[HIGH COURT OF AUSTRALIA.]

DUDLEY BUILDINGS PROPRIETARY LIMITED . . . . . } APPELLANT;
PLAINTIFF,

AND

ROSE AND OTHERS . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 9.

SYDNEY, *April* 21.

Rich, Starke, Dixon Evatt and McTiernan JJ.

Contract—Sale of land—Company to be formed—Sale to trustees for proposed company—Vendor to "recognize" company when formed as purchaser—After payment of named sum vendor to exonerate original purchasers from liability—Company formed and amount stipulated paid—Novation—Whether effected—Liability of original purchasers.

The appellant entered into a contract for the sale of land and buildings in Melbourne to certain individuals. The contract contained the following clause:—"13. It is the intention of the purchasers to form and register under the provisions of the *Companies Act* 1915 a proprietary company for the purpose of acquiring the said property. The persons named in this contract are acting as trustees and/or agents for such proprietary company. The vendor will upon the formal notification of the registration of such company and the production of its certificate of incorporation recognize it as the purchaser and will after payment of £5,000 of the purchase money exonerate the said persons from all liability hereunder." A proprietary company was duly registered with objects which included the acquisition of the property. On the same day the appellant was formally notified of the registration and the certificate of incorporation was produced to it. The purchasers paid the deposit and instalments of purchase money due to 20th May 1930 amounting to £5,000, but did not pay the instalment falling due on 20th May 1931. The appellant thereupon brought an action against the purchasers and the newly-formed company to recover the amount of the deposit.

Held, by *Rich*, *Starke* and *Dixon* JJ. (*Evatt* and *McTiernan* JJ. dissenting), that the purchasers were liable to pay the instalment:

By *Rich* J., on the ground that clause 13 of the contract contemplated the new company's accepting the position of purchaser, and in point of fact the new company did not offer to undertake the obligations of purchaser and was never put in the position of purchaser;

By *Starke* J. on the ground that no new contract between the new company and the vendor was made after the new company was incorporated, and under clause 13 of the contract the purchasers were not exonerated on the payment of £5,000;

By *Dixon* J., on the ground that there was no evidence to show that in fact the company undertook or offered to undertake any direct liability as purchaser to the appellant, either upon the terms and conditions contained in the contract of sale or otherwise.

Per Evatt J.: The conduct of the new company and the vendor indicated a tacit acknowledgment of the entry of the new company into the transaction as party principal in place of the individual purchasers, and, as £5,000 had actually been paid, the individual purchasers were exonerated from all liability under the contract.

Per McTiernan J.: The individual purchasers were exonerated from further performance of the contract after the payment of the sum of £5,000.

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

APPEAL from the Supreme Court of Victoria.

The appellant, Dudley Buildings Pty. Ltd., brought an action in the Supreme Court of Victoria against the respondents, William Jasper Rose, Stephen Egerton Bailey, John Plunkett Cranny, Henry Edward Pett, Walter James Gorman, Aubrey Evelyn Taylor, The Perpetual Executors and Trustees Association of Australia Ltd. (administrator with the will annexed of the estate of Thomas Paul Anthony deceased) Barry Kenlis Taylor and Collins Street West Investment Pty. Ltd.

The statement of claim indorsed on the writ was substantially as follows:—

1. The plaintiff is a company incorporated in the State of Victoria.

2. The defendant, Collins Street West Investment Pty. Ltd. is a company incorporated in the State of Victoria.

3. By a contract in writing made on 20th May 1926 the plaintiff agreed to sell and the defendants Rose, Bailey, Cranny, Pett, Gorman, A. E. Taylor, Thomas P. Anthony and B. K. Taylor, agreed to

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buy certain land in the city of Melbourne therein described together with all buildings and erections thereon and known as Dudley Buildings for the price of £34,000 and under and subject to the conditions of sale therein contained.

4. By the said conditions it was provided (*inter alia*) that the defendants named in par. 3 hereof should on the signing of the said contract pay to the plaintiff a deposit of £1,000 and should pay the residue of purchase money as follows :—A further sum of £1,000 on 20th May in each of the years 1927-1935 inclusive, and the balance then remaining owing on 20th May 1936. By the said conditions it was further provided that the defendants named in par. 3 hereof should take over the liability of the plaintiff in respect of certain mortgages on the said land therein more particularly described.

5. The defendants named in par. 3 hereof duly paid to the plaintiff the sum of £1,000 on 20th May in each of the years 1927, 1928, 1929 and 1930, but have not paid to the plaintiff the sum of £1,000, which according to the conditions of the said contract became due and payable by them to the plaintiff on 20th May 1931.

