



REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1914.

[HIGH COURT OF AUSTRALIA.]

MARKS BROTHERS APPELLANTS;
DEFENDANTS,

AND

PARK RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

Contract—Construction—Contract for services.

An oral agreement was entered into between the plaintiff, who was an engineer, and the defendants, who were manufacturers of agricultural implements, that in consideration of the plaintiff continuing in the employment of the defendants and endeavouring to improve a certain patented vertical chaff and root cutter the defendants would give the plaintiff 10 per cent. of the profits to be obtained from that implement and any improvements thereof. Subsequently a written agreement was entered into between the same parties by which the defendants agreed that the plaintiff "for special services rendered in perfecting and successfully demonstrating our patent vertical chaff and root cutter and any other machinery shall be entitled to receive 10 per cent. of our profits from manufacture." The plaintiff "to remain in

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MELBOURNE,
March 27, 30,
31;
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our employ for five years at £5 per week and the term to be extended if still in business for another five years. This agreement stands good on the same terms if taken to New Zealand. If the patent rights are sold to any firm, capitalist or capitalists, or formed into a company or the like" the plaintiff "to receive 10 per cent. of the sale."

Held, upon the evidence, (1) that the oral contract related only to the manufacture and sale in the Commonwealth of the vertical chaff and root cutter and any improvements thereof; (2) that the written contract was a single contract—and not two separate and independent contracts, one being a contract for the services of the plaintiff for five years renewable for a further five years, and the other a contract that the plaintiff should be paid 10 per cent. of the profits of manufacture during that term and 10 per cent. of the proceeds of the patent rights if they were disposed of; (3) that the words "our profits from manufacture" in the written contract related only to the business of manufacture and sale by the defendants in the Commonwealth and New Zealand of the vertical chaff and root cutter or any improvements thereof and other machinery and (by *Griffith C.J.* and *Barton and Gavan Duffy JJ.*, *Isaacs J.* dissenting) the profits derived from such manufacture and sale during the plaintiff's continuance in the service of the defendants; (4) (by *Griffith C.J.* and *Barton and Gavan Duffy JJ.*, *Isaacs J.* dissenting) that the patent rights referred to in the written agreement were patent rights within the Commonwealth and New Zealand only, and that the sale of such rights therein referred to meant a sale made during the plaintiff's continuance in the service of the defendants.

Decision of the Supreme Court of Victoria (*Madden C.J.*) reversed.

APPEAL from the Supreme Court of Victoria.

Richard Thomas Park brought an action in the Supreme Court against a firm called Marks Brothers and its members, Horace Marks and Walter David Marks. The nature of the action and the facts sufficiently appear in the judgments hereunder. The action was tried before *Madden C.J.* who gave judgment for the plaintiff.

From that decision the defendants now, by special leave, appealed to the High Court.

Mann, for the appellants.

Bryant (with him *Williams*), for the respondent.

Cur. adv. vult.

April 6.

GRIFFITH C.J. The defendants in this case are two brothers who had been in partnership as farmers, but had discontinued

that business. The defendant Horace had invented a vertical chaff and root cutter, said to be of entirely novel principle. In October 1908 he obtained a Commonwealth patent for it. In January or February 1909 he and the defendant Walter agreed to enter into partnership as agricultural implement makers, principally for the manufacture and sale of this new chaff cutter. They accordingly started business at South Melbourne. The terms of the partnership were not reduced to writing, but it appears that the brothers were to have equal shares. The defendant Horace also applied in 1908 for a patent for the same invention in various countries in Europe and America, in New Zealand and in the Transvaal.

The principal contest at the trial—and, indeed, the principal matter in contest in the action—is whether these foreign patents were partnership property of the defendants, and so much turns on that question that I will deal with it first.

