[HIGH COURT OF AUSTRALIA.]

DAVIS INVESTMENTS PROPRIETARY LIMITED . . . . . . APPELLANT;
APPELLANT,

AND

COMMISSIONER OF STAMP DUTIES (N.S.W.) . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1957-1958.

SYDNEY, 1957, *Dec.* 3-5; 1958, *May* 9.

Dixon C.J., McTiernan Webb, Kitto and Taylor JJ.

Company—Sole shareholder in another company—Other company possessed of assets consisting of valuable shares—Agreement to transfer shares to sole shareholder at par value—Par value substantially less than real value—Consideration moving transfer—Whether transaction one of sale at a price or satisfaction of rights of shareholder—Stamp Duties Act 1920-1949 (*N.S.W.*), *s.* 41 (1), 66 (3A).

The appellant company owned all the shares in another company which had among its assets three parcels of shares, fifty-seven shares in all, in other companies. The appellant company made an agreement with the other company to purchase those shares for a total price of £57 : they were all fully paid up £1 shares but in fact of a total value of £54,382. The question upon the appeal was under which sub-section of s. 66 of the *Stamp Duties Act* 1920-1949 (N.S.W.) the agreement fell. The answer depended on whether the transfers were made without consideration (sub-s. 3), or, if there was a bona fide consideration in money or money's worth, whether they were made upon a consideration which was (sub-s. 3A) or was not (sub-s. 3B) less than the unencumbered value of the shares.

Held, by *Dixon* C.J., *McTiernan* and *Taylor* JJ., *Webb* and *Kitto* JJ. dissenting, that although the relationship of the companies doubtless explained the transaction, it was not one for which the company law provides for the effectuation of the rights and duties subsisting between shareholder and company but a transaction of purchase and sale ; so that although the value of the shares the appellant held in the other company dropped correspondingly the transaction should be considered as a transfer for a price and the consideration must be confined to the price expressed in the agreement : accordingly the agreement fell under s. 66 (3A).

Archibald Howie Pty. Ltd. v. *Commissioner of Stamp Duties (N.S.W.)* (1948) 77 C.L.R. 143, discussed.

Decision of the Supreme Court of New South Wales: *Davis Investments Pty. Ltd.* v. *Commissioner of Stamp Duties* (1958) S.R. (N.S.W.) 229; (1957) 74 W.N. 479, affirmed.

APPEAL from the Supreme Court of New South Wales.

Davis Investments Pty. Ltd. appealed by way of stated case under s. 124 of the *Stamp Duties Act* 1920-1949 to the Full Court of the Supreme Court of New South Wales against an assessment of stamp duty made by the Commissioner of Stamp Duties. The case so stated was substantially as follows:—1. Davis Investments Pty. Ltd. (hereinafter called the appellant) is a company duly incorporated under the provisions of the *Companies Act* 1936. On 30th November 1951, the nominal capital of the appellant was £60,000 0s. 0d. divided into 60,000 shares of £1 0s. 0d. each. The issued capital of the appellant was £52,000 consisting of 52,000 ordinary shares of £1 0s. 0d. each fully paid. Of the issued capital Jack Davis of 4 Ian Street, Rose Bay, publisher, was on the day last-mentioned the owner of 20,800 shares in the appellant, Hannah Sarah Simblist and Jack Davis of 250 Pitt Street, Sydney, trustees, were on that day the owners of 26,000 shares in the appellant and Jack Edward Madgwick of 34 Bapaume Road, Mosman, manager, was on that day the owner of 5,200 shares in the appellant.

2. D. Davis & Co. Pty. Ltd. is a company deemed to have been duly incorporated under the provisions of the *Companies Act* 1936, pursuant to sub-s. (4) of s. 3 thereof. On 30th November 1951, the nominal capital of the said company was £15,000 divided into 15,000 shares of £1 0s. 0d. each. The issued capital of that company was £15,000 consisting of 15,000 ordinary shares of £1 0s. 0d. each fully paid up. On 30th November 1951 Jack Davis of 250 Pitt Street, Sydney, music publisher, was the beneficial owner of 7,497 shares in that company, Robert Hill (deceased) late of 82 Pitt Street, Sydney, was the beneficial owner of one (1) share in that company, Robert Hill (deceased), Hannah Sarah Davis Klippel and Jack Davis were the beneficial owners of 7,497 shares in that company, Leslie Walter Hudson (deceased) late of 82 Pitt Street, Sydney, was the beneficial owner of one (1) share in that company, Allan Spence Lamond (deceased) late of 82 Pitt Street, Sydney, was the beneficial owner of one (1) share in that company, Hannah Sarah Simblist of 62 Kambala Road, Bellevue Hill, director, was the beneficial owner of one (1) share in that company, Jack Edward Madgwick of 250 Pitt Street, Sydney, manager, was the beneficial

H. C. OF A. 1957-1958. DAVIS INVESTMENTS PTY. LTD. v. COMMISSIONER OF STAMP DUTIES (N.S.W.).

owner of one (1) share in that company and Wilfred Edward Johnson (deceased) late of 82 Pitt Street, Sydney, was the beneficial owner of one (1) share in that company.

3. At nine forty-five o'clock in the morning of 30th of November 1951 the said beneficial owners of the shares of D. Davis & Co. Pty. Ltd. sold for valuable consideration all their shares in that company to the appellant.

4. At ten forty o'clock on 30th November 1951 an agreement was made between D. Davis & Co. Pty. Ltd. of the one part and the appellant of the other part in the words and figures following, namely :—"Agreement made the 30th day of November one thousand nine hundred and fifty-one Between D. Davis & Company Pty. Limited (hereinafter called 'The Vendor') of the one part And Davis Investments Pty. Limited (hereinafter called 'The Purchaser') of the other part Whereby it is agreed and declared as follows :—1. The vendor shall sell and the purchaser shall purchase the following assets : (a) 49 fully paid £1 shares in the capital of Golden Press Pty. Limited. (b) 4 fully paid £1 shares in the capital of Davis Artists Pty. Limited. (c) 4 fully paid £1 shares in the capital of Davis Publications Pty. Limited. (d) The furniture and fittings more particularly described in the inventory signed by a director of each of the parties hereto for identification. (e) The motor cars more particularly described in the aforesaid inventory. 2. The purchase price for the foregoing assets shall be : (a) For the assets mentioned in par. (a) the sum of £49. (b) For the assets mentioned in par. (b) the sum of £4. (c) For the assets mentioned in par. (c) the sum of £4. (d) For the assets mentioned in par. (d) the sum of £631. (e) For the assets mentioned in par. (e) the sum of £1,283. 3. Upon completion of this agreement the vendor shall execute and deliver transfers of the shares mentioned in cl. 1 hereof and shall deliver the other assets hereby agreed to be sold. In Witness Whereof the parties hereto set their hands the day and year first hereinbefore written."

5. The forty-nine fully paid one pound shares in the capital of Golden Press Pty. Ltd. referred to in the said agreement were on 30th November 1951, of a value of £47,254 0s. 0d. No question arises on this appeal in relation to the value of those shares. The four shares in Davis Publications Pty. Ltd. referred to in the said agreement were on 30th November 1951, of a value of £7,124 0s. 0d. No question arises on this appeal in relation to the value of those shares. The four shares in Davis Artists Pty. Ltd. referred to in the said agreement were on the day last mentioned of a value of £4 0s. 0d. and no question arises on this appeal in relation to the

value of those shares. The balance of the property the subject of the agreement of sale was not liable to stamp duty under the provisions of the *Stamp Duties Act* 1920-1949 and no question arises in relation to such property on this appeal.

6. Upon the execution of the said agreement of sale of 30th November 1951, the shares in the capital of D. Davis & Co. Pty. Ltd. were reduced in value by £54,325. Except for the fact that the value of the said shares was so reduced the value of these shares is not relevant to any question arising on this appeal.

7. The Commissioner of Stamp Duties (hereinafter called the respondent) has valued the property liable to stamp duty included in the said agreement of sale, namely, the said forty-nine shares in Golden Press Pty. Ltd. and the four shares in Davis Artists Pty. Ltd. and the four shares in Davis Publications Pty. Ltd. in the sum of £54,382 0s. 0d.

8. For the purpose of assessing stamp duty payable on the agreement of sale the respondent has assessed stamp duty on the sum of £57 0s. 0d. at the rate of *ad valorem* duty provided in the second schedule to the *Stamp Duties Act* 1920-1949, as on a sale for a consideration in money or money's worth of not less than the unencumbered value of those shares and has assessed duty on the said sum of £57 0s. 0d. in the sum of 3s.

