it appears, a taxpayer should contemplate the possibility of his own future breaches of contract. While the possibility remains it is not, as a matter of business good sense, appropriate to treat the amount received as income. The reasoning is hardly acceptable even if the conclusion is desirable. It would, for example, be interesting to learn whether, in a case of payment for goods sold and delivered, the seller is entitled to argue that no income is derived because of the contingency of an action should the goods prove to be defective. And in the *Arthur Murray* situation, in the event of the taxpayer failing to give the lessons contracted for, should it retain the moneys received in reserve until the period of the Statute of Limitations expires? It would appear that the discussion of the contingency aspect was not necessary to the decision, which could have rested on business practice. What the Court was trying to do, it seems, was to explain that business practice, and in so doing it created an unnecessary difficulty for itself. It should have gone no further than the terms of the case stated, which, by setting out affirmatively what business practice was, prevented the Court from considering the question whether it does in fact accord with business usage to consider an amount received unconditionally as not immediately being income derived.

The result, then, is a confirmation of business practice as the test in situations arising under the Income Tax Assessment Act, 1936-1966, where the Act lays down no test for those situations. The decision is important for the business community as it affirms the legal basis of the common business practice of deferring "unearned" income where it is appropriate to do so. By inference, it reassures the businessman that the Courts are ready to pay heed to business conventions when allowed by the legislature to do so.

Footnote

In the light of this decision by the High Court, the Commissioner has announced that it will be applied in the majority of instances in future.[26] Interesting questions might arise as to receipts included in assessments for previous years, and "earned" in future years; are they to be taxed anew when earned?

S. J. FERGUSON, Case Editor — Fourth Year Student

PREINCORPORATION CONTRACTS

BLACK AND ANOR. v. *SMALLWOOD AND ANOR.*[1]

Black v. *Smallwood* is an application and possibly a development of the principles enunciated by the English Court of Appeal in *Newborne* v. *Sensolid*.[2]

The plaintiffs, as vendors of certain lands situate at Campbelltown, signed a document in the form of the 1953 edition of the conditions and terms of sale approved by the Real Estate Institute of New South Wales. Where the form of contract provided for the signature of the purchaser, there were the words "Western Suburbs Holdings Pty. Limited" and, underneath, the signatures

[26] 9 *The Taxpayers' Bulletin* No. 14 at 4, where full details are set forth.
[1] (1966) 39 A.L.J.R. 405.
[2] (1954) 1 Q.B. 45.

"Robt. H. Smallwood" and "J. L. Cooper", bracketed together thus:

Signature of purchaser: Western Suburbs Holdings Pty. Limited
Occupation: Robt. H. Smallwood } Directors.
Address: J. L. Cooper }

Cooper informed the plaintiffs that there was no money in the account of Western Suburbs Holdings Pty. Ltd., and that Smallwood and he would have to pay the deposit "pending the cheque from Western Suburbs Holdings Pty. Ltd.". The deposit was in fact paid by a cheque drawn by Cooper on behalf of a firm in which he had a one-quarter share, and a receipt was given by the vendor's agent for money received from Western Suburbs Holdings Pty. Ltd.

Subsequently the plaintiffs' solicitors sent by letter to the solicitors named as the "purchasers' solicitors" in this document, a further document which was stated to be a redraft of the original document but incorporated all its provisions. This letter was headed "Black and Anor. to Western Suburbs Holdings Pty. Ltd." and referred to execution "by your client" (singular). The "purchasers' solicitors" replied that "there may be some delay in exchanging contracts with you in connection with this matter, as our client company has not yet been incorporated". In fact, Western Suburbs Holdings Pty. Ltd. was not incorporated until about ten weeks after the original document was signed, when one share each was issued to Cooper and Smallwood, and one share was issued to each of two other persons. Subsequently, the "purchasers' solicitors" raised some question of non-disclosure on the part of the vendors and stated that their "client company" did not wish to "complete negotiations", and requested a return of the deposit.

After receiving a letter which stated that the vendors required "the contract to be completed by the purchaser", the "purchasers' solicitors" wrote to the vendors' solicitors, informing them that their "client does not propose to proceed with this matter". In acknowledging a formal notice to complete, they then asserted that the contract was a nullity since Western Suburbs Holdings Pty. Ltd. was not incorporated on the date when the document was signed. During this period, all letters had been headed with reference to the company.

