[HIGH COURT OF AUSTRALIA.]

VICKERY . . . . . APPELLANT;
PLAINTIFF,

AND

WOODS . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1951-1952.

SYDNEY, 1951, *Dec.* 6, 7, 10.

MELBOURNE, 1952, *March* 7.

Dixon, Williams, Webb, Fullagar and Kitto JJ.

Stamp Duties—Transactions or instruments liable—Conveyance or transfer on sale—Agreement for sale—Purchaser acting as agent for company to be formed—Formation of company—Transfer to company executed—Duty paid—Rescission—Novation—Conveyance by direction—Refund of ad valorem duty—Stamp Duties Act 1920-1949 (*N.S.W.*) *No.* 47 *of* 1920—*No.* 37 *of* 1949), *s.* 41 (4) (*a*), (7).*

V. sued W., the Commissioner of Stamp Duties (N.S.W.), to recover money paid as stamp duty on a contract executed by him for the purchase of a station property. At the time when the contract was made V. purported to act as agent for a company which had not then been incorporated and which did not come into existence until two months later. After the formation of the company, the instruments of transfer to effect the conveyance of the land to the company were duly executed and the balance of purchase money was paid by the company. W. claimed that *ad valorem* duty was payable upon the transfers as well as upon the original contract and a sum of money was paid as duty. V. then claimed under s. 41 (7) of the *Stamp Duties Act* 1920-1949 (N.S.W.), a return of the stamp duty paid upon the contract on the

*Section 41 (7) of the *Stamp Duties Act* 1920-1949 provides that:—"(a) In case the agreement is afterwards rescinded or annulled the ad valorem duty paid thereon shall be refunded by the Commissioner to the party to the agreement by whom or on whose behalf the duty was paid, or to his executors, administrators, or assigns. Application for the refund shall be made in or to the effect of the prescribed form within three months of the agreement being rescinded or annulled. . . . (c) This subsection shall not apply where the purchaser or any person claiming under him has entered into possession of or has attorned tenant of the property, nor unless the Commissioner is satisfied that the contract has not been rescinded or annulled only to avoid the stamp duty upon a subsale of the property."

ground that, after the payment of duty and before completion by conveyance, the contract entered into by him had been rescinded. W. refused to return the duty.

Held, that the evidence did not establish a rescission of the original contract and, consequently, V. was not entitled to recover the amount claimed under s. 41 (7) of the *Stamp Duties Act* 1920-1949 (N.S.W.).

Lake Victoria Ltd. v. *Commissioner of Stamp Duties* (1949) 49 S.R. (N.S.W.) 262; 66 W.N. 119, referred to.

Decision of the Full Court of the Supreme Court of New South Wales: *Vickery* v. *Commissioner of Stamp Duties*, (1950) 51 S.R. (N.S.W.) 79; 68 W.N. 66, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales by Arthur Vickery against Edward Thomas Woods, Commissioner of Stamp Duties for New South Wales and the nominal defendant appointed under the *Claims against the Government and Crown Suits Act* 1912 (N.S.W.), to recover the sum of £1,396 as the amount of stamp duty refundable by the defendant to the plaintiff.

The plaintiff alleged in his declaration that by an agreement in writing made on 11th April 1947, he agreed to purchase certain lands in New South Wales from Edward Walter Outhwaite, Ulonga Pastoral Co. Pty. Ltd. and S. O. Wood Pastoral Co. Pty. Ltd. and thereafter the defendant, as Commissioner of Stamp Duties, in pursuance of the *Stamp Duties Act* 1920-1940 charged the plaintiff with *ad valorem* stamp duty on that agreement amounting in all to the sum of £1,397, which sum was duly paid by the plaintiff to the Commissioner of Stamp Duties and the payment was recorded on the agreement by means of impressed stamps affixed by the commissioner. It was further alleged that after that payment of that stamp duty and before the completion of the said agreement it was rescinded and within three months of that rescission the plaintiff requested the commissioner to refund to him the stamp duty so paid less the sum of £1 deducted in accordance with s. 41 (7) (b) of the *Stamp Duties Act* 1920-1940, but the commissioner refused to do so.

The defendant denied that the agreement had been rescinded and alleged that at no material time was he satisfied that the agreement had not been rescinded as alleged only to avoid the stamp duty upon a sub-sale of the property, the subject of the agreement.

