

H. C. OF A. of personality. That being so, the word “also” seems to have  
1920. another purpose, and that other purpose appears to us on the  
McROBERT whole to be of necessity a break of thought, making the final gift  
v. in the clause a gift to Peter alone “if so needed” in addition to  
McROBERT. the preceding unqualified gift to the sisters.

On these grounds we agree that the order appealed from was right.

*Appeal dismissed. Costs of respondent to be paid out of the estate of the testator.*

Solicitor for the appellants, *Charles E. Coy.*  
Solicitors for the respondent, *Connelly & Crocker, for Tatchell, Dunlop, Smalley & Balmer, Bendigo.*

B. L.

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| Dist<br>Lion Nathan<br>Brewing<br>Investments<br>Pty Ltd, Re<br>(1995) 31<br>ATR 1215 | Dist Lion<br>Nathan<br>Brewing<br>Investments &<br>Conr for ACT<br>Revenue, Re<br>39 ALD 759 | Foll Lion<br>Nathan Brew-<br>ing Invest-<br>ments v C'ner<br>for ACT Rev-<br>enue (1996)<br>133 FLR 4 | Dist Lion<br>Nathan<br>Brewing Inv<br>Pty Ltd v<br>C'ner for ACT<br>Rev (1997) 79<br>FCR 177 |
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[HIGH COURT OF AUSTRALIA.]

THE WAR SERVICE HOMES COMMISSIONER

AGAINST

THE COLLECTOR OF IMPOSTS FOR VICTORIA.

ON REMOVAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. *Stamp Duty—Conveyance or transfer on sale of land—Transfer by direction—Inter-*  
1920. *mediate sale—Conveyance giving effect to sale—Transfer to War Service Homes*  
Melbourne, *Commissioner—Commonwealth instrumentality—Stamps Act 1915 (Vict.) (No.*  
March 4, 5. *2728), secs. 17, 68—Stamps Act 1918 (Vict.) (No. 2982), sec. 3—War Service*  
*Homes Act 1918 (No. 43 of 1918).*

Knox C.J.,  
Isaacs, Higgins,  
Gavan Duffy,  
Powers, Rich  
and Starke JJ.

Sub-secs. 3, 5, 6 and 7 of sec. 68 of the *Stamps Act 1915 (Vict.)* (replaced by sec. 3 of the *Stamps Act 1918 (Vict.)*) provide as follows:—“(3) Every sale of real property shall be chargeable with ad valorem duty upon the consideration therefor, and such duty shall be paid on the conveyance” (which term by sec. 62 includes “transfer”) “which seeks to give effect whether



directly or indirectly to every such sale. (5) Notwithstanding anything contained in sub-secs. 3 and 4 of this section the Collector of Imposts shall exempt any conveyance from duty in respect of the consideration for any sale or sales sought to be given effect to by such conveyance made prior to the first day of January one thousand nine hundred and nineteen. (6) Every party to a conveyance . . . shall fully and truly set forth in precise terms in such conveyance the consideration moving from the original purchaser and also the consideration moving from any sub-purchaser or sub-purchasers who are or who at any time have been interested in the real property the subject matter of the said conveyance or any part or parts thereof. (7) The duty payable on a sale of real property shall be borne by the purchaser at such sale and any contract or agreement whereby he seeks to relieve himself from liability therefor shall be ineffective to relieve him from such liability or to impose upon any other person any liability therefor or any obligation to recoup such purchaser or to indemnify or keep him indemnified against the payment thereof or any part thereof."

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By an instrument of transfer it was stated that A, the registered proprietor of certain land, in consideration of a certain sum paid by B to A and of a certain other sum paid by the War Service Homes Commissioner to B, did thereby by direction of B transfer the land to the War Service Homes Commissioner. The land had been sold by A to B for the sum mentioned in the transfer as having been paid by B to A. The transfer was produced by the War Service Homes Commissioner to the Collector of Imposts, who, being of opinion that it was chargeable with duty as on a transfer on sale at least on the consideration paid by B to A, assessed the duty accordingly. On a case stated by the Collector of Imposts asking the question whether the transfer was chargeable with any duty,

*Held*, that the transfer was chargeable under sec. 68 (3) with duty on the sale from A to B.

