BOOK REVIEWS

The Law of Stamp Duties in Victoria, by KEVIN ANDERSON, LL.B., Q.C., 2nd Ed. (Butterworth and Company Ltd, Sydney, 1968), pp. 1-412. Price: $13.50.

The practising lawyer has constant recourse to the Stamps Act and to the law and practice concerning stamp duties. A comprehensive and up-to-date guide to this law and practice is of most material assistance, and the second edition of *Anderson* will accordingly be warmly welcomed. The first edition is now some 19 years old. During those years numerous amendments to the legislation have been made (32 since 1958) and there has been a considerable increase in the body of decided cases. The new edition includes reference to all this material, and its publication is an invaluable service to the profession, especially when 'as one is constantly reminded, principle and reason afford no sure guide to the law on the subject of stamps'.[1] A particularly useful feature of the book is Appendix D which contains the standard requisitions made by the Comptroller.

It is a most attractively produced book with solid binding, heavy end-papers, very clear type and first class paper. However, unfortunately the proof-readers have not done their job very adequately. Take only two examples. In the four pages of the Introductory Note this reviewer noticed four slips: on page 6 line 12, 'their' should be 'there'; on page 7 line 10 there is a clause which neither introduces nor concludes nor forms part of any coherent sentence; on line 28 of the same page the semi-colon should surely be a full-stop; and on page 8 line 2 'as Part of Part II' should be 'as part of Part II'. Again, on page 157, second last line, 'effect' should be 'affect' and halfway down the page the 's' has been omitted from *'Carmichael's Case'*.

The reader will naturally enquire what material appears in relation to the new duties of recent years. The learned author has reproduced as Appendix E an article entitled 'Receipts by Solicitors' taken from the *Law Institute Journal*, but otherwise has been content to set out the new provisions of the Act relating to receipt duty without any very substantial comment or explanation. This may well be the safest course. Certainly exposition of these new sections is an invidious task because of their broad scope and the lack at present of any judicial guidance. However it is suggested that in a book of this nature it would be of particular assistance to include an explanatory paraphrase of the broad operation of the provisions, so that the enquiring reader may begin reading them with some preliminary assistance. The same comment may be made concerning the duty payable in respect of 'Credit and Rental Business' (where the text is ornamented only by references to the legislative history of the various sections).

One of the most impressive and helpful features of the first edition was the completeness of the citation of all relevant authorities, and the second edition maintains that very high standard. However, to a large extent the real difficulties and vital questions concerning stamp duty encountered in practice are ones that have not been much canvassed in the decided cases. By concentrating mainly upon actual decisions, the learned author perhaps does unduly narrow the scope and value of his commentary. For example, the many difficulties arising out of the provisions of the Act in relation to 'additions' and 'accretions' to Deeds of Gift and Settlement are not touched upon save for a passing reference to *Phillips v. Comptroller of Stamps*,[2] (p. 152). But many interesting questions can be posed. Thus it is usual these days that a family trust is in form created by a settlor who is not the parent of the principal beneficiary, and the substantial funds of the trust are then contributed by the parent. Some consider that such a course will avoid the operation of section 102 (1) (b) of the Income Tax Assessment Act 1936-68 (Cth). But however that may be, it is of importance to ascertain whether duty will be attracted as on an 'addition' in cases where there is an original Deed of Settlement by which the sum of say $10 is settled, and the property subject thereto is then substantially increased by a large cash gift by a person other than the settlor. Professor Ford in a valuable article,[3] has suggested

1 *Comptroller of Stamps v. Martin* [1967] V.R. 369, 372 *per* Adam J.
2 [1941] V.L.R. 164.
3 'Gift Taxation Affecting Trusts' (1958) 1 *M.U.L.R.* 287, 312.

that because an entry must be made in the accounts of the trustee, such a cash gift will be an 'addition'. It is submitted, however, that the contrary view is at least arguable. Section 84 (1) (a) says that 'addition' includes 'any property that . . . by entry in any book or account or paper of the settlor or donor or trustee . . . is added to or becomes subject to the original instrument or further instrument'. Is the word 'by' to be emphasized? It may be said that the cash gift becomes subject to the trusts of the original instrument by reason of the fact that when initially received by the trustees it is already impressed with that trust (as a consequence of the oral terms upon which it is handed over). So it is not 'by' the 'entry' that it is added to or becomes subject to the original instrument; the entry is merely an accounting recognition of what, legally, has already taken place. Therefore the transaction is not within the terms of the definition. Such an interpretation derives some support from the attention which the courts have paid to the corresponding phrase '*whereby* any property is settled . . . or given' in Heading IX itself: see, *e.g.*, *Scott v. Comptroller.*[4]

