H. C. OF A. 1909.

ATTORNEY-GENERAL FOR NEW SOUTH WALES v. MARTIN.

Isaacs J.

that a person in authority had read something to the accused. Under these circumstances I consider that from every aspect the Crown left the whole matter in doubt, and if it were a confession I should think that the evidence was wrongly admitted. But, for the reasons I have given, I do not think it was a statement in the nature of a confession or in any way implicatory of the accused, and therefore I think the appeal should be allowed.

Appeal allowed. Order appealed from discharged. Conviction affirmed.

Solicitor, for appellant, *J. L. Tillett*, Crown Solicitor.

Solicitor, for respondent, *W. U. Smyth King*.

C. E. W.

Cons *Taxation, Federal Commissioner of v Everett* (1980) 143 CLR 440

Foll *Hadlee v. Commissioner of Inland Revenue* [1991] 3 NZLR 517

Appl *Thompson v Australian Capital Television Pty Ltd* (1994) 127 ALR 317

Refd to *Levenstrath Community Assoc v Nymboida SC* (1999) 105 LGERA 362

[HIGH COURT OF AUSTRALIA.]

HOCKING AND OTHERS . . . . APPELLANTS; DEFENDANTS,

AND

THE WESTERN AUSTRALIAN BANK . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1909.

PERTH, *Oct.* 22, 26, 27; *Nov.* 3.

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

Partnership—Mining Syndicate—Mining Act 1904 (*W.A.*) (*No.* 15 *of* 1904), *sec.* 281*—*Partnership Act* 1895 (*W.A.*) (59 *Vict.*, *No.* 23), *secs.* 34, 42—*Com-*

* No. 15 of 1904, sec. 281 (5), declares that "a partner's interest in the mining partnership may be sold or assigned without dissolving the partnership, and without the consent of the other members, and from the date of such sale or assignment the purchaser or assignee shall be deemed to be a member of the partnership.

"Provided that he shall be deemed to take such interest subject to all such liens existing in favour of the partners as are registered, but not further."

panies Act 1893 (*W.A.*) (56 *Vict. No.* 8), *sec.* 7—*Assignment of sub-shares—Guarantee for money advanced—Liability of assignees—Estoppel—Rule of construction.*

An assignee of a sub-share from a member of a mining partnership does not become a member of the partnership and is not liable under a guarantee given subsequent to the assignment of the interest by the assignor.

An assignee of such a share attended, some days after the guarantee had been given, a meeting of persons who had agreed to become members of a company formed to acquire the syndicate's interests.

Held, that he was not estopped from denying liability on the guarantee.

Sec. 281, sub-sec. 5 of the *Mining Act* 1904 (W.A.), applies only to the case of a single assignment by a partner of his whole interest in the partnership.

Per Griffith C.J. All Acts altering the common law are to be taken to alter it only so far as is necessary to give effect to the express provisions of the Act.

Decision of the Supreme Court of Western Australia, *Hocking* v. *West Australian Bank*, 11 W.A.L.R., 144, reversed.

APPEAL from the Supreme Court of Western Australia.

The facts are set out in the judgment of *Griffith* C.J.

Pilkington K.C. and *Northmore*, for the appellants. The defendants cannot be held liable at common law or under the *Partnership Act* (59 Vict. No. 23). The partnership under notice was one that came into existence in consequence of sec. 281 sub-sec. (1) of the *Mining Act* (No. 15 of 1904), and is unlimited in the number of its members, whereas firms under the *Partnership Act* are limited in number to twenty. Moreover, secs. 34 (6) and 42 (1) of the *Partnership Act* lay down that no person may be introduced as a partner without the consent of all existing partners, and that an assignee of a share cannot take any part in the management of the partnership. In fact the relationship between the vendor of an interest in a partnership and the purchaser of such interest is that of trustee and *cestui que trust*: *Dodson* v. *Downey* (1); *Newry, &c., Railway Co.* v. *Moss* (2); *Ex parte Bugg* (3); *Gentle* v. *Faulkner* (4); *Lindley on Partnership*, 7th ed., p. 621; *Redman, Landlord and Tenant*, 5th ed., p. 283. There was no

(1) (1901) 2 Ch., 620.
(2) 14 Beav., 64; 51 E.R., 211.
(3) 2 Drew. & Sm., 452; 62 E.R., 692.
(4) (1900) 2 Q.B., 267.

