[HIGH COURT OF AUSTRALIA.]

STANWELL PARK HOTEL COMPANY LIMITED . . . . . Appellant ;
Plaintiff,

AND

LESLIE . . . . . Respondent.
Defendant,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. of A. 1952.

Sydney, *March* 25; *April* 9.

Dixon, Williams, Webb, Fullagar and Kitto JJ.

Vendor and Purchaser—Contract—Price payable by instalments—Protection against appreciation or depreciation of currency—"Rise and fall" clause—Variation of price with index numbers—Validity.

There is no principle of law which prevents parties to a contract from accepting a fixed figure as a primary monetary expression of a liability and then proceeding to effect a substantive variation of the liability by providing that more or less money must be actually paid according as index numbers evidence a variation of price levels. That is only a method of measuring the actual liability contracted for.

Decision of the Supreme Court of New South Wales: *Stanwell Park Hotel Co. Ltd.* v. *Leslie*, (1951) 51 S.R. (N.S.W.) 273; 68 W.N. 267, reversed.

Appeal from the Supreme Court of New South Wales.

A special case filed in the Supreme Court of New South Wales showed that, by an agreement bearing date 1st February 1947, made between the plaintiff, Stanwell Park Hotel Co. Ltd., and the defendant, Richard Leslie, the plaintiff agreed to sell and the defendant agreed to buy certain lands described therein for the sum of £2,600. A deposit of £100, as required by the terms of the contract, was paid by the defendant as purchaser to the plaintiff as vendor.

[Editor's Note:—On 10th July 1952 the Judicial Committee of the Privy Council granted special leave to appeal from this decision.]

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The contract provided, *inter alia*, for the payment of monthly instalments of £8 13s. 4d. " until the whole of the balance of the purchase money and all additions thereto shall be paid to the vendor, provided that if any sum shall remain owing or unpaid at the expiration of ten years from the date of this contract such sum shall thereupon immediately become due and payable ". The additions referred to consisted of stamp duty, interest, rates, taxes, costs &c. The purchaser undertook by cl. 21, in addition to the payments mentioned above, to pay on 1st May in each year a sum of not less than £50, and agreed that " the whole of the purchase moneys, interest, additions and accretions shall be paid not later than " 1st February 1957. In the event of default in the payment of a monthly instalment of £8 13s. 4d. for a period of one hundred and eight days after the due date for the payment thereof the contract provided that " the whole of the balance of purchase money and all additions thereto shall at the option of the vendor be deemed to fall due and become immediately payable and the vendor shall be at liberty to sue the purchaser for the whole amount of the said balance of purchase money and all additions thereto ".

After payment of a certain number of monthly instalments of £8 13s. 4d. each, the last such payment being made on 10th November 1947, and of annual amounts, the last such payment being of the sum of £25 on 11th May 1950, the purchaser made default, whereupon the vendor exercised its option to deem the balance of the purchase money and the additions thereto as due and immediately payable. The total payments made by the purchaser under the contract, including the deposit of £100, amounted to the sum of £495 13s. 4d.

The balance claimed by the plaintiff-vendor to be due and payable was the sum of £4,112 10s. 4d., which sum he claimed was ascertained by the application of cll. 22 and 23 of the contract, which were in the following terms :—" 22. Provided always and notwithstanding anything contained in this Contract it is hereby agreed by and between the parties hereto in order to provide for the equitable performance of this Contract in the event of inflation and/or deflation of price levels that if the Retail Price Index Number ' C ' series (weighted average for all items of household expenditure for the six capital cities) published in the Commonwealth Statistician's Quarterly Summary of Australian Statistics (hereinafter called the Index Number) shall have increased by twenty-five per cent. or more above or decreased by twenty-five per cent. or more below the Index Number for the years 1923-

1927 for any period during the currency of this Contract then the amount of each payment hereinbefore agreed to be made shall be varied (increased or reduced as the case may be) in the manner following that is to say: By being multiplied by a fraction (hereinafter called the Determinant Fraction) of which the Numerator shall be the Index Number last published before the date on which such payment is payable or paid, whichever shall be the greater, and the Denominator shall be the Index Number last published before the tenth day of February, 1942. 23. Provided further that if any such increased or reduced payment calculated as aforesaid is made by the Purchaser in accordance with the preceding clause the amount of such payment to be applied in reduction of the purchase money and additions thereto shall be calculated by dividing by the Determinant Fraction the amount of such payment by the Purchaser".

