[HIGH COURT OF AUSTRALIA.]

McCAUGHEY . . . . . APPELLANT;

AND

THE COMMISSIONER OF STAMP DUTIES (NEW SOUTH WALES) . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 14, 17; *Sept.* 4.

Griffith C.J., Barton and Isaacs JJ.

Stamp Duty—Conveyance on sale—Partnership property—Dissolution of partnership—Sales to one partner of other partners' shares in partnership—Stamp Duties Act 1898 (*N.S.W.*) (*No.* 27 *of* 1898), *sec.* 3, *Sched.* 2.

In 1911 the appellant was a member of two partnerships, one consisting of himself and A., and the other of himself and A. and B. The partnership assets consisted in both cases of pastoral property comprising land, stock and the usual accessories, the legal title to the land being vested in the appellant. By the deeds of partnership the appellant declared himself a trustee for the members of the respective firms of the land, stock and premises. In the beginning of 1912 the appellant agreed to buy out the shares of his respective partners as from 31st December 1911. Shortly afterwards the appellant agreed to sell to third parties for a lump sum the whole of the property which had been the partnership assets. On 23rd April 1912 a deed was executed which was made between the appellant and A. and B. After reciting the previous partnerships, that the appellant had purchased the shares of A. and B. in the partnerships, that it had been agreed that the partnerships should be dissolved, that the appellant had agreed to sell the whole of the properties to the third parties, and that the parties had agreed to enter into the agreement testified by the deed, the deed witnessed that in pursuance of the said agreement and in consideration of the premises (1) the several parties dissolved the two partnerships, which should be deemed to have been dissolved as from 31st December 1911; (2) A. and B. ratified and confirmed the sale by the appellant to the third parties and requested him to transfer and assign the station

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properties, stock, plant and chattels or so much thereof as might be absolutely vested in him or as to which he might have declared any trust in their favour, to the purchasers in terms of his agreement for sale ; (3) the appellant covenanted to pay all partnership debts and costs of sale ; and (4) each of the parties mutually released the others from all claims in respect of partnership dealings up to and inclusive of 31st December 1911.

Held, by *Griffith* C.J. and *Barton* J. (*Isaacs* J. dissenting), that the deed of 23rd April 1912 was not in respect of the sale of the shares of A. and B. in the respective partnerships a "conveyance on sale" within the meaning of the *Stamp Duties Act* 1898, which defines "conveyance" as meaning "any instrument or deed whereby property is vested in any person or transferred or conveyed from one person to another."

Decision of the Supreme Court of New South Wales reversed.

APPEAL from the Supreme Court of New South Wales.

A special case was stated under the *Stamp Duties Act* 1898 by the Commissioner of Stamp Duties, which was (so far as material) as follows:—

"1. In and prior to the year 1912 Sir Samuel McCaughey was carrying on business as a grazier in co-partnership with John McCaughey and Thomas Wilson Vincent under the style or firm of 'McCaughey & Co.'

"2. The said partnership was so carried on under the provisions of an indenture of partnership dated 3rd April 1905 and an indenture of declaration of trust dated 20th October 1908. Under the said indentures the assets of the said partnership belonged to the said partners in the following shares and proportions, namely, the said Sir Samuel McCaughey a three-fifth share or interest, the said John McCaughey a one-fifth share or interest, and the said Thomas Wilson Vincent a one-fifth share or interest.

"3. The assets of the said partnership at the date of the said indenture of partnership consisted of a station property known as 'Dunlop' comprising freehold lands and lands held under leasehold and other tenures less than freehold under the Crown Lands Acts, such lands being situated in the Western District of this State, and also stock, furniture and working plant thereon.

"4. At the date of the said indenture of partnership the lands the subject thereof were all standing in the name of the said Sir Samuel McCaughey, and by the said indenture it was witnessed

that the said Sir Samuel McCaughey held the said lands on the trusts of the said indenture.

"5. In and prior to the said year 1912 the said Sir Samuel McCaughey was also carrying on business as a grazier in co-partnership with the said John McCaughey under the style or firm of 'S. McCaughey & Co.'