H. C. OF A. 1909.

HOCKING v. WESTERN AUSTRALIAN BANK.

misrepresentation or concealment on the part of any of the defendants and the fact that the manager of the plaintiff bank was a shareholder in and secretary of the syndicate shows that he must have been aware of the fact that the deed forbade any new partners being introduced without the consent of partners representing a majority of the shares; so the fact that the appellants attended a meeting called to form the syndicate into a company some days after the advance had been made by the plaintiff bank can in no way prevent the appellants, who were holders of sub-shares, from denying their liability. If the defendants are liable at all, it is as a result of the provisions of the *Mining Act* (No. 15 of 1904), sec. 281, sub-secs. (1) and (5). Sub-sec. (1) sets out what constitutes a mining partnership, and sub-sec. (5) deals with the transfer of interests in such a partnership, but this only refers to the transfer of the whole of a share and not of a sub-share, as was the case here.

[GRIFFITH C.J. referred to *Hill* v. *East and West India Dock Co.* (1).]

Draper and *F. M. Stone*, for the respondents. The persons interested in the Princess Alix Gold Mining Syndicate were engaged in a common undertaking for the purpose of making a profit. The fact that it was with mining that they were concerned makes the case different from one of ordinary partnership because the provisions of the *Mining Act* (No. 15 of 1904), sec. 281, allow the transfer of a partner's interest without the consent of all the other partners. Mining partnerships have always been distinguished from ordinary partnerships, see *Fereday* v. *Wightwick* (2); *Jefferys* v. *Smith* (3); *Crawshay* v. *Maule* (4); *Williams* v. *Robinson* (5). Therefore, even if the defendants could not be held liable apart from the *Mining Act*, sec. 281 (5) of that Act clearly marks the position.

The defendants attended a meeting for the purpose of forming a company to take over the interests of the syndicate; by that action they showed that they considered themselves partners and they are now estopped from denying their liability. [They re-

(1) 9 App. Cas., 448.
(2) 1 Russ. & M., 45.
(3) 3 Russ., 158.
(4) 1 Swans., 495.
(5) 12 N.S.W. L. R. (Eq.), 34.

ferred to:—*In re Hallett's Estate* (1); *Baroness Wenlock* v. *River Dee Co.* (2); *Birmingham* v. *Kirwan* (3); *Const* v. *Harris* (4); *Scarf* v. *Jardine* (5); *Bentley* v. *Bates* (6); *Stewart* v. *Nelson* (7); *Lindley on Partnership*, 7th ed., p. 401.]

Northmore in reply, referred to *McSwinney on Mines*, 3rd ed., p. 135; *Pollock, Digest of the Law of Partnership*, 7th ed., p. 80; and *Lindley on Partnership*, 7th ed., p. 66.

Cur. adv. vult.

November 3.

GRIFFITH C.J. This is an action brought by the respondent bank to recover the balance of an advance made by them on 20th September 1905 to a partnership called the Princess Alix Gold Mining Syndicate, of which the appellants are alleged to have been members at that date. The only question for determination is whether the appellants were then partners in the syndicate. The respondents put their case in two ways. First, they say that the appellants were at common law and under the *Partnership Act* members of the partnerhip, and, secondly, that even if they were not partners at common law or under the Act, they were partners by virtue of the *Mining Act* 1904 (Western Australia).

The Princess Alix Gold Mining Syndicate was a partnership formed under an indenture dated 31st March 1905, and made between ten persons, one of whom, Percy Marmion, had acquired by an agreement of 23rd January 1905 a right of purchase of a gold mining lease known as the "Princess Alix Lease" for £20,000, upon certain terms, of which it is only necessary to mention two, namely, that the purchase money was to be paid in full on or before 26th September 1905, and that Marmion might at any time before that date determine the agreement, in which event the vendors were to retain all instalments of purchase money already paid. In the meantime he was to be at liberty to work the mine, the product being disposed of as stipulated in the agreement. In September nearly £17,000 had been paid on

(1) 13 Ch. D., 696.
(2) 19 Q.B.D., 155.
(3) 2 Sch. & Lef., 442.
(4) 1 Turn. & R., 496.
(5) 7 App. Cas., 345.
(6) 4 Y. & C., 182.
(7) 15 N.Z. L. R., 637.

