offered on oath to the Court, would be conclusive on the question of the existence of necessity, but in this case we have no evidence on the subject from them or from any other person. The defence of justification under the King's prerogative in time of war therefore fails. No argument was addressed to us on the quantum of damages. The verdict must stand, and the appeal should be allowed.

Appeal allowed with costs. Motion to Full Court of Supreme Court dismissed with costs and verdict for the plaintiff for £1,321 3*s.* 5*d. restored.*

Solicitors for the appellant, *E. Prichard Bassett & Co.*, Sydney.

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

B. L.

[HIGH COURT OF AUSTRALIA.]

HARRIS . . . . . APPELLANT;
DEFENDANT,

AND

BYERLEY . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Contract—Construction—Agreement for services—Payment by commission on profits—Auditor's or accountant's certificate as to profits—Arbitration clause—Interdict Act 1867 (*Qd.*) (31 *Vict. No.* 11).

A written contract by which B. agreed to manage H.'s businesses provided that payment for such services was to be by a fixed salary and a commission on all net profits in excess of a certain sum, and that "for the purpose of computing the amount of the said commission and for all other purposes" the balance-sheet or profit and loss account of the businesses prepared and certified by H.'s auditor or accountant was to be conclusive and binding

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on both parties. The agreement also contained a clause providing for arbitration in accordance with the *Interdict Act of* 1867 (Qd.) in the case of any dispute or difference as to amount of remuneration, or as to the construction of the agreement, or as to any other matter or thing arising thereunder or in the course of B's employment.

Held, that within the ambit of the auditor's or accountant's authority, which was to make out a balance-sheet or profit and loss account of each year's transactions, so showing the net profits, his computations were final, but that his authority did not extend to determining the principles upon which an amount should or should not be taken into account as between the parties in such computations.

Decision of the Supreme Court of Queensland affirmed in part.

APPEAL from the Supreme Court of Queensland.

By an agreement dated 10th April 1912, between Albert Charles Byerley and William Joseph Phelps Harris, it was agreed (*inter alia*) that Byerley should manage Harris's two drapery businesses, situated respectively at Rockhampton and Mount Morgan, upon certain terms, of which the following are material :—The remuneration of the said Albert Charles Byerley for such services shall consist of a fixed salary of six pounds per week and by way of further remuneration a commission of half the net profits derived from the businesses over and above the net profit of three thousand pounds per annum (clause 2). For the purpose of computing the amount of the said commission and for all other purposes (if any) the balance-sheet or profit and loss account of the said businesses prepared and certified by the auditor or accountant for the time being of the said William Joseph Phelps Harris shall be conclusive and binding on both parties (clause 12). In case of any dispute or difference arising between the parties hereto as to the amount of the remuneration payable under any of the foregoing stipulations or as to the validity of any notice given hereunder or as to the construction of these presents or as to any other matter or thing arising hereunder or in the course of the employment of the said Albert Charles Byerley every such dispute and matter in difference shall be referred to a single arbitrator if the parties can agree upon one or otherwise to two arbitrators to be appointed by the said William Joseph Phelps Harris and Albert Charles Byerley respectively and their umpire in accordance with the provisions of the

Interdict Act of 1867 or any Statute for the time being replacing, extending or modifying the same (clause 16). In accordance with the agreement Harris's auditor or accountant from time to time made up balance-sheets and profit and loss accounts. Byerley disputed the correctness of these accounts in respect of many items, and brought an action in the Supreme Court against Harris, in which he claimed (1) that an account may be taken of what is due by the defendant to the plaintiff under the said agreement; (2) that the defendant may be ordered to pay to the plaintiff the amount found due on the taking of such account; (3), in the alternative, that the accounts of the defendant purporting to show the amount due to the plaintiff under the said agreement may be reopened and a proper account taken or that leave may be given to the plaintiff to surcharge and falsify. The defence, in addition to upholding the correctness of individual items in the account, contended that by reason of the provisions of clause 12 of the agreement the plaintiff was not entitled to question the accuracy of the balance-sheets and profit and loss accounts certified by the defendant's auditor or accountant, or the propriety of the charges and deductions shown in the said balance-sheets and accounts. The action was tried before *Chubb* J., who decided that the plaintiff was entitled to an account to ascertain what was due to him by the defendant under the agreement, and to an order for payment of the amount to be found due to him on the taking of the account, and gave costs to the plaintiff.

From this decision the defendant now appealed to the High Court.

Feez K.C. and *Douglas*, for the appellant.

Macgregor and *Walsh*, for the respondent.

[GRIFFITH C.J. It appears to us that two entirely distinct questions are raised in this appeal, one as to the construction of certain clauses of an agreement, by which it is contended that the jurisdiction of the Supreme Court is ousted, the other as to the correctness of an account in certain matters of detail. We suggest to counsel that they should first argue the former point. The other can then

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be argued, if the first is not already disposed of in favour of the appellant.]

