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have adduced material evidence as to the agreement made by Story on the 8th October 1903; and that the policy in question, effected with the Australian Mutual Provident Society, does not fit the terms of the letter of that date—for it was not a "similar" policy to the policy which, under that letter, was to be replaced.

Appeal dismissed with costs.

Solicitors, for the appellants, *Nunn, Smith & Jeffreson.*
Solicitor, for the respondent, *W. M. McIllwrick.*

B. L.

[HIGH COURT OF AUSTRALIA.]

MARTIN JOSEPH BRENNAN AND HENRY ALMAN . . . . . PLAINTIFFS, } APPELLANTS;

AND

JAMES HURTLE MORPHETT . . . DEFENDANT, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *April* 28, 29.

Griffith C.J., Barton and O'Connor J.J.

Sale of a mining area—Reservation of an interest by vendor—Subsequent declaration of trust without further consideration—Mining Act 1898 (*Qd.*), (62 *Vict. No.* 24)—*Estoppel.*

In 1889 the respondent was the registered proprietor of a mining claim which he had purchased from one Hart who retained a one-fifteenth "fully paid up" share. In 1900, and without any further consideration, the respondent made a declaration which was registered in the Warden's Register, stating that he held "one-fifteenth interest in the said claim in trust for and on behalf of the said George Hart of Hampden in the Colony of Queensland the said one-fifteenth being a fully paid up share in the said claim and any company formed or associated to work the said claim."

Hart sold one-sixth of his share to the appellant Alman, and subsequently sold the remainder of his interest to the appellant Brennan. The respondent afterwards sold the whole claim to a company, the consideration being a sum of money and fully paid shares in the company, and offered to the appellants one-fifteenth of such money and shares. Brennan claimed that he was entitled to one-fifteenth, less one-sixth, of the shares of the company as floated, credited as fully paid up, and a similar proportion of the purchase money paid to defendant.

Held, that the declaration of 1900 was inoperative, either as a trust, since a trust could not exist as to shares in a company not yet in existence but which might possibly be established in the future, or as a contract, there being no consideration to support it.

Held, also, that the registration of the declaration of trust did not operate as an estoppel, and assignees from Hart could not because of it be in any better position than Hart himself, and that Brennan was therefore entitled to only one-fifteenth, less one-sixth, of the purchase money and shares actually received by the respondent.

Judgment of *Chubb* J., *Brennan* v. *Morphett*, 1908 St. R. Qd., 45, affirmed.

IN this action the plaintiffs claimed from the defendant in money and shares, or in shares alone, one fifteenth of the capital value, as incorporated, of the "Mount Elliott Limited," a copper mining company, which was registered with a capital of £66,000 in paid up shares of £1; or, in the alternative, damages for breach of trust.

The facts were not in dispute and were as follows:—

On 10th April 1899 one George Hart, who was the registered owner thereof under the *Mining Act* 1898, by agreement in writing of that date, sold to the defendant the Mount Elliott reward claim, Cloncurry, retaining for himself a one-fifteenth "fully paid" up share in the area.

The agreement was substantively as follows:—

"The said George Hart is possessed of [here followed a description of the area] and agrees to sell to the said James Hurtle Morphett and the said James Hurtle Morphett agrees to buy from the said George Hart the said area on the following terms and conditions viz.:—

"The said James Hurtle Morphett agrees to pay down in cash the sum of £300 at once and an additional sum of £1,700 within 12 months from the signing of this agreement.

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"And the said George Hart shall retain a one-fifteenth fully paid up share in the said area.

"And also the said James Hurtle Morphett agrees to pay all the expenses in connection with the working of the said area from this date and to expend not less than the sum of £250 in improving the said area.

"And the said George Hart agrees to transfer the said area to the said James Hurtle Morphett on completion of this contract."

The defendant duly paid to Hart the sums of £300 and £1,700 mentioned, and Hart transferred the entire claim to the defendant.

The defendant, for some private reason, transferred the claim to his brother John C. Morphett, who then became registered as owner, but the defendant remained always the beneficial owner thereof for himself and Hart.

On 20th March 1900 the defendant, as his brother's attorney, executed and registered a document, called a declaration of trust, in the words following:—

"No. 3007. I John Cummins Morphett of Adelaide, South Australia, being the registered proprietor of the reward claim known as Mount Elliott and registered in the Warden's Register of Cloncurry as number three hereby declare that I hold one-fifteenth interest in the said claim in trust for and on behalf of George Hart of Hampden in the Colony of Queensland the said one-fifteenth share being a fully paid up share or interest in the said claim and any company formed or associated to work the said claim."

