[HIGH COURT OF AUSTRALIA.]

GEORGE SKELTON YUILL . . . . APPELLANT;
PLAINTIFF,

AND

SYDNEY KIDMAN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 14, 15, 17.

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

Contract—Construction—Sale of interest in partnership—Agreement to deduct from purchase money sum payable by vendor as his share of the partnership losses as shown by balance sheets—Undistributed profits of previous years—Right to include in estimate of loss and profits.

The plaintiff and defendant with other persons were partners in two station properties in Western Australia. By agreement, dated 19th February 1908, the plaintiff agreed to sell to the defendant his one-eighth interest in the partnership, and also in certain travelling stock belonging to the partnership, the consideration money being separately assessed in each case. The agreement provided that any sum payable by the plaintiff as his share of the loss or liabilities of the stations up to 31st December 1907, as shown in the balance sheet up to that date issued by the managers of the stations, should be deducted from the purchase money payable in respect of the travelling stock, and that the travelling stock should be excluded from all calculations of profit and loss. Separate balance sheets for the two stations, including profit and loss accounts, were made up for each year by the partnership, and any profit earned in any year and not distributed was carried forward into the accounts for the following year.

The balance sheet for 1907, which was made up on 25th May 1908, showed a loss on the working of the stations for that year, (excluding the value of the travelling stock), but also showed undistributed profits carried forward from previous years leaving a balance of profit to the partnership. *Held*, that

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there was no sum payable by the plaintiff as his share of the loss or liabilities of the partnership as shown by the balance sheet, and that therefore no deduction could be made by the defendant from the purchase money.

Decision of the Supreme Court, 10th March 1910, reversed.

APPEAL by the plaintiff from the decision of the Supreme Court upon the hearing of a special case stated by consent of the parties. The action was brought to recover the balance of purchase money alleged to be due to the plaintiff for his share and interest in certain travelling stock under an agreement dated 19th February 1908, which was in the following terms:—"An agreement made 19th February 1908, between George Skelton Yuill of Sydney in the State of New South Wales merchant (hereinafter called the vendor) of the one part, and Sidney Kidman of Kapunda in the State of South Australia grazier (hereinafter called the purchaser) of the other part. Whereas under the provisions of an agreement dated 17th December 1900, and made between Alexander Forrest, Sydney Phillip Emanuel, and Isidore Samuel Emanuel of the first part, the said Sidney Kidman and Charles Nunn Kidman of the second part, the said George Skelton Yuill of the third part, Robert Richards of the fourth part, and Benjamin John Hercules Richards of the fifth part, the vendor is entitled to a one-eighth share or interest in certain station properties known as the Victoria River Downs and Austral Downs Stations, situate in the Northern Territory of the said State of South Australia, and Carlton Station situated in Western Australia and the stock thereon. And whereas the vendor is also entitled to a one-eighth share or interest in certain cattle, part of the stock of the said stations, now being travelled from the said stations to the Eastern States of the Commonwealth of Australia. Now these presents witness and it is hereby agreed as follows:—1. The vendor shall sell and the purchaser shall purchase all the right title and interest of the vendor in to or out of the said recited agreement, and all the one-eighth share and interest or other the share and interest of him the vendor in the said station properties known as the Victoria River Downs, Carlton and Austral Downs Stations situate as aforesaid and in the lands and hereditaments comprising the same or held there-

with, and in the plant thereon, and in the stock (including cattle horses and mules) thereon or elsewhere bearing the station brands, and in the said stations brands. And also the one-eighth share and interest or other the share and interest of him the vendor of and in the said travelling stock.

"2. The consideration for the said sale shall be the sum of £15,000 for the share and interest in the said station properties, and the sum of £1,979 11s. 5d. for the share and interest in the travelling stock, and such sums shall be paid as follows, namely the sum of £7,500 part of the said sum of £15,000 shal be paid in cash on the signing of this agreement, and £7,500 the balance of the said sum of £15,000 with interest thereon at 4 per cent. shall be paid in six months from the date hereof, and secured by the promissory note of the purchaser in favour of the vendor, and the said sum of £1,979 11s. 5d. shall be paid within fourteen days from the issue by the managers of the said stations of the balance sheets of the station properties up to 31st December 1907.

"3. The vendor shall be entitled to all the profits arising from the share and interest of the vendor in the said station properties up to 31st December 1907, and shall indemnify the purchaser from all loss on or liabilities in respect of such share and interest up to that date. And as from that date the purchaser shall be entitled to all profits arising from such share and interest in the said station properties, and shall indemnify the vendor from all liabilities in respect thereof.