"6. The said last-mentioned partnership was so carried on under the provisions of an indenture of partnership dated 1st September 1908; under the said indenture the assets of the said partnership belonged to the said partners in the following shares and proportions, namely, the said Sir Samuel McCaughey a four-fifth share or interest and the said John McCaughey a one-fifth share or interest.

"7. The assets of the said partnership consisted of a station property known as 'Toorale' comprising freehold lands and lands held under leasehold and other tenures less than freehold under the Crown Lands Acts, such lands being situated in the Western District of this State, and also stock, furniture and working plant thereon.

"8. At the date of the said last-mentioned indenture the whole of the lands comprising the said Toorale Station stood in the name of the said Sir Samuel McCaughey, and by the said indenture the said Samuel McCaughey covenanted and agreed that he should hold the said lands as partnership property subject to the said indenture.

"9. In the year 1908 another station known as 'Nocoleche' comprising freehold land and land held under leasehold and other tenures less than freehold under the Crown Lands Acts, such lands being situated in the Western District of this State, was acquired by the said Sir Samuel McCaughey on behalf of the said partnership.

"10. The whole of the lands comprising the said Nocoleche Station then stood in the name of the said Sir Samuel McCaughey, and by an indenture of declaration of trust dated 20th October 1908 the said Sir Samuel McCaughey thereby declared that he held the said lands as to one equal undivided moiety thereof in trust for himself and the said John McCaughey and Thomas Wilson Vincent as partnership property subject to the said

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indenture of partnership dated 3rd April 1905, and as to the remaining one equal undivided moiety thereof in trust for himself and the said John McCaughey as partnership property subject to the indenture of partnership dated 1st September 1908," hereinafter mentioned.

"12. By memorandum of agreement dated 15th January 1912 made and signed by the said Sir Samuel McCaughey and John McCaughey, it was *inter alia* agreed that as on 31st December 1911 the said John McCaughey should sell and the said Sir Samuel McCaughey should purchase the said John McCaughey's one-fifth share or interest in the freehold and leasehold lands on the said Toorale, Dunlop and Nocoleche Stations and in the working plant and furniture, sheep, cattle and horses depasturing thereon on that date, the price to be paid by the said Sir Samuel McCaughey for the one-fifth share or interest to be a lump sum of £87,500, such sum to be payable in cash to the said John McCaughey on completion of the transfer of his one-fifth share or interest in the said lands, plant and stock to the said Sir Samuel McCaughey.

"13. By an agreement in writing dated 4th March 1912 signed by the said Sir Samuel McCaughey and Thomas Wilson Vincent, the said Thomas Wilson Vincent agreed to sell and the said Sir Samuel McCaughey agreed to buy the one-fifth interest of the said Thomas Wilson Vincent in the said Dunlop Station and also his one-tenth interest in the said Nocoleche Station for a lump sum of £22,500 as on 1st January 1912, and further that the proceeds of such sale should go as part payment of the one-half share payable by the said Thomas Wilson Vincent to the said Sir Samuel McCaughey in respect of the purchase in the next paragraph hereof mentioned by the said Thomas Wilson Vincent and another of the said Toorale, Dunlop and Nocoleche Stations of a like date after deduction of the debt of the said Thomas Wilson Vincent to the said Sir Samuel McCaughey.

"14. By an agreement in writing dated 8th March 1912 the said Sir Samuel McCaughey agreed to sell the said Dunlop, Toorale and Nocoleche Stations to the said Thomas Wilson Vincent and one Matthew Robinson for the sum of £250,000 but no conveyance or transfer of any of the lands comprised in the

said stations has yet been made but delivery of possession of the stock and other chattel property used in connection with the said stations has been given under the said agreement to the said purchasers.

"15. In respect of the transactions in the last three preceding paragraphs hereof mentioned no cheques or money passed between the said Sir Samuel McCaughey, John McCaughey and Thomas Wilson Vincent, but the purchase money due to the said John McCaughey went into his credit against his debt due to Sir Samuel McCaughey and the purchase money due to the said Thomas Wilson Vincent was credited against his debt to the said Sir Samuel McCaughey and the surplus credited to the said Thomas Wilson Vincent and Matthew Robinson as part payment of the purchase money of the said Toorale, Dunlop and Nocoleche Stations under the agreement in the last preceding paragraph hereof mentioned.