6. Alternatively with par. 5 hereof the plaintiff says :—(*a*) By the said conditions it was further provided as follows :—" It is the intention of the purchasers to form and register under the provisions of the *Companies Act* 1915 a proprietary company for the purpose of acquiring the said property. The persons named in this contract are acting as trustees and/or agents for such proprietary company. The vendor will upon formal notification of the registration of such company and production of its certificate of incorporation recognize it as the purchaser and will after payment of £5,000 of the purchase money exonerate the said persons from all liability hereunder." (*b*) By letter dated 2nd March 1931 the solicitors of the said defendants named in par. 3 hereof informed the solicitor of the plaintiff that the defendants named in par. 3 hereof had formed a proprietary company for the purpose of taking over and carrying on the said contract and produced the certificate of incorporation of the defendant Collins Street West Investment Pty. Ltd. (*c*) The defendant Collins Street West Investment Pty. Ltd. has not paid to the plaintiff

the sum of £1,000 referred to in par. 5 hereof which became due and payable by it to the plaintiff on 20th May 1931.

And the plaintiff claims : As against the defendants Rose, Bailey, Cranny, Pett, Gorman, A. E. Taylor, The Perpetual Executors and Trustees Association of Australia Ltd. (administrator with the will annexed of the estate of Thomas Paul Anthony deceased) and B. K. Taylor or alternatively as against the defendant Collins Street West Investment Pty. Ltd. £1,000.

The defence of the defendants Rose, Bailey, Cranny, A. E. Taylor and B. K. Taylor was as follows :—

1. They admit pars. 1 and 2 of the statement of claim.

2. Subject to the production at the trial of the contract in writing therein mentioned they admit par. 3 thereof.

3. They do not admit that par. 4 thereof correctly or fully sets out the provisions which it purports to set out of the said contract or the effect thereof.

4. They deny that the sum of £1,000 or any sum became due or due and payable by them or any of them to the plaintiff on 20th May 1931. Save as aforesaid they admit par. 5 thereof.

5. They admit par. 6 thereof.

6. They say that by reason of the condition of the said contract set out in par. 6 (*a*) of the statement of claim and the facts set out in par. 6 (*b*) thereof they were before 20th May 1931 exonerated from all further liability to the plaintiff under the said contract and are not liable to the plaintiff for the sum claimed in this action.

7. Alternatively to par. 6 hereof they say that—by reason of (*a*) the condition of the contract set out in par. 6 (*a*) of the statement of claim ; (*b*) the facts set out in par. 6 (*b*) thereof ; (*c*) the fact that since the incorporation of the defendant Collins Street West Investment Pty. Ltd. the said defendant company has by its acts and by the acts and conduct of its agents or servants accepted liability as the purchaser under the said contract of sale and agreed to be bound thereby in the place of (*inter alios*) the above-named defendants, Rose, Bailey, Cranny, A. E. Taylor and B. K. Taylor ; (*d*) the fact that since the incorporation of the said defendant company the plaintiff has recognized and accepted the said defendant company as the purchaser under the said contract of sale and as being bound

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thereby in the place of (*inter alios*) the said defendants, Rose, Bailey, Cranny, A. E. Taylor and B. K. Taylor—they, the said defendants, were before 20th May 1931 exonerated and/or released from all further liability to the plaintiff in respect of the said contract and are not liable to the plaintiff for the sum claimed in this action.

The defence of The Perpetual Executors and Trustees Association of Australia Ltd. was substantially the same as that of the above-named defendants.

The defence of Collins Street West Investment Pty. Ltd. was as follows :—

1. It admits pars. 1 and 2 of the statement of claim.

2. Subject to the production at the trial of the contract in writing therein mentioned it admits par. 3 thereof.

3. Save that it admits that by the conditions of the said contract it was provided (*inter alia*) that the sum of £1,000 was to be paid by the defendants named in par. 3 of the said statement of claim to the plaintiff on 20th May 1931, it does not admit par. 4 thereof.

4. It admits pars. 5 and 6 thereof.

By its reply the plaintiff alleged that it would rely upon sec. 128 of the *Instruments Act* 1928 and/or the corresponding prior enactment.

For the purposes of this action mutual admissions of fact substantially as follows were made by the parties :—

1. The plaintiff, Dudley Buildings Pty. Ltd., is a company incorporated by the law provided for that purpose in the State of Victoria, and the registered office of the company is, and at all material times in this action was, situate at 273 Collins Street, Melbourne, and the secretary of the company is, and at all material times in this action was, Alfred William Dolamore, whose place of business was at all material times at 422 Little Collins Street, Melbourne.

2. On 20th May 1926 the plaintiff Company entered into a contract in writing with Rose, Bailey, Cranny, Pett, Gorman, A. E. Taylor, Thomas Paul Anthony and B. K. Taylor for the sale and purchase of certain land and buildings in the city of Melbourne.

3. On 12th August 1929 Thomas Paul Anthony, one of the purchasers referred to in par. 2 above, died, and The Perpetual Executors and Trustees Association of Australia Ltd. became the administrator with the will annexed of the estate of the said Thomas Paul

Anthony, and as such has been made a defendant in this action. The purchasers referred to in par. 2 above with the substitution of the above mentioned Trustee Company for the above-mentioned Thomas Paul Anthony are hereinafter referred to as the first-named defendants.

4. On 2nd March 1931 the defendant Collins Street West Investment Pty. Ltd. was incorporated under the law provided for that purpose in the State of Victoria. The said company was formed and registered by the first-named defendants as aforesaid. Hereinafter in these admissions the said company is referred to as the second-named defendant.

