STAMP DUTY: SETTLEMENTS AND CONVEYANCES

Introductory

Stamp duty is only a minor source of revenue for the State, but it is the form of fiscal legislation which most frequently has to be considered by the conveyancer. Stamp duty law has many complexities and obscurities, some of which are peculiar to Queensland and thus not readily determinable by a reference to the standard text-books. It is the object of this article to attempt an examination of the impact of the Stamp Acts 1894 to 1962, in which the law relating to stamp duties in Queensland is mainly enacted, on two types of instruments of particular importance to the conveyancer, namely settlements and conveyances (including agreements for sale, chargeable as conveyances).

Before discussing the law relevant to the taxation of these instruments, it is necessary to refer briefly to a few preliminary matters.

In its general conception and structure the Queensland legislation is modelled on the English Stamp Act of 1891 [1]. As in the parent Act, stamp duty is imposed upon instruments rather than transactions. This is made clear by s.4, which provides that the stamp duties to be charged for the use of her Majesty upon the several *instruments* specified in the First Schedule to this Act shall be the several duties in the said Schedule specified. The schedule to the Act lists the instruments which are required to be stamped and the requisite stamp duty for each, denoted by impressed stamps except where express provision is made to the contrary: s.13.

Consequently if a legal transaction can be effected without the execution of an instrument being requisite, no stamp duty will be attracted. However in several instances, as we shall see, the execution of an instrument is in effect merely the condition precedent to the taxation of a transaction.

Difficulty arises in applying the notion that what is taxed is the instrument and not the transaction in two instances: where a subsequent record is made of a transaction entered into orally; and where a transaction is effected by several instruments. In *Cohen and Moore v. I.R.C.*,[2] a deed was executed settling a small sum on certain trusts. Prior to the deed's execution, but when it

1. 54 & 55 Vict. c. 39. An excellent series of articles on the law of stamp duties in England will be found in Vols. 17 and 18 of the Conveyancer and Property Lawyer (Cited as Conv.).
2. [1933] 2 K.B. 126.

was in draft form,[3] an oral declaration of trust was made in respect to a very large sum that the settlors would hold it on the same trusts as were contained in the deed until trustees thereof were appointed. The deed recited the verbal declaration of trust, and appointed the trustees of the settlement made by the deed as trustees of the large fund. It was argued that the verbal declaration did not attract stamp duty, and the subsequent deed did not settle the large fund since it had been already settled. Finlay J., rejecting these contentions, stated:

"I think that the splitting up of the securities was an artificial splitting up. I think that the transaction was really all one transaction, and that, being one transaction, the whole was recorded in the document—the only document which has been drawn up—which is the settlement".

In *Hopkins v. C.S.D.*,[4] Philp J. criticised this decision as inconsistent with the basic principle of stamp duty law, and pointed out that on the "new charter" doctrine enunciated in *Davidson v. Chirnside*[5] it did not matter that the large fund had already been settled before the terms of the settlement were incorporated into the deed. It would seem also from the decision of the Court of Appeal in *Fleetwood-Hesketh v. I.R.C.*[6] that Finlay J. misconstrued the authorities upon which he relied for the "one transaction" rule. In that case, Finlay J. had held that a receipt acknowledging payment of the purchase price of a reversionary interest under a will must be stamped as a conveyance on sale as being a contemporaneous record of the transaction of sale. On appeal, the Court held that it was chargeable as an agreement for sale, but Romer L. J. expressly held that the document was not a conveyance on sale,[7] since although the receipt was part of the transaction between the parties, it did nothing to vest the property in the transferee. It is suggested that the relevant inquiry is not whether the instrument constitutes a contemporaneous record of a transaction,[8] but rather what operation the instrument itself has in the particular circumstances.

The question whether several documents can be treated as one instrument where together they evidence a transaction such that

3. Emphasis was placed on this fact in *Grey v. I.R.C.* [1958] 1 Ch. 375, where *Cohen and Moore v. I.R.C.* was distinguished.
4. [1945] St.R.Qd. 162, 180.
5. (1908) 7 C.L.R. 324.
6. [1936] 1 K.B. 351.
7. Lord Hanworth M.R. and Maugham L.J. did not expressly decide whether the acknowledgment was chargeable as a conveyance on sale, though the former apparently thought it was not, and the latter that it was, but only on the ground that there was no antecedent parol agreement for the transfer of the interest in question.
8. This may, however, make it chargeable under the head of an "Agreement or any *Memorandum* of an Agreement".

if it were contained in one document it would be dutiable was elaborately discussed by Philp J. in *Hopkins v. C.S.D.*[9] In his Honour's view, the liability of any particular document to duty was to be determined upon the face of the document itself. The authorities which suggested that an agreement made by a series of documents attracted duty turned on the words "whether the same be only evidence of a contract" contained in the schedule; and since those words were to be found in the Queensland Act only in relation to agreements, it followed that other types of instruments were not liable to be stamped simply because they formed part of a transaction recorded in a number of documents. In that case he held that a document which recorded an intention to settle property and the trusts upon which the property would be held after it had been transferred to the trustee was not a settlement. It did not itself create a trust or become the charter of rights under a trust existing at the time of its first execution; and even if a settlement could have been spelled out of a number of documents executed over a period of time, the particular instrument before the Court, not being itself a settlement, was not chargeable as a settlement.[10] In the case of settlements, there is an express provision in the Act (s. 61) that where several instruments are executed for effecting the settlement of the same property only one of the instruments is to be charged with *ad valorem* duty, and the instruments not chargeable with *ad valorem* duty are to be charged with ten shillings duty. But the effect of this section, in the view of Philp J., was not that a particular instrument was chargeable as a settlement where it was only one of a series of documents together operating to settle property; rather it meant that where property was settled by several instruments, each of which was separately chargeable with duty as a settlement, *ad valorem* duty would be imposed only once. On appeal to the High Court, Latham C.J. agreed substantially with the opinion of Philp J., but the majority (Rich and Dixon JJ.) held that the instrument in question did operate as a settlement; hence they were not required to decide the question whether it was sufficient to charge an instrument as a settlement that it was one of a combination of instruments which together effected a settlement, though Dixon J. discussed it in some detail.