9. The respondent has assessed stamp duty on the sum of £54,325 0s. 0d. being the difference between the unencumbered value of those shares at 30th November 1951 and the sum of £57 0s. 0d. at the rate of duty specified in the sixth schedule to this Act.

10. There was no other property in New South Wales conveyed by D. Davis & Co. Pty. Ltd. to any person on the day of but prior to the said agreement of sale or at any time within the period of three years preceding the date of that agreement without consideration in money or money's worth. Accordingly, the respondent assessed stamp duty on the said sum of £54,325 0s. 0d. in the sum of £1,901 7s. 6d., being three and one-half per cent of that sum. The respondent assessed a further duty of £1 0s. 0d. upon the agreement as an agreement under seal, and no question arises on this appeal concerning that assessment of £1 0s. 0d. The respondent therefore has assessed the stamp duty payable upon the agreement of sale in the sum of £1,902 10s. 6d.

11. The respondent has claimed that the consideration for the agreement by D. Davis & Co. Pty. Ltd. to sell to the appellant the shares in Golden Press Pty. Ltd., Davis Artists Pty. Ltd., and Davis Publications Pty. Ltd. was £57 0s. 0d. and no more,

H. C. of A. 1957-1958.

Davis Investments Pty. Ltd. v. Commissioner of Stamp Duties (N.S.W.).

and that therefore the appellant being the purchaser under the said agreement of sale, is liable under and by virtue of ss. 66 (3A) and 41 of the *Stamp Duties Act* 1920-1949 to pay stamp duty on the said sum of £54,325 0s. 0d. at the rate of duty specified for such an amount in the sixth schedule to the Act.

12. The appellant, being dissatisfied with the assessment of stamp duty by the respondent, has required the respondent to state a case for the opinion of the Supreme Court of New South Wales pursuant to s. 124 of the *Stamp Duties Act* 1920-1949, and has paid the duty assessed in the said sum of £1,902 10s. 6d. and the sum of £20 0s. 0d. as security for costs in accordance with that section.

13. The following questions are stated for the determination of the Supreme Court of New South Wales :—(1) Whether the agreement made 30th November 1951 between D. Davis & Co. Pty. Ltd. of the one part and the appellant of the other part for the sale by D. Davis & Co. Pty. Ltd. to the appellant of forty-nine shares in Golden Press Pty. Ltd. and four shares in Davis Artists Pty. Ltd. and four shares in Davis Publications Pty. Ltd. was made upon a bona fide consideration in money or money's worth of less than the unencumbered value of the said shares ? (2) Whether the said agreement for the sale of those shares should—(a) be charged with *ad valorem* duty in accordance with ss. 41 and 66 (1) and (2) of the *Stamp Duties Act* 1920-1949, or (b) be charged with *ad valorem* duty in accordance with ss. 41 and 66 (3A) of the said Act, or (c) be charged with *ad valorem* duty in accordance with the provisions of ss. 41 and 66 (3B) of the Act.

14. The court is also asked whether the duty chargeable on the agreement of sale should be assessed at the said amount of £1,902 10s. 6d., or, if not, at what amount.

15. The court is also asked to decide the question of costs.

The Full Court of the Supreme Court (*Owen* J., *Roper* C.J. in Eq. and *Manning* J.) answered as follows the questions asked in the stated case :—

1. The agreement referred to was made upon a bona fide consideration in money or money's worth of less than the unencumbered value of the said shares.

2. The agreement for sale should be charged with *ad valorem* duty in accordance with ss. 41, and 66 (3A) of the *Stamp Duties Act* 1920-1949 : *Davis Investments Pty. Ltd.* v. *Commissioner of Stamp Duties* (1).

From that decision Davis Investments Pty. Ltd. appealed to the High Court contending that the proper duty chargeable was

(1) (1958) S.R. (N.S.W.) 229 ; (1957) 74 W.N. 479.

£135 19s. 6d. whereas the judgment of the Supreme Court ordered that the duty chargeable should be £1,902 10s. 6d.

N. H. Bowen Q.C. (with him *L. W. Street*), for the appellant. The agreement should be assessed as upon a full consideration under s. 66 (3B) of the *Stamp Duties Act* 1920-1949 (N.S.W.). There was no gift involved :—" Consideration " is used here in its conveyancing sense, and not so much, if at all, in its contractual sense ; " Money or money's worth " includes every type of consideration except marriage consideration : see *Attorney-General* v. *Earl of Sandwich* (1) ; *Attorney-General* v. *Boden* (2) and *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation* (3). Consideration under the *Stamp Duties Act* need not pass from the transferee to the transferor. It is quite sufficient if it passes to a third party, or there were a detriment, as long as it was a consideration. As a contrast to that see the definition of " gift " in s. 4 of the federal *Gift Duty Assessment Act*. In the case of appeals under s. 124 of the *Stamp Duties Act* 1920-1949 the court may draw its own inferences of fact on the stated facts. [He referred to *Commissioner of Stamp Duties (N.S.W.)* v. *Pearse* (4).] Under s. 124 the onus rests on the commissioner of proving the facts which would establish the correctness of his assessments (*McCaughey* v. *Stamp Duties Commissioner* (5)). On 30th November 1951 there was one transaction involving two steps. What was done was, at one blow, but in two documents, to acquire the shares of the shareholders in D. Davis & Co. Pty. Ltd. and also assets *in specie* from the company, which immediately stripped those shares of about £54,000 of value, but paid the shareholders who transferred those shares to them. That is one way in which the transaction is put by the appellant. If one isolates the second transaction, it is still seen ,on analysis, to be for full consideration. The subsidiary held the assets subject to the obligations of the memorandum and articles of association. What the subsidiary did, rightly or wrongly, was to agree with the beneficial owner of its shares to transfer these shares simply in exchange for their par or book value, which would be a gross under-value if it did it to a stranger, but the analysis of that situation is that whereas the subsidiary agreed that it would detach them it did not do it by way of detaching them and passing them out as a dividend ;

(1) (1922) 2 K.B. 500, and particularly at pp. 516, 517, 520, 528.
(2) (1912) 1 K.B. 539.
(3) (1954) A.C. 114 ; (1954) 88 C.L.R. 434.
(4) (1951) 84 C.L.R. 490, particularly at p. 518 ; (1954) A.C. 91, at pp. 111, 112 ; (1953) 89 C.L.R. 51, at p. 63.
(5) (1945) 46 S.R. (N.S.W.) 192, at p. 207 ; 62 W.N. 230.

H. C. OF A. 1957-1958. DAVIS INVESTMENTS PTY. LTD. v. COMMISSIONER OF STAMP DUTIES (N.S.W.).

it did not go into liquidation and detach them and allow the distributor to pass them out; it did not detach them by way of a reduction of capital. It de facto detached them, but none the less effectively, from that existing obligation which governed them and detached them from those obligations which it owed to the shareholder and it passed them out. When that was done, there was a complete balance of consideration. It could be put by saying that in so far as it represented an extinguishment it was an unauthorised distribution of capital made in consideration of a promise not to complain of it; the right to have the asset applied in the course of the company's business has gone.

[DIXON C.J. referred to *Commissioner of Taxation (N.S.W.)* v. *Stevenson* (1) and *Thornett* v. *Federal Commissioner of Taxation* (2).]

That case would analyse, from the point of view of reduction or liquidation, the very thing that has happened here. Only here it happened in a way that the law does not normally provide for. Another way of putting it is to say that the subsidiary agreed with the appellant that in consideration of its being freed from its obligations to the appellant under the statutory contract in relation to these shares and being at liberty to detach the shares from those obligations it would transfer them to the appellant at par or book value. Reliance is placed on the statutory contract, the memorandum and articles of association and the operation of s. 22 of the *Companies Act* 1936 (N.S.W.), as amended. [He referred to *Osborne* v. *The Commonwealth* (3); *Re Sheffield Manufacturing and Plating Co. Ltd.* (4); *Birch* v. *Cropper* (5); *Scottish Insurance Corporation Ltd.* v. *Wilsons & Clyde Coal Co. Ltd.* (6); *Smith* v. *Anderson* (7); *Randt Gold Mining Co.* v. *New Bolkis Eersteling Ltd.* (8) and *Archibald Howie Pty. Ltd.* v. *Commissioner of Stamp Duties (N.S.W.)* (9).] There is a tendency to accept the position that a nominal value is a bona fide consideration. It is a bona fide full consideration when one examines the transaction because it is not limited to the £57. That is a nominal amount. The validity of the transaction is not in question in these proceedings. If it be a valid transaction then all rights as a shareholder in relation to these assets have been extinguished. Those rights were to have the assets applied in accordance with the company's stated objects in its ordinary course of business to produce profits to be declared to them by way of