"4. Any sum payable by the vendor as his share of the loss or liabilities of the said station properties up to 31st December 1907, as shown on the balance sheet up to that date issued by the managers of the said station properties, may, if paid by the purchaser, be deducted by him from the said sum of £1,972 11s. 5d. payable by him within fourteen days from the issue of such balance sheet as aforesaid.

"5. Such balance sheet shall be made up in the manner hereinbefore adopted in respect of such stations, and in assessing profits and losses under clause 3 hereof increase of herds shall not be taken into account, and the 3,334 bullocks and 1,714 cows now travelling and being such travelling stock as aforesaid, and all droving expenses in connection therewith, (having been taken into

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account in assessing the said sum of £1,979 11s. 5d), shall be excluded from all calculations of profit and loss for the purposes of clause 3."

When this agreement was made the balance sheets for 1907 had not been made up. The defendant had paid to the plaintiff under the agreement £1,083 15s. 3d. in respect of the travelling stock. The balance of the sum of £1,979 11s. 5d. agreed to be paid by the defendant for the travelling stock, namely £895 16s. 2d., the defendant claimed to be entitled to deduct under the terms of the agreement, as representing one-eighth of the total net loss on the working of the station properties for the year 1907. The plaintiff contended that under clause 4 of the agreement there was no sum payable by him as his share of the loss or liabilities of the station properties up to 31st December 1907 as shown in the balance sheet issued up to that date, as the undistributed profits of previous years, which appeared on the balance sheets, showed that although on the working of the stations for the year 1907 there was a loss, the plaintiff was nevertheless a creditor of the partnership at the end of 1907, and that therefore the defendant was not entitled to make the deduction claimed. It was admitted that the liability, if any, on the part of the plaintiff, in respect of his share and interest in the station properties, had been discharged by the defendant. The Supreme Court held that loss or liabilities up to 31st December 1907 in clause 4 meant loss or liabilities for the year ending 31st December 1907, and that it was not the intention of the parties in estimating this loss or liability to include the undivided profits of previous years shown in the balance sheets as issued up to 31st December 1907. They therefore entered a verdict for the defendant.

The plaintiff appealed from this decision.

Knox K.C., *Lamb* K.C. and *Weigall*, for the appellant. Effect must be given to the plain words of the agreement, unless the context compels the Court to adopt some other construction. To entitle the purchaser to make the deduction claimed, it must be shown that on the balance sheets there was a sum payable by the vendor to the partnership on 31st December 1907.

Under the first two clauses of the agreement, if they stood alone, the purchaser would be entitled to the whole of the vendor's interest in the partnership, whatever that might include. It would be a walk-in walk-out contract. But the agreement must be construed as a whole. The succeeding clauses modify this and provide, in effect, that whatever profits the vendor would be entitled to if there had been no agreement he is to be entitled to retain up to 31st December 1907, as shown in the balance sheets made up to that date. The object of the purchaser was to get an unencumbered one-eighth share in the partnership. Until the 1907 balance sheets were made up it was not known whether at the end of that year the vendor would be a debtor or a creditor to the partnership. The vendor says, "I will agree to indemnify you against any liability you are called upon to discharge in respect of my indebtedness to the partnership, provided I am allowed to retain any profits shown on the balance sheet up to 31st December 1907." The parties have expressed their intention in the aptest possible words. Clause 5 provides what items are to be excluded in the calculation of profits and losses. Both parties were members of the partnership. They knew how the balance sheets were made up, and that up to 1906 they showed an amount of undistributed profits. If they had intended that these profits should be excluded, presumably they would have said so. It was manifest that if the proceeds of the travelling stock (which represented the whole of the income of the partnership for 1907), and the undistributed profits were excluded, the profit and loss account for 1907 could not possibly have shown a credit balance. The contention of the respondent is that "up to 31st December 1907" means "for the year ending 31st December 1907." Clause 3 was intended to provide for the case of a dividend being declared by the partnership. But no question of profits arises in this case. The respondent must rely on clause 4 of the agreement, and must show by the balance sheets that a sum was payable by the vendor to the partnership, as his share of the liabilities of the partnership, on the 31st December 1907. Upon the appellant's construction of the agreement there was a balance due to the partnership at that date of £1,200 11s. 7d., that is, the difference between £16,181 1s. 7d. and £14,980 10s.,

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of which the appellant would be entitled to claim one-eighth. Upon the respondent's contention there would be a debit balance of £7,166 9s. 7d., one-eighth of which the respondent claims to deduct from the sum agreed to be paid by him for the travelling stock. In other words the respondent's contention is that the parties, having estimated the amount to be paid for the travelling stock, have subsequently agreed that the purchaser is entitled to deduct a sum equal to nearly half its value.