S.26 imposes a liability upon the person executing an instrument liable to stamp duty before it is duly stamped to pay the stamp duty payable and a penalty, which may be remitted by the Commissioner. The general rule as regards the time for stamping instruments first executed in Queensland is that they must be

9. [1945] St.R.Qd. 162, at pp. 177-180.
10. In fact in this case there was no evidence that other documents had been executed. In particular, there was no evidence that the property in question had been transferred to the trustee.

stamped before execution. The reason for this rule was explained by Philp J. in *Hopkins v. C.S.D.*[11] As his Honour pointed out, the English stamp duty legislation originally required the material upon which it was intended to write the designated matter to be stamped before the writing was completed. Subsequently this position was modified so that engrossing on stamped paper was no longer demanded, but it was required that the instrument should be stamped before execution, though the Commissioners in practice stamped executed instruments without penalty within a certain period. The rule seems at first sight to be in conflict with the right afforded by s.22 to require the Commissioner's opinion with reference to executed instruments, but the provisos to s.26 remove most practical difficulties.

One consequence which was long thought to follow from the fact that at least in theory an instrument required stamping before execution was that the liability of the instrument to duty had to be determined upon the face of the instrument, and that extrinsic evidence was inadmissible for this purpose except where the Act expressly authorised the Commissioner to have regard to evidence dehors the instrument—for example, to determine the true consideration given or the value of property. This proposition was stated by Griffith C.J. in *Davidson v. Chirnside*[12] and was more fully expounded by Philp J. in *Re Sharpe*[13]. But in *C.S.D. v. Hopkins*[14] the High Court unanimously held that extrinsic evidence may be admitted to determine the real nature of the transaction to which the instrument relates and to ascertain the amount of duty payable. Dixon C.J. cited with approval the statement in Halsbury's Laws of England:[15]

"The question whether an instrument is duly stamped, or as to what stamp is required, is in general determined by what appears upon the face of it to be its legal operation when first executed so as to be capable of that operation, but the Court is not bound by the apparent tenour of an instrument, and will decide according to the real nature of the transaction, receiving, if necessary, extrinsic evidence".

The main consequences which follow if an instrument is not stamped are these:

(a) The Crown may recover the duty and penalty. Originally in Queensland stamp duty was not recoverable as a debt due to the

11. [1945] St.R.Qd. 162, at pp. 172-4.
12. (1908) 7 C.L.R. 324, at p. 340.
13. [1944] St.R.Qd. 26.
14. (1945) 71 C.L.R. 351.
15. Vol. 28, par. 955 (Second edition). See also *Archibald Howie Pty. Ltd. v. C.S.D.* (1948) 77 C.L.R. 143, and *Comptroller of Stamps v. Buckland* [1959] V.R. 517.

Crown.[16] As the Court stated in *C.S.D. v. Wienholt*[17], it was by invalidating the instrument until the proper duty was paid that the law was able to insist on payment of the duty. If therefore the holder of the instrument was content to let his instrument remain a nullity, he was free to do so; but if he desired the recognition or assistance of the law to effectuate the instrument, he had to pay the duty. Now by virtue of s.4B stamp duty constitutes, from the date of execution of the instrument, a debt due and owing to the Crown from every party by whom the instrument is signed or executed, and it is made recoverable by the Commissioner in any Court of competent jurisdiction. Penalties imposed by the Act may be recovered in a summary way before any two justices of the peace: s.78[18]

(b) Inadmissiblity and voidness of the instrument. Unless an instrument chargeable with stamp duty is duly stamped in accordance with the law in force at the time when it was first executed or first brought into Queensland if executed outside Queensland, it cannot be given in evidence except in criminal proceedings, nor is it available for any purpose whatever: s.4A[19]. There is a proviso to this in the form that when an unstamped instrument is tendered as evidence in civil proceedings, the judge may admit it as evidence if the party producing it or his solicitor gives security or a written undertaking to pay the duty and penalty. Upon due stamping or upon security or a written undertaking under s.4A being given, the instrument is rendered fully as efficacious as if it had been stamped before execution.[20]

Settlements

S.2 of the Stamp Acts defines the expression "Settlement" as meaning any contract, deed or agreement (whether voluntary or upon any good or valuable consideration other than a bona fide pecuniary consideration) whereby any property, real or personal, is settled or agreed to be settled in any manner whatsoever. It also defines the expression "Deed of Gift" as meaning and including

(a) every deed of gift or instrument by way of gift transferring or purporting to transfer property absolutely.

16. This is still in general the case in England, though there are a few exceptions. See 17 Conv. 387.
17. (1915) 20 C.L.R. 531, 542.
18. See *Cobar Corporation Ltd. v. A.G. for N.S.W.* (1909) 9 C.L.R. 378.
19. The words "not be available for any purpose whatever" have been judicially expounded in *Fengl v. Fengl* [1914] P. 274 (an unstamped document stated to be inadmissible to prove collateral matters). See also *Dent v. Moore* (1919) 26 C.L.R. 316 (the terms of an unstamped contract of sale cannot be proved by admissions made by the defendant, where the contract is reduced to writing in an instrument intended by the parties to be the binding record of the contract.)
20. *Shepherd v. Felt and Textiles of Australia Ltd.* (1931) 45 C.L.R. 359.

(b) every disposition of property containing trusts or dispositions to take effect during the life of the donor, and not being made before and in consideration of the marriage of the donor, or in favour of a bona fide purchaser or incumbrancer for valuable consideration in money.

(c) every deed or instrument wherein any person directly or indirectly disposes of property to or for the benefit of any person connected with him by blood or marriage, in consideration or with the reservation of any advantage to or in favour of himself or any other person.