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On 11th April 1947 the plaintiff entered into an agreement with Outhwaite and the two pastoral companies referred to above whereby they, as vendors, sold to the plaintiff, who purported to act as agent for the Gunbar Pastoral Co. Pty. Ltd., about 122,037 acres of land, described in the agreement, for the sum of £146,444 15s. 4d. At the date of the agreement the Gunbar Pastoral Co. Pty. Ltd. had not been incorporated and it did not actually come into existence until 11th June 1947, the plaintiff being the governing director of the company. On 5th June 1947 application was made to the delegate of the Treasurer, Land Sales Control, for his consent, pursuant to the *National Security* (*Economic Organization*) *Regulations*, to the sale, and his consent thereto was given on 6th November 1947. In that application the purchaser's name was shown as " Arthur Vickery for Company to be formed ", and a declaration in connection with the application was made on 4th June 1947 by " Arthur Vickery for Gunbar Pastoral Co. Pty. Limited ". The plaintiff's solicitors continued to act for him after the incorporation of the company and they also acted for the company for the purpose of carrying into effect the general objects of the agreement and the completion of the purchase, and finally, on 3rd December 1947, they forwarded to the vendors' solicitors the necessary instruments of transfer in order to effect the conveyance of the subject lands to the Gunbar Pastoral Co. Pty. Ltd. Those instruments of transfer were duly executed and the balance of the purchase money was paid by the company to the vendors.

The Commissioner of Stamp Duties claimed that *ad valorem* duty was payable upon the transfers as well as upon the original agreement, and, in compliance with that ruling, the sum of £1,304 was paid as duty on the transfers. The commissioner claimed that the transfers were not in conformity with the agreement, and the plaintiff, being dissatisfied with the assessment, requested the commissioner to state a case for the opinion of the Supreme Court. The plaintiff informed the commissioner on 1st December 1949, that it was not intended to proceed with the stated case, and a claim was then made by the plaintiff for a refund on the footing that the agreement of 11th April 1947 had been rescinded.

The claim for a refund was rejected by the commissioner, whereupon the plaintiff brought the present action.

The trial judge, *Owen* J., found that from the date of the contract until completion by conveyance the vendors and their solicitors, the plaintiff and the company (when it came into existence) and the firm of solicitors which acted both for the plaintiff and the company, in their dealings with one another and with the delegate

of the Treasurer, whose approval to the contract was necessary, all treated the transaction as being one under which the company and not the plaintiff was the original contracting party and the purchaser of the land. The parties concerned drifted into a position in which the company was regarded and treated as the original contracting party and disregarded the presumption whereby the plaintiff was deemed to have been the purchaser. The conveyance by the vendors to the company, when looked at in the light of the prior conduct of the parties, constituted a rescission of the contract of 11th April 1947. In the light of the facts established at the hearing, there had been a rescission of the contract, not by any express agreement but by reason of the fact that in the circumstances disclosed in the evidence an intention to rescind the contract must be imputed in law to the plaintiff and to the original vendors.

Judgment was entered for the plaintiff in the sum of £1,395.

An appeal from that decision was allowed by the Full Court of the Supreme Court: *Vickery* v. *Commissioner of Stamp Duties* (1). From that decision the plaintiff appealed to the High Court.

G. E. Barwick K.C. (with him *B. P. Macfarlan*), for the appellant. There was for some period of time a contract between the vendors and the appellant as purchaser. That resulted not from any actual intention of the appellant but from the intention imputed to him by the law by reason (a) that the parties, that is, the vendors and the appellant, intended a contract to result; and (b) that there was nothing in writing (which by law was the exclusive evidentiary source) to preclude the imputation of that intention. That contract became a contract to convey to the appellant and beneficial equitable interests in the land were immediately created in him. The company, after its incorporation, and the vendors came into direct contractual relations (that being the right inference from the facts) by virtue of which, and only by virtue of which, the property was conveyed to the company. The appellant by the form of the original contract assented in advance to the vendors entering into the new contract with the company, which therefore worked a novation and a rescission of the original contract, with a consequential revesting of the appellant's equitable interests in the vendors, and then, by virtue of the new contract, passing from them to the company. The equitable interest did not at any stage pass from the appellant to the company. There was at the inception a contract between the vendors and the appellant

(1) (1950) 51 S.R. (N.S.W.) 79; 68 W.N. 66.