The plaintiff exhibited interrogatories for the examination of the defendants, which by arrangement were answered by Horace only. The seventh interrogatory was: “In what places have the defendants or either of them obtained protection under the Patents Acts or other similar privileges for the inventions or any of them respectively referred to in the pleadings?” The answer was: “To the seventh interrogatory I say that the defendants have obtained protection for the inventions referred to in the pleadings as follows:—” Then were enumerated various places for which patents were applied for and granted, including Australia. That answer was relied on by the plaintiff as showing conclusively that all the various patents were partnership property. This was disputed by the defendants. There was nothing to support the contention of the plaintiff except that answer, but it was shown by very strong evidence indeed that they were not partnership property. Various books, cheques and other documents were produced, all of which showed that the expenditure in respect of what I will call the foreign patents was made by Horace entirely out of his own funds, and was never in any way treated as partnership expenditure. The solicitor who prepared the answers to interrogatories gave evidence, and said that he misunderstood the seventh interrogatory. The form of

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the question was: "In what places have *the defendants or either of them* obtained protection" &c. It did not occur to him that it meant "*either and which of them*," and therefore he thought it was his duty to set out all the places in which the defendants or either of them had obtained protection. Not only is that explanation a reasonable one but the language of the question is, at best, ambiguous. In my opinion, therefore, the answer cannot be relied on as conclusive evidence that all the patents were partnership property. I have come to the conclusion, without any doubt, that the foreign patents were not the property of the partnership.

I proceed to state the other relevant facts. The plaintiff is a mechanical engineer. About May 1909 he joined the defendants' firm as a fitter. While there in that year he devised an improvement of the chaff cutter, which he communicated to the defendants. An application for a patent for the improvement was made, but was not proceeded with. In October 1910 he invented another improvement for which the defendant Walter obtained a patent as assignee from him. In March 1910 the defendant Horace was about to go to Europe with the intention of patenting and pushing the sale of the chaff cutter, of which he was the sole owner outside the Commonwealth. The plaintiff says that at that time he was entirely dissatisfied with his position, and proposed to leave the defendants' service; that the defendant Horace pressed him to remain, and as an inducement offered him "10 per cent. of the invention"; that they thereupon shook hands; and that the plaintiff said he would stay on. He did stay on. The defendants deny this conversation, but the plaintiff's evidence was accepted by *Madden C.J.* On the strength of it the plaintiff alleges by par. 7 of the statement of claim that the defendants verbally agreed that in consideration of the plaintiff continuing in their employment and endeavouring to improve the patent vertical chaff cutter the defendants would give him 10 per cent. of the profits to be obtained from the chaff cutter and any improvements thereon—a rather large expansion of the few words and the hand-shake. But the plaintiff cannot put the promise higher than what he alleges in his statement of claim.

During Horace's absence in Europe an agreement was made in

writing, which is set out in par. 8 of the statement of claim, and which I will read later on. The circumstances of making it are stated by the plaintiff in this way. He said he had been to Sydney on business of the firm in April 1911, where he had demonstrated the working of the chaff cutter at the Easter Agricultural Show; that when he came back he said to Walter, who was the only one of the brothers then in Australia, "Will you put in writing what your brother and you promised before he went to England?" and that after some conversation an agreement was drawn up in these terms:—

"This agreement is to certify that I Walter Marks attorney for the firm of Marks Bros. agricultural implement manufacturers of 60 Clarendon Street South Melbourne do hereby agree That from 1st May 1911 Richard Thomas Park our works manager for special services rendered in perfecting and successfully demonstrating our patent vertical chaff and root cutter and any other machinery shall be entitled to receive ten per cent. (10 per cent.) of our profits from manufacture. The said Richard Thomas Park not to participate in the cost of working out the patent prior to 1st May 1911. The said Richard Thomas Park to remain in our employ for 5 years at £5 per week and the term to be extended if still in business for another 5 years. This agreement stands good on the same terms if taken to New Zealand. If the patent rights are sold to any firm capitalist or capitalists or formed into a company or the like Richard Thomas Park to receive ten per cent. (10 per cent.) of the sale."

The action is brought for a declaration that the plaintiff is entitled to 10 per cent. of all the profits from the manufacture of that machine and "other machines and improvements used in connection with the process covered by the inventions set out in the statement of claim and also to 10 per cent. of the profits arising from the disposal of the said process or any part thereof and from the disposal of the rights or licence thereof or any part thereof wherever made." The defendants deny the verbal agreement, but admit the making of the written agreement, and allege that the patent rights mentioned in it are those for the Commonwealth and New Zealand only. This last point, as I have said, was the principal matter in contest in the action, and I have