6. On 20th August 1926 the first-named defendants under and by virtue of the contract referred to in admission No. 2 entered into possession of the land and buildings thereby contracted to be sold, and took over the leases between tenants of various portions of the said building and the plaintiff, which leases were current at that date, and thereafter until the incorporation of the second-named defendant on 2nd March 1931 rents payable under such leases were paid to the said first-named defendants, and the first-named defendants conducted the business of leasing the premises and receiving rents for the same.

7. The negotiations for the contract of sale and purchase mentioned in admission No. 2 were carried out by personal interviews between Milton Livingstone Davey, solicitor, on behalf of the plaintiff Company, and the said Messrs. A. E. and Barry Taylor, agents, and Messrs. Macpherson and Kelley, solicitors, on behalf of the first-named defendants. The draft of the said contract was settled between the said solicitors.

8. Pursuant to the obligations for payment contained in the contract of sale referred to in admission No. 2, the under-mentioned payments were made upon the dates set opposite each amount.

[Hereafter was set out a list of payments totalling £7,792 17s. 8d. made between 13th October 1926 and 31st March 1931.]

Each of such payments was made by means of a cheque for the amount set out above drawn (up to and including the payment on 5th January 1931) either by A. E. and Barry Taylor or by T. P. Anthony and Barry Taylor or by J. P. Cranny and Barry Taylor on

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an account in the name of "J. P. Cranny and Barry Taylor-Dudley Buildings A/c." and (as regards the said payments on 18th and 31st March 1931) by J. P. Cranny and Barry Taylor on the said account in the name of "J. P. Cranny and Barry Taylor-Dudley Buildings A/c." The said cheques were made payable to Dudley Buildings Pty. Ltd. and were posted or handed to the secretary of the plaintiff Company either at 422 Little Collins Street or 271 Collins Street or 101 Swanston Street, Melbourne, and a receipt for each of such payments signed by or on behalf of A. W. Dolamore as secretary of the plaintiff Company was addressed to "A. E. and Barry Taylor" either at Temple Court or Dudley Buildings, Collins Street, Melbourne. Since 31st March 1931 no payment under or pursuant to the said contract has been made by the defendants or any of them to the plaintiff.

9. At all material times up to the issue of the writ herein, Messrs. Macpherson and Kelley have acted as solicitors for and on behalf of the first-named defendants and after the incorporation of the second-named defendant as aforesaid for and on behalf of such defendant, and at all material times Milton Livingstone Davey Esq., has acted as solicitor for the plaintiff.

10. From 2nd March 1931 up to 30th June 1931 when the writ in this action was issued, certain correspondence took place between the solicitors above mentioned, and also between Messrs. Macpherson and Kelley and Alfred William Dolamore, the secretary of the plaintiff Company. The enclosures mentioned in the letter dated 2nd March 1931 from Messrs. Macpherson and Kelley to Mr. Milton Davey were received by the said Milton Davey. On 18th March 1931, and on 31st March 1931, letters accompanying the payments of £26 5s. and £162 referred to in admission No. 8 were forwarded by the firm of A. E. and Barry Taylor as managing agents to the secretary of the plaintiff Company.

The contract of sale referred to in par. 3 of the statement of claim and par. 2 of the admissions provided (*inter alia*) that the conditions in Table A of the *Transfer of Land Act* 1915 should apply to the contract with and subject to the additions and modifications contained therein. Clause 11 of the contract provided that "if the

purchaser . . . shall not pay the instalments of purchase-money . . . the deposit and all other purchase money paid by the purchasers shall be actually forfeited to the vendor." Clause 13 of the contract contained the terms set out in par. 6 (*a*) of the statement of claim above set out.

At a meeting of shareholders of Collins Street West Investment Pty. Ltd. held on 13th March 1931 5,000 fully paid shares were allotted to six of the individual respondents and an agreement, dated 20th February 1931 between Dudley Buildings Syndicate and Collins Street West Investment Pty. Ltd. was duly sealed.

The action was tried by *Mann* J., who held that the defendants had been exonerated under the 13th condition of the contract of sale. The plaintiff did not press the alternative claim against Collins Street West Investment Pty. Ltd. His Honor accordingly gave judgment for the defendants.

From that decision the plaintiff now appealed to the High Court.

Fullagar (with him *P. D. Phillips*), for the appellant. The individual contracting on behalf of a non-existing company is personally liable (*Kelner* v. *Baxter* (1); *Scott* v. *Lord Ebury* (2); *Story* on *Agency*, 9th ed. (1882), secs. 280-282). Therefore, when the contract states that the vendor will " recognize " the proposed company as the purchaser, this constitutes an agreement to enter into a novation. It cannot be regarded as merely an agreement to discharge the purchasers when the company is formed, whether the company becomes liable or not. There has been no novation and the original purchasers remain liable.

