boundaries follows the line or course of a river, is an *ager limitatus*, and then there is no presumed extension to the middle line.

But in other cases the second line of approach may be available, when it is unnecessary to consider whether the property is an *ager limitatus* or not. It may clearly appear from the grant that the boundary was intended to be something other than the middle line. In such a case one may say that the property is an *ager limitatus* but nothing is gained by doing so. The *factum probandum*, the expressed intention of the grantor, is sought directly and, being found, concludes the matter.

That is what seems to me to be the position here. I cannot conceive of the words "inner bank of Orange River" having been used to describe the south-eastern boundary of the erf with any other object than to exclude the river bed. That being so, effect must be given to the clear language of the grant, which in this case is the legend of the diagram.

What was intended by the admission that the erf is entitled to alluvion is not clear, but it was certainly not intended to constitute an admission by legal intendment that the erf's south-eastern boundary was the river, i.e. the middle line of the river and not its inner or north-western bank. For the purposes of the present proceedings it must be disregarded.

For these reasons I agree that the appeal should be dismissed.

BEYERS, J.A., concurred in the above judgment.

Appellants' Attorneys: *Truter & Lombard*, Cape Town; *J. G. Kriek & Cloete*, Bloemfontein. Respondent's Attorneys: *Deputy State Attorney*, Cape Town; *Naudé & Naudé*, Bloemfontein.

COMMISSIONER FOR INLAND REVENUE v. FREDDIES CONSOLIDATED MINES LTD.

(APPELLATE DIVISION.)

1956. *November* 19, 23. CENTLIVRES, C.J., SCHREINER, J.A., STEYN, J.A., DE VILLIERS, J.A., and BRINK, J.A.

Land.—Transfer Duty.—Act 40 *of* 1949 *sec.* 2.—"*Acquire*".—*Meaning of.—Sec.* 5 (1) (*a*) *of Act.—Scope of.—*"*Property*".—*Meaning of in Act.—Lump sum paid for several erven individually registered.—Duty payable on total value.*

The word "acquired" in section 2 of Act 40 of 1949 must be construed as meaning the acquisition of a right to acquire the ownership of property.

The meaning of section 5 (1) (*a*) of Act 40 of 1949 is that the value on which duty must be paid is the consideration payable by the person who has acquired the right to acquire the ownership of property.

The word "property" in Act 40 of 1949 does not mean only a unit of land separately registered in the Deeds Office but includes land held under separate titles.

In terms of two separate agreements entered into on the same day the respondent company had bought the whole of the undertaking and assets of two other companies. In one agreement the following clause appeared: "(4) It is

acknowledged and recorded that of the consideration payable by the purchaser company . . . £730,695, is payable in respect of the immovable property referred to in Schedule 'A', which £730,695 is the value of such immovable property." The immovable property referred to in the Schedule consisted of a large number of separate erven in townships, each erf being referred to by its number. The Schedule placed no value on any of the erven, and these erven were registered as separate erven on the Deeds Registry. The respondent and the sellers had submitted declarations of purchaser and seller in which the true value of each of the erven was stated separately. The appellant had claimed transfer duty on the total value of all the erven and not on the values of each individual erf. In order to obtain transfer of the erven into its name the respondent had paid the amount claimed by the appellant, portion of it being paid under protest. In an application by the respondent claiming that transfer duty was payable on each individual erf and asking for judgment for the amount paid under protest, a Provincial Division had granted the order as prayed. In an appeal,

Held, that the duty was payable on the basis contended for by the appellant, viz., the duty had to be calculated on the total value of the erven and not on the values of each individual erf.

The decision in the Transvaal Provincial Division in *Freddies Consolidated Mines Ltd.* v. *Commissioner for Inland Revenue* reversed.

Appeal, by consent, from a decision in the Transvaal Provincial Division (DOWLING, J.). The facts appear from the judgment of CENTLIVRES, C.J.