(1) (1937) 59 C.L.R. 80.
(2) (1938) 59 C.L.R. 787.
(3) (1911) 12 C.L.R. 321, at pp. 365, 366.
(4) (1951) 52 S.R. (N.S.W.) 34; 68 W.N. 200.
(5) (1889) 14 App. Cas. 525.
(6) (1949) A.C. 462.
(7) (1880) 15 Ch. D. 247.
(8) (1903) 1 K.B. 461.
(9) (1948) 77 C.L.R. 143.

dividend, to be returned on a winding-up. If rights be given up, particularly if the rights so given up represent, looked at from the other point of view, obligations of the person dealt with, then that is consideration in money or money's worth in accordance with the authorities. If it is permissible as a consideration it would exactly balance. The difficulty may be said to be whether that is in the contemplation of the parties or whether that is what they are doing by their agreement. If they had expressly stated that that is what they were doing then it would be a consideration. They would not enter into the second agreement until the situation had arisen that the appellant, who was going to be the purchaser, had become the beneficial owner of all the shares. It was within their contemplation that they would not sell for £57 unless the purchaser owned all the shares with the result that it was within their contemplation that they were passing out to a person who already had this type of interest or this bundle of rights in relation to the assets. It is basic to this submission that the court will always, in a stamp duty matter, not be tied solely to the form of the agreement, but will look at the identity of the parties and the relationship between the parties. It is a substantial beneficial interest. Although they do not state what the consideration is, they do state a price. The consideration referred to in sub-s. (3B) is the real consideration moving the transaction, and all dealing with the transaction know that it is not the £57, unless it is just this limited right, that is being transferred. This court has power to draw inferences, the inference being that the parties knew what they were doing and they intended to carry out the transaction; that was the intended consequence and not an accidental consequence of what they were doing. [He referred to *Attorney-General* v. *Earl of Sandwich* (1) and *Attorney-General* v. *Boden* (2).] There might be some revenue advantage in doing this; but if they had reduced their capital a stated sum to be satisfied as to £57 by the distribution of these shares *in specie*—there would not have been any income tax liability (*Ex parte Westburn Sugar Refineries Ltd.* (3), *Archibald Howie Pty. Ltd.* v. *Commissioner of Stamp Duties* (*N.S.W.*) (4)). The problem in this case is whether the parties intended what is being put to the Court; whether that really is the bargain. If one looked at consideration broadly, motive or intention in a contractual consideration sense would not be particularly relevant, but if conveyancing consideration it could be. [He referred to *Commissioner of Stamp*

(1) (1922) 2 K.B. 500.
(2) (1912) 1 K.B. 539.
(3) (1951) A.C. 625.
(4) (1948) 77 C.L.R. 143.

H. C. OF A. 1957-1958. DAVIS INVESTMENTS PTY. LTD. v. COMMISSIONER OF STAMP DUTIES (N.S.W.).

Duties (*Q.*) v. *Hopkins* (1)]. The court has a duty to draw inferences on the whole of the facts before it, not only on the agreement. Where there is a nominal consideration the court will almost inevitably go to the circumstances to ascertain what the parties were really doing by the transaction. The onus is on the commissioner to support the correctness of his assessment. They chose to do it this way deliberately. It should be given effect to as a sale for a nominal consideration which neither of the parties could be thought to have considered was in any way a recompense for what was being transferred. That could not have been in contemplation. There was no gift of it, it was a balance in consideration ; one had a right to acquire it and the other one was justified in transferring it. They deliberately chose the par value for the reason stated. It was basic to the whole set-up that they should first in the same hour acquire those shares so that that consequence would flow. [He referred to *Commissioner of Stamp Duties* (*Q.*) v. *Hopkins* (2); *Duckett* v. *Collector of Imposts* (3) ; *Norton* on *Deeds*, 2nd ed. (1928); pp. 219 et seq., and *Turner* v. *Forwood* (4).] *Archibald Howie Pty. Ltd.* v. *Commissioner of Stamp Duties* (*N.S.W.*) (5) is in the nature of a parallel. The approach there made was to look at what the parties had done and, the transfer being only pursuant to the resolution which itself flowed from the articles, then it was incumbent to ascertain what the parties were doing by that transaction. [He referred to *Re Artisans Land & Mortgage Corporation* (6).]. In order to find the valuable consideration for the actual transfer, it is necessary to see how the enforceable right arose which has been satisfied ; it is necessary to go back beyond the creation of the right to examine the control pursuant to which the right arose. It is implicit in the section applying to this case that one cannot ignore that one company was a subsidiary company and the other was the whole company. [He referred to *Borland's Trustee* v. *Steel Bros. & Co. Ltd.* (7) ; *Inland Revenue Commissioners* v. *Crossman* (8) ; *Re Artisans Land & Mortgage Corporation* (6).] When one comes to ascertain whether there is an equivalence of consideration the nominal value of the share is irrelevant whether one is dealing with the whole of the shareholders or a sole beneficial owner. The mutual promises are a promise to sell for £57 and a promise to buy for £57 instead of the right that they have got. The new contract between them completely eliminates the other

(1) (1945) 71 C.L.R. 351.
(2) (1945) 71 C.L.R., at p. 378.
(3) (1927) V.L.R. 457, at pp. 466, 467.
(4) (1951) 1 All E.R. 746, at p. 749.
(5) (1948) 77 C.L.R., at pp. 149, 150, 152-154, 156, 159.
(6) (1904) 1 Ch. 796.
(7) (1901) 1 Ch. 279.
(8) (1937) A.C. 26.

contract. The right or an obligation to apply assets in a particular way depends for its value on the value of the asset. *Hill* v. *Permanent Trustee Co. of New South Wales Ltd.* (1) shows the limited number of ways that a company is able to distribute its assets to its shareholders.

[Kitto J. referred to *Trevor* v. *Whitworth* (2).]

If the transaction is *ultra vires* the company there is no agreement to stamp. It is one or the other. [He referred to *Ex parte Westburn Sugar Refineries Ltd.* (3); *British and American Trustee and Finance Corporation Ltd.* v. *Couper* (4); *Commissioner of Taxation (N.S.W.)* v. *Stevenson* (5); *Inland Revenue Commissioners* v. *Burrell* (6); *Inland Revenue Commissioners* v. *Blott and Greenwood* (7); *Federal Commissioner of Taxation* v. *Blakely* (8) and *Thornett* v. *Federal Commissioner of Taxation* (9).] If it is a liquidation or de facto distribution and it is a distribution of the whole of the assets it is in replacement of the share. If it is a distribution of part, it is in partial replacement of the share, and it is an exact balance with the right. One cannot disregard the fact that these two documents were executed virtually simultaneously. One can look at that fact in considering what was the consideration. [He referred to *Federal Commissioner of Taxation* v. *Becker* (10).] To describe it as an accidental or unintended or mere consequence is to disregard what they were doing. It is not sought to advance the proposition that this was a compromise of a cause of action which had arisen; rather it could be said that the agreement, with existing obligations, existed and this agreement varied those and anticipated any right of action arising, prevented it from arising. The circumstances show that there is no lack of consideration.

H. A. Snelling Q.C. (Solicitor-General for New South Wales) (with him *K. S. Jacobs*), for the respondent. The appellant's argument confuses the end or result desired by the parties with the means adopted. [He referred to *Commissioner of Stamp Duties (Q.)* v. *Hopkins* (11); *Cormack's Trustees* v. *Inland Revenue Commissioners* (12) and *Davidson* v. *Chirnside* (13).] Stamp duty is a tax on instruments and although extrinsic evidence is admissible

(1) (1930) A.C. 720; 31 S.R. (N.S.W.) 32; 48 W.N. (N.S.W.) 13.
(2) (1887) 12 App. Cas. 409.
(3) (1951) A.C., at p. 631.
(4) (1894) A.C. 399.
(5) (1937) 59 C.L.R., at pp. 103, 104.
(6) (1924) 2 K.B. 52.
(7) (1921) 2 A.C. 171.
(8) (1951) 82 C.L.R. 388, at pp. 406, 407.
(9) (1938) 59 C.L.R. 787.
(10) (1952) 87 C.L.R. 456; (1951) 9 A.T.D. 326, at pp. 327, 328; (1952) 10 A.T.D. 77, at pp. 78-81.
(11) (1945) 71 C.L.R. 357.
(12) (1924) S.C. 819, at p. 826; (1924) S.L.T. 616, at p. 619.
(13) (1908) 7 C.L.R. 324, at p. 343.