Tait, for the respondents. In effect the appellant is seeking to imply a new term in clause 13 of the contract of sale. This is not necessary to give business efficacy to the contract and, therefore, should not be done (*The Moorcock* (3); *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*) (4); *L. French & Co.* v. *Leeston Shipping Co.* (5)).

Fullagar, in reply.

Cur. adv. vult.

(1) (1866) L.R. 2 C.P. 174.
(2) (1867) L.R. 2 C.P. 255.
(3) (1889) 14 P.D. 64.
(4) (1918) 1 K.B. 592, at p. 605.
(5) (1922) 1 A.C. 451, at p. 454.

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April 21.

The following written judgments were delivered :—

RICH J. I have had the advantage of reading the judgment of my brother *Dixon* and in view of the account of the facts it contains it is unnecessary for me to restate them. The question in this appeal turns upon the interpretation of a provision relating to a matter necessarily involving many technical considerations, namely, the transfer *de futuro* to a company not yet formed of the rights derived by a purchaser under a contract of sale and, subject to the fulfilment of conditions, the discharge of the original purchaser. Unfortunately the contract is conceived in no technical spirit and is not expressed in terms of art. Differences of opinion as to what it should be taken to mean are in these circumstances inevitable. I am in agreement with the view in effect expressed by *Mann* J. that we should not supplement by implications the intentions of the parties appearing from the text merely because we think they are required to give symmetry and cohesion to the transaction. But, upon full consideration, I have come to the conclusion that what is stated in the text of the contract necessarily involves the result claimed by the appellant. When clause 13 says that " the vendor will upon formal notification of the registration of such company and production of its certificate of incorporation recognize it as the purchaser " it must mean if the new company is ready to accept the position of purchaser. Let it be supposed that the original purchasers promoted a company and caused it to be registered and were in a position to produce its certificate of incorporation but that the company, through some mischance, not inconceivable in the world of company promotion where harmony is not always certain, suddenly disclaimed the transaction and refused to go on with the proposal: in such an event I do not see how the vendors could recognize it as the purchaser. The clause must be interpreted as requiring some readiness and willingness on the part of the company to proceed with the acquisition of the property. I take it the company must be ready and willing to accept the situation of purchaser and be recognized as such. What, then, is implicit in the statement that the company is ready to become and to be recognized as the purchaser ? The situation of purchaser is one of rights and obligations. The description " purchaser " imports an obligation to buy as well as a right to

acquire. The company must, in my opinion, be one ready and willing to undertake the obligations of the contract. Recognition of it by the vendor means that it is accepted as the purchaser undertaking those obligations. In point of fact the company did not offer to undertake the obligations and it never was put in the position of purchaser. Possibly the company might, if called upon, have been ready to assume the obligations of purchaser, but this is not enough; the respondents were bound to procure the company actually to undertake or to offer to undertake those obligations by a binding contract. I am unable to agree in the construction of the contract which treats it as releasing the obligations of the original purchaser without the new purchaser undertaking the obligations of the contract so that the vendor remains bound to sell but there is no purchaser bound to buy.

For these reasons I think the appeal should be allowed.

STARKE J. By a contract in writing made on 20th May 1926, the appellant, the vendor, sold to the respondents, the purchasers, certain land in the city of Melbourne, together with all buildings and erections thereon, for the sum of £34,000. The conditions of the contract provided that the purchasers should on the signing of the contract pay to the vendor a sum of £1,000 as a deposit on account of the purchase money, and the residue as follows: a further sum of £1,000 on 20th May in each of the nine years succeeding the year 1926, take over the liability of the vendor in respect of certain mortgages, and pay the balance remaining owing on 20th May 1936. A further condition was as follows: "It is the intention of the purchasers to form and register under the provisions of the *Companies Act* 1915 a proprietary company for the purpose of acquiring the said property. The persons named in this contract are acting as trustees and/or agents for such proprietary company. The vendor will upon formal notification of the registration of such company and production of its certificate of incorporation recognize it as the purchaser and will after payment of £5,000 of the purchase money exonerate the said persons from all liability hereunder." In March of 1931, the purchasers formed a proprietary company for the purpose of taking over and carrying out the contract of 20th

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May 1926, and so notified the vendor. On 13th March 1931 there is a minute of the proprietary company to the effect that an agreement dated 20th February 1931 between Dudley Buildings Syndicate and the company was duly sealed. This agreement is not in evidence, but it was not disputed at the Bar that it related to some agreement, to which the vendor is no party, between the purchasers and the company. The purchasers paid the deposit, and the sum of £1,000 in each of the years 1927, 1928, 1929 and 1930, but they did not pay the instalment of £1,000 falling due on 20th May 1931. The vendor brought an action against the purchasers in the Supreme Court of Victoria for this instalment (*Reynolds* v. *Fury* (1)). The purchasers claimed that the condition of the contract above set out exonerated them. *Mann* J. upheld this view, and did not think that the condition stipulated for any new contract between the vendor and the company.