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as beneficial purchaser (*Scott* v. *Lord Ebury* (1); *Dudley Buildings Pty. Ltd.* v. *Rose* (2); *Bowstead* on *Agency*, 10th ed. (1944), p. 248). There was only one promise in point of law; that was to convey to the appellant as purchaser. Only a conveyance to the appellant alone could be in conformity with the contract within the meaning of s. 41 of the *Stamp Duties Act* 1920-1949 (N.S.W.). *Re Downs Theatres Pty. Ltd.* (3) is distinguishable.

[FULLAGAR J. referred to *Summergreene* v. *Parker* (4).]

There was not in fact any sub-sale by the appellant to the company after formation. There was ample evidence of an agreement between the company after incorporation and the vendors to convey to the company, and on the part of the company to pay the purchase money (*Howard* v. *Patent Ivory Manufacturing Co.* (5); *McLeod* v. *Cardiff Colliery Co.* (*N.L.*) (6)). *In re Northumberland Avenue Hotel Co.* (7) and *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (8) are distinguishable. The conveyance was direct to the company without recital of any direction. It was not in conformity. If there had been a direction in fact it would have been in breach of the statute to have so conveyed—and would have involved both the vendors and the company. There was not in fact any direction (as distinct from a consent). On this the finding of the primary judge is conclusive. There should not be any direction inferred, because (i) it would be inconsistent with the actual intention of the parties and the form of the original contract (see *Williston, Law of Contracts*, revised edition (1936), vol. 1, p. 893, par. 306); and (ii) it would involve an offence in both vendors and company. Therefore the conveyance was not merely not in conformity with, but was not in performance of, the contract with the appellant as beneficial purchaser. That contract, with the appellant as beneficial purchaser, should be regarded as abandoned or rescinded either (a) because the parties to it in fact did so, as was their intention throughout, or (b) because of an inconsistent conveyance to the company with the appellant's consent, evidenced in anticipation by the form of the original contract, or (c) because of a novation upon the company entering into direct relationship with the vendors through their respective solicitors and in relation to the delegate of the Treasurer questions of authority being disposed of by ratification. All the facts are

(1) (1867) L.R. 2 C.P. 255.
(2) (1933) 49 C.L.R. 84.
(3) (1942) Q.S.R. 179.
(4) (1950) 80 C.L.R. 304.
(5) (1888) 38 Ch. D. 156.
(6) (1924) V.L.R. 430; (1925) V.L.R. 1.
(7) (1886) 33 Ch. D. 16.
(8) (1901) 1 Ch. 196; (1902) 1 Ch. 146.

undisputed. The sole questions are questions of legal inference or explanation.

A. R. Taylor K.C. (with him *N. H. Bowen*), for the respondent. The contract bound the appellant, the purchaser, when it was made (see *Monkira Pastoral Co. Ltd.* v. *Commissioner of Stamp Duties (Q.)* (1)). Notwithstanding it was stated to be subject to the consent of the Treasurer, the contract was valid before consent, but subject to defeasance if consent was not given. The contract was not afterwards rescinded. No evidence was given of any intention to rescind or which would form a basis for inferring rescission. Nor was evidence given that the solicitors who acted for the appellant and for the new company after it had been formed had any authority to bind their clients to a new contract. Under the contract the appellant had the right to present to the vendors transfers in favour of the new company as he did : *Williams, Vendor and Purchaser*, 4th ed. (1936), pp. 641, 642. Even if it be conceded that the new company when formed proceeded to act upon an erroneous view of the position and in the belief that it was bound, that would not create a fresh contract or amount to a rescission of the old contract (*In re Northumberland Avenue Hotel Co.* (2) ; *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (3) ; *McLeod* v. *Cardiff Colliery Co. (N.L.)* (4)).

In construing s. 41 (7) (c) of the *Stamp Duties Act* the primary judge said that no question arose for the commissioner unless there had, in fact, been a sub-sale upon which duty was chargeable. He held, in effect, that there could not be any intention of avoiding duty unless liability to pay it had arisen. It followed, in his view, that the commissioner's opinion should be concerned with whether there had been a rescission with the intention of fraudulently cloaking an existing liability, that is, an intention to avoid *payment* of such liability. To avoid duty on a sub-sale means to avoid a liability. Rescission *after* a dutiable sub-sale would not avoid duty on the sub-sale or payment of duty on the sub-sale. In fact the commissioner properly understood s. 41 (7) (c). Because the primary judge took a different and wrong view of that provision he found that the opinion of the commissioner was not in law an opinion at all.