CASE removed from the Supreme Court of Victoria.

A case, which was substantially as follows, was stated by the Collector of Imposts of Victoria under sec. 33 of the *Stamps Act* 1915 (Vict.) for the opinion of the Supreme Court:—

1. On 15th December 1919 Mr. Gordon H. Castle, Crown Solicitor for the Commonwealth of Australia, the duly appointed solicitor for the War Service Homes Commissioner, a person incorporated under the provisions of an Act of the Federal Parliament called the *War Service Homes Act* 1918, for the purposes of the said Act produced a transfer (a copy of which formed part of the case) to the Collector of Imposts, and required his opinion with respect to such transfer—(a) whether it is chargeable with any duty; (b) with what amount of duty it is chargeable.



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2. On the said 15th December 1919 the said Crown Solicitor produced to the Collector of Imposts an agreement for sale and purchase of the land described in the said transfer, dated 15th August 1919, entered into by Alice Edith Philpott and Gilbert James Williams, in which it was agreed (*inter alia*) that the purchase money for the said land should be £720, and that the purchaser should pay £72 on the signing of such agreement and the balance of the purchase money £648 on or before 9th October 1919.

3. On the said 15th December 1919 the Collector of Imposts, being of opinion that the transfer was chargeable with duty as on a transfer on sale at least on the consideration moving to the said Alice Edith Philpott from the said Gilbert James Williams, assessed the duty on such consideration at £7.

4. On 23rd December 1919 the Crown Solicitor of the Commonwealth paid the amount of duty assessed by the Collector of Imposts; and on the same day by letter informed the Collector of Imposts that he was dissatisfied with the assessment made in respect of the ad valorem duty charged upon the consideration for the sale to the said Gilbert James Williams, and required him to state and sign a case setting forth the question upon which his opinion was required and the assessment made by him.

5. In compliance with the requisition in this behalf and pursuant to sec. 33 of the *Stamps Act* 1915 the Collector of Imposts under the Stamps Acts states and signs this case, setting forth the question upon which his opinion was required and the assessment made by him.

The questions for the opinion of the Court were: (1) Is the said transfer chargeable with any duty? and, if so, (2) with what amount of duty is the said transfer chargeable?

The transfer referred to above was, so far as material, as follows:—  
“I, Alice Edith Philpott, being registered as the proprietor of an estate in fee simple in the land hereinafter described subject to the encumbrances notified hereunder, in consideration of the sum of £720 paid to me by Gilbert James Williams and in further consideration of the sum of £648 paid to the said Gilbert James Williams by War Service Homes Commissioner, a body corporate by the *War Service Homes Act* 1918-1919 of the Commonwealth



of Australia, do hereby at the request and by the direction of the said Gilbert James Williams transfer to the said War Service Homes Commissioner all my estate and interest in all that piece of land " &c.

The matter was removed from the Supreme Court to the High Court pursuant to sec. 40A of the *Judiciary Act* 1903-1915.

*Latham*, for the War Service Homes Commissioner. Sec. 17 of the *Stamps Act* 1915 imposes stamp duty on instruments and not upon transactions (*Commissioner of Stamps (Qd.) v. Wienholt* (1) ), and no alteration is made in that respect by the amendments of sec. 68 made by sec. 3 of the *Stamps Act* 1918. The duty imposed by the Act as unamended is one duty, and no other duty is imposed by the amendments. Sec. 68 (3) imposes duty upon a conveyance which gives effect to a sale, and by sec. 62 a conveyance is an instrument whereby any property upon the sale thereof is legally or equitably vested in the purchaser. In the case of the present transfer by direction, the transfer does not vest any interest, legal or equitable, in any person upon the sale of the land; and so it is not a conveyance which seeks to give effect to a sale within the meaning of sec. 68 (3), and no duty is imposed upon it. The Legislature may have intended by sec. 68 (3) to impose duty upon every sale of land and by sec. 68 (7) to make it payable by the purchaser, but it has failed to do so. If sub-sec. 3 should be interpreted as imposing the duty upon each purchaser, the liability is a personal one, and there are no means of making Williams pay the duty on the sale to him. An attempt to compel the War Service Homes Commissioner to pay duty upon the transfer is invalid, as being an attempt to tax a Commonwealth instrumentality (*The Commonwealth v. New South Wales* (2) ).