It is well settled that " a company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence " (*Kelner* v. *Baxter* (2); *Natal Land, &c., Co.* v. *Pauline Colliery Syndicate* (3)). In order to do so, a new contract must be made with it after its incorporation on the terms of the old one (*Natal Land, &c. Co.* v. *Pauline Colliery Syndicate*). Merely adopting a contract of purchase made before the company's formation by persons purporting to act on its behalf does not bring about any contractual relation with or obligation to the vendor (*North Sydney Investment and Tramway Co.* v. *Higgins* (4); *In re Northumberland Avenue Hotel Co.* (5)). There is no finding, and no evidence, I think, that any new contract was entered into between the vendor and the proprietary company.

But the purchasers insist that no such contract is necessary. All that is necessary according to them is that the vendor will recognize the company as the purchaser. But as the purchaser from whom? Clearly, I should say, the purchaser from the vendor. And if from the vendor, how is the company to be recognized as such purchaser unless there be some contractual relation or obligation between

(1) (1921) V.L.R. 14; 42 A.L.T. 122.
(2) (1866) L.R. 2 C.P. 174.
(3) (1904) A.C. 120.
(4) (1899) A.C. 263.
(5) (1886) 33 Ch. D. 16.

them ? That such a relation was intended is borne out, I think, by the statement in the condition that the purchasers named in the contract are acting as trustees or agents for a company intended to be formed. Another view of the condition suggested by the purchasers was that they were exonerated so soon as the sum of £5,000 was paid, whether the company was formed or not, and, if formed, whether a new contract was entered into between it and the vendor or not. I cannot think this the meaning of the parties. Some liability under the contract is intended and stipulated, either on the part of the purchasers or on the part of the company to be formed. But even a contractual obligation on the part of the company to be formed is, under the terms of the condition, not to exonerate the purchasers until the sum of £5,000 has been paid.

In my opinion the judgment below should be reversed, and judgment given for the appellant.

DIXON J. On 20th May 1926 the appellant entered into a contract of sale with the respondents. The subject of the sale was land and buildings in the city of Melbourne. The appellant, by its agents, acknowledged that it had sold the property to the respondents, using that expression to include the predecessors in title of some of them, for the sum of £34,000, and the respondents that they had purchased it for that sum on the conditions therein contained, and the respondents agreed to complete the purchase in accordance with such conditions. The purchase money was payable £1,000 as a deposit, £9,000 in nine annual instalments of £1,000 each, £19,000 by the purchasers' undertaking the liability upon two mortgages given over the property for that sum, and the balance of £5,000 on 20th May 1936. The thirteenth condition of sale was as follows :— " It is the intention of the purchasers to form and register under the provisions of the *Companies Act* 1915 a proprietary company for the purpose of acquiring the said property. The persons named in this contract are acting as trustees and/or agents for such proprietary company. The vendor will upon formal notification of the registration of such company and production of its certificate of incorporation recognize it as the purchaser and will after payment of

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£5,000 of the purchase money exonerate the said persons from all liability hereunder."

The payments of purchase money amounted to £5,000 on 24th May 1930. On 2nd March 1931 a proprietary company was registered by the respondents with objects which included the acquisition of the property. On the same day the appellant was formally notified of the registration, and the certificate of incorporation was produced to it. The evidence does not clearly show what steps the company took to assume the position of purchaser, but apparently before its incorporation a preliminary agreement had been made between the respondents and a trustee for it for the assignment to it of the contract of sale in consideration of 5,000 fully paid up shares of £1 each. At any rate, at the first ordinary meeting held on 13th March 1931, such shares were allotted and an agreement dated 20th February 1931 was sealed, and on 8th May 1931 the respondents appear to have assigned to the company by deed all their right, title and interest in the contract of sale and the property. The next instalment of £1,000 fell due under the contract on 20th May 1931, but it was not paid. On 30th June 1931 the appellants commenced the action, out of which the appeal arises, to recover the instalment from the respondents and, in the alternative, from the company. The action was tried by *Mann* J., who held that the respondents had been exonerated under the thirteenth condition of sale. The appellant did not persist in the alternative claim against the company but submitted to judgment thereon and appealed to this Court from the decision of *Mann* J. in favour of the respondents. The question of the respondents' liability depends upon the interpretation of the thirteenth condition of sale. There is no evidence, in my opinion, to show that in fact the company undertook or offered to undertake any direct liability as purchaser to the appellant, either upon the terms and conditions contained in the contract of sale, or otherwise. If the condition means, as *Mann* J. thought it did mean, that the respondents are relieved in such circumstances, then the purchasers' obligations under the contract no longer bind anyone. The respondents say that there is nothing surprising in such a result, because the condition stipulated for payment of £5,000 and another