The vendors' solicitors thereupon wrote to "the purchasers' solicitors" stating that they "are now instructed to require the two individuals, Smallwood and Cooper, who signed the contract of the 22nd December 1959 as directors on behalf of Western Suburbs Holdings Pty. Ltd., to complete the contract made by them in the name of the company". No completion took place and accordingly the vendors began a suit for specific performance of the original agreement, by Smallwood and Cooper.

The principal defence of the defendants was a denial that any contract was made between the plaintiffs and the defendants. All that Cooper and Smallwood purported to do was sign the name of a "person" which in fact did not exist. They did not themselves purport to contract. This defence was based squarely on the decision of the Court of Appeal in *Newborne* v. *Sensolid*.

In *Newborne's Case* a contract for the sale to the defendant by the plaintiff of certain goods was signed by the plaintiff, one Leopold Newborne, as follows: "Leopold Newborne (London) Ltd., Leopold Newborne". At the time when the contract was signed, there was no company incorporated under the name of Leopold Newborne (London) Ltd., although the plaintiff was in the process of forming it. Goddard, C.J. said:

> What we cannot find in this case is that Mr. Newborne ever purported to contract to sell as agent or as principal. The contract was one which he was making for the company, and although Mr. Diplock has argued that in signing as he did Mr. Newborne must have signed as agent, since

> the company could only contract through agents, that was not really the true position.
>
> The company makes the contract. No doubt the company must do its physical acts, and so forth, through the directors, but it is not an ordinary case of principal and agent. It is a case in which the company is contracting and the company's contract is authenticated by the signature of one of the directors. This contract purports to be a contract by the company; it does not purport to be a contract by Mr. Newborne. He does not purport to be selling his goods but the company's goods.[3]

Jacobs, J. sitting in Equity did not think that there was anything in the contract which as a matter of construction, even in the light of the actual circumstances, whether they were known or unknown to the signatories, would lead to the conclusion that Smallwood and Cooper intended to undertake a personal obligation. His Honour considered *Newborne's Case* and distinguished it on the ground that "all the Court of Appeal had to determine was whether, when a contract was made by a non-existent company, and it appeared on the face of it that the company and not the individual who signed for the company, was intended to be the contracting party, that individual could not sue upon the contract as if it were his own contract".[4] He went on to say:

> In my view a distinction must be drawn between the position of a plaintiff and the position of a defendant . . . . It is true that if it is made clear that the agent accepts no personal liability whether or not the company is in existence, then there will be no room for the imposition of a personal liability upon him. Such a case would be a rare one but the possibility of such case points to the principle which in my view is applicable, namely the principle of estoppel. The defendant in such a case cannot be heard to say that he did not intend to assume any personal liability when the effect of such an assertion would be to destroy the possibility of the firm contract and relationships which the other party intended.[5]

His Honour concluded that the original document must be regarded as a contract between the plaintiffs and the two defendants, and accordingly he made a decree for specific performance of that contract.

On appeal to the Full Supreme Court,[6] all three Judges were of opinion that the appeal should be allowed. All three considered *Newborne's Case* applicable. Walsh, J. said that there would have been a binding contract on the authorities prior to *Newborne's Case*,[7] which was out of accord with his own view of the correct principles to be applied. But he thought, nevertheless, that the Supreme Court should follow *Newborne's Case*[8] as it was a decision of the Court of Appeal. The degree for specific performance was set aside.

The plaintiff's appealed from this decision to the High Court of Australia, which dismissed the appeal. Barwick, C.J., Kitto, Taylor and Owen, JJ. delivered a joint judgment in which they concluded not only that they should follow *Newborne's Case*, but also that the decision in that case was correct. Windeyer, J. delivered a separate concurring judgment.

