its execution at the time the defendant refused to accept delivery of the vessel itself.

[Counsel referred to *Merchant Shipping Act* 1894 (57 & 58 Vict. c. 60), secs. 56, 57; *Fry on Specific Performance*, 6th ed., sec. 1075.]

Pilkington K.C. and *Stawell*, for the respondent, were not called upon.

PER CURIAM. In our opinion the judgment appealed against is correct, and the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Unmack & Unmack*.

Solicitors for the respondent, *Stone, James & Pilkington*.

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JAMES CLARK & CO. v. STANG.

Distd Imposts, Collector of (Vic.) v. Cumming Campbell Investments Pty. Ltd. (1940) 63 C.L.R. 619

[HIGH COURT OF AUSTRALIA.]

THE COLLECTOR OF IMPOSTS FOR VICTORIA . . . . . APPELLANT;

AND

PEERS AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 24; *Mar.* 16.

KNOX C.J., GAVAN DUFFY, RICH and STARKE JJ.

Stamp Duties—Deed of gift—Transfer of land from husband to wife—Consideration—Antenuptial agreement—Benevolence—Amount of duty—Transfer subject to mortgage—Covenant by husband to pay mortgage debt—Deduction of mortgage debt—Stamps Act 1915 (*Vict.*) (*No.* 2728), *sec.* 82, *Third Schedule, cl.* IX.

The Third Schedule to the *Stamps Act* 1915 (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 in separate clauses, of which clause IX. is as follows:—

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"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 *bonâ 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."

Held, that a transfer under seal of land made by a husband to his wife after the marriage in pursuance of an agreement entered into on the treaty for the marriage was a deed of gift within the meaning of clause IX., and was liable to stamp duty accordingly.

The word "gift" in clause IX. does not in sub-clause 1 involve the idea of benevolence.

Castlemaine Brewery Co. v. *Collector of Imposts*, 22 V.L.R., 4; 17 A.L.T., 282; *Brett* v. *Collector of Imposts*, 22 V.L.R., 29; 18 A.L.T., 8; *Thompson* v. *Collector of Imposts*, 25 V.L.R., 529; 21 A.L.T., 158; *Atkinson* v. *Collector of Imposts*, (1919) V.L.R., 105; 40 A.L.T., 131, were rightly decided in point of fact.

Sec. 82 of the Act provides that "(1) When the property comprised in any deed of settlement or gift is subject to any mortgage debt" &c. "such deed shall be liable to the duty payable on the amount or value of such property after a deduction has been made of the amount of such mortgage debt" &c. "(2) No such deduction shall be made unless the deed of settlement or gift is expressly made subject to such mortgage debt" &c. "and the amount . . . thereof is stated in such deed of settlement or gift or in a schedule thereto."

In the transfer the transferor stated that he was the registered proprietor of an estate in fee simple of certain land subject to the encumbrances notified thereunder, and that he transferred to his wife all his estate and interest in the land. The transfer also contained a covenant by the transferor to pay the principal and interest due and to become due under a mortgage which was described and the amount of which was stated at the foot of the transfer as an encumbrance.

Held, by *Knox* C.J., *Gavan Duffy* and *Starke* JJ., that in assessing the value of the property for the purposes of assessment for stamp duty the amount of the mortgage debt should be deducted from the value of the fee simple of the land notwithstanding the covenant by the transferor to pay the mortgage debt.

Decision of the Supreme Court of Victoria: *Peers* v. *Collector of Imposts*, (1920) V.L.R., 516; 42 A.L.T., 87, reversed.

APPEAL from the Supreme Court of Victoria.

A case, which was substantially as follows, was stated by the Collector of Imposts for the State of Victoria for the opinion of the Supreme Court:—

1. On 22nd June 1920 Mr. William H. Peers, the duly appointed solicitor for both parties to a transfer dated 15th June 1920 from John Livingstone Peers to Lilian Kate Peers, produced such transfer to the Collector of Imposts and required his opinion with respect to such transfer: (*a*) whether it is chargeable with any duty, and (*b*) with what amount of duty it is chargeable.

2. On 6th July 1920 the Collector of Imposts—being of opinion that the said transfer was not exempt from payment of stamp duty as the said Mr. William H. Peers had verbally informed the Collector that the said transfer was not made before the marriage of the parties to such transfer nor in pursuance of any agreement in writing or articles in writing executed before the celebration of such marriage, but was made in pursuance of a verbal agreement before and in consideration of marriage—assessed the duty at £27 15s. as on a deed of gift on £1,850, the value of the land transferred by such transfer.

3. On 19th July 1920 Mr. William H. Peers 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, 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.

