to pay the costs of the appeal.

Solicitor for the appellant, *E. A. Dunphy*, Crown Solicitor for Western Australia.

Solicitors for the respondent, *Unmack & Unmack*.

O. J. G.