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already expressed my opinion upon it. As to the written agreement *Madden* C.J. held that it contained two distinct agreements independent of one another, one a contract for the services of the plaintiff for five years renewable for a further five years, and the other a contract to give the plaintiff 10 per cent. of the profits of the manufacture during that term and 10 per cent. of the proceeds of the patent rights if they were disposed of. Several expressions of the agreement give rise to comment. The agreement is "for special services rendered in perfecting and demonstrating" &c. That expression is a curious one. Probably the parties had in mind both special services already rendered—looking to the past—and special services to be rendered—looking to the future. I do not think it is necessary to decide whether the words should be construed as including both. The substantial consideration was that the plaintiff would continue in the service of the defendants for five years certain and possibly for ten years. So far as "special services rendered" can be construed as referring to the future, the consideration would be very vague and almost illusory. The last clause of the agreement as to the plaintiff receiving 10 per cent. of the proceeds of the sale of the patent rights seems to me to be entirely subsidiary or auxiliary to the main object. The plaintiff was to serve for ten years and was to receive in addition to his wages 10 per cent. of the proceeds of manufacture during that term. But if the patent rights were sold during that period, these advantages would be lost to him and he might get practically nothing. The 10 per cent. of the proceeds of sale was in the nature of compensation or solatium for being deprived of the chance of profits from manufacture during that period of ten years.

The next question that arises is: What is the meaning of "our profits from manufacture"? Those words, in my opinion, mean the profits of the manufacture carried on at South Melbourne, but to be extended to cover the event of the defendants setting up works in other parts of the Commonwealth. The reference to New Zealand indicates that it was intended that the language should apply also to any expansion to that Dominion. The agreement must therefore, in my opinion, be limited to the patent rights which were in fact the property of the firm and

were known to both parties as being the property of the firm, and cannot be extended to include patent rights not the property of the firm.

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With respect to the agreement of March 1910—I call it an agreement because *Madden* C.J. found it to be established by the conversation I have already referred to—the conversation of May 1911 throws a good deal of light upon what was intended, and in my opinion the proper inference to be drawn is that both the written contract and the verbal contract referred to the same subject matter. I also infer that the written contract was intended to be in substitution for the verbal contract except so far as any profits before that date were concerned.

In the view I take of the agreement the main consideration for the defendants' promises is the continuance of the plaintiff's services. If they ceased the basis of the agreement failed. I think, therefore, that the concluding stipulation for 10 per cent. of the proceeds of the sale of the patent rights was co-terminous with the services of the plaintiff.

This disposes of all the questions that arise on the pleadings.

But during the action the defendants dismissed the plaintiff for alleged misconduct, and they have pleaded an additional defence based on that misconduct. That defence has not been dealt with, but stands over for further investigation. If the plaintiff's service was lawfully terminated at that time, the whole contract was at an end. But if not, and if the service was wrongly terminated, then the plaintiff is entitled to damages based upon his probable future gains if he had continued in defendants' service. Whether those damages would be recoverable in the present action I do not know. That depends upon the Rules of the Supreme Court.

For these reasons I think that the appeal should be allowed and the judgment appealed from discharged, and a declaration should be substituted to the following effect:—Declare that the agreement set out in par. 7 of the statement of claim relates only to the manufacture and sale in the Commonwealth of the vertical chaff and root cutter in the statement of claim mentioned and any improvements thereof. Declare that the contract contained in the agreement of 1st May 1911 mentioned in par. 8 of the

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1914. independent contracts, and that the term "our profits from manu-
MARKS BROS. facture" therein appearing relates only to the business of manu-
v. facture and sale by the defendants in the Commonwealth and
PARK. New Zealand of the said vertical chaff and root cutter or any
Griffith C.J. improvements thereof and other machinery and the profits
derived from such manufacture and sale during the plaintiff's
continuance in service. Declare that the patent rights in the
said agreement mentioned are patent rights within the Common-
wealth and New Zealand only and that the sale of such rights
therein referred to is a sale made during such continuance in
service.

BARTON J. The Court is to "see what is the intention expressed in the words, used as they were with regard to the particular circumstances and facts with regard to which they were used. The intention will then be got at by looking at what the words mean in that way": Lord *Blackburn* in *Inglis v. Buttery* (1). This seems to mean that the contract is to be applied to its subject matter so far as is necessary to identify who and what it was that the parties were dealing with. When this has been done, words of plain meaning cannot be shown by oral evidence to mean something different from what they express; though where the words are susceptible of more than one meaning evidence may be adduced to show in which sense they were used. Evidence of this kind does not contradict or vary the contract.