F. Badenhorst, Q.C. (with him *J. D. Curlewis*), for the appellant: The value on which transfer duty is payable is either the value determined in terms of secs. 5 (1) (*a*), 5 (1) (*b*) and 1 (iii) of Act 40 of 1949 or, alternatively, that determined in terms of secs. 5 (6) and 1 (v). No provision is made in the Act for a declaration by purchaser and seller of a "true value" of the property in a case where consideration is payable, nor is the splitting up of the "consideration payable" and the allocation of different amounts to the individual erven subsequent to the date of acquisition permitted in terms of the Act. The declarations in the present case were, therefore, defective and appellant did not have the power to accept the "true values" reflected therein as if these "true values" represented separate considerations for the individual erven, for purposes of determining the transfer duty; cf. sec. 5 (1) (*a*). The provisions of the Act do not support the proposition either that the word "property" where used in the Act, means a unit of property as separately registered in the Deeds Office; cf. secs. 1 (vi), 5 (4) and (6). Respondent paid a total consideration for the right to acquire the ownership of the land described as 238 erven and appellant was correct in demanding payment of duty on the amount of such total consideration; see *Minister of Finance* v. *Gin Bros. & Goldblatt*, 1954 (3) S.A. at p. 881. No anomalies arise as envisaged by the Judge *a quo* except that if persons regulate their transactions in one form it will attract more duty than when it is in another form. This is, however, peculiar to all taxing statutes. In the present case the parties elected to regulate their transaction in a way attracting a higher, rather than a lower, rate of duty; cf. *C.I.R.* v. *Kohler*, 1953 (2) S.A. at p. 591; *C.I.R.* v. *Rand Selections Corporation, Ltd.*, 1956 (3) S.A. at p. 132.

W. G. Trollip, Q.C. (with him *C. S. Margo*), for the respondent: In regard to the interpretation of sec. 2 of Act 40 of 1949 as amended by Acts 59 of 1951, 31 of 1953 and 32 of 1954, according to the inten-

tion of the Legislature as expressed in the original Act, and before the proviso was first enacted in 1953, the "value of any property", in its application to the present case and having regard to the definition of "property" in sec. 1, meant the value of "any land and any fixtures thereon" which means the value of any unit of land and fixtures thereon, and by the term "unit of land" was meant a piece of land existing as one of the well-recognised entities such as a farm, erf, stand or lot, capable of separate ownership. Separate registration in the Deeds Office would be the usual test here, in view of the definition of "erf" in sec. 102 of Act 47 of 1937 and the proviso, for example, to sec. 22 (2), although, apart from consolidation of title, there may be a consolidation in fact of two or more pieces into one unit of land, as where one building is erected on and over two or more stands. It is the value of each such piece of land, in this case each erf, which has to be ascertained in terms of sec. 2 of Act 40 of 1949 as amended. In sec. 1, in the definition of "property", the words "land and any fixtures thereon" suggest and are appropriate to a piece of land. The expression "any property" in sec. 2, read in the light of the definition, here becomes "any land", and that implies any piece of land. Sec. 2 is subject to sec. 9, where specific references occur which are peculiarly appropriate to an individual piece of land; see secs. 9 (1) (*c*), (*g*), (*h*) and (*i*); 9 (2), (3), (7) (*d*). Sec. 2 provides for value to be determined in terms of secs. 5, 6, 7 and 8 and in sec. 5 specific references again occur which are peculiarly appropriate to an individual piece of land; see sec. 5 (4) (*a*), (6), (7), (8). Secs. 5 (7) (*b*) and (*c*) involve the same notion. In particular, the reference to "the Municipal or Divisional Council valuation of the property" is significant because valuations for rating relate to individual pieces of land; see e.g. secs. 8 and (9) (1) read with sec. 4 of Ord. 20 of 1933 (T.), *Randfontein Estates G.M. Co. (Witwatersrand) Ltd.* v. *Randfontein Municipality*, 1939 T.P.D. at pp. 408, 410-1; sec. 25 of Ord. 7 of 1914 (C.), since replaced by secs. 47 and 95 of Ord. 19 of 1951 (C.); *Cape & Transvaal Land & Finance Co., Ltd.* v. *Director of Valuations*, 1938 C.P.D. at p. 446; sec. 88 read with 256 of Ord. 15 of 1935 (O.), and secs. 105, 107, 109, 113 (*d*) and 122 read with the definition of "rateable property" in sec. 2 (1) of Ord. 21 of 1942 (N.). These provisions on the determination of fair market value are the best indication that what is contemplated in sec. 2 is an individual piece of land, like an erf. It is that value, as determined in respect of each individual property which is the value for the purpose of transfer duty, and not a number of such values lumped together merely because of the accident of a number of separate properties acquired simultaneously in one overall contract. The words, in sec. 12 (1) "no registration officer shall make any record . . . of an acquisition of property . . ." also are appropriate to the division in the Deeds Registry, of land into separate pieces. Sec. 15 (1) is similarly appropriate to the notion of a particular piece of land. It is irrelevant, in the ascertainment of the value of each erf, that there is only one contract under which several erven are acquired, or that an overall price is fixed for all such units or that the contract itself might be indivisible. The words used by the parties in their transaction cannot alter the meaning of sec. 2, for it is the acquisition which is dutiable and not the transaction. The reference to a