Rolin and *Mitchell*, for the respondent. What the respondent bought for £15,000 was the whole of the appellant's interest in the assets of the partnership, excluding the travelling stock, but including the accumulated and undivided profits up to 31st December 1907. These profits were part of the vendor's interest in the partnership. When the parties were negotiating they had before them the balance sheets up to the end of 1906, which were the basis of their negotiations. The vendor is given credit for one-eighth of the then estimated value of the travelling stock, which had not then been sold. At the date of the contract the parties did not know what would be the result of the operations of the partnership for 1907, as the balance sheet for that year had not then been issued. Clauses 3 and 4 of the agreement refer exclusively to the profits and losses during 1907, which had still to be adjusted. The consideration for the sale is fixed subject to this adjustment. The intention is that from the sum representing the gross profits for 1907 there is to be deducted a sum representing one-eighth of the working expenses of the stations for that year. From this calculation the value of the travelling is excluded, as the vendor had already received payment for this. It had already been earmarked and considered and assessed. Profits and losses in clauses 3 and 4 of the agreement mean profits and losses which at the time of the negotiations were unknown, and could not be ascertained until the balance sheets were issued by the managers of the stations. The words "in assessing such profits and losses," in clause 5, show that profits mean unascertained profits, and increase of herds in that clause cannot refer to the increase during the whole period of the partnership. This supports the argument that the

only period which the parties had then in contemplation was the year 1907. Prior to this the profits are represented by the assets of the partnership. The word "arising" in clause 3 means which have arisen and are at present unknown.

Having paid the vendor's one-eighth share of the working expenses of the stations for 1907, the defendant is entitled to deduct it. That was a sum chargeable against the vendor which has been discharged.

"Loss" means excess of outgoings over income for the year. Clause 4 is ancillary to clause 3, and points out one mode in which the indemnity is to be exacted. The respondent can justify the deduction made under either clause 3 or 4.

Knox K.C. in reply.

Cur. adv. vult.

The following judgments were read:—

Nov. 17.

GRIFFITH C.J. The plaintiff and defendant with other persons were members of a partnership firm who owned pastoral properties in Western Australia, two of which were called Victoria River Downs and Carlton, the plaintiff's share in the partnership property being one-eighth. By an agreement, dated 19th February 1908, the plaintiff agreed to sell his interest in the partnership to the defendant. At that time part of the assets of the firm consisted of about 5,000 cattle on their way to market. The agreement provided that the plaintiff should sell to the defendant all his interest under the agreement of partnership (which was dated 16th December 1900) and all his one-eighth interest in the station properties and stock and in the travelling stock (clause 1). The consideration for the sale was £15,000 for the plaintiff's share and interest in the station properties, and £1,979 11s. 5d. for his share and interest in the travelling stock, the latter sum being payable within fourteen days from "the issue by the managers of the said stations of the balance sheets of the station properties up to 31st December 1907" (clause 2). Clauses 3, 4 and 5 were as follows:—

"3. The vendor shall be entitled to all the profits arising from the share and interest of the vendor in the said station proper-

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ties up to 31st day of December 1907, and shall indemnify the purchaser from all loss on or liabilities in respect of such share and interest up to that date. And as from that date the purchaser shall be entitled to all profits arising from such share and interest in the said station properties, and shall indemnify the vendor from all liabilities in respect thereof.

"4. Any sum payable by the vendor as his share of the loss or liabilities of the said stations up to 31st day of December 1907, as shown on the balance sheet up to that date issued by the managers of the said station properties, may, if paid by the purchaser, be deducted by him from the said sum of £1,979 11s. 5d. payable by him within fourteen days from the issue of such balance sheet as aforesaid.

"5. Such balance sheet shall be made up in the manner hereinbefore adopted in respect of such stations, and in assessing profits and losses under clause 3 hereof increase of herds shall not be taken into account, and the 3,334 bullocks and 1,714 cows now travelling and being such travelling stock as aforesaid, and all droving expenses in connection therewith, (having been taken into account in assessing the said sum of £1,979 11s. 5d.), shall be excluded from all calculations of profit and loss for the purpose of clause 3."