It appeared that the plaintiff had taken each instalment payment made by the defendant from September 1948 onwards (when the retail price index first increased by twenty-five per cent above the 1923-1927 figure) and, against the purchase price, had credited the defendant with a figure less than that actually paid, for example, of a payment of £50 made in August 1949, the amount credited to the defendant in reduction of the price was £36 13s. 5d. Having thus "written down" the payment made by the defendant by crediting him with less than in fact was paid, the plaintiff then subtracted the total of such credits from the price and struck a balance of £2,758 13s. 2d., which had then been "written up" to £4,112 10s. 4d. by multiplying the amount of that balance by $\frac{1534,}{1029,}$ the appropriate determinant fraction.

The question for the determination of the court was whether the plaintiff, having deemed the whole balance of the said moneys to fall due and be immediately payable, was entitled on the true construction of the agreement:—(i) to vary the amounts previously acknowledged by applying the formula set out in cll. 22 and 23; and (ii) to sue for the balance of purchase money increased by the formula set out in those clauses?

The Full Court of the Supreme Court of New South Wales (*Street* C.J., *Owen* and *Herron* JJ.) answered both parts of the question in the negative and ordered that a verdict and a judgment be entered for the plaintiff for the sum of £2,678 12s. 2d.: *Stanwell Park Hotel Co. Ltd.* v. *Leslie* (1).

From that decision the plaintiff appealed to the High Court.

(1) (1951) 51 S.R. (N.S.W.) 273; 68 W.N. 267.

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A. R. Taylor Q.C. (with him *N. D. McIntosh*), for the appellant. Clauses 22 and 23 of the contract between the parties provide against a rise and fall of price levels during the currency of the contract. The time at which the variation is made is at the time of payment. The amount of the purchase price set out in the contract is not altered, but the amount to be credited against the purchase price varies according to the index number. The court below was in error in applying the " gold clause " cases to this matter, as in this case there is not any question of the medium of discharging the debt or the form of currency to be used. Clauses 22 and 23 only measure the liability of the purchaser. In *Feist* v. *Société Intercommunale Belge D'Electricité* (1) the words used were " will pay . . . in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on 1 Sept. 1928 ", but the House of Lords held that that was clearly not a reference to the mode of payment but to the measure of the company's obligation. There is not any room here for such a question ever to arise under cll. 22 and 23. So also in *R.* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* (2) the term of the contract was " payment . . . in gold coin of the United States of America of the standard of weight and fineness . . . or in " sterling money at the fixed rate of 4.865 dollars to the £. Those words bear no similarity to the words used in this case. Neither has the case of *New Brunswick Railway Co.* v. *British and French Trust Corporation Ltd.* (3) any bearing on the interpretation of cll. 22 and 23. Once the balance is called up it becomes a " payment hereinbefore agreed to be made ".

A. Richardson Q.C. (with him *G. R. Stewart*), for the respondent. The " rise and fall " clause cannot apply to a balance of purchase money called up after default since it presupposes a payment of money. That clause applies to periodic payments over ten years and the amount of the increase varies from time to time according to the statistician's index number published each quarter, but the appellant having called up the balance of purchase money after default, the accelerated payment thereupon becoming due should not be multiplied by the determinant fraction—the contract does not so provide. Further, the periodic payments according to the contract are received " in reduction of the purchase money ", the balance if paid cannot be said to be " in reduction of the purchase

(1) (1934) A.C. 161.
(2) (1937) A.C. 500.
(3) (1939) A.C. 1.

money" : see *Eastern Extension Australasia and China Telegraph Co. Ltd.* v. *The Commonwealth* (1). *Feist's Case* (2) on appeal (3) and *Jolley* v. *Mainka* (4) apply. As to the periodic payments, the "rise and fall" clause was intended to apply, but the appellant, having accepted payments without regard to that clause and having acknowledged those payments and credited the respondent with the full amount, cannot afterwards recast the statement of accounts and give credits for lesser amounts calculated according to the determinant fraction.

Cur. adv. vult.

April 9.