So far as this reviewer can ascertain, there is no reference in *Anderson* to section 52A of the Commonwealth Inscribed Stock Act 1911-1963 (Cth). By this section certain 'instruments and documents shall not be liable to stamp duty or other tax under any other law of the Commonwealth or of a State or Territory of the Commonwealth unless they are declared to be so liable by the prospectus relating to the loan in respect of which they are issued or used'. The documents include 'documents relating to the purchase, sale, transfer, transmission, conversion, renewal or redemption of stock, Treasury Bonds, debentures or other prescribed securities'. It is clear enough that an out-and-out gift by immediate transfer of such stock will not attract stamp duty. However a mere agreement to transfer does not fall within the exemption: *Commissioner of Stamps (Queensland) v. Counsell.*[5] An interesting question arises in relation to 'additions'. If a cash gift in the circumstances referred to in the last paragraph *would* be dutiable as an addition, would a gift (to the trustees of the existing settlement by some person other than the settlor) not of cash but of Commonwealth Inscribed Stock attract duty? If what attracts the duty is not the transfer itself, but the entry in the books of the trust, then it might be argued that such book (with entry) was not a 'document relating to . . . transfer' of the stock. The entry might be thought to be merely ancillary to the transfer, and not exempt by analogy with the decision in *Counsell's case.* The correct view is not, at least, completely clear. But in terms the legislation does not impose duty on the entry. Rather it says that if there is an addition (as defined) whether by entry or otherwise, then the trustee must make a statutory declaration of the amount or value thereof, and it is that *declaration* which is subject to the duty: section 88 (1). This preserves, at least in form, the theory that stamp duties are a tax upon instruments rather than transactions. Now surely if the Stamps Act said specifically that whenever one person transferred inscribed stock to another, that person must bring into existence a new instrument which was then liable to stamp duty, such a provision would be invalid as being inconsistent with section 52A of the Commonwealth Inscribed Stock Act. It is submitted that the same reasoning applied to the present provisions relating to additions necessarily leads to the conclusion that no duty would be payable in the situation envisaged above.

It appears that none of the interesting points raised in Professor Ford's article has been discussed. Thus *Anderson* baldly states (pp. 162, 163) that the phrases 'Whether revocable or not' and 'or directed to be given' in Heading IX of the 3rd Schedule were 'introduced . . . to overcome the decision in *Comptroller of Stamps (Vict.) v. Howard Smith*'.[6] But Ford[7] has indicated a ground for arguing that the amendment was not effective to achieve that purpose: 'The introductory words of Heading IX . . . should limit the application of the clause to dispositive instruments. The point of the *Howard Smith* decision was that a revocable mandate is not a dispositive transaction. The decision was not based on the narrower proposition that the arrangement was revocable'.

As is well known, the words 'Settlement or Gift, Deed of', appearing in the head-

4 [1967] V.R. 122, 144.
5 (1937) 57 C.L.R. 248.
6 (1936), 54 C.L.R. 614.
7 *Op. cit.* 325.

ing, have been interpreted (by reason of the text following) to encompass all instruments, whether deeds or not. The interesting question presents itself whether a gift made by delivery of a bearer negotiable cheque could be caught. A cheque would seem, on any view, to be 'an instrument', but it seems that in practice the Comptroller does not seek to assess duty in such cases. It may be that such a practice is justified because the cheque is not itself a dispositive instrument. It is a mere mandate (to a bank) like the letter in the *Howard Smith case* (which was addressed to a trustee). Consequently it is not the cheque that effects the disposition. (A cheque, if not supported by consideration, is also in every sense revocable, and in that respect also resembles the instrument in question in the *Howard Smith case*). If it is right to say that the cheque is not itself a dispositive instrument—is not one 'whereby' property is given—then it becomes most important to determine whether the amendment referred to above is now apt to catch, for duty, a letter such as that in *Howard Smith*. But if a cheque is a direction to give, and therefore within the words of the Heading, it seems that there is not really any good reason why it should not be dutiable as a Deed of Gift. It is therefore submitted that the Comptroller's attitude to cheques does appear logically to involve the conclusion that *Howard Smith's case* would be decided in the same way if the facts arose again.

Another difficult problem concerns transfers of marketable securities. Duty at gift rates is payable unless the transfer 'is made for a consideration in money or money's worth of (the book says 'or' on p. 257) not less than the unencumbered value of the marketable security'. In *Davis Investments Pty Ltd v. C.S.D. (N.S.W.)*[8] the shares were transferred by a wholly owned subsidiary to its parent company for their face value of £57, whereas their true value was £55,000. It really did not matter, for commercial purposes, what the consideration was expressed to be, because of the circumstances that the transferor and all it owned was the 'property' (in the broad sense) of the transferee. But a majority of the court (Webb and Kitto JJ. dissenting) held that the consideration which moved the transfer, even in the broad sense, was only the price of £57, and could not be said to encompass also the background circumstances which made the precise specification of the consideration a matter of little concern to the parties. If the parties choose to cast their transaction in the form of a sale at a price, then that price will ordinarily be the relevant consideration. Consequently, duty was payable as on a gift of £54,943. But if the consideration is expressed to be the allotment of shares, then all factors bearing upon the true value of those shares may be considered: *Lennon v. Comptroller of Stamps*,[9] *Comptroller of Stamps v. Buckland*.[10] Moreover, in determining what is a consideration, and what is its true worth, the court can look beyond the terms of the instrument itself notwithstanding section 24(1) which provides that 'All the facts and circumstances affecting the liability of any instrument to ad valorem duty or the amount of the ad valorem duty with which any instrument is chargeable shall be fully and truly set forth in the instrument'. Exactly where the boundary line is to be drawn between *Lennon, Buckland,* and *Archibald Howie Pty Ltd v. C.S.D. (N.S.W.)*[11] on the one hand and the *Davis Investment case* on the other is a question of considerable difficulty. Indeed the more general question of the extent to which the form of the contents of the instrument and of what the parties choose to express in it are conclusive and exhaustive, is one of the most difficult in the law of stamp duties, and it is a matter of regret that we are not given the assistance of the author's comments and experience on all of these matters. Further, the *Davis case* is referred to only in passing and no statement of the facts is given. Although the legislation there in question was the Stamp Duties Act of New South Wales and not the Victorian Stamps Act, the two statutes are in this respect identical. It would therefore seem appropriate that the misfortune of those who prepared the transfer in that case should be drawn to the attention of every reader as a warning of what dangers might befall him.

