[HIGH COURT OF AUSTRALIA.]

SUMMERGREENE . . . . . APPELLANT;
DEFENDANT,

AND

PARKER . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 4, 5.

MELBOURNE, *June* 1.

Latham C.J., Williams, Webb and Fullagar JJ.

Principal and Agent—Sale of business—Purchase on behalf of company not in existence—Trustees—Contract to make a contract—Quaere, concluded contract—Refusal by vendor to complete—Vendor's agent—Right to commission—"Effect a sale."

P., who was employed by S. as her agent for commission to "effect the sale of her business" obtained from A. and J. a written offer. This offer was made by them as "the trustees on behalf of a company to be formed" but not then in existence, to purchase the business on certain terms. These terms provided (*inter alia*) that the vendor would have the right to take up shares in the company, and would grant a lease and assign certain tenancies, to the company. Clause 6 of the offer was as follows:—"The usual agreement for sale and purchase to be entered into by you and the company containing the usual terms of sale and these terms in a form to be satisfactory to you and to the company." This offer was accepted by S. but she refused to complete the sale. The contemplated company was not formed. In an action by P. to recover commission from S.,

Held that the documents did not constitute a contract between S. and A. and J. which effected a sale of the business and *further* that even if the documents, apart from clause 6, were sufficient to constitute a contract, that clause was so uncertain in its terms as to prevent the arrangement amounting to a binding contract.

Kelner v. *Baxter*, (1866) L.R. 2 C.P. 174, referred to.

Decision of the Supreme Court of New South Wales (Full Court): *Parker* v. *Summergreene*, (1949) 50 S.R. (N.S.W.) 5; 67 W.N. 8, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales by Guy Herwald Parker, a real estate agent carrying on business under the firm name of G. H. Parker & Co. at Burwood, near Sydney, against Dora Isabelle Summergreene for commission in the sum of £500 for effecting the sale of the defendant's business carried on by her under the name of "The Dyeing King."

The first count in the declaration was based on the money counts. By the second count it was alleged that in consideration that the plaintiff would effect the sale of the defendant's business the defendant promised the plaintiff that she would carry the sale so effected into completion and would pay him £500, and although he had effected a binding executory contract of sale between the defendant and two persons jointly ready willing and able to complete the purchase of the business and all conditions were performed and all things happened and all times elapsed necessary to entitle the plaintiff to receive payment of the sum so promised to him yet the defendant refused to complete the contract, repudiated the sale and refused to pay to him the said sum.

So far as is material to this report the defendant pleaded never indebted to the first count, and as to the second count that she did not promise as alleged, and she denied that the plaintiff effected a binding executory contract of sale between her and two persons jointly ready willing and able to complete the purchase of the business.

At the hearing of the action before *Maxwell* J. and a jury of four, various letters were put in as evidence. By a letter dated 7th November 1946, addressed to the plaintiff it was certified on behalf of the defendant "that (Mrs.) D. Summergreene has given her permission and authorization to Mr. G. H. Parker to effect the sale of her business trading as 'The Dyeing King'." A letter bearing the same date, forwarded by the plaintiff to the defendant was in the following terms:—"Re The Dyeing King. Following receipt of your letter of 7th inst., authorizing our Mr. G. H. Parker to effect a sale of the abovementioned Dyeing and Cleaning Business, it is desired to report that the proposition has been submitted to Esquire Proprietary Ltd. of 230 Elizabeth Street, Sydney, for the sum of £9,000 gross. Arrangements were completed this morning for a meeting of representatives of the company with your Accountant . . . on Monday next, from which we trust business will eventuate."

In a letter dated 28th November 1946, and forwarded by her to the plaintiff the defendant agreed "to grant Esquire Pty. Ltd. an

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option of Purchase over my Business known as ' The Dyeing King ' for a period of Three Weeks, terminating 19th Dec. 1946, at the price quoted, plus cost of Press improvements and installation at City shop."

Messrs. Church & Co., a firm of solicitors acting for Arthur Ogilvie Anderson and Harry Phillip Jones, the last-named being the managing director of Esquire Pty. Ltd., by letter dated 20th December 1946, wrote to the defendant in the following terms :—

" Dear Madam,

On behalf of Messrs. A. O. Anderson and H. P. Jones the Trustees on behalf of a Company to be formed and known as ' The Dyeing King Pty. Limited ' we hereby offer to purchase from you the business presently carried on by you under the name of ' The Dyeing King ' at 53 Northumberland Road, Auburn and elsewhere upon a walk-in walk-out basis including all the assets of the said business (except the freehold property) as disclosed to the Company's investigators upon the following conditions namely :—

1. The purchase price is to be £8,750 of which a Deposit of £500 is to be paid forthwith and the balance upon completion.

2. You are to grant to the Company a lease of the business premises known as No. 53 Northumberland Road, Auburn for five (5) years with an option for a further five (5) years at a rental equal to the rental paid by you for the said business premises immediately prior to your purchase of the freehold.

3. The due assignment to the Company of all tenancies of shops and portion of shops presently used by you in the said business.

4. The business is to be taken over on the 1st February 1947.

5. You are to have the right of taking up Five hundred (500) Shares in the Company at par for yourself and a further Five hundred (500) for your daughter.

6. The usual Agreement for sale and purchase to be entered into by you and the Company containing the usual terms of sale and these terms in a form satisfactory to you and to the Company.

You will notice that the Company proposes to carry on the business under the name of ' The Dyeing King '."

The defendant replied by letter dated 21st December 1946, as follows : " A. O. Anderson and H. P. Jones, Trustees on behalf of a Company to be formed and known as ' The Dyeing King Pty. Ltd.'
c/o F. J. Church & Co.,
Solicitors,

. . . I acknowledge receipt of a letter from Messrs. F. J. Church & Co. on your behalf offering to purchase the business presently carried on by me under the name of ' The Dyeing King,' and I

hereby accept the offer to purchase on the terms enumerated in the said letter. . . . "

The two last-mentioned letters were marked and referred to as Exhibit D.

The deposit of £500 mentioned in clause 1 of the letter dated 20th December 1946, was paid on 24th December 1946, by Messrs. Church & Co. to the plaintiff as agent for the defendant, and Anderson and Jones proceeded with the formation of the proposed company.