"16. The whole of the lands comprising the said Toorale Dunlop and Nocoleche Stations have throughout the transactions above-mentioned remained and still remain standing in the name of the said Sir Samuel McCaughey.

"17. By an indenture dated 23rd April 1912 and made between the said Sir Samuel McCaughey of North Yanco of the first part, the said John McCaughey of Yarrabee Station near Morundah of the second part and the said Thomas Wilson Vincent of Dunlop Station near Bourke, all in this State, of the third part, the said parties thereto thereby purported to dissolve the said two partnerships and contained other provisions as therein mentioned.

"18. The said Sir Samuel McCaughey required the Commissioner of Stamp Duties to assess the duty payable in respect of the said last-mentioned indenture.

"19. The said Commissioner claimed that such indenture was a conveyance or transfer on sale of the shares and interests of the said John McCaughey and Thomas William Vincent in the said two partnerships of 'McCaughey & Co.' and 'S. McCaughey & Co.,' mentioned in pars. 1 to 11 inclusive hereof, to the said Sir Samuel McCaughey for the consideration stated in the said agreements mentioned in pars. 12 and 13 hereof, namely, together the sum of £110,000.

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"20. The Commissioner accordingly assessed the said duty *ad valorem* in accordance with the said *Stamp Duties Act* at £550.

"21. The said Sir Samuel McCaughey paid the said sum of £550, but being dissatisfied with the said assessment required the Commissioner to state this special case.

"22. The said Sir Samuel McCaughey claims that the said indenture is liable to duty to the extent of £1 only as a deed not otherwise charged within the Second Schedule to the *Stamp Duties Act* 1898.

"23. The questions for the decision of the Court are:—

"(1) Is the said indenture liable to duty *ad valorem* as a conveyance on sale?

"(2) In any event what is the amount of the duty payable in respect thereof?

"(3) How the costs of this case should be borne and paid."

The indenture of 23rd April 1912 referred to in par. 17 of the special case was as follows:—

"This indenture made 23rd April 1912 between the Honourable Sir Samuel McCaughey . . . . of the first part John McCaughey . . . . of the second part and Thomas Wilson Vincent . . . . of the third part Whereas the said parties hereto have carried on the business of sheep and cattle breeders and graziers in co-partnership together under the style or firm of 'McCaughey & Co.' upon the said Dunlop Station property under and by virtue of an indenture or deed of partnership dated 3rd April 1905 made between the same parties as are parties hereto and have also carried on a similar business in co-partnership together upon the Nocoleche Station property . . . under and by virtue of the said indenture of 3rd April 1905 and a certain further indenture or declaration of trust dated 20th October 1908 given under the hand and seal of the said Samuel McCaughey by whom the said property was purchased with the consent of the parties hereto of the second and third parts and in whom the said property is vested And whereas the said Samuel McCaughey and John McCaughey have carried on the said business of sheep and cattle breeders and graziers in co-partnership together under the style or firm of 'S. McCaughey & Co.' upon the station property properly known as 'Toorale' situate near Bourke