The Court delivered the following written judgment :—

This is an appeal from an order of the Supreme Court of New South Wales by which a question submitted by a special case for the determination of the Court was answered and judgment was entered for the plaintiff in the action for £2,678 12s. 2d. The question so submitted relates to the calculation of the amount of the balance of purchase money under a contract for the sale of land by the plaintiff, who is the appellant, to the defendant, respondent. The difficulty arises from provisions, contained in the contract of sale, directed to varying the amount of the purchase money payable by instalments in accordance with the rise or fall of the price level as disclosed by certain index numbers published in the Commonwealth Statistician's Quarterly Summary of Australian Statistics.

The first clause in the contract expresses an agreement by the respective parties to buy and sell the land it describes at the price of £2,600. The second clause requires the purchaser (the defendant-respondent in these proceedings) to pay a deposit of £100 in part payment of the purchase money and to pay the balance of purchase money (together with additions on account of stamp duty, interest, costs and the like) by monthly instalments of £8 13s. 4d. until the whole of the balance of purchase money and all additions thereto shall be paid. There is a proviso that if any sum should remain owing or unpaid at the expiration of ten years from the date of the contract such sum should immediately become due and payable. The third clause, besides providing for interest, includes a stipulation that the purchaser may make payments on account of the balance of purchase money over and above the instalments and a provision that upon default for one hundred and eight days in any of the instalments the whole balance of purchase money and the additions shall, at the option of the vendor, be deemed to fall

(1) (1908) 6 C.L.R. 647.
(2) (1933) Ch. 684.
(3) (1934) A.C. 161.
(4) (1933) 49 C.L.R. 242.

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due and become immediately payable and may be sued for. The contract was made on 1st February 1947, and various payments were made during the ensuing two years. No payment, however, was made after 11th May 1950, and the vendor (the plaintiff-appellant) in the exercise of his option deemed the whole balance of the moneys under the contract to fall due and become immediately payable. The action was brought to recover such moneys.

It is in these circumstances that the question arises whether the amount to be recovered is to be increased to any and what extent by applying the provisions for varying the instalments of purchase money according to changes in the price level as evidenced by the statistician's index numbers. These provisions are contained in cll. 22 and 23 of the contract and it will be necessary later to set them out. They provide against a rise or a fall in the price level during the currency of the contract. They recognize that the variations of price level may not be constant either in direction or in degree, so that every instalment may be affected differently. The time at which the variation is to be calculated is the time when the payment is made. It is not every variation that is to be taken into account, only those which vary from the datum by twenty-five per cent or more, whether up or down. The provisions adopt, for the purpose of calculating the variations, the Retail Price Index Number C series (weighted average for all items of household expenditure for the six capital cities). The datum is the index number for the years 1923-1927, the figure being 1,000. Thus a recalculation of an amount to be paid is made necessary when, but not until, the index number published in the Quarterly Summary last before the making of the payment has risen to 1,250 or more or has fallen to 750 or less. In that event an increase or diminution in the amount to be paid is required which is to be proportional to the rise or fall in the price level, not this time, however, the price level since 1923-1927, but the price level since the beginning of 1942. The index number last published before 10th February 1942 is taken for this purpose and the payment as otherwise fixed by the contract is to be varied in the proportion which the most recent index number bears to that index number. The index numbers have of course actually risen, not fallen, and they have risen to more than 1,250.

The result has been that the amount of the instalments to be paid has been proportionally increased above £8 13s. 4d. The index number last published before 10th February 1942 was in fact 1,029. Let it be supposed that an index number last before the payment of a given instalment was 1,544. The amount of