The Schedule provides that a Settlement, Deed of Gift, or Voluntary Conveyance (not being the appointment merely of a new trustee) of any property containing any trust, or any Declaration of Trust having the effect of such settlement, deed or conveyance, is chargeable with ad valorem duty on the amount or value of such property as is set out in the Schedule.

It will be observed that in the Queensland definition section the expressions "Settlement" and "Deed of Gift" are separately defined, though they are combined in the schedule. In Victoria however (most of the relevant cases are Victorian)[21] the two definitions are run together, with the result that 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; the existence of consideration is consistent with a transaction being a gift, but it is essential to the idea of a gift that there be a transfer of property by way of benefaction. By way of contrast, the courts have pointed out that benefaction is not an indispensable element of a settlement.[22] The presence of a bona fide pecuniary consideration prevents an instrument from being assessed for duty as a settlement, though it may of course be dutiable under some other head, for example as a conveyance.[23]

Secs. 59, 60 and 61 of the Stamp Acts relate to settlements. In its original form, the Act imposed settlement duty only on instruments whereby any definite and certain principal sum of money, or any definite and certain amount of stock, or any security, was settled or agreed to be settled. The equivalent of s.59 was inserted in the English Act [Stamp Act 1891, s. 104] in consequence of decisions that a settlement of a policy of life assurance was not

21. For an examination of the Victorian legislation, see Ford: Gift Taxation affecting Trusts (1951) Melb. U.L.R. 287, at pp. 317-329. See also Walker: Settlements and Gift Duties in Victoria.
22. For example, in *Buzza v. Comptroller of Stamps* (1951) 83 C.L.R. 286, at p. 297.
23. See *Collector of Imports (Vic.) v. Cuming Campbell Investment Pty. Ltd.* (1940) 63 C.L.R. 619.

a settlement of a definite and certain sum of money, since payment was subject to various contingencies. *Ad valorem* duty is charged only on the value of the policy at the date of the instrument where it is a provision of the settlement that those beneficially entitled to the proceeds of the policy shall keep it up. Otherwise, the duty is chargeable on the full amount secured by the policy. S.60 operates to prevent the attraction of further duty in addition to the *ad valorem* duty on a settlement of money stock or security in certain cases. The purpose of s.61 has already been mentioned.

The law relating to duty upon settlements is notoriously difficult. Perhaps the best approach is to begin by considering one of the latest decisions of the High Court on this matter, viz, *Buzza v. Comptroller of Stamps.*[24] The testator by his will, made in 1924, left his residuary estate to his trustee upon trust to pay one third of the income to his widow, and subject thereto upon trust as to capital and income for his children in equal shares. He empowered his trustee to invest trust moneys forming part of his residuary estate in the purchase or lease of a dwelling house for his widow, with full power to sell and dispose of the dwelling house at any time. The testator died in 1930. In 1949 an indenture was made between the widow, children and trustee, by which it was provided that the trustee should hold the residuary estate

(a) upon trust as to the freehold estates to hold to the use of the widow during her life with remainder to the children in equal shares: provided that if the income should be less than £340 p.a., the deficiency was charged on the freehold property;

(b) subject thereto the remainder of the residuary estate and income should be appropriated and distributed forthwith among the children in equal shares.

The total value of the real estate was £12,781 and of the residuary personal estate £16,813.

On these facts several questions arose.

(a) Was the indenture a "settlement" within the meaning of the Stamps Act?

(b) If so, what was the value of the property settled?

(c) Did it fall within the exception of an agreement for a "bona fide pecuniary consideration" ?

(a) All members of the Court accepted the view that settlements essentially involve some modification of absolute proprietary right over property, and that they usually, though not necessarily, create successive estates or interests therein. Williams J. quoted

24. (1951) 83 C.L.R. 286.

from Dixon J's judgment in *C.S.D. v. Hopkins*[25]: "An instrument is a settlement because it creates trusts and contains limitations which restrict or affect alienation and transmission, according to the course provided by law for estates in fee simple or a full ownership." It would seem then to be essential to the conception of a settlement that the rights of enjoyment over property should be restrained by the limitations of the settlement, but that the limitation of interests in succession is not an essential attribute.

Both McTiernan J. and Williams J. relied upon the oft-quoted statement of Palles C.B. in *Masserene v. I.R.C.*; "It is essential to such an instrument that there shall be— (1) such free property, by which I mean property which then is not, according to our jurisprudence, subject to the trusts in question; (2) a settlor, who either is, or appears on the face of this instrument to be, competent to subject that free property to trusts which, until the execution of the instrument, did not bind it; and (3) an imposition by the instrument of such trusts upon such property." Here, according to McTiernan J., there was no settlor. The trustee was not the settlor, because it had no beneficial interest in the residuary property or any power other than as trustee of the will. The widow's interest was limited and did not enable her to settle the properties upon herself for an estate for life and upon the children in remainder; similarly for the children's interest. The residuary property was already subject to the settlement made by the will; all that the indenture did was, not to free it from the settlement and to resettle it, but to change the manner of administration of the settlement made by the will. Williams J's reply to this was that the settlors were all the parties to the indenture other than the trustee. Since they were all sui juris, and they each had an equitable interest in the residuary estate, they could collectively have put an end to those trusts and required the trustee to make an immediate distribution of the property. Instead, by means of the indenture they left the legal estate in the trustee, confirmed his obligation to perform active duties (which were however different to those required by the will) and stated the beneficial interests of the widow and children in the residue, which were different to those they enjoyed under the will. "Thenceforth the duties of the trustee and the beneficial interests of the widow and children in the residue were entirely governed by the trusts and powers of the indenture and these trusts and powers were altogether independent of the trusts and powers contained in the will." Since the equitable interests created in the residue as a whole were different from those which existed under the will, there was, according to Williams

25. 71 C.L.R. 351 at p. 378.