It was the practice of the partnership to make up separate annual balance sheets, including profit and loss accounts, for the two stations of Victoria River Downs and Carlton. Any profit earned in any year and not divided was carried forward into the accounts for the following year.

The balance sheets as made up to 31st December 1907, which were issued on 25th May 1908, showed balances to credit of profit and loss of £11,960 15s. 2d. and £4,220 6s. 5d. for the respective stations—together £16,181 1s. 7d. The amount attributed to the 5,000 cattle was £14,980 10s. This amount being excluded from the calculation of profits in pursuance of clause 5 of the agreement, there was a net balance to credit of profit and loss of about £1,200.

If, however, the amounts to credit of profit and loss brought forward from the balance sheets for the year ending 31st December 1906 were left out of consideration as well as the

£14,980 10s. there would have been a debit balance on the profit and loss accounts of about £7,166. It appeared from the balance sheets that the amounts at credit of profit and loss and not distributed were for the most part not retained in cash, but were represented by assets of the partnership. Under these circumstances the plaintiff claims that the defendant was not entitled to make any deduction under clause 4 of the agreement from the sum of £1,979 11s. 5d., while the defendant contends that he is entitled to deduct one eighth of the sum of £7,116. The question for determination is which of these contentions is right.

The travelling stock and the sum representing their proceeds may be left out of consideration, just as if on 31st December 1907 the partners had agreed to withdraw that sum from the partnership accounts and deal with it as a separate fund.

The answer to the question depends on the construction of clause 4 of the agreement. In order to succeed the defendant must establish that the balance sheet up to 31st December 1907 as issued by the managers shows a "sum payable" by the plaintiff "as his share of the loss or liabilities of the stations." For this purpose the balance sheet was, as provided by clause 5, to be made up in the manner theretofore adopted, *i.e.* carrying forward the balances to credit of profit and loss for the preceding year, and the travelling stock were to be excluded from the calculation.

I think that the term "sum payable" must be read in an extended sense as meaning any sum which, if the partnership had been dissolved on that day, would appear, on taking the accounts, to be chargeable to the plaintiff before he could claim repayment of his capital in full. But this is the widest sense that can be given to it.

As I have already said, the balance sheet so made up showed a divisible profit of about £1,200. It did not, therefore, show any loss or liability of the stations payable by the plaintiff, or any sum which was chargeable to him in favour of the partnership before a return of capital could have been made.

This is enough to dispose of the case; but I will refer briefly to the arguments which were addressed to us in support of the judgment appealed from. The main contention was that the

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sum of £15,000 was the price paid for the plaintiff's one-eighth share in the assets of the partnership, (other than travelling stock) in whatever form they might exist, and including the assets which represented accumulated and undivided profits, and that the language of clause 3 providing that the vendor should be entitled to "all profits up to 31st December, 1907" must consequently be limited to profits for the year 1907, since otherwise he would be paid twice over, not only receiving the amount of the accumulated profits under clause 3, but being also paid for the assets representing them.

Even if this argument were sound it would not in my judgment affect the construction of clause 4, on which the right of the defendant to make the deduction depends. But it is not necessary to express an opinion on the point. Whatever may be the construction of clause 3, three points are abundantly clear: (1) that the sale was to take effect as from 31st December 1907, (2) that up to that date the plaintiff was for all purposes to be deemed to have been the owner of his one-eighth share, and (3) that he was to be treated for the purposes of the agreement, including the stipulation in clause 4, as entitled to his share of all profits earned up to that date. The balance sheet being made up on this basis, it appeared that on 31st December 1907 the plaintiff's account with the firm was in credit, and not in debit. Clause 4 therefore never came into operation.

It was suggested that this construction gives no effect to clause 4, but that is not so. When the agreement was made the balance sheets for 1907 had not been made up, and it was uncertain whether, when made up in the stipulated manner, they would show a sum at credit or at debit of profit and loss. If they had shown a sum at debit the plaintiff would have had to pay one-eighth of it, and the amount might have been deducted by the defendant from the £1,979. As it happened they showed a credit, and no amount fell to be deducted.

For these reasons I think that the appeal must be allowed, and judgment entered for the plaintiff for £895 16s. 2d., with interest at 4 per cent. per annum from 8th June 1908 (on which day the amount deducted by the defendant should have been paid) and costs of action.

The respondent must pay the costs of the appeal.