The judgments raise some important notions of corporation law. At the time when this contract was signed, there was no principal in existence. While it is fundamental that a corporation has existence apart from its members and incorporators, nevertheless, that existence depends entirely upon the relevant Act of Parliament, in this case, the Companies Act, 1936. It follows that until the company is registered and a certificate of incorporation issued

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[3] At 51.
[4] (1963) 81 W.N. (Pt. 1) (N.S.W.) 138 at 140.
[5] At 141.
[6] (1965) 65 S.R. (N.S.W.) 431.
[7] *Id.* at 446.
[8] *Id.* at 446.

by the Registrar, there is just no company to enter into a contract. There appears to be no doubt that if there is no legal person extant at the time a contract is entered into, even if a legal person subsequently comes into existence under that name, that legal person is not capable of ratifying the contract, although ostensibly entered into by its agent on its behalf. If there was no party, the contract is simply a nullity and is not capable of ratification. *Kelner* v. *Baxter*[9] is clear authority for this. What then was the effect of the signature by Smallwood and Cooper?

The concept of a legal person in the nature of a corporation is a highly artificial one.[10] Nevertheless, it is one which our law recognises and one which is eminently useful and sensible. Because a company is an artifact or a construct of the law, however, and since it does not have the capability of a natural person to perform acts in the physical world and generally to carry on an existence in the world, a corporation can act only with the aid of natural persons. The only way in which a company, for example, can execute any written paper, either under seal or otherwise, is by the agency or instrumentality of natural persons.[11] This "agency" is a somewhat more restricted notion than the legal notion of agency, whereby one person may perform certain acts on behalf of another, such as entering into a binding contract, or receiving money. While this distinction was discarded as meaningless by one of the Judges in the Full Court,[12] Windeyer, J. was prepared to defend the distinction as a worthwhile one, flowing essentially from the artificial nature of the concept of a corporation having separate legal personality. Because of the possibility of confusion perhaps a word such as "instrument" should be substituted for "agent".

Thus, it is possible for a natural person, as the "instrument" of a company, to perform certain kinds of acts on the company's behalf, which in themselves do not affect the company's legal rights. That is, they may sign the company's name. The alteration of the company's rights by this act of its instrument follows only from the effect attached by law to the signing of a contract by any legal person, not from the binding of the company in contract by its instrument. The act of "agency" is not the entering into the contract, but the signing of the company's name.

This being the position, the question will often arise in practice, as it did in this case, as to the extent to which the agents or instruments of a company can be regarded as bound by a contract made by them for the purposes of the company before the company has been incorporated. (It is to some extent misleading to say "on behalf of the company" since this implies that there is a company in existence.)

If these principles are accepted, and *Newborne's Case* and *Black* v. *Smallwood*[13] say they must be, then it follows that, in this case, the defendants Smallwood and Cooper could not have been held to be liable to perform this contract, unless there is to be found in our law a further overriding principle, which it was thought might flow from *Kelner* v. *Baxter*, that a person professedly contracting on behalf of a principal, which in fact does not exist, is personally liable on that contract.

In *Kelner* v. *Baxter*,

> . . . a company being projected for carrying on the business of an hotel, and purchasing the premises and stock of the plaintiff, the following agreement was entered into:—"Jan. 27, 1866: to A.B. and C. on behalf of

[9] (1866) L.R. 2 C.P. 174.
[10] See 39 A.L.J.R. at 408 *per* Windeyer, J.
[11] See Conveyancing Act, 1919-1964, s.51A(2).
[12] (1965) 65 S.R. (N.S.W.) *per* Walsh, J. at 443.
[13] 39 A.L.J.R. at 408B.

> the proposed Gravesend Royal Alexandria Hotel Company. I hereby propose to sell the extra stock, as per schedule hereto, for the sum of £900, payable on 28th Feb. 1966" (signed by the plaintiff). "We have received your offer to sell the extra stock as above, and we hereby agree to accept the terms proposed". (signed) "A.B. and C. on behalf of the Gravesend Royal Alexandria Hotel Company". The goods were handed over to the representatives of the proposed company, A.B. and C., and were consumed in the business. The company obtained a certificate of incorporation under the Companies Act, 1862, on the 20th Feb., but collapsed before the money was paid.[14]

Earle, C.J. observed:

> The cases fully bear out the proposition that, where a contract is signed by one who professes to be signing "as agent" but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby.[15]

Again, Byles, J. states that the true rule is: "That persons who contract as agents, are generally personally responsible where there is no other person who is responsible as principal."[16] These statements are unequivocal. The basis for the conclusion of all the Judges in the case is that, unless such a rule exists people would be deprived of a bargain simply because the person with whom they entered into the contract purported to do so as agent for some principal which did not exist.