in the Western Division of the said State of New South Wales under and by virtue of a certain indenture or deed of partnership dated 1st September 1908 And whereas the said Samuel McCaughey has purchased the shares of the said John McCaughey and Thomas Wilson Vincent in the said partnerships and it has been agreed that the said partnership hitherto existing between them under and by virtue of the said recited indentures of 3rd April 1905 and of 20th October 1908 should be dissolved as on and from 31st December 1911 and further that the partnership heretofore existing between the said Samuel McCaughey and John McCaughey under and by virtue of the said recited indenture of 1st September 1908 should also be dissolved by the mutual consent of both parties as on and from the said 31st December 1911 And whereas the said Samuel McCaughey with the knowledge and consent of the said John McCaughey and Thomas Wilson Vincent (testified by their entering into and executing these presents) and also with the knowledge and consent of the said John McCaughey (testified as aforesaid) by an agreement dated 8th March 1912 agreed to sell and Matthew Robinson . . . and the said Thomas Wilson Vincent (therein styled Thomas Vincent) agreed to purchase the said Dunlop, Nocoleche and Toorale Station properties and the stock plant and chattel property upon and belonging to each of the said station properties for the sum of £250,000 upon and subject to the conditions therein mentioned And whereas the said several parties hereto have agreed to enter into these presents for the purposes and in manner hereinafter appearing Now this indenture witnesseth that in pursuance of the said agreement and in consideration of the premises the said several parties hereto do hereby dissolve the partnership heretofore existing between them in regard to the said Dunlop and Nocoleche Station properties and do hereby declare that the said firm of 'McCaughey & Co.' shall be and shall be deemed to have been dissolved as on and from 31st December 1911 and each of the said parties hereto of the second and third parts doth hereby ratify and confirm the sale by the said Samuel McCaughey of the said partnership property to the said Matthew Robinson and Thomas Wilson Vincent

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for the price and upon the terms and conditions of the hereinbefore recited agreement for sale and doth hereby authorize request and direct the said Samuel McCaughey to transfer and assign the said Dunlop and Nocoleche Station properties and the stock plant and chattel property thereupon or so much thereof as may be absolutely vested in him and of which he may have declared any trust in their favour to the said purchasers in terms of the said agreement for sale And this indenture further witnesseth that in further pursuance of the said agreement and in consideration of the premises the said Samuel McCaughey and John McCaughey do hereby dissolve the partnership heretofore existing between them in regard to the said Toorale Station and do hereby declare that the said firm of 'S. McCaughey & Co.' shall be and shall be deemed to have been dissolved as on and from 31st December 1911 and the said John McCaughey doth hereby ratify and confirm the sale by the said Samuel McCaughey to the said Matthew Robinson and Thomas Wilson Vincent of the said Toorale Station property and the stock plant and chattels thereon in conjunction with the aforesaid Dunlop and Nocoleche Station properties for the price and upon the terms and conditions of the hereinbefore recited agreement for sale and doth hereby authorize request and direct the said Samuel McCaughey to transfer and assign the said Toorale Station stock and chattel property to the purchasers thereof in terms of the said agreement for sale And this indenture further witnesseth and it is hereby agreed and declared that the said Samuel McCaughey doth hereby for himself his heirs executors and administrators covenant with the said parties hereto of the second and third parts and each of them and their respective heirs executors administrators and assigns that he the said Samuel McCaughey his executors or administrators will pay and discharge all debts liabilities and engagements of the said respective firms of 'McCaughey & Co.' and 'S. McCaughey & Co.' inclusive of all costs incurred in the sale of the said partnership properties And this indenture further witnesseth that in further consideration of the premises each of the said several parties hereto doth hereby release and for ever discharge the others and other of them and their and his heirs executors and

administrators of and from all actions suits proceedings accounts claims and demands which the releasing party has or may have against the others or other of them and their and his respective heirs executors and administrators estates and effects for or on account of any act deed matter or thing whatsoever done or omitted or neglected to be done in anywise relating to or affecting the partnership heretofore existing between them up to and inclusive of the said 31st December 1911 And each of them the said Samuel McCaughey and John McCaughey doth hereby release and for ever discharge the other of them and his respective heirs executors and administrators of and from all actions suits proceedings accounts reckonings claims and demands which the releasing party has or may have against the other of them and his respective heirs executors and administrators estate and effects for or on account of any act deed matter or thing whatsoever done or omitted or neglected to be done in any wise relating to or affecting the partnership heretofore existing between them up to and inclusive of the said 31st December 1911."