BARTON J. The defendant claims to deduct from the £1,979 11s. 5d. otherwise admittedly payable to the plaintiff under the agreement a sum of £985 16s. 2d., or the plaintiff's one-eighth share of £7,865 12s. 5d., which, in the defendant's view of the agreement, represents the loss or liabilities of the stations up to 31st December 1907 as shown by the balance sheet. It is in fact the total of the expenditure of that particular year, the proceeds of the sale of travelling stock being excluded from the calculations of profit and loss under clause 5 of the agreement. The defendant's contention is that the "loss or liabilities of the stations up to the 31st day of December 1907" means merely the loss or liabilities chargeable against the transactions of that particular year, and if the items which aggregate that £7,865 12s. 5d. are properly to be called "loss or liabilities," the contention involves the reading of the words "up to the 31st day of December 1907" as equivalent to "during the year 1907." Now the words "up to the 31st day of December 1907" apply not only to any "sum payable" under clause 4, when they are associated with the balance sheets, but also to clause 2, where they are used in the same connection, and to clause 3, where they are not expressly so connected, but apply to the profits, and if the defendant's contention is correct all profits remaining undistributed up to the end of 1906 are excluded, so that the plaintiff would not be entitled to set them against any losses in 1907. In its literal and ordinary sense the expression does not import any restriction of the transactions to the year 1907 in exclusion of previous years, and it seems to me that before the defendant can have the benefit of the construction of the expression in the restrictive sense he must show something in the context which expressly or by plain implication controls the expression so as to give it a meaning other than that which *primâ facie* it carries; or else he must show that the agreement cannot be applied to its subject matter by giving the words their *primâ facie* import and without giving them the sense contended for.

Mr. *Rolin* has argued these matters very ably, but I do not think we can read the contract otherwise than in what appears to be its plain and ordinary sense, a reading which appears to me to be perfectly sensible both in itself and in the carrying out

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of the contract. The balance sheet, made up in the manner theretofore adopted, as provided in clause 5, took into account profits remaining undistributed on 31st December 1907, amounting to £11,960 15s. 2d. in respect of Victoria River Downs, and £4,220 6s. 5d. in respect of Carlton. These two sums would together amount to £16,181 1s. 7d. to the credit of profit and loss at the date named, but to conform with clause 5 the proceeds of the travelling stock, £14,980 10s., must be eliminated. This leaves a profit of £1,200 11s. 7d. for all the partners, of which £150 1s. 5d. would be the plaintiff's proportion. Thus the balance sheet shows no "sum payable by the vendor as his share of the loss or liabilities . . . up to 31st day of December 1907 as shown on the balance sheet" when "made up in the manner hereinbefore adopted in respect of such stations." On the result therefore of the reading of the contract in its plain ordinary sense, there is no scope for the operation of clause 4, and consequently no justification for the deduction claimed by the defendant. Clause 3 operates so as to give the plaintiff all the profits arising from his share and interest in the properties up to the end of 1907, there being no "loss on or liabilities in respect of his share and interest up to that date" for which he is called on to indemnify his purchaser. Clause 4 merely prescribes the method in which that indemnity is to be made and carried into account should occasion arise, and it has not arisen. I am therefore of opinion that the plaintiff must succeed in his appeal.

O'Connor J. The special case in which this appeal arises was stated for the purpose of obtaining the opinion of the Supreme Court on certain clauses of a contract whereby the plaintiff (appellant) had sold to the defendant (respondent) his interest in certain station properties, and in certain travelling cattle. Fifteen thousand pounds was the consideration money for the vendor's interest in the stations and £1,979 11s. 5d. for his interest in the travelling cattle.

In making payment of the latter amount, the defendant deducted £895 16s. 2d., being one-eighth share of the total expenditure debited in the profit and loss account of the Victoria River Downs Station for the year ending 31st December 1907,

He claims that clause 4 of the contract entitles him to make the deduction, and so the Supreme Court have held. We have now to determine whether that view is correct.

The right to make the deduction is given by clause 4 in these terms:—"Any sum payable by the vendor as his share of the loss or liabilities of the said stations up to 31st day of December 1907, as shown in the balance sheet up to that date, issued by the managers of the said station properties, may, if paid by the purchaser, be deducted by him from the said sum of £1,979 11s. 5d. payable by him within fourteen days from the issue of such balance sheet as aforesaid."