However, the joint judgment in the High Court states:

> *Kelner* v. *Baxter* was cited as an authority for the proposition that there is a rule of law to the effect that where a person contracts on behalf of a non-existent principal he is himself liable on the contract. But we find it impossible to extract any such proposition from the decision.[17]

Their Honours conclude that the decision in the case was that, in the circumstances, the writing disclosed an intention that the defendants should be bound. On the other hand, Earle, C.J. was clearly of opinion that the language used was such that it would have shown that the persons who signed were signing only as agents if the company had been in existence. The decision cannot be taken to be one in which the Court found an actual intention that they personally should be parties to the contract. This view of *Kelner* v. *Baxter* is the one adopted by the Judges in *Newborne's Case*. Parker, J. at first instance, observed:

> In *Kelner* v. *Baxter* the principle there laid down is that if a person contracts ostensibly as agent for a non-existent principal, as for example a company which is not yet formed, he *can be held*[18] to be himself personally liable.[19]

This was approved by the Court of Appeal, and it is supported by Latham, C.J. in *Summergreene* v. *Parker*.[20]

The High Court, however, refused to accept the broad principle, that where a person professedly contracts as agent for a non-existent principal he is *personally* bound by the contract. Both judgments restrict the decision in *Kelner* v. *Baxter* on its facts, since in that case it appeared from the contract itself that both the plaintiff and the defendant were aware at all times that

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[14] (1866) L.R. 2 C.P. 174.
[15] At 183.
[16] At 185.
[17] 39 A.L.J.R. at 405-06.
[18] The italics were suggested by Asprey, J. in the Full Court. The statement of Parker, J. can thus be restricted: he does not say that an agent *is* liable but only that he *may*, in some cases, be liable.
[19] (1954) 1 Q.B. at 47.
[20] (1950) 80 C.L.R. 304. Walsh, J. in the Full Court (65 S.R. 439-440) suggests that the views of Latham, C.J. would support the principle that an agent *will* be bound.

the hotel company had not been incorporated. The only possible way of giving any meaning to the agreement between the plaintiff and defendants was to conclude that both parties intended that the defendants should be personally liable. Although both parties doubtless intended that payment was to come from the company's funds when it was incorporated, this was not a term of the contract. Both judgments in the High Court regarded this as basic in the interpretation of the decision in *Kelner* v. *Baxter*.[21]

What distinguishes *Kelner* v. *Baxter* from *Newborne*, then, and what is presumably the critical question in these cases, is the intention of the parties to the contract, which is to be gleaned from the terms of the contract whether written, or implied, and insofar as they are admissible, from the surrounding circumstances. Where the intention of the parties is made clear, that it is the principal or no one, who makes the contract, the agent cannot subsequently be bound by, or sue upon, the contract. Presumably it will be moderately easy where there is in fact a principal in existence on whose behalf a contract is made, to find a stipulation that an agent is not personally liable or entitled to sue. But where the principal is non-existent, since it is probable that the parties to a contract intend that it should have some effect, the party asserting a binding contract to which the agent is a party might as a matter of construction start with an assumption in his favour which the other must displace if he can. Thus in *Vickery* v. *Woods*,[22] Dixon, J. said:

> The contract itself was expressed as an acknowledgment of a sale to the appellant as agent for the Gunbar Pastoral Co. Pty. Ltd. and his signature as purchaser is qualified by the words "For Gunbar Pastoral Co. Pty. Ltd." As that company had not yet been registered and so did not then exist, he must be considered as contracting so as to incur the liability of a principal; otherwise the contract would be inoperative. To avoid personal liability as a consequence, a clear expression of an intention not to be bound personally is necessary; the expressions used in this contract are not sufficient for that purpose.[23].