H. C. OF A. 1957-1958.

DAVIS INVESTMENTS PTY. LTD. v. COMMISSIONER OF STAMP DUTIES (N.S.W.).

still the question is : What is the legal effect and true character of the instrument ? Significance should be attached to each of the words in s. 66 (3A), especially the word " upon ". That restricts the scope of the notion of consideration quite apart from the word " consideration " itself. Regard should be had to the words " consideration in money or money's worth " : see *Williams* on *Real Property*, 23rd ed. (1920), p. 80. The " unencumbered value of the property conveyed " means unencumbered value on the open market, and is to be judged by external standards of the property viewed objectively. The shares agreed to be sold by this contract of sale must be valued by the parties in the case at £50,000. The appellant must show a consideration totalling moneys worth £50,000 before it can be asserted that the respondent was wrong in applying s. 66 (3A). The appellant's problem is to argue that something worth the difference between that amount and £57 is to be found in considering the real nature and character or the legal effect of this agreement. That problem cannot be avoided by saying or suggesting that the unencumbered value of the property conveyed here by this instrument being stamped may be only £57 and therefore the £57 constitutes the consideration. The appellant's claim that this conveyance was upon some other consideration as well as upon the purchase price expressed in the agreement, is wholly fallacious.

[DIXON C.J. referred to *Brunswick* (*Duke*) v. *Hanover* (*King*) (1)].

Any of the suggested implied conditions is quite unreal. It is entirely unreal to suggest that the parties either directed their attention to any question of their shareholders' rights, because shareholders' rights are not, in any way, mentioned in the agreement. In so far as it is suggested that there was an agreement by the purchasers to vary their shareholders rights in the company, that could not be done, except in the proper manner under the *Companies Act* 1920, as amended. The parties had no notion of any additional consideration because it did not matter to them. The assent of the shareholders to this transaction occurred prior to this agreement ; they bought the other shareholders out and then became in complete control. Prior to entering into this the company must have resolved to do so ; therefore it is not their signature as purchasers but it is their assent as controllers of the vendor which has the effect that they might be estopped. The company must be presumed to have resolved to enter into this agreement and they, before that time, became the owners of the shares. They intended

(1) (1848) 2 H.L.C. 1 [9 E.R. 993].

to sign this agreement as purchasers, not in their capacity as shareholders. The value is the value as ascertained according to ordinary principles, not the value to a particular individual in particular circumstances peculiar to him ; value in the ordinarily understood sense in all branches of the law. Section 125 is another provision which gives an indication that it is, in effect, market value that the Act is considering. The appellant's submission that by the purchasers entering into this agreement they have impliedly incurred an additional obligation which amounts to consideration, that obligation being some obligation not to complain or to extinguish or release their rights as shareholders, is met by the fact that that was achieved by the new shareholders in the vendor company assenting to the vendor entering into the agreement, so that there was no need for anything further on that point to be achieved by the purchaser's signature on the agreement, and by the fact that there was nothing in the agreement to indicate that they were intending by this agreement to work out or implement their rights as under the statutory contract. By the adoption of this agreement they adopted a course opposed to the course that they could have taken by working out their statutory rights in the form of a capital, bonus or capital dividend. The facts show that here were assets which were greatly appreciated in value. There is nothing which the Court can discover either within or outside of the agreement which can be regarded as an additional consideration in the way of any foregoing or release of a cause of action, or possible cause of action (*Evans* v. *Stevenson* (1)). Paragraph 6 of the stated case is a most important and very significant paragraph. That statement is an admission that the consideration in the agreement was greatly less than the real value. The fact that the vendor sustained the loss is an immediate concession that there was not any consideration other than the £57. The very nature of considertion depends upon intended consideration ; one cannot have a kind of imputed consideration. Consideration means : What did the purchaser agree to hand over ? *Archibald Howie Pty. Ltd.* v. *Commissioner of Stamp Duties* (*N.S.W.*) (2) is against the appellant's argument because the whole basis of it was that the consideration is to be found in the implementation of a shareholder's rights worked out according to law. Here the shareholders have deliberately chosen a manner which was not a working out of shareholders' rights and was not a transaction which they intended to operate

(1) (1882) 8 V.L.R. (Eq.) 108, at pp. 119, 120.

(2) (1948) 77 C.L.R. 143.

H. C. of A. 1957-1958.

Davis Investments Pty. Ltd. v. Commissioner of Stamp Duties (N.S.W.).

in implementation or satisfaction of the statutory contract. [He referred to *Wigan Coal and Iron Co. Ltd.* v. *Inland Revenue Commissioners* (1) and *Associated British Engineering Ltd.* v. *Inland Revenue Commissioners* (2).] There is nothing to show any invalidity in these transactions either on the grounds: that this was an unlawful return of capital, or that they were *ultra vires*, or at all. [He referred to *Buckley* on *The Companies Act*, 12th ed. (1949), p. 905; *Bolton* v. *Natal Land Colonization Co.* (3) and *Foster* v. *New Trinidad Lake Asphalt Co. Ltd.* (4).] There was nothing before the Court for it to conclude that the provisions of the statute dealing with the reduction of capital have been infringed. Nor are the memorandum and articles of association before the Court to show that there is anything to prevent the assets of the company being sold at an under-value or at a gross under-value, to anybody. There is nothing on the face of this case which makes it plain or justifies an inference that this agreement was void. On the material before this Court, this Court would not, and could not, come to the conclusion that the transaction was necessarily invalid.

[Dixon C.J. referred to *Re Alkaline Reduction Syndicate Ltd.* (5).]

There is no authority which decides that a shareholder cannot purchase the assets of the company, even at an under-value. *Foster* v. *New Trinidad Lake Asphalt Co.* (4) seems to meet the very question as to whether one can distribute accretions of assets—that is what is done here.

[Kitto J. referred to *In re Walters Deed of Guarantee* (6) and *Trevor* v. *Whitworth* (7).]

The facts are quite as consistent one way or the other, and if the question had been debated in the Full Court below and had become a real issue, the court could have asked for further facts. That court was not requested to take appropriate action under s. 124 (6). A proper shareholders' meeting was not held. Where the parties deliberately depart from the first proposition and contract in another capacity as buyer and seller, not as shareholders and company, they have passed their agreement into that form. The substance of each matter is the same but the form which the parties have adopted as the manner of reaching that end is all important in deciding questions of stamp duty. The form they have adopted here shows that they are not intending to implement shareholders' rights or to work under the statutory contract at all. They chose

(1) (1945) 1 All E.R. 392.
(2) (1941) 1 K.B. 15.
(3) (1892) 2 Ch. 124.
(4) (1901) 1 Ch. 208.
(5) (1896) 45 W.R. 10; 12 T.L.R. 534.
(6) (1933) Ch. 321.
(7) (1887) 12 App. Cas. 409.

to adopt the role of buyers from the company which shows that they were not choosing to give up any of their rights as shareholders; and not treating it as a dividend distribution.

N. H. Bowen Q.C., in reply.

Cur. adv. vult.

May 9, 1958.

The following written judgments were delivered :—

DIXON C.J. The facts upon which this difficult case really turns may be reduced to a very brief statement indeed. The appellant, Davis Investments Pty. Ltd., having become solely entitled to the shares in D. Davis & Co. Pty. Ltd. proceeds to obtain transfers of certain of its valuable assets including fifty-seven shares in three other companies. There are no creditors who could complain of the transaction. It is therefore immaterial to the parties, except for purposes of the revenue laws of State or Commonwealth, for what consideration the assets are transferred to the holding company, that is Davis Investments Pty. Ltd., by the company whose issued share capital it holds, that is by D. Davis & Co. Pty. Ltd. By an agreement that is drawn up and executed by the respective companies the transaction is expressed as a sale and purchase of the shares in the other companies at prices which are in fact par, that is to say at £1 each. But the value of the fifty-seven shares is not £57 : it is £54,382. By the transfer of the shares the holding company (Davis Investments Pty. Ltd.) gained no accession of wealth : for the value of the shares which it held in the other company (D. Davis & Co. Pty. Ltd.) dropped correspondingly ; that is to say, their value decreased by £54,382 less £57, or £54,325. What the transfer meant to the holding company was a change of the form of property containing this value. That is to say, by the transfers that company would become the immediate owner of the shares which theretofore were the property of the company whose share capital it held. The latter company (D. Davis & Co. Pty. Ltd.) of course parted with the ownership and so depleted the value of its assets. But as it did so to its only shareholder it thereby satisfied the potential demand of its shareholders upon its assets, demands that under the company law were exercisable or capable of effectuation by securing either the declaration of a dividend or dividends or a reduction of capital or a winding-up. There is nothing to suggest that the transfer of the shares at par worked an unauthorised reduction of capital of D. Davis & Co. Pty. Ltd.: so presumably the same result might have been obtained by a distribution *in specie* by way of dividend or by way of reduction of

H. C. OF A. 1957-1958.

DAVIS INVESTMENTS PTY. LTD. v. COMMISSIONER OF STAMP DUTIES (N.S.W.).