On 24th January 1947, a draft agreement was submitted by Church & Co. on behalf of Anderson and Jones to the defendant containing detailed provisions with respect to the purchase of her business by a company about to be formed. The defendant's solicitor informed the plaintiff's solicitor that the defendant did not approve of the proposed terms of sale or of the agreement and that she did not propose to proceed with the matter.

The defendant said in evidence that her family did not want her to sell the business and after thinking it over she changed her mind about wanting to sell it.

There was not any evidence as to what provisions should be contained in a " usual agreement for sale and purchase," nor was there any evidence as to what were the " usual terms of sale."

The question: " Did the defendant promise the plaintiff £500 commission if he effected the sale of the defendant's business ? " left to the jury by *Maxwell* J., was answered in the affirmative.

The judge held that the acceptance by the defendant of the offer made in the letter dated 20th December 1946, did not result in the formation of a contract because par. 6 of that letter left terms of the contract to be determined in the future, so that the documents did not represent a concluded bargain. Judgment was given for the defendant.

An appeal by the plaintiff from that decision was allowed by the Full Court of the Supreme Court (*Street* A.C.J., *Owen* and *Herron*, JJ.), and in the stead of the judgment for the defendant which was set aside, judgment was entered for the plaintiff for £500 (*Parker* v. *Summergreene* (1)).

From that decision the defendant appealed to the High Court

F. W. Kitto K.C. (with him *W. S. Gee*), for the appellant. The letters marked Exhibit D. did not constitute a binding sale of the business. Those letters show that the parties only contemplated a purchase by the company if and when formed. The offer was for

(1) (1949) 50 S.R. (N.S.W.) 5; 67 W.N. 8.

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a purchase which, in all its essentials, was a purchase by the company. The provision relating to shares is quite incompatible with any other construction. It would be impossible to carry out the contract unless the company were formed. *Kelner* v. *Baxter* (1) is not an authority for the suggestion in the Court below that the names of Anderson and Jones should be inserted in lieu of the company. There was not any intention to create an immediately binding contract; the intention was to make an agreement as to what should be an agreement with the company when formed. The facts do not show an immediate sale as in *Kelner* v. *Baxter* (2). The decision in that case is difficult to justify logically. The true view, and one which covers this case, is as stated in *Hollman* v. *Pullin* (3).

[LATHAM C.J. referred to *Bowstead* on *Agency*, 8th ed. (1932), art. 122; 10th ed. (1944), art. 124.]

The proposition there stated is right.

[FULLAGAR J. referred to *Kelner* v. *Baxter* (4).]

The intention must be discovered from the documents.

[LATHAM C.J. referred to *Furnivall* v. *Coombes* (5).]

It does not follow from that case or from *Kelner* v. *Baxter* (1) that in every case where there is a contract which purports to be for or on behalf of somebody it must be concluded that there is a personal liability if the third party named does not exist. There is not any absolute rule that in the absence of a principal an agent becomes personally liable. This was a contract for a company to be formed *in futuro*. The contract depended upon the formation of that company. That company was not formed therefore there was not any contract. The respondent did not "effect a sale" (*Preston* v. *Emmett*: see note (6)). Exhibit D does not contain the whole of the terms and conditions relating to the transaction. Clause 6 clearly shows an intention by the parties that another agreement "containing the usual terms of sale" was "to be entered into" by them, and it follows that there was not any concluded agreement. What constitutes "usual terms" was not shown by the evidence. The proposed agreement was undefined, and in view of the fact that those terms were to be in a form satisfactory to the appellant and to the company further negotiations would be necessary. The appellant would not be able to sell the business to Anderson and Jones and also to the company. She could not sell the business twice. The deposit of £500 could have

(1) (1866) L.R. 2 C.P. 174.
(2) (1866) L.R. 2 C.P., at pp. 183-185.
(3) (1884) 1 Cab. & Ell. 254, at pp. 256, 257.
(4) (1866) 15 L.T. 213.
(5) (1843) 5 Man. & G. 736 [134 E.R. 756].
(6) (1946) 72 C.L.R. 660 (note); (1946) 46 S.R. (N.S.W.) 442 (note).

been paid by anybody interested in the company and was not necessarily paid by Anderson and Jones. Merely to substitute Anderson and Jones for the company would not solve the difficulty. The general principle applicable is summed up in *Pollock* on *Contracts*, 11th ed. (1942), p. 34; see also *Rossiter* v. *Miller* (1); *Winn* v. *Bull* (2); *Von Hatzfeldt-Wildenberg* v. *Alexander* (3); *Rossdale* v. *Denny* (4); *Chillingworth* v. *Esche* (5) and *Sinclair, Scott & Co. Ltd.* v. *Naughton* (6). The subject of uncertainty was dealt with in *Scammell and Nephew Ltd.* v. *Ouston* (7). The observations by Lord *Wright* (8) are applicable to this case because of the use of the word "usual" unexplained by any evidence. The sale which was in contemplation was a sale to be defined in a future document which would contain terms described as usual and which terms would be the subject of further negotiations.

A. B. Kerrigan, for the respondent. The question for decision depends upon the letters which constitute Exhibit D. Those letters should be construed by reference to any surrounding circumstances to which reference was made therein. The words "as disclosed to the Company's investigators" refer to disclosures pursuant to the investigation made by investigators on behalf of the parent company of which Jones was the managing director. Clause 4 shows that completion was contemplated without any reference to the formation of the proposed company but to a date in point of time. It was entirely immaterial to the parties whether the company was or was not formed; the contract had to be completed. They bound themselves to certain definite things which were independent of whether a company was or was not formed. Clause 6 was intended to cover the possibility of the company being formed by 1st February 1947, and desiring to take over its own business. That clause did not import uncertainty into the agreement. None of the cases has dealt with a position where two parties have agreed that something further shall be done by one of them with a third party, even if they have left what should be done in a condition of uncertainty; very special emphasis was laid upon that by the words used in *Scammell and Nephew Ltd.* v. *Ouston* (9). There was nothing inconsistent with there being a binding agreement between Anderson and Jones of the one part and the respond-

(1) (1878) 3 App. Cas. 1124, at pp. 1152, 1153.
(2) (1877) 7 Ch. D. 29, at pp. 31, 32.
(3) (1912) 1 Ch. 284, at pp. 288-290.
(4) (1921) 1 Ch. 57, at p. 59.
(5) (1924) 1 Ch. 97, at pp. 104, 113, 114.
(6) (1929) 43 C.L.R. 310.
(7) (1941) A.C. 251, at pp. 268, 269, 273.
(8) (1941) A.C., at p. 269.
(9) (1941) A.C., at p. 254.