the payment would then have been £13 instead of £8 13s. 4d. But to increase an instalment is not to increase the purchase price. If every instalment were raised to £13 and the matter stood there, the only result would be to shorten the time within which the purchase price of £2,600 named in the contract would be paid off. To effect the purpose of the provisions therefore it was necessary either to vary the named price of £2,600 or else to dispose of the payments of the instalments in such a way that, although the named price stood, the vendor would receive more *in toto*, that is on the footing that the index number continued above the figure of 1,250. On the contrary footing, namely, that it fell and remained below 750, it would be necessary to make such a provision that *in toto* he would receive less. Of course at the time when the contract was made it was conceivable that the index number might sometimes be below 750, sometimes above 1,250 and sometimes between those figures. On that hypothesis it would be necessary to provide that the actual total received in the end would reflect the net result of these variations from time to time. In these circumstances the device adopted was to leave the amount of the purchase money named in the contract unvaried and to leave the amount to be credited against that figure by way of instalments or part payments unvaried but to vary in proportion with the variations of the index figures the amount actually to be paid to the vendor to obtain such a credit. Thus in the instance given it would be incumbent upon the purchaser to pay the sum of £13 to the vendor, but having done so he would receive a credit against the purchase money of £8 13s. 4d. only. If throughout the whole period of the contract the index number stood at 1,544, the vendor would receive in all half as much again as the named figure of £2,600, that is after interest and other "additional" charges had been met. In other words, when the index number stood above 1,250 the vendor would receive a sum composed first of the instalment of £8 13s. 4d., which, subject to interest, he would credit against the named purchase price, and second an additional sum which he would retain as part of the consideration. Conversely, when the number fell below 750 the vendor would receive as an instalment a less sum than £8 13s. 4d., but would be bound to credit £8 13s. 4d. against the named purchase price, bearing the deficiency as a diminution of the consideration. This conception is clear enough when applied to the instalments of specified amount. But it will be remembered that the purchaser is also entitled under the contract to pay off amounts of purchase money as he chooses. Moreover, it might happen that he paid less than he was obliged

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to do on account of instalments. It was therefore necessary, if complete operation was to be given to the foregoing scheme, so to frame the clauses that every payment made of whatever amount would be submitted to the same procedure. A proportionate amount, representing the equivalent according to the price level of February 1942, would be credited, the excess being retained or the deficiency borne, as the case may be, by the vendor for the purpose of arriving at the total consideration in respect of the land. Thus, if the purchaser chose to pay a sum of £45 on account of the purchase money while the index number stood at 1,544, the vendor would credit against the named amount of purchase money of £2,600 and interest only £30.

It will be seen that what has determined the form of this scheme for varying the consideration so as to preserve a correspondence with the price level is the fact that it is a contract for payment by instalments. Indeed, it is only because the payment of the purchase money was spread over a period that it was desired to take account of the possible fluctuation in the purchasing power of money. A chief question in the appeal is whether the drafting of the clauses has not been so dominated by this purpose that they are drawn in such a form that they are inapplicable to the balance of purchase money called up upon default in the payment of instalments. Clauses 22 and 23 which contain the provisions in question are as follows :—

" 22. Provided always and notwithstanding anything contained in this Contract it is hereby agreed by and between the parties hereto in order to provide for the equitable performance of this Contract in the event of inflation and/or deflation of price levels that if the Retail Price Index Number 'C' series (weighted average for all items of household expenditure for the six capital cities) published in the Commonwealth Statistician's Quarterly Summary of Australian Statistics (hereinafter called the Index Number) shall have increased by twenty-five per cent. or more above or decreased by twenty-five per cent. or more below the Index Number for the years 1923-1927 for any period during the currency of this Contract then the amount of each payment hereinbefore agreed to be made shall be varied (increased or reduced as the case may be) in the manner following, that is to say :

By being multiplied by a fraction (hereinafter called the Determinant Fraction) of which the Numerator shall be the Index Number last published before the date on which such payment is payable or paid, whichever shall be the greater and the Denominator shall

be the Index Number last published before the tenth day of February, 1942.

23. Provided further that if any such increased or reduced payment calculated as aforesaid is made by the Purchaser in accordance with the preceding clause the amount of such payment to be applied in reduction of the purchase money and additions thereto shall be calculated by dividing by the Determinant Fraction the amount of such payment by the Purchaser."

The difference in the purpose of the two clauses will be apparent from the foregoing explanation. Clause 22 picks up what it describes as " each payment hereinbefore agreed to be made " and varies it according to the variation that has occurred in the index number when compared with that of February, 1942. That gives the amount to be paid. Clause 23 then performs the purpose of ascertaining the amount to be credited by the vendor against the named figure of purchase money. It ascertains it by reversing the calculation prescribed by cl. 22.

The first question is whether the process prescribed by cll. 22 and 23 is applicable to the balance of purchase money called up in consequence of default in the regular payment of instalments. The difficulty lies in the expression in cl. 22 " the amount of each payment hereinbefore agreed to be made shall be varied " and the references in cl. 23 to that expression by the words " if any such increased or reduced payment calculated as aforesaid " followed by the words " the amount of such payment ". In considering the applicability of the expression to the balance of purchase money called up for default, it is necessary also to consider how it applies to sums of money paid by the purchaser independently of the monthly instalments of £8 13s. 4d.