H. C. OF A. 1909.

HOCKING v. WESTERN AUSTRALIAN BANK.

Griffith C.J.

account of the purchase money, and on the 20th of that month the syndicate obtained from the respondents an advance of £3,300, which enabled them to complete the purchase. In October a joint stock company was formed, to which the lease was transferred.

The indenture of 31st March, after reciting this agreement, and that Marmion had entered into it on behalf of himself and the other parties to the indenture, witnessed, among other things, (1) that the parties to the indenture were partners for the purpose of working and acquiring the Princess Alix Gold Mining Lease under and in accordance with the terms and conditions of the agreement; (2) that the capital of the partnership was £3,250, contributed by the partners in unequal proportions specified in the deed; (4) that the control of the business of the partnership should be vested in all the partners, and that in the case of division of opinion the matter should be decided by a majority of the votes, each partner having one vote for every pound contributed by him to the capital, Marmion having the general control in the absence of special direction; (5) that no partner should assign or mortgage his share or interest in the partnership, "or introduce any other person as a partner with him therein," without the previous consent in writing of such of the other partners as should represent a majority "of the said votes"; and that, if he did, he should nevertheless remain liable for his proportionate share of the losses (if any) of the partnership until such time as the lease should have been acquired by the partnership or the option to purchase should have been abandoned; (8) that any partner should be at liberty to sell his share or any part thereof with such consent, provided that he had previously offered it to the other partners on the same terms, and that the offer had not been accepted within seven days of the offer; (11) that on the acquisition of the lease Marmion should transfer to one Archibald, who was not a member of the partnership, a one-twelfth undivided interest in the lease.

Apart from any question arising under the *Mining Act*, this was an ordinary deed of partnership, and the rules of law governing the rights and objections of its members, both *inter se* and as regards third persons, were those prescribed by the

Partnership Act 1895, which is substantially a transcript of the English *Partnership Act*.

During the interval between 31st March and 20th September 1905 the appellants and several other persons agreed with different members of the partnership to buy portions of their interests in the adventure. No instruments in the nature of formal assignments were executed, but the transactions were in each case evidenced by receipts purporting to be for the price of so many shares in the Princess Alix Syndicate. In the case of two purchases by two of the appellants the receipts contained the words "Scrip to be delivered when formed into a company." Besides these purchases from members of the syndicate the appellant Hocking bought at different times 175 shares from Archibald, which were apparently to come out of his one-twelfth interest in the lease when acquired. In correspondence the purchasers sometimes spoke of the receipts as sale notes, and sometimes described themselves as shareholders. The term "share" was apparently used to denote a 1/3250th of the whole adventure, although in Archibald's case this would seem to be inaccurate. The provisions of the deed of partnership as to obtaining the consent of the other partners before sale and as to offering them an option of purchase were not observed in any instance.

The respondents contend that the several purchasers became members of the partnership before 20th September, and were consequently members of it on that day and so liable for the advance. They rely also upon the subsequent conduct of the purchasers in attending a meeting of persons who had agreed to become members of the company afterwards formed, which was held under circumstances to which I will afterwards refer.

The appellants contend that they did not become members of the partnership. They point out that an assignee of the whole of the interest of a partner in a partnership does not under sec. 42 of the *Partnership Act* 1895 (corresponding to sec. 31 of the English Act) become a partner, but has only the rights declared by that section, and further, that, even if he does, it was settled law before the Act and remains the law, since the Act does not alter it, that a person who agreed to buy a portion of the interest of a partner in a partnership did not become a

H. C. OF A. 1909.

HOCKING v. WESTERN AUSTRALIAN BANK.

Griffith C.J.

partner, but that his vendor, while remaining a member of the partnership exactly as before, became a trustee for him of the interest agreed to be sold.

There is no doubt as to the soundness of this position, and in my judgment it follows that the several purchases of portions of interests of members of the syndicate in the adventure (by transactions of a nature quite familiar to persons acquainted with the incidents of mining adventures in Australia) did not operate to establish the relation of partners between the purchasers and the original members of the syndicate in such a way as to make the latter agents for the former as regards persons dealing with the syndicate.