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ent of the other part, to be superseded later on by some other agreement if the respondent could agree with the proposed purchaser, namely, the company. It did not follow that because clause 6 might be void or served no useful purpose the remaining provisions did not constitute an agreement. The word " agreement " was not used in the technical sense. Clause 6 drew attention to what was required by law if the company desired to enter into a fresh contract. The respondent had an enforceable contract against Anderson and Jones, and it followed that the appellant effected a sale (*Kelner* v. *Baxter* (1); *Scott* v. *Lord Ebury* (2); *In re Northumberland Avenue Hotel Co.* (3)). The respondent, in respect of clauses 2 and 3, could have granted to Anderson and Jones a lease of the business premises and an assignment of the tenancies, and she could have waived the condition in clause 5 which was entirely in her favour. The non-formation of the company was due to the respondent's repudiation of the contract. It was an implied term between the respondent and her agent that she would not arbitrarily withdraw from the contract. In accordance with the principles in *Kelner* v. *Baxter* (1) the Court will strive to find that, in the circumstances, Anderson and Jones are personally liable. Exhibit D showed that the parties " got beyond negotiations " (*Scammell and Nephew Ltd.* v. *Ouston* (4). In form those letters appear to be an offer and acceptance. If there was an uncertainty in clause 6, it was an uncertainty between the respondent and the proposed company and could not be imported so as to make uncertain or invalid the rest of the contract, which was on those terms complete and sufficient: see *Story* on *Agency*, 8th ed. (1874), s. 281. The contract could have been carried out if it had not been for the respondent's refusal to carry on, and if the contract had been carried out there would have been a sale. The matter of " effecting a sale " was dealt with in *Scott* v. *Willmore & Randall* (5). Upon the documents the respondent could have sued Anderson and Jones: it was immaterial that they might have found difficulty in suing her (*Emmett* v. *Preston* (6)). Clause 6 could not have any application to anything until the company had been incorporated. Everything that was necessary to be settled was settled by agreement between the parties (*May & Butcher Ltd* v *The King* (7)) This case falls within the exception to which Lord *Wright* drew attention in *Luxor (Eastbourne) Ltd.* v. *Cooper* (8). Exhibit D shows there was

(1) (1866) L.R. 2 C.P. 174.
(2) (1866) L.R. 2 C.P. 255, at pp. 258, 261, 265.
(3) (1886) 33 Ch. D. 16, at pp. 17, 19.
(4) (1941) A.C., at p. 269.
(5) (1949) V.L.R. 113.
(6) (1946) 46 S.R. (N.S.W.) 386, at p. 388; 63 W.N. 226, at p. 227.
(7) (1934) 2 K.B. 17, at p. 21.
(8) (1941) A.C. 108, at pp. 141, 149.

a binding executory contract providing in its own terms for another contract if the parties thereto could agree upon it, that is, the company, if formed, but failing that that those terms would be carried into effect. *Hollman* v. *Pullin* (1) was entirely inconsistent with *Kelner* v. *Baxter* (2) and *In re Northumberland Avenue Hotel Co.* (3) and, also, the association there referred to was in existence.

F. W. Kitto K.C., in reply There was no purchaser who was bound by a completed concluded contract to purchase. The correct view in a case where there were terms to be agreed upon between one of the parties and an outsider, was expressed in *Foster* v. *Wheeler* (4).

Cur. adv. vult.

June 1.

The following written judgments were delivered :—

LATHAM C.J. The plaintiff G. H. Parker sued the defendant Mrs. D. I. Summergreene for commission for effecting the sale of the defendant's business carried on by her under the name "The Dyeing King." The action was tried before *Maxwell* J. and a jury, and in answer to a question submitted to them the jury found that the defendant promised the plaintiff £500 commission if he effected a sale of her business. The question whether or not the plaintiff had effected a sale of the business depended upon the true effect of two documents. The first document was a letter from Messrs. Church & Co., solicitors for Messrs. A. O. Anderson and H. P. Jones, to the defendant. It was in the following terms :—

"On behalf of Messrs. A. O. Anderson and H. P. Jones the Trustees on behalf of a Company to be formed and known as 'The Dyeing King Pty. Limited' we hereby offer to purchase from you the business presently carried on by you under the name of 'The Dyeing King' at 53 Northumberland Road, Auburn and elsewhere upon a walk-in walk-out basis including all the assets of the said business (except the freehold property) as disclosed to the Company's investigators upon the following conditions namely :—

1. The purchase price is to be £8,750 of which a Deposit of £500 is to be paid forthwith and the balance upon completion.

2. You are to grant to the Company a lease of the business premises known as No. 53 Northumberland Road, Auburn for five (5) years with an option of a further five (5) years at a rental equal to the rental paid by you for the said business premises immediately prior to your purchase of the freehold.

(1) (1884) 1 Cab. & Ell. 254.
(2) (1866) L.R. 2 C.P. 174.
(3) (1887) 33 Ch. D. 16.
(4) (1888) 38 Ch. D. 130.

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3. The due assignment to the Company of all tenancies of shops and portion of shops presently used by you in the said business.

4. The business is to be taken over on the 1st February 1947.

5. You are to have the right of taking up Five hundred (500) Shares in the Company at par for yourself and a further Five hundred (500) for your daughter.

6. The usual Agreement for sale and purchase to be entered into by you and the Company containing the usual terms of sale and these terms in a form satisfactory to you and to the Company.

You will notice that the Company proposes to carry on the business under the name of 'The Dyeing King'."

The second document was a letter from the defendant accepting the offer made in the letter already mentioned and was in the following terms:—

"I acknowledge receipt of a letter from Messrs. F. J. Church & Co. on your behalf offering to purchase the business presently carried on by me under the name of 'The Dyeing King' and I hereby accept the offer to purchase on the terms enumerated in the said letter."