The agreement of 8th March 1912 for the sale of Dunlop, Toorale and Nocoleche Stations by Sir Samuel McCaughey to Robinson and Vincent, referred to in par. 14 of the special case, contained the following clause :—

"3. The vendor so as to bind himself and his executors and administrators agrees with the purchasers their executors and administrators to find all necessary sums which may be required by the purchasers for the purpose of effectually working and carrying on the said stations. The sums so advanced shall be a charge on the said stations. The sums so advanced shall bear interest at the rate of £4 per centum per annum from the time the same are advanced. It is the intention of the parties hereto that the said stations shall be carried on by the purchasers in the same manner as they have hitherto been carried on by the vendor and that the vendor shall find all necessary sums for the purpose of stocking, working and carrying on the same. In the event of drought and losses of stock occurring the vendor shall find all necessary sums for the purpose of restocking the said stations."

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The Full Court (*Cullen* C.J. and *Harvey* J., *Ferguson* J. dissenting) held that the indenture of 23rd April 1912 was liable to *ad valorem* duty as a conveyance on sale, that the amount of duty payable upon it was the amount assessed by the Commissioner, and that the costs of the special case should be borne and paid by Sir Samuel McCaughey.

From that decision Sir Samuel McCaughey now appealed to the High Court.

The nature of the arguments sufficiently appears from the judgments.

Langer Owen K.C. (with him *Bethune*), for the appellant.

Rolin K.C. (with him *S. A. Thompson*), for the respondent.

During argument reference was made to *Garnett* v. *Commissioners of Inland Revenue* (1); *Lindley on Partnership*, 8th ed., p. 402; *Horsfall* v. *Hey* (2); *Christie* v. *Commissioners of Inland Revenue* (3); *Alpe on Stamp Duties*, 12th ed., p. 110; *Commissioners of Inland Revenue* v. *Angus* (4); *Dodson* v. *Downey* (5).

Cur. adv. vult.

The following judgments were read :—

Sept. 4.

GRIFFITH C.J. With all respect to the majority of the learned Judges of the Supreme Court this case seems to me, when stripped of irrelevant matter, to be quite simple, and, indeed, hardly arguable.

The question is whether the deed of 23rd April 1912 was a conveyance or transfer on sale of property within the meaning of the *Stamp Duties Act* 1898. The term "conveyance" is defined as meaning "any instrument or deed whereby property is vested in any person or transferred or conveyed from one person to another." The test to be applied is, therefore, whether after the execution of the instrument any property became

(1) 81 L.T., 633.
(2) 2 Ex , 778.
(3) L.R. 2 Ex., 46.
(4) 23 Q.B.D., 579, at p. 585.
(5) (1901) 2 Ch , 620.

vested in the alleged transferee which was not vested in him before that execution.

The relevant facts lie in a short compass. In 1911 the appellant was a member of two partnerships, one consisting of himself and John McCaughey, and the other of himself, John McCaughey and one Vincent. The partnership assets consisted in both cases of pastoral property, comprising land, stock and the usual accessories, the legal title to the land being vested in the appellant, who in both cases held a predominant interest. By the deeds of partnership he declared himself a trustee for the members of the respective firms of the land, stock and premises.

In the beginning of 1912 the appellant had agreed to buy out the shares of his respective partners as from 31st December 1911. This, of course, entailed a dissolution of the partnerships as from that day. The pecuniary consideration which he was to give, which was very large in both cases, is not material, nor is it material to consider the mode in which it was to be paid. Shortly afterwards the appellant had agreed to sell to third persons for a lump sum the whole of the property which had been partnership assets.

The contracts for purchase or dissolution may be regarded as in the first instance executory, but no conveyance was necessary to give effect to them so far as regards the land of which the appellant was already the sole legal owner. So far as regards the stock and other chattels the possession remained in him as continuing partner. He was, therefore, able to transfer the whole property to his purchasers without the aid of any assurance from his former partners beyond the contracts of sale or dissolution, which are not now in question.