4. In compliance with the requisition in this behalf and pursuant to sec. 33 of the *Stamps Act* 1915, I, Henry Frederick Metzner, Collector of Imposts under the Stamps Acts, do hereby state and sign this case setting forth the questions upon which the opinion of the Collector of Imposts was required and the assessment made by him.

The questions for the opinion of the Court are:—

(1) Is the said transfer chargeable with any duty?

(2) With what amount of duty is it chargeable?

The transfer referred to in the case was, so far as is material, as follows:—"I John Livingstone Peers . . . being registered as proprietor of an estate in fee simple in the land hereinafter described subject to the encumbrances notified hereunder in consideration and in pursuance of the agreement entered into on the treaty for the

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marriage between me and my present wife Lilian Kate Peers . . . (then Lilian Kate Furneaux . . . spinster) that I should upon the solemnization of the said marriage (which was actually solemnized on the twelfth day of November one thousand nine hundred and nineteen) transfer the equity of redemption of the said land to her the said Lilian Kate Peers and that I should thereupon and henceforth until fully paid pay all instalments of principal and all interest thenceforward accruing due in respect of and upon the Credit Foncier mortgage by me to the State Savings Bank Commissioners set out at the foot hereof as an encumbrance and in further consideration of the said marriage being so solemnized on the said twelfth day of November I do hereby transfer to the said Lilian Kate Peers all my estate and interest in all that piece of land" (the land was then described) "and in consideration and in pursuance of the said agreement and of the said marriage so solemnized as aforesaid I the said John Livingstone Peers for myself my heirs executors and administrators do hereby covenant with the said Lilian Kate Peers her heirs executors administrators and transferees to pay all instalments of principal and all interest as from the twelfth day of November one thousand nine hundred and nineteen accruing due thereunder in respect of the said mortgage."

The mortgage was set out at the foot of the transfer as an encumbrance, and was described as a mortgage to secure the repayment of £900 and interest upon which there was on 12th November 1919 £865 4s. for principal and £6 2s. 3d. for interest owing and still to be paid.

The Full Court answered the questions by declaring that the transfer was not chargeable with any duty, and ordered the repayment of the sum of £27 15s. paid as and for duty on the transfer: *Peers* v. *Collector of Imposts* (1).

From that decision the Collector of Imposts now, by special leave, appealed to the High Court.

Ham, for the appellant. This instrument is a "deed of settlement or gift" within the meaning of clause IX. of the Third Schedule to the *Stamps Act* 1915. The language of the section is inconsistent

(1) (1920) V.L.R., 516; 42 A.L.T., 87.

with attaching the idea of benevolence to the word gift. The instrument is a settlement both in law and in the popular sense of that word. [Counsel was stopped.]

R. E. Hayes (with him *Reginald Hayes*), for the respondents. The word "settlement" involves some limitation upon the interest of the settlee. This was an ordinary business transaction, and therefore does not come within the meaning of either "settlement" or "gift." The word "settlement" is used in its legal sense. It means an instrument "which on its face purports to be the charter of future rights and obligations with respect to the property comprised in it, and which contains such limitations as are ordinarily contained in settlements" (*Davidson* v. *Chirnside* (1)). This transfer is not such an instrument. The transfer was the completion of a contract. There was an agreement, the consideration had been given, and, when the transfer was executed, there was a complete contract (*In re Holland*; *Gregg* v. *Holland* (2)). This transfer is not a "gift" within the meaning of the Schedule, for the idea of benevolence is absent (*Castlemaine Brewery Co.* v. *Collector of Imposts* (3)); *Brett* v. *Collector of Imposts* (4); *In re Meares* (5); *Atkinson* v. *Collector of Imposts* (6)).

[KNOX C.J. referred to *In re Irving* (7).]

The amount of duty charged is too large. The amount due on the mortgage should be deducted under sec. 82 of the Act, for the transfer is of the land subject to the mortgage.

Ham, in reply. The amount of the mortgage debt should not be deducted, for the husband has covenanted to pay it. [Counsel referred to *In re Officer* (8); *Macrow* v. *Collector of Imposts* (9); *Attorney-General* v. *Johnson* (10).]

[RICH J. referred to *Lord Advocate* v. *Wilson* (11).]

Cur. adv. vult.

(1) 7 C.L.R., 324, at p. 340.
(2) (1902) 2 Ch., 360.
(3) 22 V.L.R., 4; 17 A.L.T., 267, 282.
(4) 22 V.L.R., 29; 18 A.L.T., 8.
(5) (1905) V.L.R., 4; 26 A.L.T., 82.
(6) (1919) V.L.R., 105; 40 A.L.T., 131.
(7) 19 N.S.W.L.R., 269.
(8) (1918) V.L.R., 607; 40 A.L.T., 77.
(9) (1921) V.L.R., 23; 42 A.L.T., 155.
(10) (1903) 1 K.B., 617, at p. 624.
(11) (1896) W.N., 118, at p. 120.