In January 1947 a draft agreement was submitted on behalf of Messrs. Anderson and Jones to Mrs. Summergreene containing detailed provisions with respect to the purchase of her business by a company about to be formed. The defendant's solicitor informed the plaintiff's solicitor that the defendant was not satisfied with the proposed agreement and she refused to proceed with the transaction. In evidence she said that she made up her mind not to go on because her family objected to her selling the business. *Maxwell* J. held that the acceptance by the defendant of the offer made in the letter of 20th December did not result in the formation of a contract because par. 6 of the letter left terms of the contract to be determined in the future, so that the documents did not represent a concluded bargain. He therefore gave judgment for the defendant.

Upon appeal to the Full Court the court applied the rule for which *Kelner* v. *Baxter* (1) is cited. In that case it was held that where a contract is signed by a person who professes to be signing "as agent" but who has no existing principal at the time and the contract would be wholly inoperative unless binding upon the person who signed it, he is personally liable on it. In that case the defendants purported to make a contract to purchase goods on behalf of a proposed hotel company. The goods were delivered to persons who purported to act on behalf of the company and the goods were consumed. Afterwards a company was incorporated. The "agents" had no

(1) (1866) L.R. 2 C.P. 174.

principal when they purported to make the contract and the company when it came into existence was incapable of "ratifying" the contract which the agents had purported to make on its behalf, though the company might of course have entered into a new contract itself. An action was brought against the agents and it was held that they were personally liable.

In the present case the question is whether by the letters which have been quoted the plaintiff effected a sale of the defendant's business. It is plain that he did not effect a sale to the company then in contemplation. That company has never come into existence. On the principle of *Kelner* v. *Baxter* (1) the Full Court held that Anderson and Jones were liable upon the contract and that a sale had been effected to Anderson and Jones. Accordingly the appeal was allowed and it was ordered that judgment be entered for the plaintiff for £500. In dealing with par. 6 of the letter of 20th December 1946 the learned judges distinguished between a case where terms of a transaction were left to be settled by a future agreement of the parties to that transaction—where there would be no contract between them—and cases in which, though some terms were left outstanding, those terms were to be settled by agreement between one of the parties and a third party who was not a party to the alleged contract. It was pointed out that par. 6 contemplated the making of a contract upon usual terms satisfactory to the proposed company and the defendant, and not the making of a further contract upon terms to be agreed between the defendant and Anderson and Jones. Reference was made to the following statement quoted from *May & Butcher Ltd.* v. *The King* (2) where Viscount *Dunedin* said :—" . . . to be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties Of course, it may leave something which still has to be determined, but then that determination must be a determination which does not depend upon the agreement between the parties." It was held, therefore, that par. 6 did not prevent the formation of a contract between Anderson and Jones and the defendant for the sale of the business, and that there was a contract, effected by the plaintiff, for the sale of the business to Anderson and Jones, so that the plaintiff had earned his commission.

In *Kelner* v. *Baxter* (1) the contract in question was a simple contract of sale of goods. There was no difficulty in substituting the agents for the principal in relation to all the terms of the con-

(1) (1866) L.R. 2 C.P. 174. (2) (1934) 2 K.B. 17, at p. 21.

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tract. It was evident that the intention of the parties was that the proposed company should buy the goods and not that the agents should buy them, but the court nevertheless held that as there was plainly an intention to contract and the goods were delivered and no other person than the agents could be liable upon the contract the agents should be held to be liable. In the present case it is plain that it was not intended that Anderson and Jones should buy the business. The intention is quite clear that a company to be formed was to be the purchaser of the business, the lessee of the premises and the assignee of tenancies, and that the defendant and her daughter should be shareholders in the company. But in *Kelner* v. *Baxter* (1) the intention was equally evident that the proposed company and not the persons purporting to act as agents should be the contracting parties, and yet the court found no difficulty in substituting the agents for the supposed principal as the contracting party. In the same way in this case the Full Court has said that Anderson and Jones should be substituted for the company wherever reference is made in the relevant letters to the company. It is possible to make the substitution in relation to several of the terms proposed in the letter of 20th December. For example Anderson and Jones could pay the purchase price (par. 1), they could take a lease (par. 2), they could accept an assignment of tenancies (par. 3), they could take over the business on 1st February (par. 4). But par. 5 presents a difficulty when it is endeavoured to substitute Anderson and Jones for the company wherever the company is mentioned. The defendant and her daughter cannot each become shareholders in respect of 500 shares in a company unless the company exists. It is impossible to substitute " Anderson and Jones " for " the company " in par. 5. Thus the application of the principle of *Kelner* v. *Baxter* (1) in the present case would mean that par. 5 must be ignored. In my opinion it is not consistent with any principle to ignore an actual term of a proposed contract in this manner and to hold that the parties are bound by the other terms but not by the term in relation to which it is impossible merely to substitute the agent for the supposed principal. In my opinion, therefore, effect cannot be given to the proposed transaction as a contract between the defendant and Anderson and Jones. The rule in *Kelner* v. *Baxter* (1) does not, in my opinion, authorize a court, in holding an agent liable even though it is clear that it was intended only that his principal should be liable, to hold the parties to be bound by a contract which omits some of the terms to which the parties agreed. On this ground I am of opinion that the

(1) (1866) L.R. 2 C.P. 174.

documents exchanged between the defendant and Anderson and Jones did not make a contract between them and that they therefore did not constitute a sale of the business, or a binding contract to sell the business, to Anderson and Jones.

But, further, par. 6 of the letter of 20th December leaves various terms to be arranged. Paragraph 6 is as follows:—"The usual Agreement for sale and purchase to be entered into by you and the Company containing the usual terms of sale and these terms in a form satisfactory to you and to the Company." This is a provision that a "usual agreement for sale and purchase" is to be entered into, that that agreement shall contain "the usual terms of sale" and, further, that the terms of that agreement are to be in a form "satisfactory to you (the defendant) and to the company." It is therefore clear that a further agreement was contemplated which was to contain usual terms and to be satisfactory to the defendant and to the company to be formed. There was no evidence as to what provisions should be contained in a "usual agreement for sale and purchase." There was no evidence as to what were "the usual terms of sale." Therefore there was no concluded agreement between the parties as to what the terms of any sale were to be: see *Scammel and Nephew Ltd.* v. *Ouston* (1). Further, the terms of the future agreement were to be in a form satisfactory to the defendant and to the company. Neither the defendant nor the company could be compelled to agree to any particular terms and it is therefore clear that all the terms of the proposed transaction had not been finally agreed between the defendant and Anderson and Jones. Accordingly changes might be made in the terms proposed and new terms could be introduced (see *Sinclair, Scott & Co. Ltd.* v. *Naughton* (2)). In such a case there is no contract between the parties.