In interpreting that provision, the whole contract must be examined, but there are two clauses worthy of special consideration. Clause 3 stipulates that the vendor shall be entitled to all profits arising out of his share of the station properties up to 31st December 1907, and that he shall indemnify the purchaser from all loss or liabilities in respect of such share and interest up to that date.

It is quite clear that "loss or liabilities," referred to in clause 3 and in clause 4 are the same. The object of the former clause was to give the purchaser a right to be indemnified in respect of liabilities arising before the end of 1907. The object of the latter clause was apparently to enable him to recoup himself out of the purchase money in his hands for any payments made by him for the purpose of clearing the plaintiff's share of any liability which might attach to it, in respect of losses which might be shown on the profit and loss account of the balance sheet to the end of 1907. Clause 5 lays down the method to be adopted in assessing profits and losses under clause 3, and the assessment of loss or liabilities for the purposes of clause 4 must be by the same method. It directs that the balance sheet shall be made up in the manner hereinbefore adopted in respect of the stations, but adds that in assessing profits and loss, increase of herds shall not be taken into account, and that the travelling stock, the plaintiff's interest in which was part of the subject matter of the contract, and all droving expenses in connection therewith, shall be excluded in the assessment of profit and loss. With these two exceptions the balance sheet is to be as usual.

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I gather from the terms of the special case that the defendant is to be taken as having paid, within the meaning of clause 4, any liability on the plaintiff's share as disclosed by the balance sheet up to the end of 1907. I think also it may be assumed, although it is not proved, that the plaintiff was liable, as between himself and his partners, to pay into the concern his proportionate share of any such loss. The defendant's right to make the deduction under clause 4 must therefore depend upon whether he has succeeded in establishing that the balance sheet of the partnership up to 31st December 1907 shows, on profit and loss account, the loss which he alleges. Taking the ordinary balance sheet for that year made up in the usual way to 31st December, and omitting from the calculations the two factors which clause 5 directs to be omitted, the result shows not a loss, but a profit of something like £1,200. That result is brought about by the presence, on the credit side, of the factor which may be described as the undistributed unappropriated profits of previous years. The inclusion of that factor was in accordance with the usual method of making up the balance sheet. It is only by excluding it from the calculations that the defendant can show the loss which he alleges. It is obvious that in any balance sheet made up in the "manner hereinbefore adopted," to quote the words of clause 5, that that factor must appear on the credit side. The defendant seeks to justify its exclusion in this instance by claiming that the balance sheet referred to in clause 5 is a balance sheet showing a profit and loss account of the transactions of 1907 only. The clause certainly does not say so, and the construction contended for is, therefore, entirely opposed to the express words of the contract. Wherever the balance sheet is referred to it is described as the balance sheet of the station properties *up to* 31st December 1907. By clause 3 the vendor is entitled to profits (meaning of course distributable profits) *up to* 31st December 1907, and is bound to indemnify the defendant against loss or liability in respect of the share and interest up to that date.

Clause 4 describes the sum to be deducted as "his share of the loss or liabilities up to 31st day of December 1907 as shown in the balance sheet up to that date." No commencing point of

the calculations is anywhere mentioned. To assume a commencing point at the beginning of 1907, and a restriction of the account within that year, is not only contrary to the plain words of the contract, but to its main object. To effect a sale, which would indemnify the defendant only in respect of liabilities attaching to the plaintiff's share in the year 1907 and would leave him responsible for liabilities attaching to the share before that date, is contrary to the whole tenor of the contract. The respondent's counsel strongly contended that to adopt the literal meaning of clause 4 would be to read it as inconsistent with clause 1, which showed on the face of it that the accumulated profits were part of the subject matter of the contract, for which the purchase money of £15,000 was paid. But the first clause cannot be construed as detached from the other clauses any more than clause 4 can be so construed. The whole contract must be read together, and so read its plain meaning, in my opinion, is that the plaintiff does sell the accumulated profits, amongst the other assets of the partnership, but retains the benefit of them in the accounts in so far as they may be necessary to balance liabilities in the profit and loss account of the balance sheet up to the end of 1907. The learned Judges of the Supreme Court seem to have thought that there was something in the contract when applied to the subject matter that forced them to adopt the defendant's view. For the reasons I have given I have come to a contrary conclusion, and I can see nothing in the contract as applied to the subject matter which would justify the restriction of the 1907 balance sheet to the transactions of that year only. In my opinion, the accumulated undistributed profits must, under the contract, be put into the credit side of the balance sheets for 1907, just as in the balance sheets of previous years, and so bring out on the profit and loss account a profit and not a loss. It must follow that the defendant has failed to establish his right under clause 4 to make the deduction from the purchase money which he has made, and the plaintiff is entitled to recover the amount deducted, that is to say, the full amount claimed in the action. The learned Judges of the Supreme Court ought in my opinion to have so decided. As they have not done so this appeal must be allowed.