This declaration was made for the protection of the interests of Hart, voluntarily and without any further consideration than the payment of the £2,000 mentioned, by the defendant purporting to act as attorney for his brother John C. Morphett, but in fact acting on his own behalf.

Shortly after registration of the declaration John C. Morphett re-transferred the claim to the defendant.

On 5th April 1900 Hart sold to the plaintiff Alman one-sixth of his interest in the claim. The sale agreement was registered and the defendant had notice thereof.

In May 1900 an option of purchase of the claim was given by the defendant, and in February 1903 another option was given.

In neither case did a sale result, but Hart was consulted about both of them.

During all this time the defendant was improving the claim. On 3rd April 1903 Hart sold the remainder of his interest in the claim to the plaintiff Brennan. The sale agreement was registered and the defendant had notice thereof. Hart died on 15th June 1905.

On 30th September 1905 the defendant (as vendor) entered into an agreement with Anthony Linedale (as purchaser) for the sale to him, upon terms, of the claim, of which the clauses material were as follow:—

"1. The Vendor shall sell and the purchaser shall purchase all that the mining tenement [here followed description of the tenement] whereof the said vendor is the registered owner at or for the price or sum of five thousand pounds and two-fifteenths share (such share to be regarded as and to be fully paid up) of the whole of any company or syndicate to be hereafter formed in connection with the said tenement.

"8. When the purchaser forms a company or syndicate in connection with the said mining tenement such company or syndicate shall be registered in Queensland and if a company to be registered as a limited liability company and having a working capital of not less than twenty thousand pounds."

Alman was informed by the defendant of the terms of this option and made no objection to them.

In pursuance of this agreement Linedale early in 1900 formed and floated a company named the "Mount Elliott Limited" with a registered capital of £66,000 in £1 shares, of which 40,000 were issued fully paid up and 26,000 contributing.

Linedale paid to the defendant the £5,000 and delivered to him 8,800 fully paid shares in the company being the agreed price of the area, and the defendant thereupon transferred the claim to the company. The company became the registered owner, entered into possession of, and proceeded to develop and work the claim.

The defendant admitted that the plaintiffs were entitled between them (to be divided according to their respective interests) to

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£413 6s. 8d. and 587 paid up shares in the company, and brought that sum and certificates for those shares into Court.

The plaintiffs did not accept what was brought into Court but joined issue on the defence. *Chubb* J. found for the defendant, and from this judgment the plaintiffs appealed to the High Court.

Lilley and *Stumm*, for the appellant Brennan. Even without the declaration of 20th March 1900, under the agreement of 10th April 1899 there was a resulting trust in favour of Hart. The declaration of 20th March 1900 set out more exactly what the share held really was. Morphett had to see that such a share was provided for in any company formed.

[GRIFFITH C.J.—This cannot refer to a company to be composed of absolute strangers with whom there would be no privity.

O'CONNOR J.—Where is there any consideration for making the declaration of March 1900?]

No authority to sell was given in the agreement, although defendant gave evidence that he had verbal authority to sell. Hart being now dead, nothing, other than what can be gathered from the declaration of trust, can be ascertained as to what took place between him and Morphett.

Though the appellants have adopted the sale, they are not bound to take one-fifteenth of what it realized because Morphett should have protected Hart's one-fifteenth interest in accordance with the conditions set out in the registered trust document, and the sale was only adopted on the ground that such share had been protected.

The declaration of trust sets out what share Hart was to have, and that means one-fifteenth, not of what Morphett received, but one-fifteenth of the whole company as floated: *In re Stapleford Colliery Co.*; *Barrow's Case* (1). Sec. 160 of the *Mining Act* 1898 shows that trusts are recognized, and the registration of this particular trust was notice to the defendant that he took subject to equities.

The appellant Alman did not appear.

(1) 14 Ch. D., 432, at p. 444.

Shand and *Lukin*, for the respondent. One of the objects of the agreement of 10th April 1899 was that Morphett should be registered as sole proprietor, and as such would have the right to transfer the claim under regulation 143.

The registered document of March 1900, for which there was no consideration, is merely an admission that one-fifteenth is held on trust for Hart, and the words added, "the said one-fifteenth share being a fully paid up share or interest in the said claim and any company formed or associated to work the said claim," mean one-fifteenth of the claim or one-fifteenth of any share in the claim of which the vendor has control if sold.