*A. H. Davis*, for the Collector of Imposts, was not called on.

KNOX C.J. The only question for decision in this case is whether the transfer by Philpott by direction of Williams to the Commissioner is chargeable with any duty, and that has been narrowed

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(1) 20 C.L.R., 531.  
(2) 25 C.L.R., 325, at p. 352; 3 C.L.R., 807, at pp. 814-815.



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down by the statement of Mr. *Davis* to the question whether the transfer is chargeable with duty in respect of the sale from Philpott to Williams. Mr. *Davis* does not claim that it is chargeable with any further duty. In my opinion the words of sub-sec. 3 of sec. 3 of the *Stamps Act* 1918 are clearly applicable and provide for duty to be charged on this transfer in respect of that sale. The matter comes before this Court as one involving a question of constitutional powers, the allegation being that the effect of the *Stamps Act*, if valid, is to impose a charge upon the Commonwealth or upon an instrumentality of the Commonwealth. I do not think that that question really arises. The plain fact of the matter is that the Commissioner has omitted to get from Williams the amount of duty chargeable in respect of this sale, which he might have insisted on getting from him as a condition of the transaction with him. The liability to pay the amount of duty payable on the sale by Philpott to Williams is by the terms of the Act imposed on Williams, and, if the duty has been paid out of the public funds, that payment was occasioned by the omission of the Commissioner to see that Williams paid the amount according to the ordinary course of conveyancing practice, and is not referable to the provisions of the Act of Parliament. I am, therefore, of opinion that the first question submitted by the special case should be answered: Yes, on the sale from Philpott to Williams.

ISAACS J. As I understand, the matter is presented by Mr. *Latham* on behalf of the Commonwealth in two ways. First, he says that if this were a transfer to any ordinary individual the document would not be taxable. I do not think I need to say more than that. I agree with what has fallen from the Chief Justice on that point. Sub-sec. 3, introduced by the amending Act of 1918, is an answer to it. That is not only made abundantly clear, I think, by the terms of that sub-section itself, but any possible argument throwing doubt upon its meaning is met by the unmistakable terms of sub-sec. 5. Then Mr. *Latham*, as I understand, took a second point: that this is not a transfer to an ordinary individual but to a Commonwealth official, and that, in effect, this transfer ought not to be regarded as taxable in the hands of the Commonwealth official,



whatever it might be in the case of an ordinary individual. As to that I can only say that the case of *The Commonwealth v. New South Wales* (1) more than covers that point. Therefore I agree that the question should be answered as stated by the Chief Justice.

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HIGGINS J. I concur.

GAVAN DUFFY J. I agree with what has been said by my brother Isaacs.

POWERS J. I agree.

RICH J. The Commonwealth had it in its power to recover the amount of the duty from Williams, but omitted to do so. Having failed to take this ordinary conveyancing precaution, and having taken a transfer by direction of Williams, the case falls, as the Chief Justice has pointed out, under sec. 3 (3) of the *Stamps Act* 1918. With regard to the second argument submitted by Mr. Latham, I agree with what has been said by my brother Isaacs.

STARKE J. I agree.

*Question 1 answered: Yes, on the sale from Philpott to Williams. Costs to be paid by Collector of Imposts.*

Solicitor for the War Service Homes Commissioner, Gordon H. Castle, Crown Solicitor for the Commonwealth.

Solicitor for the Collector of Imposts, E. J. D. Guinness, Crown Solicitor for the State of Victoria.

B. L.