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March 16.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. On 15th June 1920 the respondent John Livingstone Peers executed in favour of the respondent Lilian Kate Peers, a transfer under seal of certain land of which he was the registered proprietor. The transfer contained a recital that it was made in pursuance of the agreement entered into on the treaty for the marriage between the transferor and his wife, the said Lilian Kate Peers, that he should on the solemnization of the said marriage (which was solemnized on 12th November 1919) transfer the equity of redemption of the said land to the said Lilian Kate Peers. The land was subject to a mortgage by the said John Livingstone Peers to the Savings Bank Commissioners to secure the repayment of the sum of £900. The Collector of Imposts having assessed the stamp duty on the said transfer at £27 15s. as on a deed of gift of land of the value of £1,850, and duty having been paid accordingly, a case was stated for the opinion of the Supreme Court on the following questions, viz. :—(1) Is the said transfer chargeable with duty ? (2) With what amount of duty is it chargeable ? The Supreme Court, following certain earlier decisions, held that no duty was chargeable ; and against that decision the appellant obtained special leave to appeal on giving an undertaking to pay the costs of the respondents.

The relevant provisions of the *Stamps Act* 1915 are as follows :— Sec. 77.—" The stamp duties on deeds of settlement and deeds of gift respectively shall be paid within one month after the execution of the deed by the settlor or donor, and shall be in addition to the duties (if any) that may be payable under any Act imposing duties upon the estates of deceased persons." Third Schedule.—" There shall be charged and paid for the use of His Majesty his heirs and successors upon and for the several instruments hereinafter specified the several stamp duties hereinafter specified :—. . . (IX.) 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 *bonâ fide* adequate pecuniary consideration whereby any property is settled or agreed to be settled in any manner whatsoever, or is given or agreed to be given in any manner whatsoever, such instrument not being made before and in consideration

of marriage. (2) Any instrument declaring that the property vested in the person executing the same shall be held in trust for the person or persons mentioned therein, but not including religious, charitable, or educational trusts."

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 subclause. This was the view taken by *à Beckett* J. and the members of the Full Court in *Castlemaine Brewery Co.* v. *Collector of Imposts* (1), a case which, in our opinion, was rightly decided. The word "gift" has two distinct meanings in English law: it is used by conveyancers to describe certain assurances of real property, but it usually means a transference of the beneficial interest in property by one person to another without any consideration from that other. The phrase "deed of gift" is not a term of art among lawyers, but it has been established in the English language since the time of the Elizabethan dramatists, it means no more than a deed effectuating and evidencing such a transference.

In *Brett* v. *Collector of Imposts* (2) a debtor had assigned his estate to trustees upon trust to distribute the same among all his creditors. The Court held that this was not a deed of settlement or gift, and stated that to constitute a deed of gift within the meaning of the Schedule there must be an act of benevolence or something akin to it on the part of the donor and also some benefit accruing from the donor to the donee. In our opinion the case was well decided, and we agree that there can be no deed of gift without some benefit accruing to the donee. The phrase "the gift must be an act of benevolence or something akin to it" 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. In

(1) 22 V.L.R., 4. (2) 22 V.L.R., 29.

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Macrow v. *Collector of Imposts* (1) *Mann* J. suggested that an instrument disposing of property to volunteers might properly be described as a deed of gift although the person parting with the property had in fact received consideration from someone else for so doing, and we agree with him.

In *Thompson* v. *Collector of Imposts* (2) *à Beckett* J. held that the release of a debt charged on land in consideration of the withdrawal of a caveat against probate of a will was not a deed of gift because there was no act of benevolence or something akin to it on the part of the donor. In *Atkinson* v. *Collector of Imposts* (3) *Hood* J., for the same reason, held that the transfer of certain land in pursuance of an agreement for the compromise of caveat proceedings questioning the validity of a will and codicil was not a deed of gift. We think these cases were properly decided because the transactions in question bore no resemblance to what is ordinarily known as a deed of gift. In the latter case *Hood* J. said (4):—"In some cases the absence of a *bonâ fide* adequate pecuniary consideration may be evidence that the transaction is in reality a gift, but such a consideration does not apply here. 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." 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. The Legislature assumes that the nature of a deed of gift is inconsistent with the existence of any consideration, and then proceeds to enact that an instrument may be a deed of gift although executed on consideration except in two cases: (1) where it is executed on a *bonâ fide* adequate pecuniary consideration, and (2) where it is executed before and in consideration of marriage.