But, apart from this, a trust cannot be made of shares in a company which might possibly be established in the future: *Perry* v. *Phelips* (1).

Lilley, in reply.

GRIFFITH C.J. This action is in form an action to enforce the obligation of a trust. The property now in question is five-sixths of a one-fifteenth share of a mining tenement at Cloncurry, of which the defendant was the registered owner, and which was disposed of by him to a purchaser for a consideration consisting partly of cash and partly of two-fifteenths of the shares in any company or syndicate formed to take over the property, such shares to be fully paid up. A company was formed with a capital of 66,000 shares and the property was transferred to it, and the defendant received 8,800 fully paid up shares. He has offered the plaintiffs one-fifteenth of these shares and of the cash, but the appellants are not satisfied, and claim to be entitled, not only to one-fifteenth of the net proceeds of what the defendant had to sell, but one-fifteenth of the property in the mining tenement itself, including any additional value that may be given to it by the money expended by the purchasers. The question arises in this way:—One Hart, a miner, was the owner of the tenement. Under the mining laws it is necessary that certain expenditure should be incurred to perform the conditions of labour, and it is, of course, necessary, if anything is to be made of such a property,

(1) 4 Ves., 108.

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that money should be spent in developing it. In April 1899 Hart, who was then the registered owner, (and under whom the plaintiffs claim) offered to sell the tenement to the defendant for £2,000, reserving a one-fifteenth share to himself. The reservation was expressed in these words "The said George Hart shall retain a one-fifteenth fully paid-up share in the said mine." This I take to mean that, as between himself and his co-adventurers in the mining enterprise, the other adventurers were to bear all the expense incurred in fulfilling the labour conditions, and in developing the mine. That condition, in my opinion, was intended to operate only so long as the joint adventure should be carried on by Hart and the defendant and any others who might become co-adventurers with them. The defendant agreed to expend not less than £250 in improving the area. The registered owner of a claim is entitled under the Mining Regulations to transfer the claim, and can give a good title to it to a purchaser. Hart might, if he had so desired, have transferred only fourteen-fifteenths of the claim, keeping the other one-fifteenth registered in his own name, and entering into an agreement, which might be registered, with his co-owners that they should bear all the cost of development and the performance of conditions. He did not, however, adopt that course, but agreed to transfer the whole of the tenement. The result was that as to the one-fifteenth the defendant was a trustee for him, on the terms that he was not liable for any share of expenditure. In my opinion, it follows, both from the form of the transaction and from the nature of the property, that the defendant had implied authority as between himself and Hart to dispose of it at his discretion. If we regard the nature of the property that becomes obvious. A copper mine, on an area of 160 acres, could not be developed without the command of a considerable capital, and it must have been intended that the property should be disposed of after its character had been proved by the expenditure which the defendant was bound to make.

In the following year, for some reason which is not apparent, the defendant transferred the property to his brother J. C. Morphett, as trustee for him, and the latter afterwards re-transferred it to the defendant. While it was registered in his

brother's name the defendant, formally acting for his brother, but really for himself, executed a document dated 20th March 1900 upon which the appellants' contention is founded. It was in these words:—"I John Cummins Morphett of Adelaide South Australia being the registered proprietor of the reward claim known as Mount Elliott and registered in the Warden's Register of Cloncurry as No. 3 do hereby declare that I hold one-fifteenth interest in the said claim in trust for and on behalf of George Hart of Hampden in the Colony of Queensland the said one-fifteenth share being a fully paid up share or interest in the said claim and any company formed or associated to work the said claim."

The last words, "and any company," &c., are the ones on which the plaintiff bases his present contention. It appears to me that all such difficulty as there is in the case has arisen from the confusion of two entirely different questions—(1) Whether the defendant had authority to dispose of the claim, and (as a subsidiary question), if so, was there any agreement between himself and the defendant as to the terms on which he was to dispose of it? And (2) what were the trusts on which he held the one-fifteenth share before sale? I have pointed out that under the original transaction a power to sell was implied. Upon a sale the trusts, whatever they were, would follow the purchase money. This document of 20th March 1900 is on its face a mere declaration of the trusts on which the defendant held the claim. It was in fact executed by defendant without any communication with Hart. It was in no way of a contractual nature, and no fresh consideration moved from Hart. It was apparently intended for Hart's protection as a formal declaration of the trusts upon which the defendant held the property. It declared the terms on which the claim was and was to continue to be held by the defendant; but it was not intended in any way to refer to what was to happen after the property had ceased to be held by Hart and his co-adventurers as a mining tenement. Whether it would have made any difference in the result if it had been so intended is a matter which I will deal with later. In my opinion, the only effect of that document was to declare the existing trusts of the mining tenement, and it had no application whatever to any thing that might happen after the property was sold out and out.