Under these circumstances the deed of 23rd April was executed, which was made between the appellant of the first part, John McCaughey of the second part, and Vincent of the third part. After reciting the previous partnerships, and that the appellant had bought his co-partners' shares, and that it had been agreed that the partnerships should be dissolved, and further that the appellant had agreed to sell the whole of the properties to third persons for £250,000, and that the parties had agreed to enter into the agreement testified by the deed, the deed witnessed that

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in pursuance of the said agreement and in consideration of the premises (1) the several parties dissolved the two partnerships, which should be deemed to have been dissolved as on and from 31st December 1911; (2) the parties of the second and third parts ratified and confirmed the sale by the appellant to the third parties, and requested him to transfer and assign the station properties, stock, plant and chattels, or so much thereof as might be absolutely vested in him or as to which he might have declared any trust in their favour, to the purchasers in terms of his agreement for sale; (3) the appellant covenanted to pay all partnership debts and costs of sale; and (4) each of the parties mutually released the others from all claims in respect of partnership dealings up to and inclusive of 31st December 1911.

It will be observed that the deed contains no reference to the prices agreed to be paid by the appellant to his partners for their shares in the partnership properties. Whatever the stipulations were as to payment they remained unaltered.

My difficulty has been to discover what part of this deed can be suggested to be a transfer of property. So far as I could apprehend the argument for the respondent, principal reliance is placed upon the release. But, in my opinion, it is impossible to construe a release of debts or claims as a conveyance within the meaning of the Statute. Even if it were possible, the release now in question relates exclusively to matters antecedent to the sales and has no concern with the consideration for the sales.

The legal effect of the request to convey to third persons is at most a direction to a trustee by beneficiaries to convey trust property. It has never been suggested that such a direction is a conveyance to the trustee.

The making of such a formal request was probably unnecessary under the circumstances, but some ingenious person may have suggested that the retiring partners possibly retained some equitable interest in the partnership assets.

In no aspect of the case can any part of the deed be regarded as operating as a conveyance or transfer of property.

The appeal should, therefore, be allowed.

BARTON J. I agree with the judgment of the Chief Justice.

Isaacs J. The test of whether the deed of 23rd April 1912 is a conveyance within the meaning of the *Stamp Duties Act* 1898 (for if it is, the sale is not disputed) is in my opinion this: Does it appear from the language of the deed itself, as applied to the circumstances with reference to which it was made, that the parties intended thereby to make the partnership property of all three the separate property thenceforth of Sir Samuel McCaughey?

That is the method pointed out by the cases, as, for instance, *Wale* v. *Commissioners of Inland Revenue* (1); *Commissioners of Inland Revenue* v. *Angus* (2); *West London Syndicate* v. *Inland Revenue Commissioners* (3), and *Chesterfield Brewery Co.* v. *Inland Revenue Commissioners* (4).

In *Wale's Case* (1) the question was whether the document was a fresh mortgage or the transfer of an existing mortgage. *Kelly* C.B. said (5):—"I asked who possessed that mortgage the day before the instrument in question was executed, and who possessed it just after the execution? . . . The particular mode and form in which the change or transfer was carried out, do not affect the question."

The case of *Hutton* v. *Lippert* (6) states and exemplifies the principle which should govern this appeal. There a deed was made which for money consideration enabled another to "deal with it" (the property) "as he thinks fit." The Judicial Committee held it was a sale. Sir *Robert P. Collier* says (7):—"The effect of the transaction was to give Ekstein every right which a vendor could legally claim, and to confer upon the defendant every right which a purchaser could legally demand. Does it make any difference that the parties have called this transaction by the name of a guarantee?"

In the present case all that is necessary is the grant of the shares, not the payment for them; and if the effect of the deed is either expressly or by implication to enable Sir Samuel McCaughey to do with the partnership property all that an express grantee could do, and this in consideration of the recited

(1) 4 Ex. D., 270.
(2) 23 Q.B.D., 579.
(3) (1898) 2 Q.B., 507.
(4) (1899) 2 Q.B., 7.
(5) 4 Ex. D., 270, at pp. 276, 277.
(6) 8 App. Cas., 309.
(7) 8 App. Cas., 309, at p. 313.

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purchase of the shares, it seems to me the partnership property is thereby irrevocably converted into Sir Samuel's several property, and the deed must be regarded as in substance a transfer.

Cullen C.J. and *Harvey* J. thought it was such a transfer. *Ferguson* J. was of the contrary opinion. The grounds of his opinion are contained in these words, which relate to the partnership between Samuel and John: "According to my view, Sir Samuel, instead of taking the contemplated transfer to himself, and then transferring to the sub-purchasers, obtained by the deed in question John McCaughey's concurrence in the transfer to the sub-purchasers. The deed is not the completion of the original transaction; it is the fulfilment of a condition necessary for carrying out a substituted transaction."