"transaction" in sec. 2 is not strictly necessary for the purpose of the section. Consequently, where several pieces of land are acquired under one contract, it is irrelevant that in form the contract is divisible into several agreements, one for each piece of land, with a separate consideration stipulated for each, or that it is indivisible because one consideration is stipulated for all the pieces of land. In both cases, the value of each piece has to be determined in terms of sec. 5. In the determination of such value regard is had firstly to the consideration payable, not the purchase price, of each piece; (see sec. 5 (1) (*a*)), and/or secondly to the fair value thereof; (see sec. 5 (6), (7) and (8)). For that purpose a composite consideration would have to be apportioned either in the contract itself or in the declarations of purchaser and seller; see sec. 14. If the Commissioner is dissatisfied with that apportionment, he acts under sec. 5 (6), (7) and (8) in order to determine the value of each individual piece of land. Such apportionment and/or determination would, for example, have to be made in the following cases, viz. the acquisition of immovable and movable property for one consideration, the acquisition of immovable property and the renunciation of a right in one transaction, the acquisition of one property, portion of which is exempt under sec. 9 (1) (*c*), the acquisition of several different kinds of property for one consideration and the acquisition of several different properties in different parts of the Union for one consideration; see *Union Government* v. *Tahan*, 1931 O.P.D. at p. 90; *Minister of Finance* v. *Gin Bros. and Goldblatt*, 1954 (3) S.A. at pp. 884-6, 889-91. The effect of the introduction of the proviso to sec. 2 is not to change the original meaning thereof. Alternatively, the provisions of sec. 2 as amended by the proviso are ambiguous and the interpretation contended for *supra* should be applied because appellant's contention, if correct, would lead to anomalous situations, and, in accordance with the principles to be applied in interpreting a fiscal statute, the tax is not exigible unless clearly imposed; see *C.I.R.* v. *Simpson*, 1949 (4) S.A. at p. 695; Maxwell *Interpretation of Statutes* (10th ed., p. 288). There is nothing in sec. 2 or elsewhere in the Act which provides that transfer must be paid on total values or on the sum of all values of all properties acquired in one transaction. The *contra fiscum* rule should thus be applied; see *Estate Reynolds and Others* v. *C.I.R.*, 1937 A.D. at p. 67; *R.* v. *Hathorn and Others*, 1948 (4) S.A. at p. 169; *Maxwell, supra*; Steyn *Die Uitleg van Wette*, p. 102.

Badenhorst, Q.C., in reply.

Cur. adv. vult.

Postea (November 23rd).