condition provided that, if default were afterwards made, all instalments of purchase money were to be forfeited; and after all the liability of a proprietary company would or might be worth little or nothing. *Mann* J., in his reasons for judgment, remarked on the need for caution against attributing to the parties an intention to agree upon more effective and workmanlike terms than those their language expresses. Notwithstanding these considerations, I have come to the conclusion that, upon the proper interpretation of the condition, it did not operate to relieve the respondents of liability, because the company neither incurred nor offered to incur to the appellant the liabilities of purchaser. When the two expressions, which occur in the thirteenth condition, "form . . . a . . . company for the purpose of acquiring the . . . property" and "recognize it as the purchaser" are considered together, they describe a situation in which the persons, who contract as purchasers, procure a company to occupy the position of the purchaser of the property under the contract and the vendor accepts it as the purchaser. The position of purchaser involves contractual obligations as well as rights. The very expression "purchaser" connotes some of these obligations. It is true that the "recognition" may take place before the £5,000 is paid, and, therefore, before the original purchasers are to be exonerated. But this means no more than that the exclusion of the liability of the old purchasers is not to be a necessary consequence of the acceptance of the new purchaser. The old purchasers shall not be discharged unless the additional requirement of payment of £5,000 is complied with. The word "recognize" is not a term of art. Indeed it is anything but artistic. But it is capable of meaning "accept" or "adopt," and this meaning when applied to the company formed to acquire the property suggests that the vendor is to accept or adopt the new company as the purchaser of the property from the vendor, as the new purchaser who assumes the same rights and liabilities as the old. The improbability of the parties intending that no one should be liable as purchaser upon the contract is great, and, once it is conceded that they supposed that the company would become liable, little reason remains for interpreting the vague expressions employed in the condition as absolving the original purchasers before they had

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procured the company to become a purchaser in the full sense, namely, one who contracts to buy the property.

For these reasons I think the appeal should be allowed.

Judgment in the action for £1,000 should be entered for the plaintiff against the defendants respondents : as against the administrator *de bonis testatoris et* as to costs *si non de bonis propriis.*

EVATT J. On May 20th, 1926, a syndicate consisting of the individual respondents, Rose and others, signed an agreement to purchase from the appellant Company certain lands situate in the City of Melbourne. The agreement provided for a deposit of £1,000 on the signing thereof, and for payment of further instalments of £1,000 on account of purchase money upon each May 20th in the years 1927 to 1935 inclusive. The other terms of the contract except condition 13, need not be further set out.

Condition 13 provided :—

> "It is the intention of the purchasers to form and register under the provisions of the *Companies Act* 1915 a proprietary company for the purpose of acquiring the said property. The persons named in this contract are acting as trustees and/or agents for such proprietary company. The vendor will upon formal notification of the registration of such company and production of its certificate of incorporation recognize it as the purchaser and will after payment of £5,000 of the purchase money exonerate the said persons from all liability hereunder."

The syndicate duly paid the deposit of £1,000 and the instalments falling due upon May 20th in each of the years 1927, 1928, 1929 and 1930, so that by May 20th, 1930, the sum of £5,000 in all had been received by the appellant. The present action was brought by it to recover the instalment alleged to be due and payable by the individual members of the syndicate on May 20th, 1931. But, prior to that date, the appellant had received the following letter from the individual respondents :—

> "M. L. Davey, Esq., Solicitor, Melbourne.—2nd March, 1931.—Dudley Buildings.—Dear Sir,—We have been instructed to inform you that the purchasers of Dudley Buildings have formed a proprietary company for the purpose of taking over and carrying on the contract dated the 20th of May, 1926. In pursuance of the provisions of clause 13 of the contract we now have pleasure in producing the following documents for your perusal. 1. Certificate of incorporation of Collins Street West Investment Proprietary Limited. 2. Copy memorandum and articles of association. The preliminary agreement will be produced after sealing by the company. Yours truly, Macpherson & Kelley."

It appears from the minutes of the proprietary company, which is also a respondent to this appeal, that a preliminary agreement between it and its promoters, the individual respondents, was entered into on February 20th, 1931, and duly sealed by the company on March 13th, 1931.

The letter set out above and dated March 2nd, 1931, from the solicitors for the respondents to that of the appellant was, without doubt, a "formal notification of the registration" of the new company, and there was also a due "production of its certificate of incorporation." Therefore it became the duty of the appellant under clause 13 to "recognize" the company "as the purchaser." Did it do so ?

On May 5th, 1931, the solicitors for the company wrote the following letter to the solicitor for the appellant :—

"Macpherson & Kelley.—5th May, 1931.—M. L. Davey, Esq., Solicitor Melbourne.—*re* Dudley Buildings Pty. Ltd.—Dear Sir,—We are informed by *Collins Street West Investment Proprietary Limited* that owing to the failure of your clients to satisfactorily rearrange the mortgage for £17,500 now overdue it has been compelled to suspend all negotiations with prospective purchasers and lessees. The position is very unsatisfactory and we are instructed by the company to state that unless the said mortgage is renewed or rearranged on the existing terms and conditions within seven days it will claim—(1) Rescission of the contract. (2) A refund of all money paid. (3) Damages.—Kindly give this matter your urgent attention.—Yours truly, Macpherson & Kelley."