The further question arises whether the commissioner was required to form an " opinion " which is subject to judicial review.

(1) (1928) Q.S.R. 323.
(2) (1886) 33 Ch. D. 16.
(3) (1901) 1 Ch. 196 ; (1902) 1 Ch. 146.
(4) (1924) V.L.R. 430 ; (1925) V.L.R. 1.

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The section does not provide " if the commissioner is satisfied that the contract is rescinded only to avoid duty upon a sub-sale ". It is in the negative. The form of words used has been deliberately chosen to commit the question to the commissioner. It is sufficient for the provision to apply if the commissioner is in a situation where he can say " I do not know ", provided always, of course, that he is bona fide as to the state of his mind. If it could be shown in a particular case that he was not bona fide or was applying a mistaken view of the law the remedy would be by way of mandamus, not by action to recover a refund of duty as in this case.

G. E. Barwick K.C., in reply. Upon its proper construction sub-s. (7) (c) of s. 41 of the *Stamp Duties Act* only creates exceptions to sub-s. (7) (a). It was inserted by amendment. There is not any reason to differentiate between the first and second parts. Otherwise it has an unusual operation; all depends on the commissioner. The form of the section was dictated by the need to provide that the exception should be where the only motive of the rescission was to avoid duty and the original negative " shall not apply ". Sub-section (7) (c) was so treated in the pleadings. There was not any demurrer. The issues were on the respondent. The meaning of the sub-section is that it shall not apply unless the commissioner is satisfied in cases where there has been a sub-sale by the purchaser that the rescission has not been effected merely to avoid the stamp duty on the sub-sale; and that it shall not apply unless the commissioner is satisfied that the rescission has not been effected merely to avoid the stamp duty upon a sub-sale otherwise intended by the purchaser. The respondent's criticism of the judgment of the primary judge (i) is based on the idea (a) that an oral sub-sale does not involve duty, (b) that the conveyance from purchaser to sub-purchaser is not in itself a sub-sale, and (c) that a conveyance by direction does not involve a sub-sale; (ii) treats that judgment and the expression " avoids the stamp duty " too narrowly; (iii) confines the operation of the sub-section to one case, that is where there is not any sub-sale at all; and (iv) involves double duty in all cases of novation.

Cur. adv. vult.

March 7, 1952.

The following written judgments were delivered:—

DIXON J. The conditions of the contract of sale which the appellant signed contained the common provision negativing an obligation to produce a title in the vendor's own name. This provision ended:—" but . . . the vendors will procure proper

registrable transfers to the Purchaser of the property sold ". The contract itself was expressed as an acknowledgement of a sale to the appellant as agent for the Gunbar Pastoral Co. Pty. Ltd., and his signature as purchaser is qualified by the words " For Gunbar Pastoral Co. Pty. Ltd.". As that company had not yet been registered and so did not then exist, he must be considered as contracting so as to incur the liability of a principal; otherwise the contract would be inoperative. To avoid personal liability as a consequence, a clear expression of an intention not to be bound personally is necessary; the expressions used in this contract are not sufficient for that purpose. But, while the result is to make the appellant the person liable as the contracting party, it does not follow that the references to the Gunbar Pastoral Co. Pty. Ltd. are to be rejected from consideration for every purpose as if they were not present in the contract. They serve to indicate that the company is the intended transferee of the land and I am disposed to think that as a consequence the expression " purchaser ", in the provision relating to the vendors' obligation to procure registrable transfers, should be interpreted as covering the company, on its coming into existence. " A vendor's obligation is to execute a conveyance of the land sold to the purchaser or as he shall direct " (*Williams, Vendor and Purchaser*, 3rd ed. (1922-1927), p. 579), and doubtless the appellant could, therefore, in any case, have required the vendors to execute transfers in favour of the company. But for the purposes of s. 41 (4) (a) of the *Stamp Duties Act* 1920-1949 (N.S.W.) there may be a difference between such a transfer and a transfer to a person named in the contract as the intended transferee, even when that person is a company yet to be incorporated. In *Lake Victoria Ltd.* v. *Commissioner of Stamp Duties* (1) *Jordan* C.J. distinguishes, for the purpose of the application of s. 41 (4) (a), the case where the conveyance to a third party is made at the purchaser's direction from the case of a contract which provides for a conveyance to the purchaser or, not to the purchaser, but to some other person. In the latter case I understand his Honour regarded the conveyance as made in conformity with the contract, within the meaning of s. 41 (4) (a), and therefore as not chargeable with *ad valorem* duty. " A conveyance is not made in conformity with the agreement, unless it is made to the purchaser, or if the agreement provides that it is to be made not to the purchaser but to some other person, to that other person ". Clearly enough *Jordan* C.J. was here speaking of a person identified in the contract as opposed to any nominee, but I am not inclined