Discussion about Heading IX usually centres around the first paragraph dealing with Deeds of Settlement and Gift as such. The Heading does, of course, contain two other paragraphs. The third deals only with written acknowledgments of an existing trust, when the existing trust would, if it had been originally in writing, have

8 (1958) 100 C.L.R. 382.
9 [1965] V.R. 731.
10 [1959] V.R. 517.
11 (1948) 77 C.L.R. 143.

fallen within the first two paragraphs. But paragraph two is expressed in the widest terms: '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'. In terms this is apt to catch a purely commercial declaration of trust, and indeed many instruments which do not fall within the concept of 'gifts' or 'settlements'. However, the better view, and it may perhaps now be said to be the authoritative view, is that this paragraph is to be read down by reference to the words of the Heading, and to catch only instruments declaring trusts which are trusts in the nature of a gift or settlement: *Castlemaine Brewery Company Limited v. Collector of Imposts*;[12] *Collector of Imposts v. Peers*;[13] *Scott v. Comptroller.*[14] But from time to time suggestions to the contrary have been made—*Kelly v. Collector of Imposts*[15]—and it does seem that such an interpretation leaves no independent role for paragraph two to play. Further, such an interpretation makes it a question of the greatest difficulty whether the requirement that the consideration be 'pecuniary', as expressly stipulated in the first paragraph, must also be read into the second paragraph. Although there is a brief reference in *Anderson* paragraph three (p. 164), nothing at all is said about paragraph two. It is thought that it would be desirable to put at rest the doubt raised by the wide words of the paragraph, even if only to re-assure the startled student who reads it for the first time and wonders how to avoid such a sweeping provision.

No book has yet been written which is sufficiently comprehensive to satiate the appetites of reviewers; and if it were, it would of course attract the most pejorative comments on its unmanageable complexities and unreasonable tedium. Therefore, the above comments must not be taken as more than suggestions of difficulties in the law of stamps which will continue to arise and perplex the profession notwithstanding the useful assistance which this new edition will give to the whole of the profession, and indeed to many others in the community.

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The Concept of Obscenity, by RICHARD G. FOX, LL.M. (Melb.), Dip.Crim., Barrister and Solicitor of the Supreme Court of Victoria. (Law Book Company Ltd, Melbourne, 1967), pp. i-xix, 1-193 Price: $4.75.

The stated aims of this book are 'to expound the Australian law relating to obscenity and to articulate and analyze some of the principles and assumptions which underlie this legal concept' (p. 165). As such, a more suitable title for the book might well have been 'The Legal Concept of Obscenity' for, as the author himself indicates, the law's view of obscenity does not necessarily accord with that of the community at large. A substantial proportion of the community would no doubt agree, for instance, that irrespective of context, certain four-letter words are inherently obscene. But in law, whatever the community judgment may be, no word or subject matter is regarded as obscene *per se*. In Fox's own words, 'to the lawyer obscenity exhibits a chameleonic quality—legally its presence or absence in a publication is always ultimately determined by the time, place and circumstances of dissemination and the audience to whom it is directed'. (p. 32).

Despite its chameleonic quality, Fox tracks his prey with considerable skill and expertise. His review of state and federal legislation and judicial decisions in the field of obscenity provides a valuable source of reference for student and practitioner alike. So too does his critical analysis of the *raison d'etre* of this branch of the criminal law—an analysis which might also fruitfully be consulted by those who frame and administer obscenity laws.

Fox demonstrates that traditional justifications, such as the danger that obscene material will give rise to impure thoughts or overt sexual behaviour, are based largely upon subjective assumptions and prejudices. In particular, the popular belief that an offender's exposure to obscene material is often a causative factor in a sexual offence, tends to be rebutted by the empirical evidence available on the subject.

Seeking a more rational justification for obscenity laws, Fox seems to cast his

12 (1896) 22 V.L.R. 4. 13 (1921) 29 C.L.R. 115.
14 [1967] V.R. 122, 130. 15 (1907) 13 A.L.R. 613.
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