The words I italicize from this letter, were a further intimation that, in relation to the contract of purchase, the proprietary company was assuming the position, and attempting to exercise the full rights, of a purchaser under the contract. This intimation was not questioned in any way by the appellant, and the letters of May 5th, 1931, May 13th, 1931, and May 22nd, 1931, rather indicate a tacit acknowledgment of the entry of the company into the transaction as party principal in place of the syndicate. However, the appellant's adviser fully realized, I have no doubt, that the instalment to become payable on May 20th, 1931, might not be paid by the company, the only issued shares of which were 5,000 fully paid, representing, no doubt, the £5,000 already paid to the appellant by the individual respondents.

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So far as the company itself was concerned, its minutes of March 13th and April 29th, 1931, are consistent only with the company regarding itself as being already in the position of purchaser from the appellant.

In my opinion we are not bound to enquire whether there was sufficient evidence from which to infer an acceptance by the appellant of the respondent Company as purchaser before May 20th, 1931. Certainly no new contract of purchase was formally entered into between those two parties. That course might have been desirable, but it certainly was not desired by the appellant nor regarded as necessary by the individual respondents. Clause 13 of the agreement states with precision the intention to form the proprietary company, and the relation to come into existence between such company and its promoters. The vendor accepts the obligation to " recognize " the company " as the purchaser." The importance of the words " the purchaser " is as great as that of the word " recognize." Once the condition precedent to recognition takes place, as it did most certainly on March 2nd, 1931, the appellant (the vendor) was obliged to " recognize " the newly-formed company as the only party eligible to purchase the land. The persons who were acting as " trustees and/or agents for such proprietary company " could no longer be regarded by the vendor as purchaser, and could not acquire title from the vendor to the land sold.

Had clause 13 ended at the phrase " recognize it as the purchaser," it seems to me that, upon the assumption of the proprietary company's being prepared to go on with the purchase, the appellant would not have been able to recover from the individual respondents any instalments which became due after the time when the duty to " recognize " had arisen.

But the last clause, " and will after payment of £5,000 of the purchase-money exonerate the said persons from all liability hereunder," points in a different direction and implies that the individual respondents were to be considered as still remaining liable for the performance by the new company of its contract until £5,000 of the purchase money had been paid.

Now, before May 20th, 1931, not only had the appellant become bound to recognize the respondent Company as the purchaser from

it but £5,000 of the purchase money had actually been paid. The individual respondents had therefore become fully entitled to an exoneration "from all liability hereunder."

The appellant's action therefore failed, and in my opinion for very good reasons.

I do not quite understand the suggestion made for the appellant that "recognition" under clause 13 must be regarded as connoting a bilateral act. No doubt the situation envisaged could not take place unless a company armed with sufficient power was ready and willing to become purchaser; and a correlative duty to procure a company satisfying those requirements may be regarded as imposed upon the individual respondents as a condition of their exoneration. It is quite clear, however, that they performed it. I am strongly inclined to think that the appellant, in the correspondence referred to, also performed its duty of recognizing the respondent Company as the purchaser in place of the individual respondents. If it failed to perform its duty, it is, I think, in no better position on that account.

I entirely agree with the judgment of Mr. Justice *Mann* in this case, but I go a little further. Looking at the date of the contract of purchase, I think it is very plain that the vendor company was advised, and knew, that if the purchase turned out badly for the syndicate, they could and would quietly bring into existence a proprietary company without any capital to complete the deal. The only security the vendor sought to obtain against this contingency was a personal liability of the syndicate up to the sum of £5,000. This security it did obtain in the last part of clause 13. It is apparent that the extra thousand pounds it may obtain, as a result of this litigation, is a windfall for which it should render appropriate thanks to the solicitor who, for some curious reason, entirely failed to acknowledge the letter he received from the individual respondents' solicitors on March 2nd, 1931, and who seems to have hoped that the proprietary company would not be quite in the picture, nor the syndicate quite out of it, by the following May 20th, when the further instalment was payable.

The appeal should be dismissed with costs.

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McTIERNAN J. The judgment of *Mann* J. is, in my opinion, right. Notwithstanding the recital in clause 13 of the contract that the purchasers intended to form and register a proprietary company for the purpose of acquiring the property, the subject of the contract, and that they were acting as trustees and/or agents for such company, the purchasers became liable as principal parties under the contract (*Kelner* v. *Baxter* (1); *Scott* v. *Lord Ebury* (2); *Furnivall* v. *Coombes* (3); *Story* on *Agency*, 9th ed. (1882), secs. 280, 282). But the vendor and purchasers were, of course, at liberty to agree that the liability of the purchasers to pay the purchase money should be remitted upon the fulfilment of any conditions to which the parties agreed. It is clear that the parties did, after the above-mentioned recitals in clause 13, stipulate that the purchasers would be exonerated of all liability under the contract upon the fulfilment of a number of conditions. That part of clause 13 is as follows: "The vendor will upon formal notification of the registration of such company and production of its certificate of incorporation recognize it as the purchaser and will after payment of £5,000 of the purchase money exonerate the said persons from all liability hereunder." The problem presented by clause 13 is therefore to determine what, upon its true construction, are the conditions agreed to by the parties upon which the purchasers were to be exonerated from all liability under the contract. Three conditions are expressly stated in clause 13, namely, (1) the formation and registration of the proprietary company, (2) the notification of its registration and the production of its certificate of incorporation, and (3) the payment of £5,000 of the purchase money. All these conditions were fulfilled before the action was instituted for the recovery of the instalment sued for. But it is contended that there is another condition precedent to the exoneration of the purchasers, namely, that the company should have entered into an enforceable contract with the vendor to purchase the property. It is clear that the parties did not expressly stipulate that the vendor and the new company should make a new contract. Such a condition therefore does not form part of the contract between the parties unless it is