CENTLIVRES, C.J.: In terms of two separate agreements entered into on the same day the respondent company bought the whole of the undertaking and assets of two other companies for the sums of £5,075,980 and £5,177,942 10s. 0d. respectively. In the one agreement the following clause appears:—

"4. It is hereby acknowledged and recorded that of the consideration payable by the purchaser company to the seller company, £730,695 is payable in respect of the immovable property referred to in the schedule hereto marked 'A', which £730,695 is the value of such immovable property, as shown in the books of the seller company."

In the other agreement the same clause appears, excepting that the figure is £717,463. Each of the "A" schedules shows that the immovable property referred to in clause 4 of the agreement consists of a large number of separate erven in townships, each erf being referred to by its number. That schedule does not place a value on any of the erven. Those erven were at the time the agreements were entered into registered as separate erven in the Deeds Registry at Bloemfontein.

The respondent and the sellers submitted declarations of purchaser and seller to the Receiver of Revenue in which the true value of each of the erven was stated separately, totalling the above sums of £730,695 and £717,463 respectively. In the case of most of the erven the value of each individual erf was less than £5,000. The appellant admits that the value of each individual erf is the value shown in the declarations of purchaser and seller but denies the relevancy of such value.

A dispute arose between the parties as to the amount of the transfer duty that was payable in terms of sec. 2 of Act 40 of 1949. The Commissioner for Inland Revenue claimed £57,826 6s. 6d. as transfer duty on the basis that the duty had to be calculated on the total values of all the erven and not on the value of each individual erf. The respondent contended that the transfer duty payable was £43,950 16s. 9d. on the basis that the duty had to be calculated on the value of each individual erf. On that basis the duty would be 3 per cent on so much of the value of each erf as does not exceed £5,000 and 4 per cent thereafter. The Commissioner contended that duty was payable at 3 per cent on £5,000 of £730,695 and £717,463 respectively and at 4 per cent thereafter. In order to obtain transfer of the erven into its name the respondent paid the amount claimed by the Commissioner. It first paid £43,950 16s. 9d. and thereafter paid under protest the balance demanded by the Commissioner, viz. the sum of £13,875 9s. 9d.

The respondent petitioned the Transvaal Provincial Division for an order declaring that transfer duty at the rate of £3 per centum was payable in terms of sec. 2 of the Act in respect of the first £5,000 of the value of each individual erf and that transfer duty at the rate of £4 per centum was payable on so much of the value of each individual erf as exceeds £5,000. The respondent also asked for judgment for £13,875 9s. 9d. The Provincial Division made the declaratory order asked for and granted judgment for the amount claimed. The Commissioner now appeals, the parties having agreed to an appeal direct to this Court.

The charging section of Act 40 of 1949 is sec. 2, the relevant portion of which, as amended by sec. 1 of Act 32 of 1954, reads as follows:—

"There shall be levied for the benefit of the Consolidated Revenue Fund a transfer duty . . . of four pounds per centum on the value of any property (which value shall be determined in accordance with the provisions of secs. 5, 6, 7 and 8 acquired by any person . . . by way of a transaction . . . Provided that on so much of the said value . . . as does not exceed five thousand pounds, the duty shall be three pounds per centum."

Sec. 1 of the Act defines "property" as meaning "land and any fixtures thereon . . ." and "transaction" as meaning "an agreement whereby one party thereto agrees to sell . . . property to another. . . ." In this judgment I shall use the word "property" in the sense in which it is defined in sec. 1.

Sec. 5 (1) is as follows:—

"The value on which duty shall be payable shall, subject to the provisions of this section—

(*a*) where consideration is payable by the person who has acquired the property, be the amount of that consideration; and

(*b*) where no consideration is payable, be the declared value of the property."

"Declared value" is defined in sec. 1 as meaning "the value of the property as declared in the declaration completed in terms of sec. 14 by the person who has acquired the property."