Feez K.C. and *Douglas*. Dealing with the first question, the position is this :—Under clause 12 the auditor or accountant, having certified as to the correctness of the accounts and the proper amounts payable to each party, has finally decided the matter; the parties and the Court are bound by his decision. Except in the case of fraud, which does not arise here, such decision cannot be reviewed. (See *Halsbury's Laws of England*, vol. III., p. 285, par. 596.) The arbitration clause (clause 16) is only meant to be used in the event of there being a dispute between the parties before the auditor or accountant has given his certificate. Clause 12 of the agreement is clear, and means what it says ; and its interpretation is facilitated by a consideration of decisions on building contracts, where an architect's certificate has been held to be final. (See *Lloyd Bros.* v. *Milward* (1) ; *Chambers* v. *Goldthorpe* (2).)

[GAVAN DUFFY J. There is a difference in principle between the construction of contracts of this kind and building contracts. In the latter considerable experience and skill are required to assess values, &c., but in the former all that is required is a knowledge of the merely mechanical process of adding up figures.]

The words " and for all other purposes " in clause 12 are strongly relied on as making the certificate of the auditor or accountant conclusive against the respondent in the matters involved in this case.

Macgregor and *Walsh* were not called upon on this point.

GRIFFITH C.J. The agreement of 10th April 1912 is an agreement between the appellant and the respondent, and governs their rights. Our duty is to say what they are. The agreement was an agreement for services, under which the respondent was to manage a business or businesses for the appellant for a remuneration part of which consisted of 50 per cent. of the net profits of the businesses in excess

(1) 2 *Hudson's Building Contracts*, 4th ed., p. 262.

(2) (1901) 1 Q.B., 624, at pp. 627, 634, 635, 638.

of £3,000 per annum. It was obviously necessary that in order to ascertain the amount of those profits a calculation, based upon the business operations, should be made by someone. The parties agreed that it should be made by the accountant or auditor of the businesses, and that his computations should be final.

Clause 12 of the agreement was as follows : " For the purpose of computing the amount of the said commission and for all other purposes (if any) the balance-sheet or profit and loss account of the said businesses prepared and certified by the auditor or accountant for the time being of the said W. J. P. Harris shall be conclusive and binding on both parties."

Within the ambit of his authority, therefore, the computation of the auditor was to be final. But what was his authority ? It was to make out a balance-sheet or " profit and loss " account of each year's transactions, so showing the net profits of the businesses. But it did not extend any further. Clause 12 must be read with the rest of the agreement, including clause 16, called the Arbitration Clause, which provided that in the case of any dispute or difference arising between the parties as to the amount of the remuneration payable under any of the foregoing stipulations, or as to the validity of any notice, or as to the construction of those presents, or as to any other matter or thing arising thereunder or in the course of the employment of the respondent, every such dispute and matter in difference should be referred to arbitration in accordance with the *Interdict Act of* 1867. The terms of this clause are unlimited.

The appellant contends that the power of the auditor extended not only to deciding matters of computation, but to determining finally what matters should be taken into account as receipts or disbursements proper to be regarded as part of the business transactions, irrespectively of their real nature. One matter so dealt with is the income tax on the profits of the businesses, the whole of which has been debited against the appellant. It is impossible, reading the agreement as a whole, especially in face of the unlimited terms of the Arbitration Clause, to hold that the auditor had such an unlimited power. In my opinion his authority did not extend to determining the principles upon which an amount should or should not be taken into account. If he did

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Griffith C.J.

so, his certificate was, to that extent, waste paper. Whether the particular matters complained of by the appellant were matters within or beyond his jurisdiction is the other point in the appeal. So far as the first point is concerned, in my judgment it fails, and the Court, whose jurisdiction is not ousted by clause 16, must proceed to deal with the objections in detail.

GAVAN DUFFY J. I agree.

POWERS J. I agree.

RICH J. I agree.

As to the other question raised in the appeal—namely, as to the correctness of the accounts in respect of the various items which the appellant contended were wrongly directed by the Judge at the trial to be allowed to the respondent—the parties, after the above judgment had been delivered, arrived at an agreement by virtue of which the judgment of *Chubb* J. was to be varied by entering judgment for the respondent for £1,500 with costs of the action to be taxed; and, in addition, the amount of £2,348 14s. 9d. paid into Court together with the accrued interest thereon was to be paid out to the respondent's solicitors, and the costs of the appeal, agreed at £150, were to be paid by the appellant to the respondent.

Order accordingly.

Solicitors for appellant, *Foxton, Hobbs & Macnish*, for *B. M. Lilley*, Rockhampton.

Solicitors for respondent, *Crouch & Eden.*