The meeting of 28th September was held under the following circumstances: Sec. 8 of the *Companies Act* 1893 provides that "the persons who have agreed to become members of a company" may before incorporation pass a memorandum with or without articles for the purposes of the company at a meeting convened for that object. The section then goes on to lay down elaborate provisions for the convening of the meeting and for the conduct of the proceedings at it. It was manifestly the intention of all parties concerned in the Princess Alix adventure that the lease when acquired by the syndicate should be transferred to a company. It is also manifest that the persons who agreed to buy interests or shares in the adventure from members of the syndicate had in effect agreed to become members of such a company. Indeed, in the case of some of them, this intention was expressly shown by the form of receipt already mentioned which they took from their vendor. A meeting was accordingly convened, of which notice was given to the purchasers, and the appellants and other purchasers attended. It is contended by the respondents that they attended the meeting in the capacity of members of the syndicate, and are consequently estopped from denying that they were then such members. If, however, they were so estopped for any purpose, I fail to see how the bank, which had made the advance to the syndicate some days before the meeting, can take advantage of the estoppel. But it seems to me obvious that they attended the meeting in the capacity of persons who had agreed to become members of the company proposed to be formed. The

notice inviting their attendance summoned them in that capacity and informed them that the object of the meeting would be to form the company and to pass its articles and memorandum of association and appoint the first directors. It is said that the meeting was irregularly convened, but if it was I think the fact immaterial.

It is equally obvious that their attendance was quite consistent with their legal position as sub-partners of their immediate vendors, who were trustees for them of what they had agreed to buy.

In my opinion, therefore, apart from the *Mining Act*, the respondents have failed to show that the appellants were on 20th September members of the syndicate or partnership to which credit was given on that day. And this was the opinion of *McMillan* J. and *Burnside* J.

I turn now to the provisions of the *Mining Act* 1904. Sec. 281 of that Act enacts, *inter alia*, that "With respect to mining partnerships the following provisions shall apply :—

"(1) Whenever two or more persons acquire any mining tenement, or engage in lawfully working or using it, or jointly employ others to do so for them, a mining partnership shall be deemed to exist between such persons in respect of such mining tenement.

"A mortgagee in possession shall be deemed to be a partner.

. . . . . .

"(5) A partner's interest in the mining partnership may be sold or assigned without dissolving the partnership, and without the consent of the other members, and from the date of such sale or assignment the purchaser or assignee shall be deemed to be a member of the partnership."

The words "shall be deemed to exist," in sub-sec. 1, import that an artificial rule is being laid down, which, I think, must, as pointed out by Lord *Blackburn*, in the case of *Hill* v. *East and West India Dock Co.* (1), be applied for the purposes for which the rule is made and no further. The provisions of sec. 281 were, of course, intended to alter the existing law, but there is nothing in that section to indicate that the law regulating the

(1) 9 App. Cas., 448.

H. C. OF A. 1909.

HOCKING v. WESTERN AUSTRALIAN BANK.

Griffith C.J.

rights and obligations of the members of a mining partnership as regards creditors was to be altered to any greater extent than is expressly stated. It is a sound rule to be applied in the construction of all Acts altering the common law, that they are to be taken to alter it only so far as is necessary to give effect to the express provisions of the Act. Now, sub-sec. 1, so far from substantially altering the common law, takes that law as the basis of its provisions. The condition of the application of the new rule is that the "two or more persons" shall be persons who acquire a mining tenement or engage in working or using it, or jointly employ others to do so for them. The terms "acquire" and "engage" import the fact of working in association, whether as partners strictly so called or not, but they do not in my opinion include the case of sub-partners. This was not indeed contended. That sub-section both lays down a positive rule as between the persons so associated, and also facilitates, as between them and third persons, the proof of the fact of partnership. So far it may be said to alter the law, but no further. Sub-sec. 5 alters the law as declared by the *Partnership Act* in two important particulars. Sec. 44 of that Act provides that a partnership may be dissolved by written notice at the option of any other partner if any partner assign his share (not a part of his share) in the partnership property, whereas under sub-sec. 5 of sec. 281 a partner's interest in a mining partnership may be assigned without any such consequence. Again, sec. 34 (6) of the *Partnership Act* provided that no person may be introduced as a partner without the consent of all existing partners, whereas by sub-sec. 5 the assignee of the interest (not any part of the interest) of a partner in a mining partnership becomes a member of the partnership without the consent of the other partners. The respondents contend that, in addition to these important alterations in the law, a further alteration has been made to the effect that a partner may by separate assignments introduce as many new partners, either with him or in his place, as he thinks fit. This would be an entirely new rule, quite contrary to the law as it was before the *Partnership Act* as well as after it. Moreover, on this construction, the number of members of a mining partnership would be unlimited, whereas sec. 7 of the *Companies Act* 1893 forbids the