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Brennan is a purchaser from Hart. What he bought was Hart's equitable interest, and he could not get more than Hart had to sell, and one of the incidents of that interest was that by law the defendant could sell it. No fresh incidents could be introduced by the transfer from Hart to the appellants. There was evidence that Hart expressly authorized the defendant to sell, but, as I have already said, whether he did or not, the defendant had implied authority to sell. But suppose that he had not. If the sale by the defendant was a breach of contract or a breach of trust, the appellants do not complain of it. On the contrary they are seeking to have the benefit of the sale. It must, therefore, be taken to have been a sale made by the defendant in conformity with the terms of the trust on which he held the property.

The appellants, however, contend that upon the proper construction of this document they are entitled to one-fifteenth share in the tenement itself, even after sale, including any increased value arising from the expenditure made by any company to which it may be sold. That contention involves interpolating in the document words making it read thus:—"the said one-fifteenth share being a fully paid up share or interest in the said claim, and fully paid shares in the same proportion in the total share capital of any company formed or associated to work the said claim." The first answer to that contention is that that is not the meaning of the document. But suppose it was. Such words would be quite inoperative as a declaration of trust. They would purport to be a declaration of trust as to shares in a company that might possibly be established at some future time. The only possible effect that could be given to an intention of that sort would be by way of contract—as in a covenant to settle future property. But, if it is relied on as a contract, there must be some consideration, and there was in this case no consideration for such a promise. But, further, the result of this contention, if effect were given to it, would be, that whereas, before the existence of the document, the defendant was merely a trustee of a fifteenth share for Hart, and bound to account to him for a fifteenth of the proceeds of the claim if sold, after the execution he had no longer authority to sell the whole claim, but only to sell fourteen-

fifteenths, Hart being entitled under any circumstances to retain a full one-fifteenth interest in the property itself, whoever might buy it, and this moreover on condition that he was never to be called upon for any contribution to expenses of working. All that would have to be inferred from a document executed under such circumstances as I have referred to, voluntarily, without consideration, and merely for the purpose of putting on record, for convenience, the rights of the parties. It is clear that no such promise can be inferred, even apart from the question of consideration. But it is said that the appellants are in a better position than the vendor Hart. How can that be? They cannot have any greater right than Hart had, except by some estoppel, and there is nothing in the nature of an estoppel. It is not alleged that the plaintiffs have been misled by relying upon the particular form of the document of 20th March. Even if that document operated as a contract with Hart, I fail to see how the appellants could sue upon it. If they could, that is not this action. They are not suing for breach of contract but for enforcement of their right as *cestuis que trustent*. It happens that part of the consideration on the defendant's sale was two-fifteenths of the share capital of any company to be formed. The appellants say that the defendant is in the position that he has two-fifteenths, and can give them one-fifteenth, and, therefore, they are entitled to maintain this action. In my judgment, all they are entitled to is a one-fifteenth part of what the vendor received as consideration. It is quite obvious that, in the case of property of this sort, all the parties contemplate that it will be sold to a company, and that the members of that company will have to find the money for working it. What the plaintiffs claim, therefore, is a great deal more than Hart had, which was a one-fifteenth share in an undeveloped mine of problematical value. What they now claim to have bought is one-fifteenth of the mine as it will be developed by the capital brought in by the members of the company. In my opinion, the plaintiffs' claim fails on all points; they have, indeed, already received by the payment into Court more than they were strictly entitled to. I think the appeal must be dismissed.

BARTON J. This suit arose out of a contract already described,

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made in 1899, by which one George Hart sold to the defendant a mineral protection area consisting of about 160 acres at Cloncurry. The entire area is assigned to the defendant with a proviso that Hart retains a one-fifteenth fully paid up share. It is essential to remember that, in order to facilitate his dealing with it according to the relative proportions of the two in the property, as Hart knew, the transferee was entitled by the regulations under the *Mining Act* himself to deal with the matter of the transferred property, and after consideration of the evidence and the surrounding circumstances, I have no doubt that this transfer was made with a view to giving the transferee authority to deal with the whole of the property. That that was so must be conceded by the plaintiffs, because the suit is founded upon an affirmance of the contract afterwards made by the transferee. In the first place what is the meaning of the words relied upon:— "And the said George Hart agrees to transfer the said area to the said James Hurtle Morphett on completion of this contract?"