If it is clearly enough the intention of the parties that the agent is not to be a party, then that will be decisive.[24] It is a basic principle of contract law that the intention of the parties is critical in determining the relations which exist between them. What the court must do in a case such as *Black* v. *Smallwood* is to consider the terms of the contract in order to ascertain just who the parties to the contract are. If, on the face of the contract, a company is a party, and that company did not exist at the time of the contract, clearly the contract has no effect. This will be so whether the contract is signed X and Y on behalf of Z Pty. Ltd., or in the form in which Cooper and Smallwood signed in this case.[25] The manner of signing the contract by the company's agents or instruments, while it may be relevant to the question of the intention of the parties, will certainly not be decisive.

However, if it appears from the terms of the contract that the company does not exist at the time, and that fact was present in the minds of the signatories, the signatories will probably be presumed to have intended the contract to have some effect, and those who sign the contract as the "agents" of the company may be held to be principals and therefore parties to the contract, and liable to be sued, or be capable of enforcing it.

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[21] See 39 A.L.J.R. at 406B, 409E.

[22] (1952) 85 C.L.R. 336.

[23] At 343.

[24] This would explain the examples of Lord Campbell, C.J., quoted by the High Court at 39 A.L.J.R. 306.

[25] One criticism of the law as it was sometimes expounded prior to this was that it was thought that *Kelner* v. *Baxter* and *Newborne* v. *Sensolid* indicated that opposite results would follow from what might well be a matter of chance, namely, the form of the signature used in the contract.

The danger of an innocent contracting party being altogether defeated is reduced somewhat by the principles derived from *Collen* v. *Wright*.[26] That case lays down that a cause of action lies for damages for the breach by an agent of his implied warranty of the authority of his principal. This cause of action is well established. Windeyer, J. specifically,[27] and the other judges by inference,[28] indicate that there could be a cause of action for breach of warranty by a person who represents that he is a director of an existing company which has power to enter into a contract to purchase land. Windeyer, J. observes[29] that the principle in *Collen* v. *Wright* is of very general application, and he quotes several cases as authority for his proposition. There is no doubt that such a principle is a reasonable one, and it appears that the High Court would hold that it exists if called upon to do so. In *Black* v. *Smallwood*, every judge was at pains to point out that the only question for decision was whether the plaintiff was entitled to specific performance of the contract by Cooper and Smallwood, and that they were not called upon to decide the question of a breach of warranty.

A. R. EMMETT, Case Editor — Fourth Year Student.

REPRESENTATION OR CONTRACTUAL TERM?

DICK BENTLEY PRODUCTIONS, LTD. AND ANOTHER v. *HAROLD SMITH (MOTORS), LTD.*

One of the most confusing areas of the modern English law of contract is that dealing with what is usually referred to as "the terms of the contract".[1] This part of the law is one of fine distinctions and ill-defined terminology. Thus, a statement passing between parties entering into a contract may be simply a "puff",[2] or a mere representation, or a representation which constitutes a term of the contract.

The first of these three categories refers to statements of an obviously exaggerated and optimistic nature to which the law, naturally enough, pays no regard. Legal consequences do, however, follow from statements falling within the other two categories and, because these consequences differ, it is necessary to distinguish these latter categories. The distinction between a mere representation and a contractual term lies in the fact that whilst a term forms part of the contract a mere representation does not; it is simply a factor which may have induced the representee to enter into the contract.[3] With regard to remedies, the distinction between terms and mere representations has always been that breach of a term entitles the plaintiff to recover damages, whilst the falsity of a mere representation, though it may entitle the representee to the remedy of rescission, does not give him a contractual right to recover damages.[4]

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[26] (1857) 8 E. & B. 647, 120 E.R. 241.
[27] 39 A.L.J.R. at 409E.
[28] *Id.* at 407D, 407G-08A.
[29] *Id.* at 409F.
[1] See e.g., 1 *Chitty on Contracts* (22 ed. Pt. 3).
[2] E.g., *Scott* v. *Hanson* (1829) 1 Russ. & M. 128: land described as "uncommonly rich water meadow".
[3] Cheshire & Fifoot, *The Law of Contract* (6 ed.) at 226.
[4] Damages are recoverable in respect of a fraudulently made misrepresentation which