formation of any partnership consisting of more than 20 persons for the purpose of carrying on any business that has for its object the acquisition of gain by the partnership. I cannot find in sec. 281 of the *Mining Act* any indication of an intention to make such important changes both in the common and Statute law, or to allow the number of members of a partnership to be increased at the will of a single member of it. In my judgment sub-sec. 5 applies only to the case of a single assignment by a partner of his whole interest in the partnership. There are other difficulties in the way of the respondents' contention, arising under the provisions of the Act and Regulations relating to transfers of interests in mining tenements, but I do not think it necessary to refer to them in detail, as in my opinion the construction which must be put upon sec. 281, sub-sec. 5, offers no foundation for the argument that the appellants, by agreeing to buy subordinate interests in the adventure from the partners in the syndicate, became themselves partners in the partnership.

From the report of the judgments of the learned Judges who took a contrary view, they appear to have merely quoted sub-sec. 5, and added that under it the appellants became partners in the syndicate. We do not, therefore, know the process of reasoning by which they arrived at that conclusion, but I infer that they had not the advantage of so full a discussion as that by which we have been assisted.

For the reasons I have given, I am of opinion that the appeal must be allowed and judgment entered for the appellant defendants.

BARTON J. The question is whether the appellants were partners in the syndicate. The Full Court of this State has decided that they were, and we have to say whether that conclusion is in our opinion correct. It was contended before us that the appellants were members of a mining partnership, either at common law and under the *Partnership Act*, or else under the *Mining Act*.

Leaving aside the question of the *Mining Act* for the present, the original members of the syndicate were of course partners, and until the Princess Alix Lease should be acquired, it was the

H. C. of A. 1909.

Hocking v. Western Australian Bank.

Barton J.

working of it, under the agreement, that was the object of the partnership. The terms of the two agreements and the facts in evidence have been fully stated. The respective interests of the members of the syndicate were represented in sums of money to make up £3,250, which was declared to be the capital of the partnership. In the receipts, or sale notes as they were called, these interests seemed to be regarded as consisting of as many shares as there were pounds to represent them.

Lindley, at page 401 in the 7th edition of his work on *Partnership*, lays it down that "If the persons originally interested in the mine are not only part-owners but also partners, a transferee of the share of one of them, although he would become a part-owner with the others, would not become a partner with them in the proper sense of the word, unless by agreement express or tacit." It may be noted that the learned author is evidently speaking of a transfer of the entire interest of a co-owner and co-partner. The sale of a mere portion of a partner's interest is an *a fortiori* case. It is said that these transferees did become partners, but I see no evidence of an "agreement express or tacit" to that effect. It would have to be an agreement made between them and the original members of the syndicate before 20th September, when the advance was made. Any contracts they made were with individual members of the syndicate and for portions only of their shares. They did not enter into relations with the partnership as a whole. The proceedings at the meeting of 28th September showed that the appellants as well as the original partners desired that a company should be formed to take over the lease, paid for or to be paid for with the money which had been made sufficient for the purpose by the bank's advance, and that they desired and agreed, as was indeed indicated in two of the receipts, to have scrip for shares in the company commensurate with the interests they had bought. But this did not make them partners in the syndicate. The circular, a copy of which is in evidence, shows that the meeting was to be the statutory meeting, with the object of forming the company, passing memorandum and articles and appointing directors. The persons who have agreed to become members of a company (see the *Companies Act*, sec.

8) may or may not be members of a partnership whose concern the company is to be formed to take over. The argument that the appellants, represented by proxies at the meeting, were so represented as members of the syndicate, and that they were therefore estopped from denying that they were such, seems unsupported by sufficient evidence that they gave their proxies as such members, and even if that fact were established, the estoppel, if there was one as between them and the original partners, did not operate as between them and the bank. If their membership of the syndicate was only established by their representation at the meeting, it was not shown to exist when the advance was made.