Dixon C.J.

capital (see *Ex parte Westburn Sugar Refineries Ltd.* (1)) or in a winding-up.

The question in the case is what, in the foregoing circumstances, is the consideration for the transfers for the purpose of stamp duty under the *Stamp Duties Act* 1920-1949 (N.S.W.). The unencumbered value of the shares is fixed at £54,382. If the transfers when executed in pursuance of the agreement would be made upon a bona fide consideration in money or money's worth of less than the unencumbered value of the property transferred, then s. 66 (3A) operates to impose a stamp duty at *ad valorem* rates calculated as that sub-section prescribes. The excess of the unencumbered value, over the consideration is taxed at three and one-half per cent. If the consideration is the price of £57 the result is that a duty becomes payable of £1,902 10s. 6d. If however the consideration, properly understood, is equal to the value of the shares transferred, namely £54,382, then the duty, so it appears, would work out at only £135 19s. 6d. For the rate of duty when the consideration is equal to the full value is comparatively low.

The stamp duty to be ascertained is that which would be payable on the transfers, although it is the stamping of the agreement and not the transfers which is in question. For s. 41 (1) provides that every agreement for the sale or conveyance of any property in New South Wales shall be charged with the same *ad valorem* duty to be paid by the purchaser or person to whom the property is agreed to be conveyed as if it were a conveyance of the property agreed to be sold or conveyed and shall be stamped accordingly. The words conveyance and convey cover transfer and that is true whether the property is real or personal: see ss. 65 and 3, "property". The result is that the stamp duty on the agreement is governed by the duty which would be payable upon the transfers, were they the instruments to be stamped. For that reason the inquiry must be whether the consideration for the transfers if and when executed would be what is nominated in the agreement as the price or would be the full value.

Neither the nature nor the effect of the transaction is open to much question. The matter is really one of "characterisation". Must the price be characterised as the consideration or is it proper to characterise the further elements in the transaction which determine or govern its real effect the consideration? Assuming, as I think we should, that the transfer of the shares would not deprive the transferor company of assets representing paid-up share capital, the shares to be transferred must contain, in point of value, either

(1) (1951) A.C. 625.

accumulated trading profits or some accretion to capital over and above the equivalent of the paid-up share capital of the company. Such a " fund ", whether real or notional, would be " distributable ". In any case to sell and transfer these shares to the only shareholder of the company at a price which must amount to a nominal or book price effects a " distribution " of the trading or capital profit contained in or represented by the shares. It places in the shareholder's hands the trading or capital profit contained in or represented by the shares. It may be described in the terms employed in business or accountancy as a liberation or a distribution of or a transformation of title to the " fund " of profits. Doubtless it is not accomplished by a means provided by the company law, but if there is no interest involved but that of the shareholder, that is Davis Investments Pty. Ltd., no legal interest is invaded, and there is no one who is entitled to complain.

In the present case the detailed facts suggest that the agreement for the transfers to the shareholder, Davis Investments Pty. Ltd., of the assets constituted by the shares, formed part of a wider plan for the re-allocation of interests. But into these facts I shall not enter because I think the case should be confined to the essential elements upon which the determination or ascertainment of the consideration must depend. The facts appear in the judgment of *Kitto* J. in whose very clear and precise analysis of the case I concur down almost to the final step. I see no reason to doubt that the substance of the matter was to " liberate " surplus assets of the company to its shareholder by transfers of the shares forming the assets at a nominal price. I treat it as clear enough that this was done because the sole shareholder (Davis Investments Pty. Ltd.) was entitled to cause it to be done. It appears to me to be clear enough too that the sole shareholder was able to cause it to be done in virtue of the rights attaching to the position occupied by a sole shareholder. Moreover the transfers, while changing the title to the assets consisting of the shares in other companies would not otherwise better or worsen the position of the sole shareholder, Davis Investments Pty. Ltd. *Pro tanto* the rights given by the shares thus held would be " effectuated ", " realised ", " fulfilled " " satisfied ", or " exhausted ". The choice of expression does not matter: what matters is that a *fasciculus* or congeries of rights *in personam* existed in the hands of Davis Investments Pty. Ltd. as sole shareholder in the exercise of which it proceeded to reduce into its ownership and possession the shares transferred, at the expense of a precisely corresponding loss of value in the shares embodying the rights so exercised. I do not recede at all from what

H. C. OF A. 1957-1958. DAVIS INVESTMENTS PTY. LTD. v. COMMISSIONER OF STAMP DUTIES (N.S.W.). Dixon C.J.

I said in *Archibald Howie Pty. Ltd.* v. *Commissioner of Stamp Duties (N.S.W.)* (1). But there we dealt with a transfer made wholly in pursuance of a resolution and order for the reduction of capital. The resolution and order formed a method of effectuating the rights of shareholders. Under the resolution and order it became the duty of the company to distribute to the shareholders *in specie* the assets consisting in shares in other companies. There was no consideration, no transaction, except this. But the shares were to be distributed " at the value thereof appearing in the books of the company " and those values were only seventy per cent of the true values. We decided for reasons to which I adhere that the " consideration " was the full value of the assets because no more was done than to satisfy the absolute right of the shareholders arising from the resolution and order. But in this case there is a final problem. It is true that in the present case the shareholder, Davis Investments Pty. Ltd., is able to obtain the contemplated transfers in virtue of the rights which shareholding gives. It is true that *pro tanto* those rights will be satisfied or exhausted by the transfers. But the transaction was thrown by the parties into the form of a sale at a price. In such a case how does the expression " conveyance (transfer) made upon a bona fide consideration in money or money's worth " apply ?

No doubt, when a transfer or other assurance of property is expressed to be made for a nominal consideration, for many purposes it is open to prove a further consideration not being inconsistent with the nominal consideration expressed therein. And this may be so although there is no mention of the real consideration. Cf. *Clifford* v. *Turrell* (2) ; affirmed (3).

But here, for their own purposes the parties have given the transaction the form of a sale at a price. Had it not been for the situation occupied by the two companies one to another it might not have been possible, or at all events lawful, to transfer at such prices. In a practical sense doubtless the transaction was " moved " by that circumstance. But within the meaning of the words in s. 66 (3A) would the consideration moving the transfers—the consideration " upon " which the transfers are made—be anything but the price the parties chose to adopt ? After all we are dealing with a transfer on sale. To go beyond the price may be to prefer realism to formal expression, but it means going to the circumstances warranting the parties in fixing the price they chose and that is not necessarily the same thing as consideration. It cannot be denied that it

(1) (1948) 77 C.L.R. 143.
(2) (1841) 1 Y. & C.C.C. 138 [62 E.R. 826].
(3) (1845) 14 L.J. Ch. 390.

is an attractive view that the consideration in money or money's worth "upon" which the transfers would be made consists of all the essential elements involved in the change of rights effected by the transfers, involving as it does the effectuation of pre-existing rights. But, notwithstanding some hesitation, I have reached the conclusion that, in the circumstances of the present case, it is the price which must for the purposes of stamp duty be regarded as the consideration upon which the transfers would be made. I think that the transaction is not in itself a fulfilment or satisfaction of the rights of the shareholder as such. It is to be explained, indeed it is to be justified, by the existence of such rights or in other words by the legal situation which a sole shareholder occupies, but nevertheless the actual transaction is not one for which the law—the company law—provides for the effectuation of the rights and duties subsisting between shareholders and a company or for the effectuation of the property or personal rights of the shareholders in respect of the company. It is a transaction of purchase and sale. That is a form into which it was thrown because, doubtless, it was best calculated to achieve the ends of those in control. But considered as a transfer on sale it is a transfer for a price. The price is fixed by the parties for the sale, that is for the transfer. It is not supplied by the surrounding or accompanying circumstances, however essential the elements discoverable therein may be to the legal and economic efficacy of the transaction as a whole. In the end it is for that reason that the consideration must be confined to the price for the purpose of ascertaining the *ad valorem* stamp duty. The case is by no means an easy one but in my opinion the only consideration for the purpose of s. 66 (3A) is the price of £57.

It follows that I think the appeal should be dismissed.