That has been made the central idea upon which the appellant's argument before us has turned. It really involves much more than the construction of this deed: it involves the cardinal notion of what is meant by a share in a partnership as distinguished from joint ownership of the property belonging to the partnership. It assumes that the property sold by Sir Samuel McCaughey to Vincent and Robinson was identical with the property sold to him by his co-partners, and it treats Vincent and Robinson as "sub-purchasers." The observation that the transaction is a "substituted transaction" is consequential. But, with the greatest deference to *Ferguson* J., there is a fallacy in the position. The property sold by Sir Samuel to his purchasers was the concrete land as land, and the stock and chattels as such. What he bought from his co-partners was not realty, and was not so many head of cattle or so much plant. The nature of a share in a partnership as stated in *Lindley on Partnership*, 7th ed., at p. 377, is, in substance, quoted by *Pollock on Partnership*, 8th ed., at p. 74, in these words: "The share of a partner in the partnership property at any given time may be defined as the proportion of the then existing partnership assets to which he would be entitled if the whole were realized and converted into money, and after all the then existing debts and liabilities of the firm had been discharged."

It is a fundamental principle in partnership law that in equity land held for partnership purposes is regarded as personal

property, being affected with an eventual trust for sale: *Waterer* v. *Waterer* (1). The reasons are clearly stated by *Bowen* L.J. in *Att.-Gen.* v. *Hubbuck* (2). That may be altered by an agreement to the contrary: *In re Wilson*; *Wilson* v. *Holloway* (3). This rule is now Statute law (*Partnership Act* 1892 (N.S.W.), sec. 22).

It is evident, therefore, that John could not have properly transferred *in specie* an equitable interest in exactly one-fifth of the land (see *In re Ritson* (4)); indeed, if he were behind in his firm contributions he might not be entitled to one-fifth of the partnership property as such. And it is equally evident that consenting to Samuel selling the land, &c., direct to Vincent and Robinson and getting in return £250,000, which represented the partnership property in a changed form, could not be a substitution for transferring to Samuel a fifth share in—say, for brevity sake—the £250,000 itself.

Consenting to the one—namely, the entire disposal of the substratum of the partnership—is not in all circumstances a surrender of a partnership interest in the proceeds. Whatever be the nature of the deed the only reason given for its not being a transfer does not hold. Still, it must be shown that it is in substance a transfer of the partnership interests, in other words a change of those interests into Samuel's own separate property.

After examining the deed closely and gathering its intention and substance from its language read in the light of the surrounding circumstances, I have arrived at the conclusion that it does amount substantially to such a transfer, and that the majority of the Supreme Court were right.

In the first place, it is made exclusively between the partners. It recites that the partnership business was that of "sheep and cattle breeders and graziers," a weighty circumstance being that it did not include carrying on other graziers. I say so, because the contract of sale between Samuel and his purchasers contains a provision to carry them on (clause 3). Then the deed recites that Samuel had purchased the shares of John and Vincent. This is certainly a most significant recital, because it is clearly the basis of some of the succeeding provisions. The shares were

(1) L.R. 15 Eq., 402.
(2) 13 Q.B.D., 275, at p. 289.
(3) (1893) 2 Ch., 340, at p. 343.
(4) (1898) 1 Ch., 667, at p. 669.

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in fact purchased on 15th January 1912 and 4th March 1912. The deed recites an agreement to dissolve the partnership as from an antecedent date, 31st December 1911, which was in fact the period fixed by the prior agreements. The antecedent arrangements respectively made by the prior agreements for payment for the shares are of great importance to both sides, and will be more conveniently referred to later.