Sec. 42 (1) would not help the plaintiff bank, even if the transactions had been assignments of entire interests, for assignees are not made partners by that section. But neither the *Partnership Act* nor the pre-existing law made a person who, like the appellants, merely agreed to purchase part of a partner's interest, a partner. The vendor remains a partner, but as to the portion he has agreed to sell he is a trustee for the purchaser. It is he who has the benefit of the purchase money, not the partnership. The utmost effect of the transaction would be to make the holder of such an agreement a sub-partner with the vendor as to his interest in the original partnership, and it would not confer any rights as against that partnership. Their relations arise from the general assent of the members, and that general assent is, apart from special legislation, essential to the admission of a new associate. The plaintiffs' appeal therefore to the common law and the *Partnership Act* does not establish his position.

Then does the *Mining Act* make partners of persons in the position of these appellants? For this part of the case the bank relied in the main on sub-secs. (1) and (5) of sec. 281. To what extent if any does sub-sec. (1) place the bank as a creditor in a better position? The appellants, as has been seen, were not more than sub-partners of those who had agreed to sell them fractions of their interests. If the signatories to the partnership deed had within the meaning of the sub-section "acquired" a mining tenement at the dates of these transactions—and I do not think they had—the sub-partners clearly had not done so. The syndicate

H. C. of A. 1909.

HOCKING v. WESTERN AUSTRALIAN BANK.

Barton J.

certainly engaged in working it, but the sub-partners did not. They did not make the syndicate their agents for any such purposes. If it be conceded for argument's sake that sub-sec. (1) operates in favour of persons having claims against the co-owners or co-workers, as well as between the co-owners or co-workers themselves, it cannot so operate as against those who have not joined in "acquiring" or in "working" the tenement. And it seems to me that these terms are inapplicable to the case of sub-partners of individual members of the associated owners or workers. What then of sub-sec. (5)? Under it, "A partner's interest in the mining partnership may be sold or assigned without dissolving the partnership." Such a transaction is therefore freed of the consequences which might have followed it under sec. 44 of the *Partnership Act*, namely, the dissolution of the partnership "at the option of the other partners or any of them, by written notice." But a more important change, for the purposes of this case, is that if the partner's interest is "sold or assigned . . . . without the consent of the other members," then "from the date of such sale or assignment the purchaser or assignee shall be deemed to be a member of the partnership." In a mining partnership, therefore, there is no longer, in the case of such a sale or assignment, a prohibition of the introduction of a person as partner, without the consent of all existing partners (see *Partnership Act*, sec. 34 (6)). But does this apply to anything but a complete substitution of a new partner for an old one? Does it extend to the admission as partners of a number of persons who before this enactment would have been no more than sub-partners? Supposing the transactions which have taken place to be sales or assignments, but only of portions of interests, is each of these a sale or assignment of an "interest" within the meaning of this sub-section? The construction contended for is that an "interest" includes as many portions of an interest as may be made the subjects of sales or of agreements for sale. If this were correct, a partner might create by assignments, simultaneous or successive, an indefinite number of new interests, the holder of each one of which would be a partner, while the vendor himself, by retaining a fractional interest, would remain a partner if he did not choose to make his exit by getting rid of all that he

had. If the construction sought is open on the words of the sub-section it is the less reasonable of the two that are open, and therefore, *cæteris paribus*, it is not the one to be adopted. But I do not think it really is open, for the primary meaning of "a partner's interest" appears to be that it is a partner's whole interest, and on reference to the rest of sec. 281 and to the context of the Statute, it will be found that there is nothing to give it a different meaning as used as sub-sec. (5). The word "interest" as applied to the interest of a member of a mining partnership is almost, if not quite, invariably used to denote the entirety of the interest spoken of. Again, the number of members in a partnership dealt with under this construction might, at a stroke, be made to exceed twenty, and I see no reason to impute to the legislature an intention to relax, in the interests of purchasers of fractional interests in mining concerns, the provisions of sec. 8 of the *Companies Act*, which the construction contended for would, in the absence of such an extension, contravene. My conclusion then is that the interest which is the subject of sub-sec. (5) is the partner's entire interest in the partnership, and that there is nothing in the *Mining Act* to render the appellants anything more than without that Act they would have been, mere sub-partners of those of whose original interests they had agreed to buy portions. I am therefore of opinion that the defence to the action is sound, and that the appeal succeeds.