McTiernan J. I agree that this appeal should be dismissed. The fact that the appellant became the sole shareholder of the company which is vendor may explain why it sold the assets included in the agreement, in question, at a price so much less than their value. But I am unable to conclude from the relationship of the appellant to the vendor that the "purchase price" which is stipulated in the agreement does not represent the only consideration in money or money's worth upon which the agreement was made. The agreement is in form and substance one for the sale of the assets at the "purchase price" stipulated (cf. *Cormack's Trustees* v. *Commissioners of Inland Revenue* (1)). It is liable for duty as an agreement for sale. By reason of s. 41 (1) it is

(1) (1924) S.C. 819.

H. C. OF A. 1957-1958.

DAVIS INVESTMENTS PTY. LTD. v. COMMISSIONER OF STAMP DUTIES (N.S.W.).

chargeable as if it were a conveyance. I think that it is not possible to find that the agreement was made upon any consideration other than the price stipulated therein. In this view it is liable for the duty prescribed by s. 66 (3A). The facts in the case of *Archibald Howie Pty. Ltd.* v. *Commissioner of Stamp Duties* (*N.S.W.*) (1) are entirely different. This case is, in my opinion, of no assistance to the appellant.

WEBB J. For the reasons given by *Kitto* J. I would allow this appeal and answer the questions as his Honour proposes.

As stated by Lord *Macnaghten* in *Birch* v. *Cropper* (2): " Every person who becomes a member of a company limited by shares of equal amount becomes entitled to a proportionate part in the capital of the company, and, unless it be otherwise provided by the regulations of the company, entitled, as a necessary consequence, to the same proportionate part in all the property of the company " (3). Referring to this statement *Isaacs* J. in *Osborne* v. *The Commonwealth* (4) observed that incorporation " does not annihilate, but on the contrary is in aid of, the ultimate truth which underlies the matter, namely, the beneficial ownership of those who for the moment compose the company. Incorporation gives a special character and status to the partnership, and surrounds it with certain legal attributes and conditions, but it does not destroy it " (5). Earlier in *Osborne's Case* (6) *Griffith* C.J., after quoting Lord *Macnaghten's* statement in *Birch* v. *Cropper* (3) referred to the " substantial beneficial interest " of shareholders in the property of the company.

The vendor company here is of the type contemplated in these cases, the reasoning in which was applied by this Court to s. 66 (3A) in *Archibald Howie Pty. Ltd.* v. *Commissioner of Stamp Duties* (*N.S.W.*) (1), more particularly by *Dixon* J., as he then was, where his Honour speaks of the shareholders' " proportionate ' interest ' in the assets, an interest consisting of a congeries of rights *in personam* " (7). There a division of the assets *in specie* among the shareholders had taken place and his Honour observed as to this that " There is an equivalence not only from a logical but from a realistic point of view. The reduction in both the amount and value of the share affords an adequate consideration in money and in money's worth." (7)

(1) (1948) 77 C.L.R. 143.
(2) (1889) 14 App. Cas. 525.
(3) (1889) 14 App. Cas., at p. 543.
(4) (1911) 12 C.L.R. 321.
(5) (1911) 12 C.L.R., at pp. 365, 366.
(6) (1911) 12 C.L.R., at p. 338.
(7) (1948) 77 C.L.R., at p. 154.

That reasoning appears to me to be applicable to the facts of this case. I see no material difference between the position of shareholders who on a reduction of capital receive assets *in specie* and that of shareholders who purchase assets from the company. It is true that in each case the shareholders obtain thereby not only the legal interest but also the equitable interest to the same extent as would a non-shareholder who purchased the assets of the company. But from both the logical and the realistic point of view it is essential that the value of the interest of the shareholders as such in the assets of the company just before the conveyance to them takes place should be taken into the calculation of the consideration moving from them on the conveyance which terminates that interest and substitutes the legal and equitable interest in the assets themselves.

Kitto J. This appeal relates to the manner in which *ad valorem* stamp duty is to be charged on an agreement made on 30th November 1951 between a company called D. Davis & Co. Pty. Ltd. (referred to in the agreement as the vendor) and the appellant (called in the agreement the purchaser). It was an agreement whereby it was agreed that the vendor should sell and the purchaser should purchase certain parcels of shares in other companies (these shares numbering 57 in all) together with certain chattels. The agreement provided for a purchase price in respect of each parcel of shares, the total price for the shares being £57, and for a separate purchase price of £1,283 for the chattels. It added that upon completion the vendor should execute and deliver transfers of the shares (*scil.* to the purchaser). In fact the shares were worth £54,382.

In so far as the agreement was for the sale of the chattels, it is chargeable with a duty of £1 only: see the proviso in the second schedule as to agreements made for or relating to the sale of any goods, wares, or merchandise. But as an agreement for the sale or conveyance of the shares it is chargeable by virtue of s. 41 (1) with the same *ad valorem* duty, to be paid by the appellant as the purchaser, as if it were a conveyance (i.e. a transfer: see s. 65) of the shares. For convenience it will be referred to in this judgment as if it were in fact a conveyance of the shares and of nothing else. The duty chargeable upon it, considered as such a conveyance, is governed by the provisions of s. 66. That section contains in sub-s. (1), a general provision for the charging of *ad valorem* duty on every conveyance in respect of the unencumbered value of the property conveyed. This is qualified by a provision in sub-s. (2), the effect of which is that in the case of a conveyance

H. C. OF A. 1957-1958. DAVIS INVESTMENTS PTY. LTD. v. COMMISSIONER OF STAMP DUTIES (N.S.W.). Kitto J.

on sale the duty is to be on the amount or value of the consideration for the sale, unless that is less than the unencumbered value of the property. Then follow three sub-sections, sub-ss. (3), (3A) and (3B). These were introduced into the Act by the amending Act No. 13 of 1931 to take the place of an earlier sub-s. (3) which had made special provision for the case of a conveyance "made upon any consideration other than full consideration in money or money's worth ". The three sub-sections enacted in 1931 cover respectively the three possible cases of a conveyance made without consideration, a conveyance made upon a " bona fide consideration " of less than the unencumbered value of the property conveyed, and a conveyance made upon a "bona fide consideration" of not less than the unencumbered value of the property conveyed. In each case the consideration referred to is limited to consideration in money or money's worth. The purpose of providing separately for the three classes of conveyance is that, while duty at conveyance rates is to be charged on so much of the value as is balanced by consideration, duty at what may be called gift duty rates is to be charged on any amount by which the value is not balanced by consideration.

The conveyance we have to consider is clearly not a conveyance without consideration in money or money's worth, for the appellant is bound under it to pay £57. Sub-section (3) therefore cannot apply. The commissioner's contention is that sub-s. (3A) applies because the £57 is the only bona fide consideration in money or money's worth upon which the conveyance is made, and that amount is less by £54,325 than the unencumbered value of the shares. The appellant, on the other hand, contends that although the consideration expressed is only £57 there is in truth a consideration passing which is equal to the unencumbered value of the shares, and that accordingly the duty payable is to be assessed in accordance with sub-s. (3B). If the commissioner is right the duty payable is £1,902 10s. 6d. If the appellant is right it is only £135 19s. 6d.

The appellant's case depends upon the fact that shortly before the agreement was executed, though on the same day, the appellant purchased from the persons who held them all the issued shares in the capital of the vendor company. They were 15,000 shares of £1 each, all fully paid. Being executed after this situation had come about, the instrument obviously cannot be considered as if it effectuated a transaction between strangers. The transaction to which it gives effect is in form a sale, and it may be conceded to be in substance a sale; but it is a sale at a nominal price, made between a company and its only shareholder as a means of liberating assets of the company to the shareholder. That is the plain fact of the matter, and comparisons with transactions which in truth are sales pure and simple are not helpful. If the instrument involves the passing to the shareholder of assets of the vendor company representing any portion of its paid-up capital, it is necessarily invalid and therefore not chargeable with duty as an agreement for the sale or conveyance of property at all. This is so because of the fundamental principle of company law that the whole of the subscribed capital of a company with limited liability, unless diminished by expenditure upon the company's objects (or, of course, by means sanctioned by statute) shall remain available for the discharge of its liabilities : *Trevor* v. *Whitworth* (1) ; *In re Walters' Deed of Guarantee* (2). One aspect of this principle is that every transaction between a company (while it is a going concern) and any of its members, by means of which any of the money paid to the company in respect of the member's shares is returned to him, is prohibited, unless the court has sanctioned the transaction : *Trevor* v. *Whitworth* (3). But there is nothing in the material before us to show that on 30th November 1951 the vendor company did not have assets possessing a value of at least £15,000 over and above those comprised in the agreement. The agreement is, therefore, so far as the Court knows, valid ; but, proceeding, as we must, to consider the case on the footing that it is valid, the hypothesis must be kept always in view that immediately before the agreement was executed the vendor company had, wrapped up in its assets, distributable profits amounting to at least £54,325.