(1) (1949) 49 S.R. (N.S.W.) 262, at p. 265; 66 W.N. 119, at pp. 121, 122.

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to think that it makes any difference if the identifiable person is a contemplated company yet to be clothed with legal personality. As at present advised therefore I do not see why the transfer to the company should be regarded as otherwise than in conformity with the contract. The Commissioner of Stamp Duties, however, thought otherwise and determined that the transfers to the company were liable to *ad valorem* duty under s. 42 (5), that is, as conveyances by direction of the purchaser to some one else.

The appellant, accepting this view or hypothesis, maintains that, consistently with it, the inference must be drawn from the transaction and the circumstances surrounding it that when the company was incorporated a novation of the contract of sale took place by which, in consideration of the discharge of the appellant from his obligation, the company agreed to assume the obligation of the contract and the vendors agreed to the substitution of the company as the party to the contract agreeing to purchase. Accordingly there would be a rescission of the contract within the meaning of s. 41 (7) and the appellant would be entitled to have the duty upon the contract refunded to him. In support of this conclusion a number of considerations was arrayed. First, so it was said, the contract must be understood as an engagement with the appellant beneficially and as involving an obligation to transfer to him and to no one else except at his direction. But no direction was in fact given, none was recorded in the transfer as s. 42 (5) demanded that a direction should be, and there was no contract of resale by the appellant to the company. The transfer could not, therefore, be explained as a performance of the appellant's contract with the vendors. Next the argument relied on the fact that, when the company came into existence it dealt with the vendors. In the books of account of the agents through whom the transaction was effected the appellant was, in the first instance, debited with the deposit paid by the agents, but the entry was reversed when the company came into being and the amount charged to it. The purpose of the contract from the beginning, it was said, was for the appellant to occupy the temporary role of purchaser and then to drop out and this was effected in the result. To infer a novation would accord with the intention of all parties from beginning to end: to infer a direction, it was contended, would be contrary to the truth and would suppose an infringement of s. 41 (5).

The short answer to all this is an old one. It is that to a company that is brought into existence and acts upon an agreement antecedently made in its interest an intention to contract

is not to be imputed in order to give a legal basis or rationale to a transaction carried through upon an assumption, however incorrect, that no further contract was required and nothing more was necessary than to complete the transaction as initially provided in the contract.

Rescission and novation ultimately depend on intention, and here none existed in fact and nothing was done from which such an intention must necessarily be implied.

In the language of Lord *Davey* in *Natal Land and Colonization Co. Ltd.* v. *Pauline Colliery and Development Syndicate Ltd.* (1) the circumstances relied on for the purpose of showing that a new contract was made with the company after its incorporation on the terms of the old contract are not necessarily referable to and do not necessarily imply a new contract with the vendor. Even less reason is supplied by the course taken for the conclusion that the appellant was a party to a tripartite agreement involving a rescission of the contract between him and the vendor.

The fact is that the transaction took the course which the contract entered into by the appellant contemplated and the company paid the purchase money and took the transfer because that is what the parties to the contract intended. There was, in my opinion, no rescission or annulment of the contract and s. 41 (7) (a) does not apply.

I have had the advantage of reading the judgment prepared by *Williams* J. and I agree in the statement of facts and the reasoning it contains.

I think that the appeal should be dismissed.

WILLIAMS J. This is an appeal by the plaintiff from an order of the Full Supreme Court of New South Wales setting aside a verdict and judgment given in his favour for the sum of £1,395. The respondent, the defendant in the action, is the Commissioner of Stamp Duties for New South Wales and the nominal defendant appointed under the *Claims against the Government and Crown Suits Act* 1912 (N.S.W.). The origin of the action was a contract in writing made on 11th April 1947 between three vendors and the plaintiff as purchaser on behalf of Gunbar Pastoral Co. Ltd., a company not then incorporated, for the purchase of 122,000 acres of station lands for the sum of £146,444 15s. 4d. Under the *Stamp Duties Act* 1920-1940 *ad valorem* duty was payable on the contract and this was assessed at £1,396 and later paid by or on behalf of the plaintiff. The company was incorporated on 11th June 1947 and the plaintiff became its managing director, but no new

(1) (1904) A.C. 120, at p. 126.