The relevant circumstances have been sufficiently stated by the Chief Justice. I find no great difficulty in construing the written agreement of 1st May 1911 in the light of these circumstances. I think it is a single contract. The respondent was in the appellants' employment at the time. Their principal and almost their only business as a firm was the manufacture and sale of a patented chaff and root cutting machine, and this agreement was given to him by Walter Marks for the firm, his partner Horace Marks being then abroad, to keep the respondent in their employment, in which he had become restive. He had rendered very useful

(1) 3 App. Cas., 552, at p. 577.

service to the appellants' firm as an inventor, and he was their foreman of works. I think it evident that the intention of the appellants was to carry out the purpose of retaining him in their employment by giving him special inducement. Therefore, in addition to the increased salary of £5 a week he was to have a percentage of the firm's profits from the manufacture of the patent vertical chaff and root cutter. His services in perfecting and demonstrating that machine are described as "special services rendered." *Primâ facie* these words apply to the past. They might by possibility be read to apply to the future as well, if the context showed such an intention. But I do not find such a context.

The words "our patent vertical chaff and root cutter" designate the patented vertical chaff and root cutter which the firm were manufacturing. There is no evidence, even if evidence were admissible, that the phrase refers to a patent, or to a number of patents, or to anything but a machine of which the firm were manufacturers. If it referred to any patent at all, the firm, as such, own no patents outside the Commonwealth and New Zealand. The addition of the words "any other machinery" tends further to show that the subject matter dealt with in this branch of the contract was machinery, and not patents. The 10 per cent. by which these special services were to be rewarded was to be calculated on the firm's "profits from manufacture." Clearly, this means profits earned by the manufacture of this chaff cutter, with or without improvements, and there is in the agreement no trace of an intention to manufacture elsewhere than in Australia, unless New Zealand were added to the field. I can and do read the phrase to apply to manufacture and sale, because there could be no profits from manufacture without sale. But I find no warrant for an extension of meaning to include licences under patents, and more particularly under patents not owned by the firm as partners. This percentage of the profits seems to include profits to be made throughout the subsistence of the agreement.

Then comes the other branch, which refers to remuneration for the respondent's ordinary services; and he was to serve for five years at £5 a week and for another five years if the business continued. This is the period of time to which the agreement as

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a whole relates, and which limits both branches of it; for, with great respect for the opinion of the learned trial Judge, I do not find in the document as applied to its subject matter any intention to make an independent stipulation of this branch. The view that there is such an intention would so sever the first branch as to render that an agreement of quite indefinite duration to render special service even when the respondent should be no longer serving the firm in the manufacture and sale of the machine. I cannot think that this document says that.

The final clause is the only part of the agreement that deals with patent rights. Clearly, the business would come to an end if the sole right of manufacture for the Commonwealth and New Zealand became the property of any other firm, or of a company, and in such an event there could be no further "profits from manufacture." If that happened, the respondent was to have 10 per cent. of the proceeds of sale. It appears to me that the clause is framed to give the respondent something to compensate him for the loss of his percentage of the profits from manufacture and of his weekly salary if the manufacture with which he was concerned—namely, the manufacture in Australia, and possibly in New Zealand—necessarily ceased on the event in question. It is to give him a compensation for both losses, and probably this is why it is placed at the end of the document, as a natural sequence.

Now, the firm were manufacturing here in Melbourne, not under patent rights relating to other countries, but under rights, the only ones as to which they were partners, extending only to the Commonwealth and New Zealand. The evidence is irresistible that Horace Marks was the sole owner of any patents obtained abroad. Surely the reason of the matter is that the respondent was to have his 10 per cent. on the disposal of the local rights because it was on their disposal that the manufacture, and with it his share of the profits from manufacture and sale, would cease. It seems plain that this clause applies only to a disposal of the patent rights in the Commonwealth and New Zealand, and only to such a disposal during the life of the agreement.

I should add that my construction of the first branch of the written agreement appears entirely consistent with the meaning

of the verbal contract alleged by the respondent in par. 7 of the statement of claim, and which *Madden C.J.* appears to have found proved. The 10 per cent. of the profits from the manufacture of the machine, as improved by 1st May 1911, would in the circumstances of this case appear to correspond with "10 per cent. of the profits to be obtained from the said *patent vertical chaff and root cutter*, and any improvements thereon" as viewed in March 1910.

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I agree that the appeal should be allowed, and that the order should be such as my learned brother has suggested.

ISAACS J. read the following judgment:—There are two contracts to be considered.