By its purchase of all the issued shares in the capital of the vendor company, the appellant became the owner of a bundle of rights against the vendor company. These were, of course, rights *in personam* only ; the appellant acquired no proprietary right or interest in any of the shares in other companies which were later to be dealt with by the agreement. For this reason it is not open to the appellant to contend that the property comprised in the instrument is less than the entirety of those shares. The value with which the consideration must be compared is the unencumbered value of the shares : and it may be remarked that there is nothing in the Act to support a construction of the expression "unencumbered value" as denoting the value to the conveyee, in a case where that value differs from the value to purchasers generally.

But the acquisition of all the shares in the vendor company invested the appellant with power to bring into existence, certainly

(1) (1887) 12 App. Cas., at p. 415.
(2) (1933) Ch. 321.
(3) (1887) 12 App. Cas., at p. 423.

H. C. OF A. 1957-1958. DAVIS INVESTMENTS PTY. LTD. v. COMMISSIONER OF STAMP DUTIES (N.S.W.). Kitto J.

and without any significant delay, a right in its own favour to receive at least £54,325 out of the vendor company's assets. The hypothesis being that there was that amount available for distribution as profits, all that was necessary was the declaration of a dividend of £54,325 by the directors or by the general meeting—we have not the articles before us—and such a declaration the appellant could cause to be made at any time it wished. It is in this situation that the instrument takes effect. As from the moment of its execution (if it be considered as a conveyance), the appellant's right as the sole shareholder to take at least £54,325 out of vendor company's assets is gone. But the commissioner says that this is true in the sense only that the vendor company's assets are depleted by that amount, so that the appellant's right to take out as much as he likes of that company's distributable profits is, though intact, applicable to a reduced fund. This result, he contends, is merely consequential upon the operation of the instrument and forms no part of the consideration upon which the conveyance is made. The appellant, on the other hand, submits that it is part and parcel of the operation of the instrument that his right to take £54,325 out of the vendor company's assets generally is satisfied by his taking specific shares of that value; and that is enough, he says, to make the conveyance of the assets a conveyance upon a consideration equal to the value of the shares conveyed.

The choice between these contentions must depend upon the construction of the relevant provisions of s. 66. An initial question which suggests itself on a reading of sub-ss. (3A) and (3B), and one which obtrudes even more when the terms of these sub-sections are compared with the terms of sub-ss. (2) and (3), is whether the use of the expression " bona fide consideration " does not confine the application of the former provisions to cases where the instrument presented for stamping discloses a consideration genuinely regarded by the parties as a fair *quid pro quo* for the property conveyed. The question is important here because the instrument we are considering states as the consideration a sum which quite obviously the parties could not have considered anything like equivalent to the value of the shares sold. Sub-sections (2) and (3) both omit " bona fide ". The contrast thus presented with sub-ss. (3A) and (3B) loses much of its suggestiveness, however, when one observes that in the second schedule, pars. (1) and (3) under the head " Conveyances of Any Property ", which reflect and substantially repeat sub-ss. (3A) and (3B), both omit " bona fide ". But, more than that, it is important to observe that sub-ss. (3A) and (3B) are speaking of conveyances and not of contracts. They are concerned with the consideration "upon" which conveyances are made, and not only consideration in the sense of that which contracting parties have arranged between themselves in the course of offer and acceptance. The language is therefore that of conveyancing rather than of contract, so that "consideration" has rather the meaning of "the money or value passing which moves the conveyance or transfer" than "the more precise meaning of the law of simple contracts": *Archibald Howie Pty. Ltd.* v. *Commissioner of Stamp Duties* (*N.S.W.*) (1). This being recognized, it seems right to conclude that "bona fide" adds nothing to the sub-sections beyond emphasis upon the fact that what is to be compared with the unencumbered value of the property conveyed is the consideration which really passes, and not, if there be a distinction between them, the consideration appearing from the instrument. In other words it is the money or money's worth really moving the conveyance.

If anything is clear in this case it is that what moves the conveyance here is not £57. That is part of it, but there is much more than that. In *Archibald Howie's Case* (2), a shareholder, having what *Dixon* J. called a "proportionate 'interest' in the assets, an interest consisting of a congeries of rights *in personam*" (3), took, under a reduction of capital properly carried out, an aliquot part of the assets. There being an equivalence between his rights *in personam* with respect to a proportion of all the assets and the severed part of the assets which he took *in specie*, the conveyance to him of the latter was held to be upon a consideration of not less than their unencumbered value. In the present case, having a right *in personam* with respect to all the assets, a right to get an amount of money thereout by appropriate steps wholly within his own unconditional power, the appellant takes specific assets of corresponding amount and by so doing exhausts the right. If it be said that the conveyance to him leaves the vendor company the poorer by £54,325, the answer is that that is true only if the appellant is regarded as not having had any claim upon the assets immediately before the agreement was entered into. It is at that point that, in my opinion, the argument for the commissioner fails. It insists, rightly, that the appellant had no proprietary interest in the assets, and no interest of any sort which it could assert as against creditors of the company. But it omits to recognise that in the situation which existed when the agreement came to be executed, namely that (on the necessary hypothesis of the case) there were no

(1) (1948) 77 C.L.R., at p. 152.
(2) (1948) 77 C.L.R. 143.
(3) (1948) 77 C.L.R., at p. 154.

H. C. OF A. 1957-1958. DAVIS INVESTMENTS PTY. LTD. v. COMMISSIONER OF STAMP DUTIES (N.S.W.). Kitto J.

creditors whose debts exceeded in the aggregate the value of the assets which the agreement left untouched, the appellant did have a claim upon the assets, and a claim entitling him to as much as the value of the property which he now takes. In truth, to ask whether the vendor company is the poorer for having executed the instrument is to divert attention from the question to which sub-ss. (3A) and (3B) demand an answer. That question, in the circumstances of this case, is whether the conveyance of the shares comprised in the instrument to be stamped was moved by the appellant giving up a right as against the vendor company worth as much as the value of those shares. And the answer must be that it was. By the very act of executing it and thereby accepting the specific shares which it covered, the appellant destroyed his pre-existing right to a dividend of £54,325 out of the assets generally. That was no mere consequence of the operation of the instrument; it was part of the operation itself.

For these reasons I am of opinion that the agreement is liable to be stamped under sub-s. (3B) of s. 66. The appeal is from an order of the Supreme Court of New South Wales answering in the opposite sense certain questions submitted to it by a case stated under s. 124 of the *Stamp Duties Act*. I would allow the appeal, set aside the Supreme Court's order, and in lieu thereof order that the first three questions in the case stated be answered: (1) No; (2) (a) No, (b) No, (c) Yes; (3) The duty chargeable is £135 19s. 6d. only.

TAYLOR J. The instrument which calls for our consideration in this case is an agreement whereby D. Davis & Co. Pty. Ltd. (hereinafter referred to as the company) undertook to sell to the appellant fifty-seven shares in three other companies, together with certain specified furniture fittings and motor vehicles. The aggregate purchase price for the shares was expressed to be £57 and, for the other items, £1,914. At the time of the agreement the appellant was the holder of the whole of the share capital in the company which had been issued, namely, 15,000 ordinary shares of £1 each. It had, in fact, acquired these shares by purchase immediately prior to the making of the agreement under consideration.

Section 41 (1) of the *Stamp Duties Act* 1920-1949 provides that every agreement for the sale or conveyance of any property in New South Wales shall be charged with the same *ad valorem* duty to be paid by the purchaser or person to whom the property is agreed to be conveyed as if it were a conveyance of the property agreed to be sold or conveyed and shall be stamped accordingly. Pursuant to this section the respondent assessed the duty payable upon the agreement as if it were a "conveyance made upon a bona fide consideration in money or money's worth of less than the unencumbered value of the property conveyed" (s. 66 (3A)). No question arises with respect to the sale of the chattels referred to, the only question being whether, having regard to the provisions of s. 41 (1), the amount of *ad valorem* duty chargeable is to be determined by reference to the provisions of the later section. The critical question is, of course, whether the sale was made upon a consideration in money or money's worth of less than the unencumbered value of the subject property agreed to be sold. As already appears the respondent, for the purposes of his assessment, resolved this question adversely to the appellant and upon a subsequent appeal to the Supreme Court the same view was taken. This appeal is now brought from the order disposing of the appeal to that court.