Under sec. 3 (1) read with the definition of "date of acquisition" in sec. 1 the duty in the present case was payable within six months of the date of the agreements entered into between the respondents and the two selling companies. It is clear from the whole scheme of the Act that payment of the duty (apart from cancellation) must be made whether or not the property is transferred into the name of the purchaser. The word "acquired" in the charging section (sec. 2) must therefore be construed as meaning the acquisition of a right to acquire the ownership of property. It has been said to be a misnomer to call the duty a transfer duty: it is in fact a duty imposed, *inter alia*, on the consideration given by a purchaser of property for the right conferred on him to acquire the ownership of property. See *Minister of Finance* v. *Gin Brothers and Goldblatt*, 1954 (3) S.A. 881 at pp. 884 and 889 (A.D.). It follows that the meaning of sec. 5 (1) (*a*) is that the value on which duty must be paid is the consideration payable by the person who has acquired the right to acquire the ownership of property. In the present case the respondent by virtue of the two contracts entered into by it acquired the right to acquire the ownership of the property mentioned in those contracts. In the case of each contract that right was acquired by way of one "transaction" and it seems to me that that right was indivisible. And in each contract the consideration for the acquisition of that right is stated: that consideration is, therefore, in terms of sec. 5 (1) (*a*), the value upon which the duty must be calculated, the Commissioner not having questioned that value in terms of sub-sec. (6) of sec. 5.

If the view I have expressed above is correct it follows that I am unable to agree with the contention advanced on behalf of the respondent that the word "property" in the Act should be construed as meaning any unit of land which is separately registered in the Deeds Office and not as including a number of separately registered pieces of land. It is true that if the Commissioner is of opinion that the consideration payable is less than the fair value of the property in question he may under sec. 5 (6) determine the fair value of that property and that under sec. 5 (7) he must, in determining the fair value have regard, according to the circumstances of the case, *inter alia*, to the municipal or divisional council valuation of the property itself. He would thereupon have to value separate units of land for the purpose of determining the fair value of the right to acquire the ownership of those separate units. The aggregate of the fair value placed on each unit then becomes the value of the right to acquire the ownership of all the separate units and the duty becomes payable on that value if it exceeds the consideration payable: if it does not, the consideration remains the value of the right to acquire the ownership of the separate units upon which the

duty is payable. But the fact that for certain purposes regard may be had to the values of separate registered units of land does not have the logical consequence that the system of taxation is based on units of land.

Sec. 5 (4) (*a*) affords a strong indication that the Legislature did not intend the word "property" to mean only a unit of land which is separately registered. That sub-section provides for the determination of the dutiable value "in the case of a transaction where one property is exchanged for another." If by the word "property" is meant only a unit of land separately registered in the Deeds Office, then the section would not apply to cases where there is an exchange of a farm which is held under one deed of transfer for another farm which is held under two or more deeds of transfer nor to a case where one farm is exchanged for two separate farms. The Legislature must have intended that the section should apply to the cases I have mentioned, for there is no other provision in the Act which provides for the determination of the dutiable value in those cases. If I am correct in this, it follows that the word "property" does not mean only a unit of land separately registered in the Deeds Office but includes land held under separate titles.

For all these reasons it seems to me that duty is payable on the basis contended for by the Commissioner. The appeal is allowed with costs, and the order made by the Provincial Division is altered to read as follows:—

"Application dismissed with costs."

SCHREINER, J.A., STEYN, J.A., DE VILLIERS, J.A., and BRINK, J.A., concurred.

Appellant's Attorneys: *State Attorney*, Pretoria; *Naudé & Naudé*, Bloemfontein. Respondent's Attorneys: *MacIntosh, Cross & Farquharson*, Pretoria; *Fred S. Webber & Son*, Bloemfontein.

GERMISTON CITY COUNCIL v. CHUBB & SONS LOCK AND SAFE CO. (S.A.) (PTY.) LTD.

(APPELLATE DIVISION.)