In the Full Court it was held that par. 6 did leave terms outstanding, but it was emphasized that the new agreement contemplated was to be an agreement not between Anderson and Jones and the defendant, but between the defendant and a third party, namely the proposed company. It was held that the cases where it was decided that the necessity for a future agreement prevented the conclusion of a present agreement applied only when that future agreement was to be an agreement between the parties to the first agreement. Reference has already been made to *May & Butcher Ltd.* v. *The King* (3). But it is impossible to hold that there is a contract between two persons unless the terms of the

(1) (1941) A.C., at p. 273.
(2) (1929) 43 C.L.R., at p. 317.
(3) (1934) 2 K.B. 17 (n).

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contract are certain. The terms must be identifiable, and not in the air. If the admissible evidence plainly shows that the matter was still in the stage of negotiation and that the parties had not reached an agreement by which each consented to be bound, it cannot be held that there was any contract (*Hussey* v. *Horne-Payne* (1); *Sinclair, Scott & Co. Ltd.* v. *Naughton* (2); *Von Hatzfeldt-Wildenburg* v. *Alexander* (3)). The reason why the necessity for further agreement between the parties prevents the formation of a contract is that where this is the case the position is that all the terms of the transaction have not been agreed and that therefore the alleged contract is uncertain in its content. There is no *consensus ad idem*: *Scammel and Nephew Ltd.* v. *Ouston* (4). The parties to a contract may bind themselves under a contract which is complete in itself to leave specified matters to be determined by a third party, e.g. by an architect or surveyor or arbitrator, but it is a quite different thing to provide that the actual terms of the contract shall depend upon what some two persons shall agree. There is no legal means of compelling any persons to agree upon anything. If the content of an agreement depends upon a further agreement between one of the parties and a third person, then the contract is as uncertain in its terms as if further terms had been left to be negotiated between the parties to the contract themselves. It is true that the cases relied upon do refer to the necessity for a further agreement between the parties as preventing the formation of a contract. But in these cases it happened that what was contemplated was an agreement in the future between the parties as to the terms which were to bind them. It was held that there was no finally concluded contract because there was uncertainty as to what those terms might be. Identical reasoning applies in any case where the terms which are finally to bind the parties depend upon one of the parties and any other person agreeing upon such terms.

Accordingly, I am of opinion that any argument that the plaintiff effected a sale to Anderson and Jones by the documents quoted is answered by the fact that any alleged contract between the defendant and Anderson and Jones is rendered uncertain in its terms by reason of par. 6 of the letter of 20th December 1946, and therefore did not amount to a contract which effected a sale of the business.

It was argued that Anderson and Jones impliedly promised that they would form a company which would buy the business and in which the defendant and her daughter could take shares. But if

(1) (1879) 4 App. Cas. 311, at p. 323.
(2) (1929) 43 C.L.R. 310.
(3) (1912) 1 Ch. 284.
(4) (1941) A.C., at p. 255.

the alleged contract is thus interpreted in order to make it possible to treat it as a contract between Anderson and Jones and the defendant so as to give some effect and operation to par. 5, it then becomes a contract that Anderson and Jones will form a company which will purchase the business. Upon this construction the contract provides not for an actual sale, but for steps to be taken to bring about a sale *in futuro*. Therefore upon this construction it must be held that the plaintiff did not effect a sale of the business to any person, but only procured what, upon the construction suggested, was a contract by Messrs. Anderson and Jones to form a company which would, after its formation, purchase the business. Plainly such a transaction does not amount to "effecting a sale." Even if Anderson and Jones were held to have broken the contract by failing to form a company which was willing to buy the business and so became liable to pay damages to the defendant, it would still be the case that no sale had been effected. Further, it cannot be assumed as being clear that the document should be interpreted as meaning that Anderson and Jones undertook to form a company. They described themselves as trustees for a proposed company, but there are no words in the document by which they undertook to form it. Finally, par. 6 would still remain as creating uncertainty and preventing the formation of a contract even of the kind suggested.

For all these reasons I am of opinion that no sale was effected either to a company or to Anderson and Jones, and that the appeal should therefore be allowed.

WILLIAMS J. The appellant is the defendant in an action brought in the Supreme Court of New South Wales by the respondent as plaintiff to recover £500 commission for effecting the sale of the appellant's business carried on by her under the name of "The Dyeing King." Several issues arose in the early stages of the action, but there is only one left, the answer to which will determine the appeal. It is whether the respondent effected a sale of this business, and this depends primarily upon whether two letters, the first dated 20th December 1946 from Church & Co., solicitors for Messrs. A. O. Anderson and H. P. Jones to the appellant, and the second, the reply of the appellant of the next day, constituted a binding contract for the sale of the business. The text of these letters is set out in the judgment of the Chief Justice and I shall not repeat them.

The letter of 20th December 1946 was written on behalf of Anderson and Jones as trustees on behalf of a company to be

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formed and known as "The Dyeing King Pty. Limited." It contained an offer to purchase from the appellant the business presently carried on by her under the name of "The Dyeing King" at 53 Northumberland Avenue, Auburn, and elsewhere, upon a walk-in walk-out basis including all the assets of the business (except the freehold property) as disclosed to the company's investigators upon the six conditions therein mentioned. The first condition was that the purchase price should be £8,750 of which a deposit of £500 should be paid forthwith and the balance upon completion. On 24th December 1946 this deposit was forwarded to the appellant enclosed in a letter from Church & Co. which stated that the deposit was paid by Anderson and Jones on behalf of a company to be formed and to be known as "The Dyeing King Pty. Limited" on that company's purchase from the appellant of the business known as "The Dyeing King."