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Isaacs J.

ISAACS J. The one real question to be answered in this case is whether the conditions of clause 4 of the agreement have been satisfied so as to entitle the respondent to deduct £895 16s. 2d. from the amount of his promissory note for travelling stock.

The learned Judges of the Supreme Court thought they were. They first put a construction on clause 3 of the agreement in favour of the respondent, and then, without more, assumed that clause 4 must necessarily be governed by that construction, giving judgment for defendant accordingly. Learned counsel for the respondent have followed the same line of reasoning.

If this were a suit to determine upon the proper construction of clause 3 the respective rights of the parties to profits and indemnity in respect of the period anterior to 1907, I should be strongly disposed to adopt the view urged for the respondent. I see great difficulty, when the agreement is read as a whole, and with reference to the relative situation of the parties, in assenting to the contention presented as part of the appellant's argument that "profits" in clause 3 ought to be read as covering all the profits which ever formed part of his share in the partnership assets. And this contention has carefully been kept open by the appellant for possible future emergencies. It has been fully argued and relied on, not as essential, but as a material aid to the elucidation of the ultimate question.

As to this the governing feature of the agreement, as appears from the first clause, is the sale on 15th February 1908 of the appellant's entire interest in the whole of the partnership assets and business for specified consideration; and clauses 3, 4 and 5, are qualifications of the main provision. Though full effect must be given to every part of the agreement, it is a material consideration in ascertaining its import, where as here the main words are clear, and the qualifying language is not free from doubt, to remember the dominant purpose of the bargain. The consideration consists of two distinct parts, viz., £15,000 for everything except the travelling stock, and the sum already mentioned for that stock. The £15,000 is payable absolutely and quite irrespective of any balance sheet; half down, and half in six months with 4 per cent. interest. This indicates to my mind the absolute certainty in the minds of the parties as to the subject

matter sold whatever it may now be found to be, and a similar certainty as to price. The only uncertainty is the ascertainment now of the parties' intention from the words they have used.

At the end of clause 2, the consideration clause, it is stipulated that the stock bill is to be paid within fourteen days after the issue of the 1907 balance sheet. The reason of that delay was plainly not due to any doubt regarding subject matter, but to afford time for the operation of subsequent stipulations.

Recollecting the certainty as to the £15,000 part of the bargain, we find in clause 3 two correlative provisions which, taken together, in my opinion mean this: the year 1907 for good or for ill is to be entirely cut out of the thing primarily described as sold and to remain the vendor's own year; he taking the profits "arising from the share or interest of the vendor" to the end of that year; and indemnifying the purchaser from "all loss on or liabilities in respect of such share or interest" up to the same moment. To that extent therefore the generality of the earlier words is controlled.

Clause 3, according to my present impression, leaves the purchaser quite unconcerned with the year 1907, except that he is neither to gain nor lose by it.

But the parties saw reason to modify the effect of that clause to some extent, and this they did by clause 5. They excepted from its operation two things. First, increase of herds even in 1907 was not to pass to the vendor as his profit: in other words, this was restored to the operation of clause 1 and passed to the purchaser. Next, the travelling stock and all droving expenses in connection therewith were to be similarly excluded from profit and loss under clause 3, and the vendor's partnership interest in these assets were consequently restored likewise to the operation of clause 1. The reason of this is manifest. The vendor had received the full price of his share in the travelling stock under a bargain which was virtually a taking over of his share in them by the purchaser, and unless this special exemption were made from clause 3 he would be getting profit twice over.

Mr. *Rolin* then skilfully endeavoured to show that the con-

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ditions of clause 4 were satisfied through these modifications of clause 3, notwithstanding the significant silence of clause 5 with respect to clause 4. He said that clause 5, by excluding the travelling stock from assessment, necessarily caused the balance sheet to show a loss of £7,865 12s. 5d., the amount mentioned in paragraph 7 of the special case, and then deducting £699 2s. Carlton Station profit, a net loss appeared for 1907 of £7,166 10s. 5d., of which one-eighth is £895 16s. 2d. the sum claimed for deduction. He also said with much force that, reading the concluding words of paragraph 7 of the case, the necessary debiting of the share with the proportionate part of the year's expenses was treated as a consensual discharge by the respondent of any liability of the owner of the share for £895 16s. 2d. I will assume the accuracy of that last argument.