(1) (1866) L.R. 2 C.P., at pp. 184-185.
(2) (1867) L.R. 2 C.P. 255.
(3) (1843) 5 Man. & G. 736; 134 E.R. 756.

implicit in the phrase " recognize it as the purchaser " or should be held to be an implied term of the contract. The first alternative would, I think, involve a wide departure from the true meaning of the language of the parties and the latter would not be justified under the rule relating to the insertion of terms into a contract by implication. This rule is stated by *Scrutton* L.J. in *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*) (1), and by Lord *Buckmaster* in *L. French & Co.* v. *Leeston Shipping Co.* (2); see also *The Moorcock* (3) and *Roxburgh* v. *Crosby & Co.* (4). The ordinary meaning of the words " recognize it as the purchaser " does not require that the recognition of the new company as the purchaser should be conditional upon the novation of the contract by it. It is not necessary that the words should be understood in this sense in order to make the contract work. The vendor could have completely discharged its obligation under clause 13 to recognize the new company as the purchaser by accepting performance by it of all the outstanding obligations of the purchasing party under the contract and carrying out the contract so far as it remained to be performed on the part of the vendor for the benefit of the new company. If the original purchasers objected, the contract itself would have afforded a good answer. As the words " recognize it as the purchaser " will not by themselves sustain the burden of the appellant's contention, it remains to be seen whether the implication can be sustained that the parties intended by their contract that the vendor and purchasers should perform the bilateral act of entering into a new contract. In *L. French & Co.* v. *Leeston Shipping Co.* (5), Lord *Buckmaster* said: " It is always a dangerous matter to introduce into a contract by implication provisions which are not contained in express words, and it is never done by the Courts excepting under the pressure of conditions which compel the introduction of such terms for the purpose of giving what Lord *Bowen* once described as ' business efficacy ' to the bargain between the parties. There is no need whatever in the present case for the introduction of any such term. The contract works perfectly well without any such words being

(1) (1918) 1 K.B., at p. 605.
(2) (1922) 1 A.C., at p. 454.
(3) (1889) 14 P.D. 64.
(4) (1918) V.L.R. 118.
(5) (1922) 1 A.C., at pp. 454-455.

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implied." And in *Reigate* v. *Union Manufacturing Co.* (*Ramsbottom*) (9), *Scrutton* L.J. said :—" The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, ' What will happen in such a case,' they would both have replied, ' Of course so and so will happen; we did not trouble to say that; it is too clear.' Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed." The consideration which, it is said, requires it to be an implied term that the vendor and the new company should make a new contract is that the original contract was made to be carried out either by the original purchasers or the new company, and if the former were discharged and the latter not bound to complete the purchase, the contract would, so far as the vendor was concerned, be a mere futility. It will have been noticed that the vendor knew that the purchasers entered into the contract with the intention of forming a company to acquire the property which was sold to them and the vendor agreed to " recognize it as the purchaser " on the fulfilment of so simple a condition as the due notification of its coming into being. But no stipulation was made that the company should have sufficient resources to perform the contract even if it was novated. Thus the term which the appellant seeks to imply would not alone be sufficient to render the contract efficacious in a business sense notwithstanding the exoneration of the original purchasers. A further implication would be necessary as to the financial standing of the company to be formed. The addition of any term as to the constitution or capital of the company would clearly alter the contract. But the contention that the condition as to novation should be implied to make the contract efficacious in a business sense is, I think, untenable in the face of the express term of the contract that it should be a condition of the exoneration of the original

(1) (1918) 1 K.B., at p. 605.

purchasers that £5,000 of the purchase money should be paid. This condition does protect the vendor against the event of the contract breaking down after the exoneration of the original purchasers either because the company was unable or unwilling to complete the contract. The original purchasers were, in my opinion, in the events which happened exonerated from liability to pay the instalment of £1,000 due according to the terms of the contract before the appellant sued for it. It was also submitted that the company did in fact novate the contract and that judgment should be given against it for the instalment in question. The letters to which reference was made do not, in my opinion, support this submission.

The appeal should be dismissed.

Appeal allowed with costs. Judgment of Supreme Court discharged. In lieu thereof order that judgment be entered in the action for the sum of £1,000 *with costs for the plaintiff against the defendants respondents. As against the administrator judgment for the sum of* £1,000 *and costs and costs of this appeal de bonis testatoris et as to costs si non de bonis propriis.*

Solicitors for the appellant, *Milton L. Davey.*

Solicitors for the respondents, *Macpherson & Kelley* and *Rodda, Ballard & Vroland.*

H. D. W