At the time of this correspondence no such company as "The Dyeing King Pty. Limited" existed although Anderson and Jones were engaged in preparing for its incorporation and these preparations had reached an advanced stage. An agent cannot contract on behalf of a principal who is not in existence and ascertainable at the date of the contract, and the contract, if contract there be, must be a contract between the agent as principal and the other party, and therefore a contract on which the agent is personally liable. In *Kelner* v. *Baxter* (1) it was held that such an agent is personally liable unless it clearly appears from the terms and conditions of the alleged contract that it was not intended that the agent should be so liable.

The Full Court of the Supreme Court of New South Wales, relying upon the principles enunciated in *Kelner* v. *Baxter* (1) and differing from the learned trial judge, held that the two letters constituted a binding contract for the sale of the business between Anderson and Jones and the appellant and ordered judgment to be entered for the respondent for the £500 claimed.

I do not find anything in the letter of 20th December 1946 at variance with Anderson and Jones becoming personally liable on a contract made between them and the appellant except the sixth condition. The letter provides for the lease being granted and the assignment of the tenancies being made not to Anderson and Jones but to the company. But it is quite usual for a contract between a trustee on behalf of a proposed company as a purchaser and a vendor of property to provide that the vendor shall sell the property not to the trustee but to the proposed company. In *In re North-*

(1) (1866) L.R. 2 C.P. 174.

umberland Avenue Hotel Co. (1) the agreement with the trustee for the proposed company (Doyle) provided that the vendor (Wallis) who had an agreement for a building lease, should grant an underlease to the company and that the company should erect the buildings. Nevertheless *Cotton* L.J. said: "that was a contract which was binding as between Mr. Wallis and the other gentleman (Doyle) whom I have mentioned, and was a contract which provided that certain things should be done by the company" (2). *Lopes* L.J. said (3): "There no doubt was an agreement between a man called Nunneley, who was agent for Wallis, and a man named Doyle, who described himself as trustee for the company." Under such a contract the trustee for the proposed company would be personally liable to pay the purchase money and the vendor would be bound to dispose of the property sold to the company when formed by the direction of the trustee. If, in addition to a cash payment, other consideration was to move from the company to the vendor, such as the company, as in the present case, entering into a lease with and becoming the assignee of other leases from the vendor and giving the vendor the right to apply for shares in the capital of the company, the trustee would be personally liable for any damage the vendor might suffer if the proposed company failed to achieve existence, or having succeeded refused to enter into a new contract with the vendor and undertake these obligations.

It was not contended that the respondent, in order to earn his commission, had to do more than effect a binding contract for the sale of the business. It has been held in England that an agent employed to effect a sale of property does not earn his commission unless a binding contract of sale is made between the vendor and a purchaser who is not only ready and willing but able to purchase the property (*Martin* v. *Perry and Daw* (4); *James* v. *Smith* (5); *Poole* v. *Clarke & Co.* (6); *Bennett and Partners* v. *Millett* (7); *McCallum* v. *Hicks* (8)). The Full Supreme Court of Victoria refused to follow the decision of the Court of Appeal in *James* v. *Smith* (5) in *Scott* v. *Willmore & Randell* (9) so that I prefer not to express an opinion on a point which was not argued. But, assuming that such an agent must prove that the purchaser is not only ready and willing but also able to perform the contract, it is sufficient if the purchaser is in a position to perform the contract at the time fixed for completion. In *James* v. *Smith* (10), *Atkin* L.J. said:

(1) (1886) 33 Ch. D. 16.
(2) (1886) 33 Ch. D., at p. 20.
(3) (1886) 33 Ch. D., at p. 21.
(4) (1931) 2 K.B. 310.
(5) (1931) 2 K.B. 317 (n).
(6) (1945) 2 All E.R. 445.
(7) (1948) 2 All E.R. 929, at p. 931.
(8) (1950) 66 T.L.R. 747.
(9) (1949) V.L.R. 113.
(10) (1931) 2 K.B., at p. 322.

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"I think it is sufficient if it is proved by the agent or by the purchaser that the circumstances are such that if the vendor had been ready and willing to carry out his contract, he on his part at the proper time could have found the necessary money to perform his obligation." Accordingly, where an agent for a proposed company agrees with the vendor that the purchase shall be completed by the company performing certain acts, the vendor, in the absence of evidence that the company will refuse to do so, must wait until the time fixed for completion to see whether the company is ready and willing and able to perform these acts before rescinding the contract.

There is no evidence that Anderson and Jones would not have been able to incorporate the new company before 1st February 1947 or that the new company would not have been ready and willing and able to perform the first, second, third, fourth and fifth conditions in the letter of 20th December 1946.

Were it not for the sixth condition in this letter, I would be of the opinion that the appeal should fail. But this condition appears to me to be at variance with any intention that Anderson and Jones should be under any personal liability. Mr. *Kerrigan* contended with force and plausibility, and I should be pleased if I could to accede to his argument, that this condition only related to a possible novation at a future date of the existing contract between Anderson and Jones and the appellant into a contract between her and the new company when incorporated, and did not prevent the making of a contract between Anderson and Jones and the appellant for the purchase and sale of the business on the five preceding conditions. But I am unable to place this construction on the condition. It must be taken into consideration in determining whether it is possible to read the letters so as to impose any personal liability on Anderson and Jones, and it appears to me to be decisive that the parties intended and intended only to bring a binding contract into existence between anyone when, and only when, after negotiations, all the terms and conditions of a contract of sale had been agreed upon between the appellant and the new company and those terms and conditions had been embodied in a formal document and executed by the appellant and the new company. Condition 6 does no doubt differ from similar clauses that have been before the courts in decided cases in that it relates not to a further contract to be entered into between Anderson and Jones and the appellant but to a contract to be entered into between the appellant and the new company. If the condition had provided for a contract to be entered into between Anderson and Jones and the appellant containing usual terms of sale and these terms to be in a form satisfactory