Such independent payments would be made at the choice of the purchaser and accordingly may be said to be based upon no antecedent amount specified in the contract to which cl. 22 could apply so that the amount to be paid could be calculated. From this, so the argument may proceed, the inference is that cl. 22 is applicable only to the specified instalments of £8 13s. 4d. Accordingly cl. 23 would in its turn have no application. If the clauses apply only to the specified instalments the balance of purchase money called up for default is outside their operation.

There is less difficulty in applying the clause in terms to such balance of purchase money than to voluntary payments made at the purchaser's election, because once the balance is called up it literally becomes a " payment hereinbefore agreed to be made ". It may be multiplied by the " determinant factor " under cl. 22

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and divided by the "determinant factor" under cl. 23. In other words, the calling up of the balance of purchase money provides an antecedent liability of ascertainable amount to which the formula of cl. 22 may be applied to fix the amount actually to be paid, and to that in turn cl. 23 may be applied to reduce it back to the balance to be credited in extinguishment of the named purchase price. But greater strength is given to this part of the case for the purchaser, the defendant-respondent, if the purchaser's option to make payments in amounts not antecedently specified is used as a ground for reading cl. 22 as referring only to the specified instalments of £8 13s. 4d. Put in another way, this would mean that cll. 22 and 23 refer only to the regular payments made during the term of contract fixed for paying off the balance of purchase money by instalments.

In the Supreme Court *Herron* J. so expressed the view which he adopted but without excluding optional payments from the operation of the clauses. The distinction, however, which such an interpretation of the contract draws between, on the one hand, the amount payable to the vendor as consideration for the sale in case of default and optional payments and, on the other hand, the amount of each regular instalment appears to be illogical and really to be without reason.

The general purpose of so much of cl. 3 of the contract as gives an option to the purchaser to make payments at any time on account of the purchase money over and above the instalments and as gives an option to the vendor on default to call up the balance of payment so as to make it immediately recoverable is obviously to introduce a variation in the time and occasion of paying the purchase money but not to interfere with the method of calculating the amount of the consideration for the sale of the land. The principle underlying the provisions of the contract is that, the parties having agreed on a price of £2,600 as the value of the land at the time of the agreement for sale and having agreed on a postponement of completion, the actual amount to be paid is the monetary equivalent of that price ascertained by adjustment to the purchasing power of money prevailing from time to time as and when each payment is made. The adjustment is accomplished, as already explained, by means of variations of the sums paid from time to time and by crediting less or more than the payment, as the case may be, without formally varying the expression of price. But none the less there is an adjustment of the actual monetary consideration for the sale.

The words of cl. 22 and of cl. 23 are not intractable and the intention is apparent. It has already been said that literally the amount of purchase money called up becomes a " payment hereinbefore agreed to be made ". It would involve a restriction upon the meaning of the expression if the balance of purchase money were held to fall outside its operation according to its true interpretation. So far from restricting the application of cll. 22 and 23 by interpretation, the context and subject matter appear to require that as full and complete an operation should be given to the clauses as the language in which they are framed will admit. In truth, in relation both to the balance of purchase money called up and to the optional payments on account of purchase money, cll. 22 and 23 and cl. 3 must be interpreted in combination. When read together the general result which their combined operation is intended to produce is clear enough. The only difficulty in giving effect to that intention arises from the fact that a figure antecedent to the actual payment appears to be contemplated, whereas a voluntary payment must be at a figure chosen by the purchaser. That difficulty is more formal than substantial and more apparent than real. If the purchaser chooses under his option given by cl. 3 to tender a sum of money to the vendor as part of the consideration for the land, he must be taken to tender it as under the entire contract, that is to say, as under the combined operation of cl. 22 and cl. 23. That means that it is a sum based on the formula which cl. 22 prescribes for a part payment of the purchase money during the currency of the contract. It may not be a sum the purchaser has obliged himself by his agreement then and there to pay. But in a wider sense the amount on which it is based is a payment agreed to be made. For it is parcel of the total price which must be discharged and is paid under an agreed option enabling the purchaser to select the amount to be paid and the time of payment. The amount actually tendered must be taken to be the product of the application of cl. 22. The amount from which it is produced by the application of cl. 22 is, by the use of cl. 23, re-established as the amount to be credited against the named price. The process involved is not elaborate, although its statement may be. All that it comes to is that cl. 3 and cl. 23 combine to give to an optional payment the same character as belongs to a payment the amount and time of which is fixed. That character involves as a next step the application of cl. 23 to determine the amount to be credited. The result is that the optional payments and the balance of purchase money called

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up in consequence of the purchaser's default both fall under cll. 22 and 23.