J. a settlement of the whole corpus of residue, and therefore stamp duty was payable on the value of the whole of the residuary estate.

Dixon and Fullagar JJ. delivered judgments to the same effect. But on the question as to what property was settled Latham C.J. disagreed with the majority. He distinguished between the provisions made in the indenture with respect to the realty and personalty. So far as the real estate was concerned, he agreed that there was a settlement. But the personalty was not settled—it was to be immediately transferred to existing persons as full owners: and "a transfer of property which immediately gives a full right of disposition of the whole interest in the property cannot be described as a settlement".

(b) If only the real estate was settled, should duty be paid on the value of the real estate so settled or on the whole of the property "dealt with" by the instrument? In *Carmichael v. C.S.D.*[26], Higgins J. held that the Queensland Act made no distinction between property which was settled and property which was not settled, provided that the property was comprised in an instrument of settlement, which contained some trust. Hence since in that case the value of the property comprised in the instrument exceeded £9,000, duty was payable on that sum and not on £1,500—the value of the property actually settled. Some early Victorian decisions are to the same effect. The other members of the majority (Knox C.J. and Gavan Duffy J.) considered that the whole of the property was settled. Starke J., dissenting, held that only the fund of £1,500 was settled, and that the duty was imposed only upon the property settled or agreed to be settled. In *Buzza's Case*, Latham C.J. forcibly expressed his opinion that it is the value of the property settled or agreed to be settled which is to be taken into account in determining the duty which is chargeable. The question however did not require consideration by the other members of the Court.

(c) An argument for the appellant was that a bona fide pecuniary consideration existed, and therefore the indenture fell within the exception. Latham C.J., Dixon, Williams and Fullagar JJ. discussed this question. Their views differed as to whether the instrument was executed upon consideration and the nature of the consideration, but they were at one in holding that a pecuniary consideration is a consideration in money, not in money's worth.

From Buzza's case we may pass to one of the earliest expositions by the High Court of the law relating to duties on settlements, viz. *Davidson v. Chirnside.*[27] The testator Chirnside appointed A, B and C to be his executors and trustees. On his death they proved

26. (1926) 38 C.L.R. 465.

27. (1909) 7 C.L.R. 324.

his will in 1890. The testator bequeathed a legacy of £40,000 to his trustees on trust for his daughter D for life under a protective trust, and subject thereto he directed the capital to be held for such of D's issue as D by deed or will should appoint, and in default of issue D was empowered to appoint the capital among such persons as she pleased. By a subsequent clause he authorised his trustees in their discretion to cause the fund to be settled upon two or more trustees to be nominated by them upon trusts corresponding with those previously declared. In 1907 by a deed made between A, B and C of the one part and C and E of the other part, C and E were appointed trustees of the legacy, to hold it upon the trusts of the will.

The Full Court of Victoria had previously held that an instrument cannot be a settlement if it does not create any new beneficial interest in anyone. In the instant case it followed that view, since here the same people remained beneficially entitled to the fund, and to the same extent, as before. The High Court rejected this view. In the opinion of Griffith C.J. (with which Barton and O'Connor J.J. concurred), "any instrument which on its face purports to be the charter to the property comprised in it, and which contains such limitations as are ordinarily contained in settlements, is a settlement or agreement to settle within the meaning of the schedule, whether those rights could have been established aliunde or not. If a statement of already existing rights is added as a mere incident to the main operation of the instrument, as in the case of the appointment of a new trustee of an existing trust, this condition is not fulfilled, for in such a case the charter would still be the original settlement."[28]

The steps in the reasoning of Griffith C.J. seem to be these:—

(i) The question whether an instrument is or is not within the Act must be determined by examination of the instrument itself, and not upon extrinsic evidence.

(ii) Here no one would dispute that, but for the previous settlement made by the will, the instrument in question would be a settlement of the legacy.

(iii) The fact that a previous settlement was made by the will must be left out of account. In certain cases trusts may be declared orally; yet if these trusts are subsequently declared by an instrument, that instrument will nevertheless be a settlement, though the rights are already existing. Similarly it is immaterial that the

28. This deed was not a mere appointment of a new trustee, but rather a creation of original trustees under a new instrument: per Higgins J. at p. 350. Under the proviso to s. 57, a conveyance or transfer made effectuating the appointment of a new trustee is not to be charged with any higher duty than ten shillings.

rights declared by the instrument are, so far as regards the effective enjoyment of the property, substantially the same as rights already existing under the will.

For Isaacs J. also the vital point was that "the moment that instrument was executed it became for all practical purposes the new starting point of D's rights; it is now in effect the source of the powers and duties of the settlement trustees, and regulated henceforth the relations between them and their cestui que trust. The trusts of the will as such no longer apply to his or her legacy; and although the trusts which do apply correspond to the trusts of the will, they are not trusts of the will". In support of the High Court's view, Isaacs J. pointed out that the Schedule taxed any instrument by which property was either settled or agreed to be settled. "If, therefore, there were, first, an agreement to settle property, and afterwards a formal settlement in pursuance of the agreement both would be taxable, the settlement being chargeable notwithstanding the only beneficial interest was already created by the agreement." If in order to constitute a settlement within the meaning of the definition in the Act there must be a disposition of property in such a manner as to create a beneficial interest in property in some person in whom it did not previously exist, s.61 (2) would in Isaacs J's opinion, be unnecessary.