to both parties, it would be beyond doubt that such a condition could not be construed as a mere expression of the desire of the parties as to the manner in which a transaction already agreed to would in fact go through and would make the execution of a further contract a condition or term of the bargain, so that until the further contract was executed there would be no binding contract (*Von Hatzfeldt-Wildenburg* v. *Alexander* (1)). In the first place the meaning of the words in condition 6 " the usual agreement for sale and purchase to be entered into by you and the company containing the usual terms of sale " is quite uncertain and prevents the existence of an enforceable contract (*In re Vince*; *Ex parte Baxter* (2); *Scammell and Nephew Ltd.* v. *Ouston* (3); *Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading and Industrial Co. Ltd.* (4)). In the second place the words " these terms in a form satisfactory to you (i.e. the appellant) and the Company " clearly indicate that the letters are at most an agreement to enter into an agreement and contemplate the negotiation and execution of a formal contract between the parties. In such a case there is no binding contract until the formal contract is executed, and if the contract is recorded in two parts until the parties have signed and exchanged their copies (*Eccles* v. *Bryant and Pollock* (5)). As I have said condition 6 does not relate to the execution of a further contract between Anderson and Jones and the appellant, but it is nevertheless an integral and essential part of the bargain between them and the appellant, and is, in my opinion, expressly at variance with any intention to attribute any personal liability to Anderson and Jones or to create any contractual relations other than a contract between the appellant and the company.

I am therefore of opinion that the respondent did not effect a sale of the appellant's business to Anderson and Jones and that the respondent did not earn his commission.

For these reasons I would allow the appeal.

WEBB J. I would allow this appeal.

It was within the contemplation of the parties that the company might refuse to enter into an agreement for sale and purchase on the ground that the terms were not satisfactory to the company. The formation of a company and a new agreement with it are indicated by clauses 2, 3, 5 and 6 as necessary to effect the sale. Had clause 6 settled the terms of the new agreement the position

(1) (1912) 1 Ch., at pp. 288, 289.
(2) (1892) 2 Q.B. 478.
(3) (1941) A.C. 251.
(4) (1944) 1 K.B. 12.
(5) (1948) Ch. 93.

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would, of course, have been different. The refusal of the company to make the agreement would then have left the trustees fully liable, and an effective sale achieved or assured. But at the time when the appellant decided not to go ahead with the arrangement there was no sale and no certainty of one. There was no warranty on the part of Anderson and Jones that when the company came into existence it would make a contract satisfactory to Mrs. Summergreene. Even if there were this would give her a right to recover not the price, but damages. There would still be no sale.

FULLAGAR J. In this case the defendant offered to pay to the plaintiff a commission of £500 if he " effected a sale " of her business. That was an offer of a promise capable of acceptance by the doing of an act, the effecting of a sale. The offer could be withdrawn or revoked at any time before it was accepted by the doing of the act. If the act was done before the offer was revoked, a contract between the plaintiff and the defendant came into existence, the consideration on the plaintiff's side being completely executed and the defendant being bound by her promise to pay the commission.

There can be no doubt, I think, that a " sale " of the business was " effected " by the plaintiff if, but not unless, he procured a binding contract with a purchaser. On 20th December 1946 he procured what purports to be an offer in writing to purchase the business signed by an authorized agent on behalf of Messrs. A. O. Anderson and H. P. Jones. The defendant on the following day wrote a letter purporting to accept this offer to purchase. The " offer " described Anderson and Jones as " the trustees on behalf of a company to be formed and known as 'The Dyeing King Pty. Limited'." While the company was in process of being formed but before it was incorporated, the defendant refused to proceed with the transaction and purported to revoke her offer to pay commission on the effecting of a sale. If, but not unless, the " offer " and " acceptance " of 20th and 21st December 1946 constituted a contract for the sale of the business, the plaintiff is entitled to his commission, and the defendant's repudiation and revocation are of no effect.

The question depends on the effect of the document of 20th December 1946. It is set out in full in the judgment of the Chief Justice, as is also the letter of acceptance, and neither need be set out again here. *Maxwell* J. held that no contract was made, because clause 6 of the offer provided for further terms to be agreed upon. The case, in his view, fell within a well-known line of

authority of which *Sinclair, Scott & Co. Ltd.* v. *Naughton* (1) is a good example. On appeal the Full Court of New South Wales held that there was a binding contract of sale between the defendant of the one part and Anderson and Jones of the other part. Before considering the view taken by the Full Court of clause 6, it will be convenient to consider the construction of the document without reference to the question whether clause 6 negatives the existence of a binding contract.

Now, it is clear that there was no contract with any company. No company was in existence. But it was argued, and the Full Court decided, that there was a contract with Anderson and Jones, and that the names of Anderson and Jones must throughout the document be substituted for " the company " wherever " the company " was referred to as if it were contemplated as being the immediate purchaser. The substitution could not, of course, be made in clause 5, and it was not made in clause 6. In support of the argument that the effect of the document was to bind the defendant to sell and Anderson and Jones to buy, counsel relied upon *Kelner* v. *Baxter* (2); *Scott* v. *Lord Ebury* (3); *In re Northumberland Avenue Hotel Co.* (4) and *Natal Land and Colonization Co. Ltd.* v. *Pauline Colliery and Development Syndicate Ltd.* (5). With *In re Northumberland Avenue Hotel Co.* (4) may be compared *McLeod* v. *Cardiff Colliery Co.* (6). See also *Dudley Buildings Pty. Ltd.* v. *Rose* (7).

I do not myself think that *Kelner* v. *Baxter* (2) or any of the cases cited affords any assistance in the present case. Where A, purporting to act as agent for a non-existent principal, purports to make a binding contract with B, and the circumstances are such that B would suppose that a binding contract had been made, there must be a strong presumption that A has meant to bind himself personally. Where, as in *Kelner* v. *Baxter* (2), the consideration on B's part has been fully executed in reliance on the existence of a contract binding on somebody, the presumption could, I should imagine, only be rebutted in very exceptional circumstances. But the fundamental question in every case must be what the parties intended or must be fairly understood to have intended. If they have expressed themselves in writing, the writing must be construed by the court. If they have expressed themselves orally, the effect of what they have said is a question of fact—a question for the jury, if there is a

(1) (1929) 43 C.L.R. 310.
(2) (1866) L.R. 2 C.P. 174.
(3) (1867) L.R. 2 C.P. 255.
(4) (1886) 33 Ch. D. 16.
(5) (1904) A.C. 120.
(6) (1924) V.L.R. 430; (1925) V.L.R. 1.
(7) (1933) 49 C.L.R. 84.