(1) (1921) V.L.R., 23; 42 A.L.T., 155.
(2) 25 V.L.R., 529; 21 A.L.T., 158.
(3) (1919) V.L.R., 105; 40 A.L.T., 131.
(4) (1919) V.L.R., at p. 113; 40 A.L.T., at p. 134.

In the present case the Supreme Court were of opinion that there was nothing in the nature of benevolence either under the original agreement or in the transfer made in pursuance of such agreement. 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 acceptation 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.

As we hold that the instrument is a deed of gift within the meaning of the words of the Schedule, it is unnecessary to determine whether it is or is not a deed of settlement within the meaning of those words.

The appeal should be allowed, and a declaration made that the instrument of transfer dated 15th June 1920 is chargeable with duty under clause IX. (1) of the Third Schedule of the *Stamps Act* 1915. This disposes of question 1 of the case stated.

Question 2 calls for a decision as to the amount of duty chargeable. It appears that at the date of the marriage of the transferor and the transferee, being the date on which the transfer should have been executed, the amount owing on the mortgage above referred to was £865 4s. for principal and £6 2s. 3d. for interest. The transfer is expressed to be "subject to the encumbrances notified hereunder," and this mortgage appears thereunder as an encumbrance. The respondents contend that, in assessing the value of the property transferred for purposes of stamp duty, the amount of the mortgage debt should be deducted from the total unencumbered value of the property notwithstanding the existence of a covenant of indemnity. In our opinion sec. 82 of the Act supports this view. The value upon which duty is chargeable is therefore £979, and the amount of duty £9 16s.

The answers to the questions submitted are: (1) Yes; (2) £9 16s.

The appellant is to pay the costs of the respondents in the Supreme Court and in this Court, and to repay to respondents the sum of £17 19s. duty overpaid.

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Rich J.

RICH J. The question which emerges for our consideration is the meaning of clause IX. of the Third Schedule to the *Stamps Act* 1915, viz., the definition of "Settlement or Gift, Deed of."

The Judges of the Supreme Court felt themselves constrained by a line of previous decisions of that Court to adopt the construction which they have placed upon it. We, however, are under no such constraint. In the first place, the clause means an instrument, which, of course, includes the transaction set forth in that instrument (see *Dent* v. *Moore* (1)). Next, the transaction so set forth must be one whereby property is "settled or agreed to be settled" or "given or agreed to be given," and in either case "in any manner whatsoever." Thirdly, the transaction may be either "voluntary or upon any good or valuable consideration," with a qualification which, in my opinion, constitutes the key-note of the definition. The qualification is "other than a *bonâ fide* adequate pecuniary consideration." There is a fourth point, which I shall mention now in order to get rid of it: the definition entirely excludes instruments "made before and in consideration of marriage." The instrument in question here was made after marriage, and therefore we may disregard this exception. The qualification, viz., "other than a *bonâ fide* adequate pecuniary consideration," shows that the Legislature meant by this phrase to exclude from "settlements and gifts" transactions where the parties were acting on a pure business basis of exchanging money for money's-worth, the parties looking to the value of the property given and taken—where the consideration is of this nature, that is, not only pecuniary but adequate from the standpoint of ordinary business persons in the situation of the parties and also *bonâ fide*. But where this is not the case the instrument may be a settlement or gift notwithstanding there is a valuable consideration such as marriage or even a pecuniary consideration if it is not commercially adequate or is not *bonâ fide*.

There is nothing in the definition to the effect that it is restricted to benevolence or what is akin to benevolence, and it is well settled that taxing Acts must be taken just as they are (*Attorney-General* v. *Milne* (2); *Lumsden* v. *Inland Revenue Commissioners* (3)). The

(1) 26 C.L.R., 316, at p. 326. (2) (1914) A.C., 765, at p. 771.
(3) (1914) A.C., 877, at p. 887.

limitations as to consideration are expressly stated by the Legislature, and to introduce the qualification of benevolence or something akin to benevolence by judicial construction is not warranted. If introduced, it would be so vague as to be almost impossible to apply with any certainty.

I think the matter is so plain that references to authorities on other Acts are unnecessary and not useful.

I answer the first question "Yes."

Questions answered: (1) *Yes*; (2) £9 16*s*. *Appellant to pay costs of respondents in Supreme Court and High Court and to repay to respondents the sum of* £17 19*s*. *duty overpaid.*

Solicitor for the appellant, *E. J. D. Guinness*, Crown Solicitor for Victoria.

Solicitor for the respondents, *W. H. Peers.*

B. L.