The deed then proceeds "in pursuance of the said agreement and in *consideration of the premises*"—which includes the purchase by Samuel of the other partners' shares—to declare the dissolution of the partnership of "McCaughey & Co." And then the retiring partners in the one partnership ratify and confirm the sale by Samuel to Vincent and Robinson of the whole of their partnership property, and request and authorize him to transfer and assign Dunlop and Nocoleche Station properties and the stock and chattels thereon. That sale was one by which Samuel had contracted for himself and not for the partnership. It was made on his own behalf, binding, not the other partners, but "himself and his executors and administrators," to financially assist the purchasers.

Such a term (clause 3) was quite outside the ambit of the partnership deed; and, in truth, it was admitted in argument that that agreement was always regarded as his own separate bargain. A ratification and confirmation of the sale could not in law in the circumstances be such as to make the other partners parties to it (*Keighley, Maxsted & Co.* v. *Durant* (1)); but read with the recited purchase of the shares, it was obviously for the purpose of admitting that Samuel had the right when it was made of selling it on his own behalf, and receiving the purchase money for himself absolutely.

In other words, it is an acknowledgment that the property sold and its proceeds, the purchase money, are up to that moment partnership property, the previous agreements being merely executory, but are now and henceforth to be several and not partnership property. I regard this clause as perhaps the most definitely suggestive clause in this respect.

The clause of authority, request and direction to transfer is

(1) (1901) A.C., 240.

both complemental to the preceding provisions and to allay any possible questions on the part of the purchasers. It reads to me as a distinct abandonment of any rights on the part of the retiring partners.

As to the other partnership, the parties also declare "in consideration of the premises" it is dissolved as from the date, and again the individual sale by Samuel is ratified and confirmed, and its due carrying out authorized and directed. To my mind the methodical care with which the ratification and direction are duplicated, so as to apply expressly and directly to each partnership in turn, is a mark of the intention, not merely to give personal authority and direction for the carrying out of the combined sale by Sir Samuel, but to regard, as to each separate partnership, the whole rights as passed to him, and to wind up the whole of the inter-relations of the parties to the deed so far as they were not already provided for.

It was evident to the parties that if Sir Samuel were by the deed invested with the shares of the other partners—if he as against them henceforth was entitled to retain all the property and profits—he must immediately indemnify them against the debts and liabilities which run with the shares; and not otherwise. Accordingly we find an unqualified and instantly operating covenant by Samuel to pay all such debts and liabilities, down to and including the sale of the properties.

Then come mutual releases. These releases do not, in my opinion, include the purchase money for the shares, and do not come to a later period than 31st December 1911. But, nevertheless, they give rise to two observations. First, they are the indication of a complete settlement between the parties so far as they thought it necessary. There was no necessity, and it would have been highly inaccurate for the following reasons, to have included in the releases the purchase money for the shares.

As to John, the agreement of 15th January 1912 provided that none of it was to be paid to him, but was to be set off against his debt to Samuel, and as to Vincent the agreement of 4th March 1912 provided similarly.

Those proceeds were thus already merged in existing individual indebtedness, and were in effect paid.

H. C. OF A. 1914.

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Isaacs J.

No further deeds or documents have been executed or considered necessary between the parties. True, as stated in *Lindley on Partnership,* 8th ed., p. 520, a mere dissolution with release of claims is not a sale. The transaction is not a "sale" because the retiring partner gets no consideration; he gets on the suggested facts only what is due to him, and if he thereupon surrenders his interest in the assets it is not upon sale. But the learned author does not say it is not a transfer, and that is all that is in issue here.

Here, there was admittedly a sale, and the only question is whether this deed, among other things, carried out the sale. If it did not, then, as there is no division of assets, Sir Samuel McCaughey must yet get an assignment in order to protect the £250,000. But that, in the face of the deed itself, and fairly and reasonably construed, would be an absurdity.

In my opinion, the appeal should be dismissed.

Appeal allowed. Order appealed from discharged. Order varied as follows:— Question 1 *answered in the negative. Question* 2 *answered "The duty payable is one pound." Question* 3 *answered "Costs of special case to be paid by respondent." Respondent to pay costs of this appeal.*

Solicitors, for the appellant, *Macnamara & Smith.*

Solicitor, for the respondent, *J. V. Tillett,* Crown Solicitor for New South Wales.

B. L.