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contract was ever executed between the vendors and the company in the terms of the contract of 11th April 1947. Clause 2 of the contract of 11th April 1947 provided that it was made subject to the *National Security* (*Economic Organization*) *Regulations* and to the consent of the Federal Treasurer with the approval of the Minister for Lands thereto. It contained provisions relating to the application for such consent to the delegate of the Treasurer and provided, *inter alia*, that if at the expiration of three months from the date of the contract (or such further term as might mutually be agreed) consent should not have been granted either vendor or purchaser should be entitled to regard such consent as having been refused and the purchaser should be entitled to a refund of all moneys paid by him thereunder, but without any interest, damages, expenses or costs. The contract also provided that the purchase money should be payable as follows: (1) a deposit of £6,000 in cash on the fall of the hammer and (2) the residue in cash on completion. The consent of the Treasurer was applied for on 5th June 1947 and therefore before the company was incorporated. It was not given within three months, but the time was extended by mutual agreement. It was given on 6th November 1947. The consent was indorsed on the contract and was in the following terms: "In pursuance of the *National Security* (*Economic Organization*) *Regulations* I hereby consent to the within transaction. Dated 6th day of November 1947 F. Lowther Delegate of the Treasurer of the Commonwealth of Australia".

The contract was completed by conveyances of the subject lands to the company on 8th December 1947. The defendant claimed and was paid by the company under protest *ad valorem* duty on the conveyances, the amount of the duty being £1,403. The defendant was asked by the company to state a case under s. 124 of the *Stamp Duties Act* as to whether he was entitled to claim *ad valorem* duty on the conveyances, the company contending that the conveyances were only liable to a duty of five shillings each because they were made in conformity with the contract. The company did not proceed with the case stated and the plaintiff commenced this common law action to recover the duty paid on the contract. Section 41 (4) (a) of the *Stamp Duties Act* 1920-1949 provides that where duty has been paid in conformity with the foregoing provisions (in this case the *ad valorem* duty on the contract) the conveyance made in conformity with the agreement shall not be chargeable with *ad valorem* duty, but shall be chargeable with a duty of five shillings. The defendant exacted *ad valorem* duty on the conveyances on the ground that they were

not made in conformity with the contract of 11th April 1947. He relied on the decision of the Full Supreme Court of New South Wales in *Lake Victoria Ltd.* v. *Commissioner of Stamp Duties* (1). We are not concerned on this appeal with the question whether that case was or was not rightly decided or, if it was rightly decided, whether it applied to the facts of the present case. These are questions which would have arisen if the company had proceeded with the appeal under s. 124 of the *Stamp Duties Act*.

The common law action is based on s. 41 (7) of the *Stamp Duties Act*. Paragraph (a) of this sub-section provides, so far as material, that where an agreement on which *ad valorem* duty has been paid is afterwards rescinded or annulled the *ad valorem* duty paid thereon shall be refunded by the commissioner to the party to the agreement by whom the duty was paid provided an application for a refund is made within three months of the agreement being rescinded or annulled. Paragraph (c) provides that the sub-section shall not apply where the purchaser or any person claiming under him has entered into possession of or has attorned tenant of the property nor unless the commissioner is satisfied that the contract has not been rescinded or annulled to avoid the stamp duty upon a sub-sale of the property.

The action was tried by *Owen* J. without a jury. The plaintiff alleged in his declaration that the contract of 11th April 1947 was rescinded and that within three months of rescission he requested the defendant to refund the stamp duty on the contract, but the defendant refused to do so. The defendant in his first plea denied that the contract had been rescinded and for a second plea said that at no material time was he satisfied that the agreement had not been rescinded as alleged only to avoid the stamp duty upon a sub-sale of the property the subject thereof. *Owen* J. held that the contract had been rescinded. He also held that the defendant had failed to sustain the second plea. The Full Supreme Court upheld the appeal on the ground that the contract had not been rescinded. It found it unnecessary to decide the further question under s. 41 (7) (c) which would have arisen under the second plea if the contract had been rescinded.