For the purposes of the proceedings it was agreed by the parties that the fifty-seven shares in question were worth £54,382 and, if there were nothing more in the case, it might readily be concluded that this further appeal should also be dismissed. But it is contended by the appellant that the circumstances related in the case stated establish that consideration, additional to that expressed in the agreement, was provided by the appellant. The argument, which commended itself to *Kitto* J., is expressed and discussed in his Honour's reasons and it is unnecessary for me to do more than briefly state the various steps which appear to be involved in it. The argument assumes the existence in the hands of the company of distributable profits amounting to, or almost to, the value of the shares. Then it is said that the appellant, as the sole shareholder in the company, had a personal right or interest in those profits and that it was in a position, if it so desired, to secure to itself payment of the amount of the distributable profits by way of dividend. The next step is that by the sale the appellant's right or interest was discharged or satisfied or, perhaps, extinguished, and that, in this circumstance, is to be found full consideration in money's worth for the sale or conveyance.

The argument of the appellant was founded substantially upon observations made in *Archibald Howie Pty. Ltd.* v. *Commissioner of Stamp Duties (N.S.W.)* (1) in the course of considering whether certain transfers of shares made by that appellant company to

(1) (1948) 77 C.L.R. 143.

H. C. of A. 1957-1958. Davis Investments Pty. Ltd. v. Commissioner of Stamp Duties (N.S.W.). Taylor J.

its shareholders were dutiable under s. 66 (3A). But it is of importance to notice that these transfers had been made pursuant to a properly authorised scheme for the reduction of capital and in discharge or satisfaction of the rights of the shareholders thereby created in accordance with the appellant company's articles. The Court was unanimously of the opinion that the consideration for the transfers could not be said to be less, in money or money's worth, than the unencumbered value of the shares transferred and considered reasons were delivered by both *Dixon* J. (as he then was) and *Williams* J. Both sets of reasons disclose that the decision rested upon an examination of the nature of the rights created by the issue of a share in the capital of a company and upon the conclusion that a distribution of assets upon a reduction of capital is directly and expressly in satisfaction, *pro tanto*, of the rights of the shareholders as such. And since the distribution in that case was in partial satisfaction of rights for which full value was given at the time of their creation, that is, upon the issue of the shares themselves, there could be no ground for saying that the distribution was upon a consideration in money or money's worth of less than the unencumbered value of the property conveyed. For himself, however, *Dixon* J. added what might be thought to be another ground for reaching the same conclusion though his Honour observed that the two grounds might " be, perhaps, two sides of the same thing ". It is upon the line of reasoning apparent in the observations concerning the second ground that the appellant primarily based its present contentions and it is as well that the relevant passage should be quoted in full. The passage is as follows : " (2) From the standpoint of company law the division of the capital of a company into shares and the payment up of shares issued are regarded as respectively significant and real. The shareholder contributes the amount of the share to the capital of the company. This contribution measures his right to any return of capital which the company may make either as a going concern or in winding up. Subject to any regulation the articles may make as to the basis upon which assets in excess of share capital may be distributed, the amount of the share determines the proportion in which he shares with other shareholders in a distribution of excess assets. Thus when the amount of the issued shares in the case of this company was reduced from £1 each to 6d. each, it meant that if any of the unissued £1 shares were afterwards issued the proportion in which the respective holders of a share of the former issue and of one of the subsequent issue would in a winding up share in any funds exceeding the share capital would be as 1 is to 40. This is but an illustration of the significance of the division of the share capital into shares, shares now of a different denomination. The truth is, however, that the return of 19s. 6d. of the amount paid up is the discharge *pro tanto* of a claim of the shareholder upon the assets of the company " (1). It is, it seems to me, unnecessary to do more than read this passage to perceive a vital distinction between that case and the present case. In *Howie's Case* (2) the Court was dealing with a set of facts which disclosed that the transfers had been made by way of *return* of capital to the shareholders. Hence it is said " that the return . . . is the discharge, *pro tanto*, of a claim of the shareholder upon the assets of the company " (1). But in the present case the sale, or conveyance, was not made in discharge of any such claim or, indeed, of any claim by the appellant, as a shareholder, upon the assets of the company ; on the contrary the right of the appellant to receive the shares arose under the agreement for sale and not otherwise. It is, no doubt, true that after the sale had been made the interest of the appellant, as the sole shareholder, became less valuable than previously, but this was not because it had participated in any distribution of the company's assets but because the parties had selected a transaction, both in form and substance, which resulted in the company exchanging some part of its assets for an agreed consideration of lesser value.

Against this view, it is said, the expression " consideration ", as used in s. 66 (3A), " should receive the wider meaning or operation that belongs to it in conveyancing rather than the more precise meaning of the law of simple contracts " but as *Dixon* J. pointed out after making this observation, " The difference is perhaps not very material because the consideration must be in money or money's worth " (3). But if there be a distinction of any significance in cases such as the present it is, according to the appellant's argument, necessary to have regard to " the money or value passing which moves the conveyance or transfer ". Of course in *Howie's Case* (2) the Court had before it instruments which were, in fact, conveyances (see s. 65). In the present case, however, the application of these observations involves the notional transmutation of the agreement into a conveyance and then requires us to attribute to the dealing a consideration which is foreign to that discoverable in the actual transaction. I doubt whether s. 41 (1) requires us to invoke such processes but I am content to deal with this appeal on the assumption that the agreement should be regarded as a conveyance, that

(1) (1948) 77 C.L.R., at p. 153.
(2) (1948) 77 C.L.R. 143.
(3) (1948) 77 C.L.R., at p. 152.

H. C. of A. 1957-1958.

Davis Investments Pty. Ltd. v. Commissioner of Stamp Duties (N.S.W.).

Taylor J.

is to say, a conveyance in effectuation of the contractual rights created by the agreement.

On this assumption the argument then asserts that it is not only perceivable but obvious that the consideration expressed in the agreement was but nominal, that the sale was merely made as a means of "liberating" assets of the company to the shareholder and that upon such "liberation" the interests of the appellant, as shareholder, in the assets of the company were *pro tanto* discharged or extinguished. Therefore, it is said, the consideration which moved the sale, or conveyance, must be taken to be the surrender of some portion of the appellant's rights or interests as shareholder.

The first thing that may be said about this argument is that although, immediately before the sale, the appellant may have been, by virtue of its shareholding, in a position to secure a distribution of the company's assets, it had no enforceable right to the fifty-seven shares in question. They were in fact and in law the property of the company which was a distinct and separate entity and, subject to intervention by the appellant as the sole shareholder, entitled to make such legitimate use of its assets for the purposes of its business as it pleased. In the second place, it is impossible to say that the transaction evidenced by the agreement was a mere step in the effectuation of the rights *in personam* with which the appellant, as such shareholder, was invested. On the contrary, it created in the appellant a new and independent right to the shares in question. The case is, of course, before us on the assumption that if the appellant desired to secure the fifty-seven shares in question it was in a position to determine the manner of their acquisition. That is to say, it might have ensured that it should receive them either by way of dividend or in satisfaction of some new and independent obligation deliberately created. But it seems clear that it chose the latter course. And, indeed, on the assumption that the company held valuable assets representing distributable profits, it may have had good reason for preferring the acquisition to be by a purchase at an undervalue rather than by way of dividend since, if the assets were no longer required for the purposes of the company's business, it made little difference, except as regards the incidence of income tax, whether the company distributed its assets or sold them to the appellant for what may be regarded as a nominal sum. But to say this is far from saying that the consideration for the sale was the extinction of any of the appellant's rights as shareholder, or, the satisfaction or discharge of any of those rights. It is, in my view, erroneous to regard the sale as a conveyance in satisfaction or discharge of any of the rights of the appellant

H. C. OF A. 1957-1958.

DAVIS INVESTMENTS PTY. LTD. v. COMMISSIONER OF STAMP DUTIES (N.S.W.).

Taylor J.

as shareholder or as a dealing which extinguished any of those rights. As I have already said, the agreement created an independent right to the shares and if it is to be regarded as a conveyance it must be taken to be a conveyance upon the consideration expressed for the creation of that right. Further, as a conveyance, it must be taken to be in satisfaction and discharge of the right created by the agreement itself. No doubt the appellant's interest, as shareholder suffered a diminution in value, but this was just as much a consequence of the sale at an undervalue as if the sale had been made to a third party with a consequent reduction in the balance of the company's assets over its liabilities.

In my view, the respondent correctly assessed the duty payable upon the agreement under s. 66 (3A) and the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Dawson, Waldron, Edwards & Nicholls.*

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

J. B.