In the light of subsequent cases, and particularly of *Buzza's* case, it is doubtful how much remains of the "new charter" doctrine of the nature of a settlement. In the first place, as has already been pointed out, the High Court has unequivocably rejected the view that extrinsic evidence may not be regarded in determining whether an instrument is within the Stamp Acts. But, more importantly, at least certain members of the Court seem to have resiled from the opinion that the creation of a new beneficial interest is not an essential feature of a settlement. In *Wedge v. Acting Comptroller of Stamps* (Vic.) [29] Rich A.C.J. regarded it as relevant in determining that an instrument was not a settlement that no new beneficial interest was created by it; and in *Buzza's* case Williams and Fullagar JJ. seem to have regarded the creation of new equitable interests as essential to the conception of a settlement. However, *Davidson v. Chirnside* has certainly not been over-ruled. For the conveyancer, the practical conclusion to be drawn from both *Davidson v. Chirnside* and *Buzza's* case is not to include unnecessary dispositions in a settlement. In *Buzza's* case it seems that dtuy on the value of the residuary personalty could have been avoided by excluding the clause relating to its appropriation and distribution from the settlement; and that in *Davidson v. Chirnside* the fatal

29. (1941) 64 C.L.R. 75.

addition was the recital *in extenso* of the trusts of the will in the indenture.

Conveyances

S.49 defines "Conveyance or Transfer" as including every instrument, and every decree or order of any Court whereby any property or any estate or interest in any property is transferred to or vested in any person. The test to be applied is, therefore, whether after the execution of the instrument or the making of the decree or order any property[30] became vested in the alleged transferee which before that execution or the making of the decree or order was not vested in him[31].

The principal cases in which this section has been judicially interpreted have involved company reconstructions. In *C.S.D. v. Queensland Meat Export Company Ltd.*[32] an agreement was made that the old company in consideration of the allotment of shares, would transfer certain assets to the new company. The agreement did not appropriate the consideration to the various classes of assets, nor provide when they should be transferred. Transfers were made and *ad valorem* duty was paid in respect of some of the assets. The Commissioner thereupon claimed *ad valorem* duty upon the further assets referred to in the agreement, namely the live stock, book debts and other chattels and choses in action. The claim failed, as in the opinion of the Supreme Court of Queensland and the Privy Council the contract was not, as to any of the subject-matters dealt with, a sale in *praesenti*. This case was distinguished in *Hooper and Harrison Ltd. v. C.S.D.*[33], where the agreement was that the old company should sell and the new company should purchase the old company's merchandise for a stated sum, on the ground that two features were present there which were lacking in the instant case, namely the existence of expressions of future vesting, and their application to assets which required future formal acts of assurance.

A proviso to s.49 states that a conveyance or transfer of any property shall for the purposes of the Act be deemed to comprise all live stock and other movable chattels included in the transaction, notwithstanding that the same are not included in the

30. In *C.S.D. v. Yeend* (1929) 43 C.L.R. 235 the High Court held that a mere personal right of selling refreshments granted under an executory contract was not "property".
31. *McCaughey v. C.S.D.* (1914) 18 C.L.R. 475, at 484-5. In *Ronald Motors Pty. Ltd. and Kampman v. C.S.D.* [1941] St.R.Qd. 126 a contract relating to the sale of a motor car was held assessable to *ad valorem* duty as a conveyance on sale as it operated to transfer the property in the car to the buyer. An agreement to sell a car, as opposed to a contract of sale of a car, would be exempt from duty under s. 54.
32. [1917] A.C. 624.
33. (1924) 35 C.L.R. 318.

instrument of conveyance or transfer, but pass upon or by delivery or by or pursuant to another writing or instrument, or in any other manner, and notwithstanding that the same are not at the date of the execution of the said instrument upon such property. Apart from this proviso, the transfer of movable chattels would not attract stamp duty if effected by manual delivery, though it would be chargeable if they were included in the conveyance. In the terms of this proviso there is a significant departure from the principle of taxing the instrument and not the transaction in order to exact duty upon the conveyance of farming properties. Nevertheless, the transferor may in a quite simple way avoid this duty. If the land is held by X, and the live stock and other movable chattels are owned by X and his wife, or by X Pty. Ltd., a conveyance of the land and a transfer of the chattels will be, it is suggested, distinct transactions, so that the conveyance of the land will not be deemed to comprise the movable chattels. The chattels may be transferred without attracting duty by an agreement for sale as opposed to a sale, or by manual delivery. Here a clause frequently inserted in agreements for the transfer of live stock is that the property in the live stock will not pass until delivery has been made to the transferee.

The Schedule refers to six varieties of conveyance or transfer:—

(1) Of any stock or marketable security. These terms are widely defined in s.2. The significant point about this category is that the rate of duty is considerably less than for conveyances on sale. This is of particular importance in the case of "takeovers", since the acquisition of the shares of the transferor company will attract less duty than the acquisition of its capital assets; and it is clear from *Henty & Constable Ltd. v. I.R.C.*[34] that a conveyance of assets consequential upon a transfer of shares in the vendor company for shares in the purchaser company is not a conveyance on sale of those assets, but will be chargeable only with ten shillings duty as a "Conveyance of any kind not hereinbefore described." Until 1959 the position in Queensland was that the duty on the conveyance by one or more transfers of the whole of the stock or marketable security of a company or of any portion of it representing the controlling interest in the company was charged at the same rate as for a conveyance on sale. This enactment was difficult to apply in the case where the controlling interest was obtained by successive acquisitions of shares by a number of shareholders: and it could be, and very frequently was, avoided altogether by transferring the shares on the register of another State.[35] The

34. [1961] 1 W.L.R. 1504; noted in 4 U.Q.L.J. 230.
35. See Else Mitchell: Stamp Duty on Transfers of Shares listed on Branch Register 12 A.L.J. 83.

Queensland revenue authorities were thus in effect forced to adopt the position obtaining in other States and to impose a lower rate of duty on the transfer of shares, including the whole share capital, for otherwise they would obtain nothing.