I think it is rightly contended that, Hart being entitled to a fifteenth share and the legal estate being vested in Morphett, there was on the face of the document a trust in favour of Hart as to one-fifteenth of the property. But dealing with the matter apart from what is called the declaration of trust, which I shall come to presently, what is the meaning of the contract as it stands in respect of what Hart or his assignees may retain in the event that happened? The subject of the trust was a one-fifteenth fully paid up share in the area. If the contract stood alone would that expression justify the claim that upon sale the fully paid up share in the area, the sale being authorized, transmuted itself into a one-fifteenth share in the whole capital of any company that might be formed? I am distinctly of opinion that the contract has no such meaning; that with a contract evidencing a trust, such as this, the clear and normal meaning of words of that kind, coupled with the authority to sell, is that the *cestui que trust* is to retain a fifteenth fully paid up share in the area as long as it is an area, "fully paid up" signifying that he is not liable to contribute to the working expenses, and that, if it is sold, he is to have a like interest in the proceeds of the sale. That is the normal and ordinary meaning, and I see

nothing upon the face of the contract itself to cast the slightest doubt upon that meaning. If the case stood at that it seems to me that the plaintiffs must fail, but their claim is assisted, according to their contention, by the document of 20th March 1900, by which Morphett, having constituted his brother the registered proprietor under circumstances which made his brother a mere trustee, executed as his attorney a document in which the brother was made to say:—"I John Cummins Morphett of Adelaide South Australia, being the registered proprietor of the reward claim known as Mount Elliott and registered in the Warden's Register of Cloncurry as number three hereby declare that I hold one-fifteenth interest in the said claim in trust for and on behalf of George Hart of Hampden in the Colony of Queensland, the said one-fifteenth share being a fully paid up share or interest in the said claim and any company formed or associated to work the said claim."

Before dealing with this document I must say that it seems out of the question that it can be made the foundation for any claim on the part of the assignees of Hart for any larger interest than he had himself under the original contract. As has been pointed out by the Chief Justice, this document cannot work as a declaration of trust in respect of future acquired property, but can only operate by way of contract, not as a covenant but as a simple contract. But the difficulty that besets it in that regard is that it is not founded upon any consideration. As, then, it has no contractual operation, and as it cannot work by way of declaration of trust, can it be contended that there is in it any representation of fact on the part of the attorney of Morphett, that is, on the part of the defendant, upon which an estoppel can be founded? I do not see that a thing can be in one breath a promise as to the future, and at the same time amount to a representation of an existing fact as contended. If it means that Morphett, or his figure head, his brother, promises to transfer a fully paid up share or interest in the claim or in any company formed or associated to work the said claim, then that is a mere naked promise, and cannot amount as it stands to a representation of the existing fact. Clearly the allusion to a company can only relate to a future contingency. Finally, I cannot see in the evidence any-

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thing which could amount to an estoppel by way of conduct on the part of the defendant. I cannot find anything in the evidence to show that in any way the plaintiffs have been misled, and taking the whole of the so-called declaration of trust, I have not been able to find in that, either by way of declaration of trust, or by way of contract, or by way of representation, anything which would affect the clear interpretation of the contract of 10th April 1899, under which, it appears to me, the plaintiffs' claim cannot be justifiable if taken by itself, and as it cannot have the assistance that is claimed for it from the other document, the plaintiffs' claim must fail altogether. Therefore I agree that the appeal ought to be dismissed.

O'CONNOR J. I agree that in this case the learned Judge in the Court below was right in entering judgment for the defendant. The rights of the parties depend entirely upon the proper construction to be placed upon the agreement of 10th April 1899 made between Hart and Morphett, and the declaration of trust made by Morphett on 20th March 1900. When these documents are considered, apart from the side issues with which their interpretation has been encumbered, I do not think there can be any difficulty in ascertaining the true meaning. In interpreting the agreement of 10th April 1899 it is necessary to have regard to the subject matter. It was a mining tenement—a copper mining property of considerable area, and one which necessarily required for its development the expenditure of a large amount of money. It is apparent that Hart and Morphett had not sufficient money themselves to develop it. They evidently had a belief in the property, because Hart, the owner, being entitled to payment in cash, took as part of his payment a fifteenth share of the property stipulating that Morphett should spend £250 in the development of it within twelve months. If it had been the intention of the parties that Hart should retain the one-fifteenth share under all circumstances, and power should be conferred on Morphett to deal only with the remainder of the property, that intention could have been effected by the registration of a contract to that effect which under the Mining Regulations would constitute these parties a legal partnership