The first is the oral contract set out in par. 7 of the statement of claim. That has been found by the learned primary Judge, and I see no reason for disturbing it. It becomes a question of interpretation of that agreement. The consideration is twofold. It consists in the first place of continuing in the defendants' employment, which means as long as the defendants carry on their partnership business, and in the second place of endeavouring to improve the chaff cutter. In return for that the defendants' promise is, as I construe it, to give the plaintiff 10 per cent. of the profits to be made by the firm in their business of manufacturing and selling the chaff cutter and any improvements that may be made in it.

The expression "continuing in the employment" implies that the defendants will continue to manufacture, and this in my opinion is, unless qualified by some other terms, opposed to any notion of the "profits" mentioned arising from parting with the right of doing so.

"Employment" also seems to indicate that the profits contemplated are to arise in the sphere of operations within which the plaintiff is employed. Bentall's royalties therefore appear to me to be outside the verbal agreement.

Then we come to the written agreement.

Learned counsel for respondent relied strongly on the evidence of parol negotiations to assist in construing the contract. Two things are clearly established: (1) that negotiations may be

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considered in order to identify the subject matter (*Gordon-Cumming v. Houldsworth* (1)), and (2) that the ordinary legal construction of a word in a written contract cannot be controlled by reference to prior verbal communications (*Mercantile Bank of Sydney v. Taylor* (2)). The only expression that could raise doubt as to the subject matter is "the patent rights." Does that expression mean patent rights all over the world or only in Australia and New Zealand? The plaintiff's evidence does not disclose anything which could help us to this, because, so far as it relates to negotiations prior to the contract, nothing relevant appears. Indeed, in cross-examination, he says he did not then express a desire to include foreign parts, and never mentioned them. No other evidence on this point assists him.

We have consequently to pass by the negotiations leading up to the written agreement and to rely on the agreement itself, interpreted according to its own words as applied to the surrounding circumstances. Interpreting it in that way, its dominant feature is the creation by the defendants of a right in the plaintiff to "10 per cent. of our profits from manufacture."

Primarily that means the defendants' own manufacture in the business they were carrying on. There is nothing to alter that meaning, and the concluding paragraph strengthens it.

Then, what is the duration of that right? I have the misfortune to take a view on this point different from that of my learned brethren, and I shall state why I take that view.

The grant of 10 per cent. profits is "for special services, rendered in perfecting and successfully demonstrating" the machine &c. This is new, as contrasted with the verbal agreement. The letters and other evidence make it clear that Park did, before the contract, render very special services—an inventor's services in fact—quite outside those of an ordinary employee, and not to be measured by mere ordinary manager's wages of £4 a week.

He had done so much, that his special services even since the oral agreement was made received this recognition both in letters and in this agreement, quite apart from his ordinary routine duties. I have come to the conclusion, in unison with the rest of the Court, that this part of the consideration was entirely past.

(1) (1910) A.C., 537, at pp. 541, 544, 547-8.

(2) (1893) A.C., 317, at p. 321.

But the business was not yet thoroughly established, and so it was stipulated that he should, at all events for five years, continue his ordinary employment for which he was to receive an ordinary, though increased, remuneration of £5 a week, and if the business still continued he was to remain another five years. That was not a divisible agreement. The agreement is an entire agreement. The parties themselves call it "this agreement." As a general rule all agreements must be considered as entire: *Per Mellish L.J.* in *Wilkinson v. Clements* (1). That learned Judge proceeded:—"Generally speaking, the consideration for the performance of the whole and each part of an agreement by one party is the performance of the whole of it by the other." No doubt, as in the case just cited, an agreement may be found to consist of divisible stipulations; but that must be clearly shown. Fairness as a general rule demands that each party shall keep or be ready to keep his own part of the bargain if he claims the right to insist on the adherence to its terms by the other party; and the burden lies upon him to show the contrary. But while that is so, while there is the stated consideration and the specifically declared motive for the promise of 10 per cent., namely, the past special services—not in law a valuable consideration,—and while there is also the consideration of the performance of the agreement to serve; yet, once this latter consideration is given, it is like a price paid once and for all for an interest in the business, and the interest, if not limited by the terms of the agreement, continues as long as the business. It is analogous to a partnership, to the extent of interest, for which the necessary contribution has been completely made. It was in my opinion a substituted equivalent for the profits which would have continued but for the sale. I fail to see why the termination of the ordinary temporary services to be paid for by a separate ordinary consideration, and expressly limited in point of time, is to work a termination of an interest in a permanent improvement, originating in special services, not paid for otherwise than by 10 per cent. of the profits, and not expressly limited by any term of the contract. That is ignoring the declared intention of the parties, however insufficient in law

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(1) L.R. 8 Ch., 96, at p. 110.