(2) On the sale of any property. In *The Commonwealth v. State of N.S.W.*,[36] Higgins J. pointed out that whilst (Qld.) secs. 50 and 52 enlarge the meaning of "sale" for the purpose of the Act to the extent of including conveyances in consideration of stock and securities, or debts due, yet except to this extent, "sale" must be read in its ordinary, technical meaning which involves a price in money.[37] It is clear, however, from *Ridge Nominees Ltd. v. I.R.C.*[38] that the word "sale" in stamp duty legislation bears a rather extensive meaning, in that mutual assent of vendor and purchaser is not essential to a sale. A transfer may be "a conveyance or transfer on sale" even though the transferor is compelled to sell against his will and the price is fixed without his assent. Thus in that case it was held that a transfer of shares effected under an enactment of the Companies Act providing for a transfer of a dissenting shareholder's shares for money by a person selected to be the agent of the shareholder,[39] was a transfer on sale.

A most elaborate examination of the concept of transfer on sale was made in *Oughtred v. I.R.C.*[40] A trust fund consisting of shares was held upon trust for M for life and then for P absolutely. M and P agreed orally that M would transfer to P other shares of which she was absolutely owner and that P would transfer to her his reversionary interest under the trust. Accordingly, three instruments were executed: a transfer of the unsettled shares from M to P's nominees; a release by M and P to the trustees; and a transfer of the settled shares by the trustees to M. On this third instrument the Crown claimed *ad valorem* duty as a conveyance on sale of P's reversionary interest. Upjohn J. rejected the claim. The argument for the Crown was that under the oral agreement no equitable interest passed to M, since s.53(1)(c) of the Law of Property Act 1925 (corresponding to s.9 of the Statute of Frauds) required a disposition of an equitable interest subsisting at the time of the disposition to be in writing. P's equitable interest in the reversion therefore passed only on the transfer, which was accordingly a conveyance on sale of that equitable interest. The answer made to that contention, and upheld by Upjohn J., was that on the

36. (1918) 25 C.L.R. 325, at p. 346.
37. In that case, Higgins J. stated that a transfer from the Commonwealth to two former owners of land in consideration of a waiver of all claims against the Commonwealth for its compulsory acquisition was not a "conveyance on sale".
38. [1961] 3 All E.R. 1108.
39. Companies Act 1948, s. 209. (Qld.) Companies Act 1961 s. 185.
40. [1960] A.C. 206.

making of the oral agreement for value P became a constructive trustee of his interest for M, and that s.53 had no application to a trust arising by construction of law. The oral agreement therefore effectively assigned the equitable interest, and nothing passed under the transfer except the legal interest. Moreover, although the transfer was executed as a direct result of the agreement for sale, it was not a transfer on sale but on the winding-up of the trust and on the release of the trustees. M could not call on the trustees to convey the shares to her merely on proof of the oral agreement. They were entitled to hold the trust assets until they obtained the assent of all beneficiaries and a release from them.

The decision of Upjohn J. was reversed by a unanimous Court of Appeal. In that Court the argument which prevailed was that the transfer, read in the light of the contemporary transfer of the free shares and of the deed of release, was the completion of the oral contract and so was a transfer on sale of property. The Court of Appeal did not find it necessary to examine the point under s.53 of the Law of Property Act, but indicated that it was not prepared to accept the conclusion of Upjohn J. as to its effect.

Finally, the House of Lords by majority (Lord Radcliffe and Lord Cohen dissenting) upheld the decision of the Court of Appeal. Once again the question of the effect of s.53 was treated as a minor consideration, but the view of it which commanded most support was that the result of the oral agreement was that P became a constructive trustee of his equitable reversionary interest for M, but that an assignment of that equitable interest to M required a disposition which must be in writing. In the judgment of Lord Jenkins, with which Lord Keith agreed, it did not follow, even if one assumed that the entire beneficial interest in the settled shares vested in M under the constructive trust, that the transfer was prevented from being a transfer of the shares to M on sale. The constructive trust in favour of a purchaser which arose on the conclusion of a contract of sale did not prevent a subsequent transfer, in performance of the contract, of the property contracted to be sold from constituting for stamp duty purposes a transfer on sale of the property in question. He added:

"The parties to a transaction of sale and purchase may no doubt choose to let the matter rest in contract. But if the subject-matter of a sale is such that the full title to it can only be transferred by an instrument, then any instrument they execute by way of transfer of the property sold ranks for stamp duty purposes as a conveyance on sale notwithstanding the constructive trust in favour of the purchaser which arose on the conclusion of the contract."

A point which was strongly urged for the appellant was that whereas the property sold was the reversionary interest, the property

transferred was the settled shares, and accordingly that as the transfer was not a transfer of the property sold it was not a transfer of property on a sale thereof. Lord Jenkin's answer to this was that the effect of the oral agreement was the merger of the life interest and the consequent acceleration of the reversionary interest sold so as to bring it into immediate possession. Accordingly the settled shares as transferred to M actually represented the reversionary interest which she had bought and which had been converted into an immediate interest in possession by the terms of the oral agreement.

Lord Denning, the other member of the majority, expressed his reasons in these terms:

"P had agreed to sell his reversionary interest in the (settled) shares to M for a stated consideration (the free shares). He did not convey this reversionary interest direct to her, nor did he convey it to the trustees of the settlement. But he authorised the trustees to convey it to her—not in the shape of a reversionary interest as such—but by way of enlarging her life interest into absolute ownership. It is clear to me that, by the transfer so made by his authority, she acquired his reversionary interest as effectively as if he had conveyed it direct to her. And that is quite enough to attract stamp duty. In my opinion, every conveyance or transfer by which an agreement for sale is implemented is liable to stamp duty on the value of the consideration. It is not necessary for the instrument of implementation to be between the same parties as the agreement for sale, nor for it to relate to the self-same property as the agreement for sale. Suffice it that the instrument is the means by which the parties choose to implement the bargain they have made. It is then a conveyance or transfer on sale of any property—which I take to mean a conveyance or transfer consequent upon the sale of the property and in implementation of it."[41]

Duty is payable on a conveyance on sale on the amount or value of the consideration for the sale,[42] which will of course normally be a monetary consideration. The Act makes express provision for the calculation of *ad valorem* duty in three cases:—

(i) Where the consideration for a conveyance on sale consists of stock or securities. Then the conveyance is to be charged with *ad valorem* duty in respect of the value of the stock or *marketable* security. By virtue of s.17 of the Act, the duty is calculated on the average price of the stock or security on the day of the date of the

41. See also *Fitch Love Ltd. v. I.R.C.* [1962] 3 All E.R. 685 at p. 691.
42. For the consideration in the case of a conveyance after the commencement of building operations, see the statement by the Board of Inland Revenue, reproduced in Alpe at p. 373.

instrument. In the case of non-marketable security, the conveyance is to be charged with *ad valorem* duty in respect of the amount due on the day of the date thereof for principal and interest upon the security (s.50).