I agree with the Full Supreme Court. There is, in my opinion, no evidence that the contract of 11th April 1947 was rescinded. It was a contract entered into between three vendors and the plaintiff on behalf of a company which was not then in existence. The legal consequences that flow from such a contract were recently discussed by this Court in *Summergreene* v. *Parker* (2). Usually,

(1) (1949) 49 S.R. (N.S.W.) 262; 66 W.N. 119.

(2) (1950) 80 C.L.R. 304.

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and the present contract is no exception, an agreement entered into between a vendor and a person on behalf of a company not then incorporated, whether as agent or trustee, creates in law a contract between the vendor and that person as a principal. I repeat the opinion already expressed in *Summergreene's Case* (1) that "An agent cannot contract on behalf of a principal who is not in existence and ascertainable at the date of the contract, and the contract, if contract there be, must be a contract between the agent as principal and the other party, and therefore a contract on which the agent is personally liable. In *Kelner* v. *Baxter* (2), it was held that such an agent is personally liable unless it clearly appears from the terms and conditions of the alleged contract that it was not intended that the agent should be so liable."

The transaction to which the Treasurer gave his consent under the Economic Organization Regulations was the contract of 11th April 1947. He was not asked to give his consent to any other transaction. There never was any other contract in existence. From the beginning the vendors may have known that the purchaser intended that the subject lands should be conveyed to the company and that the purchase moneys should be paid by the company. It was immaterial to the vendors who paid the purchase money, but only the plaintiff was personally liable to pay it. They could not have sued the company for it. Upon payment the vendors would be bound to convey the lands to the company when formed if so directed by the purchaser either expressly or by implication. Contracts entered into between a vendor and a purchaser as agent for an unincorporated company are often completed by the company paying for the property and taking a conveyance. If there is no express direction by the purchaser it would be implied from his conduct where a conveyance to the company was tendered to the vendors with his consent. But a company cannot after incorporation adopt or ratify a contract purporting to be made on its behalf before it is incorporated (*North Sydney Investment and Tramway Co. Ltd.* v. *Higgins* (3)). In order to bring the vendor and the company into contractual relations a new contract must be made between the vendor and the company after its incorporation, usually in the terms of the previous contract (*Natal Land and Colonization Co. Ltd.* v. *Pauline Colliery and Development Syndicate* (4)).

Where the facts are sufficient it can be inferred that a new contract has been entered into between the vendor and the company

(1) (1950) 80 C.L.R., at p. 318.
(2) (1866) L.R. 2 C.P. 174.
(3) (1899) A.C. 263.
(4) (1904) A.C. 120.

after its incorporation (*Howard* v. *Patent Ivory Manufacturing Co.* (1); *Natal Land and Colonization Co. Ltd.* v. *Pauline Colliery and Development Syndicate* (2)). But the only reported case in which such a contract has been inferred would appear to be *Howard's Case* (3), and there the evidence was very strong because after the incorporation of the company the vendor attended meetings of the board of directors, and by agreement between him and the board acts were done which could only be referable to an agreement made between him and the company at these meetings to vary the agreement with the promoter in certain respects. In two cases of the highest authority the fact that the company entered into possession of the subject land and did acts which on their face appeared to be referable only to an agreement between the vendor and the company was held not to be sufficient for the Court to infer a new agreement between the vendor and the company: *In re Northumberland Avenue Hotel Co.* (4); *Natal Land and Colonization Co. Ltd.'s Case* (5).

In the present case there is no evidence of any new contract between the vendors and the company. The memorandum and articles of association of the company are not in evidence. The minutes of meetings of directors of the company are not in evidence. There is no evidence of any meeting between the vendors and any person or persons having any authority to contract on behalf of the company. There is correspondence between the solicitors for the vendors and the solicitors, who were acting first for the plaintiff and later also for the company, phrased as though the sale was a sale by the vendors to the company. But there is no evidence that the respective solicitors had any authority to make a contract between the vendors and the company. The tone of the correspondence is explained by the evident belief of all concerned that the contract would be completed by conveyances to the company. The one and only contract was the preliminary contract between the three vendors and the plaintiff. Such contracts are entered into so that the vendor will have a person liable to pay the purchase money. After that has been paid it is immaterial to the vendor whether he conveys to the promoter or to the company. On the other hand, the promoter, before he incorporates the company, wants to be in a position to compel a conveyance by the vendor to the company after its incorporation. The novation of the contract between the vendors and the plaintiff in the present case

(1) (1888) 38 Ch. D. 156, at p. 164.
(2) (1904) A.C., at p. 126.
(3) (1888) 38 Ch. D. 156.
(4) (1886) 33 Ch. D. 16.
(5) (1904) A.C. 120.