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jury. In *Furnivall* v. *Coombes* (1), cited by *Keating* J. in *Kelner* v. *Baxter* (2), the question was, and was treated as, a question of the construction of a covenant, and it was solved (rightly or wrongly) by reference to the principle that, if two provisions in a deed are repugnant or irreconcileable, the later must prevail. *Tindal* C.J. said : " It would have been a different thing if the defendants had so shaped their covenant as to make the payment come only out of the parish fund " (3).

In the present case I should have no doubt (apart, of course, from the possible destructive effect of clause 6) that, on acceptance of the offer contained in the document of 20th December, a binding contract was made between Anderson and Jones of the one part and the defendant of the other part. But what did the contract bind the parties to do ? I think that it bound Anderson and Jones to pay the deposit (clause 1), and I think that the defendant could have sued at common law for the deposit immediately (cf. *Reynolds* v. *Fury* (4)). It may well be that Anderson and Jones also bound themselves personally to pay the balance of the purchase price, but they could not be sued at law for that balance. What did the defendant bind herself to do ? I think that she bound herself expressly only to grant to the contemplated company (not to Anderson and Jones) a lease of the premises at Auburn (clause 2), and to assign to the contemplated company (not to Anderson and Jones) all other leases and tenancies which she had (clause 3). I think that she bound herself also (by necessary implication) to transfer to the contemplated company (not to Anderson and Jones), all other assets comprised in the description of " the business presently carried on by " the defendant. I think, finally, that Anderson and Jones bound themselves (by necessary implication—*ut res magis valeat quam pereat*) to form a company which would on or before 1st February 1947 (clause 4), take over the defendant's business and the tenancies mentioned in clauses 2 and 3.

Anderson and Jones could obtain specific performance of this contract, if at all, only if they had a company in existence and ready and willing to accept and take over the business and the tenancies. And (more important for present purposes) the defendant could obtain specific performance, if at all, only if there were a company in existence and ready and willing to accept and take over the business and the tenancies. The only immediate and enforceable right (apart from payment of the deposit) which the

(1) (1843) 5 Man. & G. 736 [134 E.R. 756].
(2) (1866) L.R. 2 C.P., at p. 186.
(3) (1843) 5 Man. & G., at p. 751 [134 E.R., at p. 762].
(4) (1921) V.L.R. 14.

defendant obtained was a right to sue Anderson and Jones for damages for breach of an implied term of the contract, if they failed to produce on or before 1st February 1947 a company ready and willing to take over the business and the tenancies.

Did the procuring of such a contract amount to " effecting a sale " of the business ? I am of opinion that (still ignoring the possible destructive effect of clause 6) such a contract was made. But I am also of opinion that the procuring of such a contract did not amount to " effecting a sale " of the business. A sale would, I think, be effected if, and only if, a contract were procured which could be directly enforced against a purchasing party. By procuring the contract in question the plaintiff did not obtain for the defendant such a contract. The only " purchasing party " was a non-existent company : in other words there was no true purchasing party. The only parties to the contract other than the defendant were not purchasing parties. They did not promise to purchase. They promised only to form a company which would purchase. No " sale " was " effected " by the contract.

So far I have considered the matter without reference to the question whether clause 6 precludes the existence of *any* contract. I have done this because I do not think that the effect of clause 6 can be determined until we have ascertained the true construction and effect of the document without reference to that question. The Full Court construed the document as containing (on acceptance) the terms of a binding contract by the defendant to sell and by Anderson and Jones to buy, a contract which might, if the parties so agreed, be performed by a transfer of the business to a company which it was proposed to form. If no company were formed, or if a company were formed but no new contract between it and the defendant could be agreed upon, then Anderson and Jones were bound to complete the contract by paying the balance of the purchase price in return for a transfer of assets *to them*. If this were the correct view of the document, I think I would agree with the view which the Full Court took of clause 6. If the new contract contemplated by clause 6 were not executed, either because the company and the defendant could not agree on its terms or for any other reason, then the contract simply stood as a contract that the defendant would sell to Anderson and Jones and that Anderson and Jones would buy from the defendant. On this view clause 6 does not matter, because it does not affect the binding character of the obligations undertaken between the defendant and Anderson and Jones. The plaintiff had brought about a sale to Anderson and Jones, and that sale would not be affected if no new contract were made between the defendant and a company.

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I am unable, as I have indicated, to construe the document as the Full Court construed it. With great respect, I do not think that there is any justification for substituting the names of Anderson and Jones for "the company" in clauses 2 and 3. I can find nothing to justify saying that the defendant promises to transfer her business to any person or persons other than the company. And clause 5 seems to me to be entirely inconsistent with the view that the contract may be implemented without the formation of a company. The right to receive shares, if desired, is part of the consideration, and what is undertaken by clause 5 cannot be performed except upon the incorporation of a company. Nor can clause 6, in my opinion, be regarded as having a merely hypothetical operation. It contains a positive stipulation, and I can see no reason for thinking that its terms were not an integral part of the whole bargain, regarded as not less essential than clauses 1-5. Clause 6, indeed, affords, as I think, a very strong reason for adopting the construction of the document which I have adopted.

In the view which I take it is not really necessary to consider whether the terms of clause 6 deprive the document of any immediate contractual force. Even if there was a contract, I do not think that the contract effected a sale. But I think I should add that, in my opinion, no contract at all was really made. I think that clause 6 brings the present case within the authority of such cases as *Sinclair, Scott & Co. Ltd.* v. *Naughton* (1).

One other argument for the plaintiff should perhaps be noticed in conclusion. It was suggested that the defendant, in repudiating her contract with Anderson and Jones, was guilty of a breach of a duty to the plaintiff. In my opinion, there was no contract to repudiate. But, even if there were, it was not a contract of sale in the relevant sense, and I think that the defendant was entitled to revoke her offer to pay commission at any time before that offer was accepted by the procuring of a real contract of sale.

In my opinion this appeal should be allowed.

Appeal allowed. Order of Full Supreme Court and judgment entered for the plaintiff set aside. Judgment entered for defendant by Maxwell J. restored. Respondent to pay costs of this appeal and in the Supreme Court.

Solicitor for the appellant, *A. W. M. Dickinson.*
Solicitor for the respondent, *P. L. Nolan.*

J. B.

(1) (1929) 43 C.L.R. 310.