(ii) Where the consideration for a conveyance on sale consists of periodical payments. If the money is payable periodically for a definite period not exceeding twenty years, *ad valorem* duty is charged on the total amount; if it is payable periodically for a definite period exceeding twenty years or in perpetuity or for any indefinite period not terminable with life, *ad valorem* duty is charged on the total amount payable during the twenty years next after the day of the date of the instrument: if it is payable periodically during any life or lives, the amount payable over the period of twelve years from the day of the date of the instrument determines the *ad valorem* duty (s. 51). Alternatively, the Crown may claim duty under the head "Bond, Covenant, or Instrument of any kind whatsoever".[43]

(iii) Where the consideration for a conveyance is a debt due to the transferee. S.52 provides that where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty. This section was applied in *City Mutual Life Assurance Society Ltd. v. C.S.D.*[44] in which it was held that the effect of an instrument whereby the mortgagor waived his rights to accounts and discharged the mortgagee from all liability to account as mortgagee in possession, whilst the mortgagor was released from liability on his personal covenant, was that the mortgagor lost his rights of redemption, and that consequently it operated as a conveyance to the mortgagee of the equitable fee simple interest in the land, upon which *ad valorem* duty was payable under s.52 on the quantum of the debt.

An important application of this provision occurs upon the sale of a business. If the purchaser agrees to discharge the vendor's business debts, the amount of these debts will be treated as part of the consideration. To avoid this result, it is a common practice to insert a clause whereby the purchaser collects the book debts

43. *British Italian Corporation Ltd. v. I.R.C.* [1921] W.N. 220. See Sergeant on Stamp Duties, 3rd ed. pp. 334-344 for a fuller report of this important case. See also *Independent Television Authority v. I.R.C.* [1960] 2 All E.R. 481.
44. [1943] St.R.Qd. 59.

as agent for the vendor and applies them in discharging the vendor's debts, the purchaser keeping the balance.[45]

(3) By way of gift of any property. Such a conveyance bears the same duty on the full value of such property[46] as on the amount or value of the consideration for a conveyance or transfer on sale.[47] Of course a voluntary conveyance may also attract duty under the Gift Duty Act 1926-1960. The question then arises whether, in the case where a voluntary disposition is effected by means of an instrument, stamp duty as well as gift duty is payable. The answer is to be found in s.10 of the Gift Duty Act. This provides that notwithstanding anything to the contrary in The Stamp Acts the stamp duty chargeable on any instrument of gift in respect of which gift duty is payable shall be ten shillings, but this stamp duty shall be in addition to and not in substitution for any other stamp duty to which the instrument is liable so far as it operates otherwise than exclusively as an instrument of gift.

From this it would seem that the relevant enquiries are:

(a) Is gift duty payable on this instrument? If not, then the section has no application and the only duty payable would be stamp duty. Thus, for example, a voluntary conveyance or deed of gift where the value of the property given is less than one thousand pounds will attract stamp duty only.

(b) If gift duty is payable, does the instrument operate otherwise than exclusively as an instrument of gift? If it does not, then the stamp duty chargeable is ten shillings; if it does, then stamp duty is chargeable so far as it operates otherwise than exclusively as an instrument of gift. What, then, is meant by the expression "operate otherwise than exclusively as an instrument of gift"? In *Archibald v. C.S.D.*,[48] Rich J. stated that the question involved an inquiry whether, "when all the indicia or elements which bring the instrument within the statutory definition of gift contained in s.2 of the Gift Duty Act are put on one side or eliminated from consideration, the remaining characteristics which the instruments exhibit would suffice to expose them to stamp duty."

(4) By way of partition or division of any property, or by way of exchange of any property. The same duty is charged on the full value of the property as on the amount or value of the consideration for a conveyance or transfer on sale. This fact makes

45. 17 Conv. 500; Sergeant, p. 107.
46. For the valuation of property passing under a voluntary conveyance, see s. 51 B and s. 51 C.
47. A voluntary conveyance may be charged under the head "Settlement, Deed of Gift, a Voluntary Conveyance" where a trust is created.
48. (1930) 44 C.L.R. 243.

the question whether a transaction is one of sale or one of partition or exchange of merely academic interest from the view point of stamp duty.[49]

(5) By way of security. Such conveyances are chargeable under the head of mortgages.

(6) Of any kind not hereinbefore described. On these a fixed duty of ten shillings is charged. The instruments chargeable with this duty are defined in s.57 by which every instrument whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person and every decree or order of any Court whereby any property is so transferred or vested, is to be charged with duty as a conveyance or transfer of property. This section seems to be superfluous in view of the definition of a conveyance in s.49, and the exceptions stated obviously do not cover the whole field, since voluntary conveyances, and conveyances by way of partition or exchange, are charged as conveyances on sale. In the parent Act, the section corresponding to s.49 defines merely a conveyance on sale, whereas s.49 is quite general.

Some instances of types of instruments chargeable under this section are: Conveyances for a consideration other than cash e.g. marriage or services; a transfer to a beneficiary under a settlement on distribution of the trust funds; a transfer by the liquidator of a company to shareholders in satisfaction of their rights in a winding up; an appropriation of property to pecuniary legatees without their consent under a clause in the will.[50]

S.54 provides that certain contracts are to be chargeable as conveyances on sale. These are any contract or agreement—

(a) For the sale of any equitable estate or interest in any property whatsoever; or

(b) For the sale of any estate or interest in any property, except

(i) Property locally situated out of Queensland;

(ii) Solely of any goods, live stock, wares, or merchandise.