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Further, where there are two fairly possible constructions, one leading to unreasonableness and injustice and the other to reasonableness and justice, the latter is to be preferred. Apply that to this contract. Assume at the end of five years the business was so flourishing by reason of the inventiveness and ability of the plaintiff as to lead to an advantageous sale of the patent rights in Australia, which necessarily entailed a cessation of the business, then on the construction adopted by the majority of the Court, Park would get nothing of this, because he would no longer be in the defendants' employ. The condition for extension of employment not arising, the stipulation for employment would be exhausted. If, however, he is to receive a share of the sale price notwithstanding his cesser of employment or the right of employment, then employment or the right to employment is immaterial, and he must equally get it at the end of ten years if so long employed, and, if so, there is no limit but the life of the business. It is a startling result that if his inventive mind assists to create and develop the business so as to bring about an advantageous sale at the end of five or even ten years, the only result to him should be the entire loss of current profits, and a situation at £5 a week; and if there should be no sale he should simply walk out with no further share in the profits due to his special inventive ingenuity.

It certainly seems to me a more reasonable and less incongruous interpretation that his permanent contribution to the general stock should find its equivalent in a correspondingly permanent interest, provided that for five, or if necessary ten, years he assists in developing and extending the business.

I agree, however, that whatever the duration of the benefit otherwise, its continuance depends upon the plaintiff's readiness and willingness to perform his part of the stipulation as to employment. If he has so conducted himself as to give just cause for dismissal—a matter yet unascertained—he cannot be said to have been ready and willing to continue to perform his part in that respect.

It was argued that in any event the defendants had received

a substantial part of the consideration, and that they could not repudiate their obligation as to profits but must find their remedy in damages. The same argument was advanced in the case of the *General Billposting Co. Ltd. v. Atkinson* (1), and was answered by Lord *Collins*, with the concurrence of Lord *Halsbury*, as I think it should be answered here, namely, that an equivalent has been given for the benefit relied on. The plaintiff did serve up to his dismissal; but he received £5 a week for his service. And he stands in this further difficult position. Without question the undertaking to serve at a salary is in law the only valuable consideration for the defendants' promise, and if it were so, his undertaking to serve during the period was obviously a vital term, a *sine quâ non* of their agreement to the bargain as a whole, and so his alleged failure to perform his part evinces, if established, "an intention no longer to be bound by the contract." This would bring into play the second part of Lord *Collins*' judgment in the case referred to.

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With the exception of the one point of difference mentioned, I agree with the relevant conclusions already expressed.

I desire to add that if it were necessary to come to a finding of fact as to whether the foreign patents were the sole property of Horace or the joint property of Horace and Walter, I should agree with the finding of *Madden* C.J. that they were the joint property of the partners.

GAVAN DUFFY J. I am disposed to think that the verbal agreement set up by par. 7 of the statement of claim entitles the plaintiff to profits of all kinds made in respect of the chaff cutter, and not merely to profits arising from the manufacture of machines by the defendants. With respect to the written contract it is not desirable that I should subject to further verbal criticism a very ill expressed document. I content myself with saying that I agree with the interpretation accepted by the Chief Justice and explained in his judgment, with this exception—that I express no opinion as to whether the foreign patents belong to the firm. I think it unnecessary to determine this question because in my opinion the final clause of the written agreement

(1) (1909) A.C., 118.

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does not apply to the foreign patents even if they are the property of the firm. It entitles the plaintiff to 10 per cent. of the profits of the sale of the patent rights under which the defendant firm was in fact manufacturing, and the firm was not manufacturing under the foreign patents.

Appeal allowed. Judgment appealed from discharged. Declarations as stated in the judgment of Griffith C.J. Parties to bear their own costs up to and including hearing. Respondent to pay costs of appeal which are not to be payable until conclusion of action and then to be set off against any costs that may be payable by the defendants to the plaintiff. Cause remitted to the Supreme Court for further hearing and determination in accordance with foregoing declarations.

Solicitors, for the appellants, *Pavey, Wilson & Cohen.*
Solicitor, for the respondent, *W. J. Robb.*

B. L.