O'Connor J. The Princess Alix Gold Mining Syndicate was a partnership constituted by the deed of 31st March 1905 for the purpose of acquiring and working a certain gold mining lease. It was one of the conditions of the deed that no partner should assign his interest in the partnership or introduce another person as partner without the written consent of other partners representing a majority of votes. The manager of the respondent bank was a member of and secretary to the syndicate. The appellants were none of them original members of the partnership, but had purchased portions of partnership shares from different persons who were. These purchases were all made before 20th September 1905. On that date the respondent bank advanced to the syndicate the amount which is the principal

H. C. OF A. 1909.

HOCKING v. WESTERN AUSTRALIAN BANK.

O'Connor J.

sum in the present claim. There can be no doubt that in making the advance the bank dealt directly with the syndicate, and on the face of the transaction it seems clear that credit was given solely to the original members of the syndicate who signed the letter to the bank of 16th September 1905. There is no suggestion of any misrepresentation by word or conduct on the part of the appellants which could be relied upon by the bank as estopping them from now contesting their liability. The rights of the parties must therefore depend entirely upon the question whether at the time when the advance was made the appellants had by their purchase of interests become members of the partnership. If they had, the original partners were empowered to bind, and did bind them in dealing with the bank. If they had not, the original partners were not authorized to bind them, and have not made them liable for the advance of 20th September or any portion of it. The question must be regarded from two points of view. First, having regard to the express terms of the partnership, prohibiting the alienation of partnership shares without the consent of the majority of partners, and to the provisions of the *Partnership Act* 1895 to the same effect. Secondly, taking into consideration the meaning and operation of sec. 281 of the *Mining Act* 1904. As to the first point of view it is unnecessary to say much. It is common ground that consent of the other partners in accordance with the partnership's deed was not obtained in respect of any of the assignments of interests by virtue of which it is sought to make the appellants liable. But it is contended that the actions of all parties concerned at the meeting of intending shareholders in the company, held eight days after the advance had been made, amounted to a waiver of that provision of the partnership deed, and also that the defendants, having with full knowledge of all the circumstances shared in the benefit of the advance without which the formation of the company would have been futile, cannot now escape liability. The clear answer to the first contention is that the business of the meeting referred to was to decide on the formation of the company and to arrange the terms and conditions of its articles and memorandum. It was called for that purpose and for no other, and might well have been attended by

persons willing to take shares in the company when formed, but who had not then any interest in the syndicate. It had no authority to bind any partner to a waiver of the terms of the partnership, and it did not even purport to deal in any way with that subject. The inferences which the respondent bank asks the Court to draw in this respect are, it seems to me, founded on exceedingly vague and inconclusive evidence, entitled to little weight against the express provisions of the deed. One view of the case, upon which *Burnside* J. apparently based his decision, amounts in substance to the ground of estoppel. But the facts as proved are wanting in one essential element of estoppel. It may be conceded the appellants well knew that without the bank's advance the contract of sale could not have been completed, the lease could not have been secured, and the company would not have been formed. But those facts will not of themselves prevent the appellants from relying on the invalidity of the assignments by virtue of which it is sought to make them liable, inasmuch as there was no misrepresentation or concealment by word or conduct on their part, and the manager of the respondent bank, as shareholder in and secretary of the syndicate, must have known at the time of the advance that the deed forbade the introduction of any new partner without the consent of partners representing a majority of shares, and that in respect of the several sales of interests to the appellants no such consent had been given. I concur, therefore, in the view of *McMillan* J. and *Rooth* J., that it is only by virtue of the *Mining Act* 1904, if at all, that the appellants can be constituted partners in the circumstances that have arisen. I do not think it necessary to refer to all the important and difficult questions of law involved in Mr. *Pilkington's* objections to the applicability of sec. 281 to a state of facts such as that now under consideration. In the view I take of the matter the whole question of the applicability of the Statute may be disposed of by one of those objections. The contention is, I think, unanswerable that subsection 5 of section 281 has no application to the sale or assignment of such interests in a mining partnership as were alleged to have been assigned in this case? To that objection I intend to confine my attention. It may be assumed for the purposes of

H. C. OF A. 1909.

HOCKING v. WESTERN AUSTRALIAN BANK.