The parties, in framing the questions in the special case, perceived that as logical possibilities four interpretations were open, namely, that it might be held (1) that both the optional payments and the balance called up fell under cll. 22 and 23, (2) that neither did, (3) that the optional payments did and the balance called up did not or (4) that the balance called up did but the optional payments did not. In point of fact the purchaser (the defendant-respondent) made four payments of £50 each and four of £25 each. Neither of these figures is a multiple of £8 13s. 4d., and, though the payments were not made in addition to regular payments of instalments, there is no correspondence with instalment payments due. The four payments of £50 and the four of £25 together amount to £300, but the total credits produced by the payments after the application of cl. 23 amounted to £224 5s. 4d., or £75 14s. 8d. less. So far as the interpretation of the contract goes the foregoing conclusion means that credit should be given in respect of these payments for £224 5s. 4d. and not £300 and that, after such credit, the liability for the balance of purchase money calculated under cl. 22 is £4,112 10s. 4d.

But, apart from the question of interpretation with which this judgment has now dealt, the plaintiff-appellant's claim to this sum failed in the Supreme Court on the ground that cll. 22 and 23 sought to prevent the purchaser as the vendor's debtor from discharging a debt, the amount of which is ascertained or ascertainable, by a payment in lawful currency, the face value of which is equal to the amount of that debt. The view was taken that the "debt" was finally or definitively fixed at £2,600 (disregarding "additional" charges) and that cl. 23 was nothing more or less than a provision that a payment of £1 (on account of that debt) in lawful currency should not discharge the debt to the extent of £1. Accordingly the rule was violated that "the obligation to which a contract to pay a sum of money gives rise is to pay, in whatever the law regards as legal tender at the time when payment is made, as many units of currency as amount to the sum" (*Bonython* v. *The Commonwealth* (1)). This rule is but an expression of the nominalistic principle. With great respect, there does not seem to be room in the present case for the operation of this principle. No question arises concerning the medium of discharging a debt, the form of currency to be used or tendered. Whatever the liability of the purchaser may be ascertained to be, that liability

(1) (1948) 75 C.L.R. 589, at p. 621.

is to be discharged in whatever the law regards as legal tender when payment is made by as many units of currency as amount to the sum so ascertained. Clauses 22 and 23 are concerned only with the measurement of the liability of the purchaser. The expression of the purchase price at £2,600 doubtless remains unvaried. But cll. 22 and 23 effectively vary the amount of the total consideration. There is no principle of law preventing parties adopting a fixed figure as the primary monetary expression of a liability and then proceeding to effect a substantive variation of the liability by providing that more or less money must be actually paid according as index numbers evidence a variation of price levels. That is only a method of measuring the actual liability contracted for. It is nothing but an indirect way of referring the admeasurement of the obligation " to a sliding scale (*échelle mobile*) linked to price or other indices " (*F. A. Mann, The Legal Aspect of Money*, p. 92).

The suggestion made for the defendant-respondent that the clauses were bad for uncertainty cannot be sustained nor can the further suggestion that there was a waiver on the part of the vendor of his right to adjust, under cll. 22 and 23, the four payments of £50 and the four of £25 made during the currency of the contract.

The appeal should be allowed with costs. The order of the Supreme Court should be discharged and in lieu thereof it should be ordered that both parts of the question submitted by cl. 6 of the special case for the determination of the Supreme Court be answered in the affirmative and that a verdict and judgment be entered for the plaintiff for £4,112 10s. 4d. with costs, including costs of the demurrer and of the special case into which the demurrer was turned.

Appeal allowed with costs. Order of Supreme Court discharged. In lieu thereof order that both parts of the question submitted by cl. 6 of the special case for the determination of the Supreme Court be answered in the affirmative and that a verdict and judgment be entered for the plaintiff for £4,112 10*s.* 4*d. with the costs of the action including the costs of the demurrer and of the special case into which the demurrer was turned.*

Solicitor for the appellant, *W. B. Scott.*
Solicitors for the respondent, *Densley & Downing.*

J. B.