In *I.R.C. v. Angus & Co.*[51] an agreement under seal was made for the sale of a business together with the goodwill. The Commissioners expressed their opinion that the instrument was chargeable as a conveyance on sale with *ad valorem* duty on the purchase price of the goodwill. The Court of Appeal overruled their decision. It pointed out that the transfer must be made by the instrument, and that if the transfer required something more than an instrument to carry it through, then the transaction was not

49. For the distinction between conveyance on sale and exchange see *I.R.C. v. Littlewoods Mail Order Stores Ltd.* [1962] 2 W.L.R. 1228 (H.L.).
50. See 17 Conv. 496-7.
51. (1889) 23 Q.B.D. 579.

struck at because the property was not transferred by it. To the argument that when an agreement is such that equity will grant specific performance of it, it is to be considered a conveyance in equity, the Court answered that anything which required a decree for specific performance could not be in itself a conveyance which had conveyed the property to the purchaser. In consequence of this decision, s.54 was enacted. Its structure is peculiar. Originally the Queensland provision covered only the present s.54 (1) (a), but in consequence of *C.S.D. v. Queensland Meat Export Co. Ltd.*[52] it was amended in its present form. But unlike the parent English provision it limits the exceptions to s.54 (1) (b) very narrowly. In England, a contract of sale of land, for example, is within the scope of the exemption, whereas in Queensland it is clearly chargeable as a conveyance on sale.

S.54 (1)(a) is not of great practical significance.[53] S.54 (1)(b) is, on the other hand, of vital importance. As Philp J. pointed out in *City Mutual Life Society v. C.S.D.*,[54] s.54 is designed to impose the duty on the contract of sale when the contract does not itself work a transfer, but merely evidences contractual rights. Thus in the case of an agreement for the sale of land, the contract as such can amount only in a fictional sense to a conveyance of an interest in it, as is clear from *I.R.C. v. Angus & Co.*[55] What it does is merely to give the transferee a right in equity to have the agreement specifically enforced; and this does not constitute a conveyance within the meaning of s.49,[56] though it does amount to a contract for the sale of an estate or interest in the land within the meaning of s.54.

Where duty has been paid under s.54, the conveyance or transfer made to the purchaser is not chargeable with any duty: s.54(6). *Ad valorem* duty may not be claimed where satisfactory evidence is produced that the contract or agreement was rescinded within thirty days after execution; or if *ad valorem* duty has been paid upon any such contract or agreement which is afterwards rescinded, the duty is to be refunded: s.54 (7). In *Monkira Pastoral Co. Ltd. v. C.S.D.*[57] an agreement was made between K and F as trustee and agent for a company about to be formed for the purchase by F of K's interest in a pastoral holding. The agreement further provided

52. [1917] A.C. 624.
53. In *Farmer and Co. Ltd. v. I.R.C.* [1898] 2 Q.B. 141 it was held that it applied to the purchase of an equity of redemption; and in *Chesterfield Brewery Co. v. I.R.C.* [1899] 2 Q.B. 7 an agreement that the shareholders of a company being voluntarily wound up would hold their shares in that company in trust for another company upon the latter alloting to them its own shares was held to be an agreement for the sale of an equitable interest in property.
54. [1943] St.R.Qd. 59.
55. (1889) 23 Q.B.D. 579.
56. In *City Mutual Life Society v. C.S.D.* a conveyance of property was in fact effected as a result of the agreement. It was not necessary for the mortgagee to obtain the court's assistance to perfect his interest.
57. [1928] St.R.Qd. 323.

that K should execute the necessary transfer to the company upon its formation. Stamp duty was paid on the agreement. K signed a transfer of the lease, delivered it to F's solicitor and authorised him to fill in the date after the Company had been registered. The Commissioner successfully claimed duty on the transfer from K to the Company as a conveyance on sale. As the Full Court pointed out, the Company acquired no right to the property under the agreement between K and F. Its rights derived from the further contract between K and the Company. S.54 (6) had no application, as the purchaser under the agreement was F, whereas the purchaser under the transfer was the Company.

Would it be possible, however, for F to recover the duty paid on the basis that the transfer from K to the Company rescinded the agreement? This was the point at issue in *Vickery v. Woods*.[58] The principles stated in that case by Williams J. which are applicable are these:

(*a*) An agreement entered into between a vendor and a person on behalf of a company not then incorporated creates a contract between the vendor and that person as a principal, unless it clearly appears that it was not intended that he should be so liable.

(*b*) A company cannot after incorporation adopt or ratify a contract purporting to be made on its behalf before it is incorporated. In order to bring the vendor and the company into constractual relations, a new contract must be made between the vendor and the company after its incorporation.

In *Vickery v. Woods* the High Court held that there was no evidence that the original contract was ever rescinded, or that a new contract was made between the vendors and the company. But the effect of novation of a contract between the vendor and agent into a contract between the vendor and company, so that the vendor agreed to accept the liability of the company to pay the purchase money in lieu of the liability of the agent, would be to rescind the original agreement and hence to found a claim for a refund of the duty paid on the original agreement. Accordingly in such cases an agreement should be executed after incorporation of the company between the vendor, agent, and company, by which the original agreement is rescinded and novated to an agreement between the vendor and the company.[59]

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58. (1952) 85 C.L.R. 336.

59. In *Re Downs Theatres Pty. Ltd.* [1942] St.R.Qd. 179, an appeal against an assessment to *ad valorem* conveyance duty on the subsequent agreement was rejected by the Full Court. On the reasoning set out above, the appellants should have claimed a refund of the duty paid on the original agreement. The Full Court was unable on the case stated to discuss the question as to what duty was payable on the original agreement.

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