O'Connor J.

argument that, when the Princess Alix Gold Mining Syndicate acquired the rights given by the contract of 21st January 1905, a mining partnership within the meaning of sub-sec. 1 between the original members of the syndicate was thereby brought into existence. I assume also that thereupon by virtue of sub-sec. 5 each partner became entitled to assign his interest in the partnership without the consent of his partners, and that if he did so assign his interest the assignee thereupon became a partner in the mining partnership. But when it is sought to apply the sub-section to the facts of this case the question at once arises, what is the meaning of the expression "partner's interest"? Was it intended to apply to the whole of the partner's interest only, or may it be interpreted as applying also to any portion of his interest? The whole may be taken to include the part, and Statutes are frequently interpreted by the application of that rule. On the other hand, the precise meaning of the expression would cover only the whole interest. Thus, although the expression generally may be read with either meaning, the Court is called upon to determine which interpretation will best carry out the intention of the legislature as it is to be gathered from the enactment itself, and from a consideration of its scope and purpose. If the sub-section is to be construed as including any portion of a partner's interest it will include every subdivision of the interest no matter how small a proportion it may be of the original share. Let me illustrate. A partner may divide his share into fifty portions and sell each to a separate purchaser—a contingency not improbable in the sudden and enormous increase in value which sometimes takes place in mining properties. Each of the fifty purchasers would then become a partner with all the rights of a partner under the Act, and there is nothing to prevent each of those fifty derivative partners from subdividing his share into such portions as he thinks fit and selling each to a new purchaser, the purchaser of each subdivision being thereby constituted a partner in the mining partnership entitled to all the rights which the Act confers on partners. So the process may be repeated indefinitely. Can it be reasonably contended that the legislature in creating this special form of partnership for mining purposes intended to bring

into existence a partnership so entirely indefinite as to its numbers from day to day that no partner would know at any time amongst how many or how few the liabilities of the partnership were to be distributed? The enabling of one partner, without the consent of his co-partners, to substitute another for himself in the partnership is in itself a material alteration in the nature of the partnership relation as it had been up to then known. But to read the sub-section as conferring power upon each partner to multiply partners indefinitely by the sale of subdivided interests would be to make a radical alteration in the whole nature of the partnership relation in the case of mining business, which the scope and purpose of the section in no way requires or justifies. Looking at the various sub-sections of the Act which bear on the obligations of the mining partnership to the Government, and of the partners to each other in the discharge of those obligations, I find it difficult to see how the provisions of the section can be made workable if the wide meaning for which the respondents contend is to be placed on sub-sec. 5. This view is strongly supported if the liability of each partner for partnership debts is considered. What is the extent of liability in respect of the debts of the partnership which a partner by purchase of a fraction of a share will incur? Is he, as the Supreme Court has decided, to bear a responsibility for the whole debts of the mining partnership, or is he, as *Rooth* J. held, liable only for a sum in proportion to the value of his interest in the partnership? The latter view would no doubt represent the provision which the legislature might be expected to make in such circumstances. But I have been unable to find any indication in the Act itself of such a limitation of liability. It appears to me, therefore, to be a strong reason why the sub-section should not be read as imposing the full obligations of a partner as to partnership debts on the purchaser of a fraction of a partnership share, that the legislature has made no provision for limiting the liability of a partner in a mining partnership in proportion to the extent of his interest in the partnership. For these reasons I am of opinions that the expression "partner's interest" cannot be read as including a portion of the partner's interest without bringing about consequences which never could have

H. C. OF A. 1909.

HOCKING v. WESTERN AUSTRALIAN BANK.

O'Connor J.

been within the contemplation of the legislature. Under these circumstances the more restricted meaning of which the expression is capable must be placed upon it, and the sub-section must be read as empowering a partner in a mining partnership to assign the whole of his partnership interest without the consent of his partners, and empowers him under such circumstances, but not otherwise, to substitute another partner in his stead. That being in my opinion the proper interpretation of the section, it follows that sub-sec. 5 did not apply to any of the sales of interests in question here, and that none of the appellants ever became partners in the Princess Alix Gold Mining Syndicate, and were therefore never bound by the act of the partnership in obtaining the advance which is the subject of the action. The learned Judge in the Court below ought therefore to have entered judgment for the defendants, and, as he did not do so, the appellants were entitled to succeed in their appeal to the Supreme Court, and must now succeed on this appeal.

Appeal allowed.

Solicitors, for the appellants, *Northmore & Hale.*
Solicitors, for the respondent, *Stone & Burt.*

H. V. J.