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into a contract between the vendors and the company would have meant that the vendors were content to accept the liability of the company to pay the purchase money in lieu of the liability of the plaintiff. There is no evidence of this and no evidence that the company ever agreed with the vendors to pay the purchase money. There were three vendors, and therefore three parties between whom and the company a new contract would have to be inferred. But there is no evidence of a novation with any of them. It is, therefore, as the Full Supreme Court said, unnecessary to consider the second plea.

I would dismiss the appeal.

WEBB J. The conveyance to the Gunbar Pastoral Co. was not, I think, in conformity with the contract between Outhwaite, the Ulonga Pastoral Co. and the Wood Pastoral Co., as vendors, and the appellant Vickery, as purchaser. It could not have been in conformity with a contract to which the Gunbar Pastoral Co. was not a party; under which alone it had no rights; which it could not ratify; and which contained no provision for a conveyance to it. A subsequent direction to convey to the company would be outside the contract, and dutiable under s. 42 (5) of the *Stamp Duties Act* 1920-1949 (N.S.W.). The conveyance was not inconsistent with the contract; but it does not follow that it was in conformity with it.

Then the conveyance must have been the result of one of three transactions: (1) a direction by Vickery to the vendors to convey to the Gunbar Pastoral Co.; or (2) a sub-sale by Vickery to the Gunbar Co.; or (3) a contract between the vendors and the Gunbar Co., following rescission of the contract between the vendors and Vickery. If a transaction as in (1) or (2) took place, then duty was payable on the conveyance, as claimed by the respondent commissioner. The onus of proving that rescission took place was on the plaintiff, that is, Vickery. I hesitate to say there was no evidence to support a finding of rescission in view of the correspondence between the solicitors. But, even if there was evidence, Vickery had to prove, in addition to rescission, that the commissioner was in fact satisfied that the agreement between the vendors and Vickery had not been rescinded to avoid the duty on a sub-sale. It was not necessary, in fact it was impossible, for Vickery to establish the actual state of mind of the commissioner. But it was sufficient for him to prove facts from which it necessarily followed that the commissioner was satisfied. I do not think that the onus of proof rested on the commissioner on the ground

that his satisfaction, or lack of it, was a matter peculiarly within his knowledge. All the commissioner had to do was to assert his want of satisfaction. It was for Vickery to show that s. 41 (7) (a) applied by proving the satisfaction of the commissioner within sub-s. (7) (c). Vickery claimed a refund of duty paid under s. 41 (1) and had to establish his claim. This view of s. 41 (7) (a) and (c) may appear to place on a taxpayer an onus almost impossible to discharge; but if the legislature has seen fit to do this as a condition of securing a refund of duty, as I think it has, that is the end of the matter. After all, this is a provision for a concession. The concession may be worth little in view of the condition as to the commissioner's satisfaction; but it is still a concession for what it is worth. I am not prepared to say that it can never be secured if contested by the commissioner.

I think the onus resting on Vickery was not discharged: it cannot be held that the only inference from the facts is that the contract was not rescinded to avoid duty on a sub-sale.

I would dismiss the appeal.

FULLAGAR J. I agree that this appeal should be dismissed. There is no evidence that the original contract was ever rescinded or annulled, or that any new contract was ever made between the vendors and the company. All parties concerned simply treated the conveyance to the company as performance of the original contract, and it did, in my opinion, in truth amount to performance of that contract.

Duty has, in my opinion, been wrongly charged, because the conveyance was "made in conformity with the agreement" within the meaning of s. 41 (4) of the *Stamp Duties Act* 1920-1949 (N.S.W.). This view, however, cannot avail the appellant in these proceedings.

KITTO J. I have read the judgments prepared by my brothers *Dixon* and *Williams*. I agree with them and have nothing to add.

Appeal dismissed with costs.

Solicitors for the appellant, *J. Stuart Thom & Co.*

Solicitor for the respondent, *F. P. McRae*, Crown Solicitor for New South Wales.

J. B.