to work in accordance with those interests. That was not done, but by the terms of the contract power to exercise absolute dominion as the registered proprietor of the whole property was given to Morphett. There can be no question, therefore, having regard to the circumstances to which I have referred, that it was the intention of the parties that Morphett should have full authority to sell the property in any way he thought fit, so long as he preserved for Hart the interest in the proceeds for which the latter had stipulated. And if that contract of 10th April 1899 were the only document to be interpreted, I should have no hesitation in saying that it was clear on the face of it that Hart was to be entitled to a fifteenth share in the working or profits of the property so long as it remained in the hands of Morphett, and a fifteenth of the proceeds of the property after it had been sold. Such being the rights of the parties under the agreement, we find that something like eleven months after it had been entered into the declaration of 20th March 1900 was made by Morphett, nominally as attorney for his brother, but really on his own behalf, and it is important to see the circumstances under which that was done. It appears that Morphett, for some reason which does not concern the matter now in hand, had transferred the property to his brother, who for a time remained the registered owner, and it was during that period, and no doubt in the interests of Hart as well as of himself, that the declaration of trust was placed on the register. The declaration was made and, according to the admission in the case, under these circumstances, without further communication with George Hart, and without any further consideration than the payment of the sum of £2,000.

Now, under these circumstances the only trusts which could exist in regard to the property arose out of the contract of 10th April 1899, and as nothing had happened since then to create any new relationship between the parties, one would naturally expect to find in this declaration of trust simply a declaration of the trusts which were created by the original contract. In my opinion, when that declaration is properly construed, that is all it amounts to, and it never was intended to amount to anything else but a declaration of the trusts arising out of the original

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contract, no doubt inartificially drawn. Reliance is placed by the plaintiffs, who now hold portion of Hart's interest, upon the last words of the declaration, and, as it is sought to be interpreted, it has this effect: that a trust attached all along to the property in the hands of Morphett which prevented him from disposing of the property in any way except so as to reserve and provide in the terms of sale that one-fifteenth of the property should under all circumstances be reserved to Hart. Now, that is a very serious change in the power of sale which the original contract gave. It imposes a new obligation upon Morphett, and it imposes a new obligation which might under certain circumstances be a detriment to him. The onus would certainly lie upon the plaintiffs, who assert that that is the meaning of this declaration of trust, to explain what possible reason can be suggested why the power of absolutely dealing with this property, on condition that Hart should have a fifteenth share in the proceeds should be turned into a contract which would prevent his dealing with the property except in such a way as to retain in any company that might be formed a fifteenth interest for the benefit of Hart or Hart's representatives. *Primâ facie*, one would expect, if there was any intention to make that alteration, it would be made in some form which would be effective. In what way has it been done? The declaration itself is in the latter words of it, no doubt, open to several interpretations. I think it may be conceded that grammatically it is capable of the interpretation which Mr. *Lilley* and Mr. *Stumm* seek to place upon it. But that is not the only interpretation which it bears. And if it is open to another interpretation—an interpretation which will make it consistent with the agreement as a declaration of the trusts which arose under the original agreement—it ought to be so interpreted. The view I take of the meaning of the declaration is that which was suggested by my learned brother the Chief Justice in the course of the argument, that it was not intended to apply to any circumstances which may arise after Morphett had parted with the property. If you read it as having relation only to the company formed or associated to work the claim while Morphett remained the holder of the claim, then it is intelligible in itself, and consistent with the original

agreement; but if you interpret it as applying beyond that, then it would apply to a condition of things in which Morphett could have no control in the distribution of the shares, unless on the assumption that the original contract was so altered as to prevent his selling or dealing in any way with the property except on terms that would give him that control. Under these circumstances it seems to me that the declaration of trust makes no alteration whatever in the rights of the parties as constituted by the original contract.

For these reasons I think the opinion of the learned Judge was right, and the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors, for the appellants, *Nicol Robinson, Fox & Edwards*, for *Lilley & Murray*, Cairns.

Solicitors, for the respondent, *Roberts & Roberts*, for *Roberts, Leu & Barnett.*

J. V. J.