1956. *November* 12-16, 22. SCHREINER, J.A., FAGAN, J.A., DE BEER, J.A., REYNOLDS, J.A., and BEYERS, J.A.

Water.—Drainage.—Flooding as the result of roadmaking operations.—Adjoining landowner claiming damages.—Initial onus *on local authority automatically discharged.*—Onus *on landowner then to prove protection of statute lost by negligent exercise of powers.—Discharge of.—Factors to be regarded.—Natural drainage.—What constitutes when road made before land sold by local authority.*

In an action by an adjoining landowner against a local authority for damages caused by flooding as a result of roadmaking operations, the discharge of

the initial *onus*, viz. the *onus* on the local authority in the first place to satisfy the Court that the Legislature contemplated an interference with private rights, is in effect automatic. As regards the *onus* which is then on the landowner to prove that the local authority was not entitled to the protection of the statute empowering the local authority to make roads because the injury complained of was due to a negligent exercise of its powers, in deciding what measures were reasonably practicable regard must be had to the total requirements and resources of the local authority and not merely to the means of providing protection to an individual landowner. Ordinarily the position of any one plaintiff in regard to protection against flooding cannot be dealt with in isolation from the requirements of the whole area and the resources available to meet them.

Semble: When land is sold by a municipality below an existing road which it has made in the interests of the public, including landowners, and where the natural drainage has been obviously interfered with, the natural drainage, for the purpose of deciding whether there has been an improper diversion of alien water, should be regarded as the drainage as so modified.

The decision in the Witwatersrand Local Division in *Chubb & Sons Lock & Safe Co. (S.A.) (Pty.) Ltd.* v. *Germiston City Council*, reversed.

Appeal from a decision in the Witwatersrand Local Division (RUMPFF, J.). The facts appear from the judgment of SCHREINER, J.A.

H. J. Hanson, Q.C. (with him *H. C. Nicholas*), for the appellant: Respondent's case was based on the general principle that no one is entitled to divert water on to the property of another as the result of artificial constructions; see *de Villiers* v. *Galloway*, 1943 A.D. 444; *Thormahlen* v. *Gouws*, 1956 (4) S.A. 430. But the creator of artificial works is not liable for the diversion of water where the works are empowered by statutory authority and where the works are carried out by a land-owner in the course of laying out a township. As to the law applicable in cases of statutory authority, see *Reddy & Others* v. *Durban Corporation*, 1939 A.D. at p. 298. It is common cause that Nagington Road was constructed by virtue of the authority in secs. 79 and 63 of Ord. 17 of 1939 (T.) read with sec. 28 of Ord. 11 of 1931 (T.) and sec. 79 (2) of Ord. 17 of 1939 (T.). Appellant is accordingly not liable for any damage suffered by respondent unless respondent can show that Nagington Road was constructed negligently or that appellant could have taken measures reasonably practicable to prevent such damage. The reasonably practicable measures referred to in the cases are measures which are reasonably practicable at the time of the construction of the works; see *Reddy's* case, *supra* at p. 300; *Breede River (Robertson) Irrigation Board* v. *Brink*, 1936 A.D. at p. 368. If measures are not reasonably practicable at the time of construction, no duty to take such measures arises subsequently. If the damage was caused by the acts of respondent, appellant is not responsible in terms of the general principles stated in *Voet* 39.3. As to works carried out by a land-owner in the course of laying out a township, it is common cause that the township of Wadeville was established by appellant on property owned by it and that the streets in the township were constructed and graded by it. In the circumstances, appellant is under no liability in respect of water diverted as a result of the construction of Nagington Road, by reason of the principle stated in *D.* 29.3.23; see also *Voet*, 39.3.5; *Donellus* (vol. IV, col. 569); Pothier *Pandectae Justinianae*, (39.3.2. xv and footnote 10). The Judge *a quo* rejected appellant's submission on the ground that the *actio aquae pluviae arcendae* was not applicable to certain properties. This is by no means clear. The question was expressly