But there are two fallacies in this process of reasoning by which it is sought to exclude from clause 4 all reference to the travelling stock. One is as to the actual provisions of clause 5, and the other is as to the bearing of clause 4 itself.

Clause 5, as I read it, does not purport to exclude the travelling stock from the balance sheet. Of course the parties to this agreement, even if they wished, could not affect its actual form or contents. They could and did affect their own mutual rights with respect to it when drawn up in the ordinary way. But the only conventional exclusion provided for by clause 5 with respect to the balance sheet is as to the assessing or calculating *vendor's profit* under clause 3 by eliminating therefrom natural increase, and, after allowing for droving expenses, the profits arising from the sale of the travelling stock. In no other respect are the proceeds of the travelling cattle or the cattle themselves eliminated by clause 5, because "profit and loss" in that clause means the vendor's profit and loss referred to in clause 3, the exclusion being expressly limited to the "purposes of clause 3." The opening words of clause 5 expressly stipulate that the balance sheet shall be made up in the manner previously adopted, and therefore, subject only to the limited exclusion just mentioned, all else remains. In other words, so far as concerns the relations of the vendor to his co-partners, there is nothing to cut

down the full effect of the firm's transactions, either for profit or loss, or the fact that these cattle or their proceeds were portion of the partnership property. The profits of the firm as a firm over the sale of the travelling stock were real, were no concern of the purchaser from Yuill, and they remained untouched by the agreement now under consideration; but the argument of the respondent, which blots out the whole dealing, not only gets rid of the profit of the other partners, but obliterates the cattle themselves, and their proceeds, as much as if they had died before sale. What possible reason could be imagined for that?

In order to ascertain the liability of the vendor to pay or make good any sum to the partnership—for that is the necessary meaning of clause 4—it is essential to know what in fact was received for the cattle, and whether they proved a profit or a loss. That, then, is an indispensable factor in working out clause 4, and is quite independent of clauses 3 and 5, which deal with the destination of the vendor's share of the profit. The constant argument of Mr. *Rolin* was that clause 5 affected the loss and liabilities mentioned in clause 3, and as the loss and liabilities in clause 4 meant the same thing, these too were necessarily affected. But from what I have already said it will be perceived there is a fundamental error in that assumption. The loss and liabilities in clause 3 are described as those in respect of the vendor's share and interest, that is, affecting him alone. The loss and liabilities mentioned in clause 4, on the contrary, are expressly stated to be those of the stations, that is, affecting the whole of the partners; consequently the travelling stock cannot be omitted in ascertaining these losses and liabilities; and only when they are truly ascertained can it be known what, if any, is the vendor's share of them payable by him.

It seems unquestionable, therefore, that the fate of clause 4 is not inseparable from that of clause 3, as modified by clause 5. Its function is different, some of its elements are different, and the consequence is different. The concrete result is that, for the purposes of discovering the liability of the vendor to make good to the partnership the sum of £895 16s. 2d. for the year 1907, the respondent is not at liberty to excise the cattle transaction £14,980 10s. from the balance sheet; and if not, the basis of his

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case for deduction disappears, and the appeal must be allowed. I agree with the order as stated by the learned Chief Justice.

Appeal allowed.

Solicitors, for appellant, *Macnamara & Smith.*
Solicitors, for respondent, *Sly & Russell.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

RICHARD JOHN NEWIS . . . . APPELLANT;
PLAINTIFF,

AND

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION . . } RESPONDENTS.
DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 15, 16.

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

Contract—Policy of fire insurance—Agreement to pay for loss by fire after payment of premium—Premium not paid prior to loss—Interim receipt given for premium before payment—Waiver—Estoppel—Fraudulent device to obtain benefit under policy—Evidence that cheques and letters were not written on day they were dated.

The defendants, by a policy of fire insurance, dated 7th September 1909, agreed to pay the plaintiff for losses caused to his property by fire after payment of the premium. The policy provided that if any fraudulent device should be used by the plaintiff to obtain any benefit under the policy, the policy should be forfeited. On 6th September the plaintiff signed and handed to H., an insurance agent, a proposal for the insurance. The plaintiff subsequently received a receipt from the defendants, dated 6th September,