H. C. OF A. 1907.

ÀBECKETT v. BACKHOUSE.

appeal being allowed they will not claim a refund of any moneys paid over by the trustees to any of the daughters after 7th March 1907 and before notice of this motion was given to them, if the Court on the hearing of the appeal should think it just that such moneys should not be refunded, and also to indemnify the trustees against any payments properly made by them under the order, also to give notice of appeal within 7 days, and security for costs of the appeal within 7 days from notice of appeal.

Cons *Laybutt* v *Amoco Australia Pty Ltd* (1974) 132 CLR 57

Solicitors, for appellants, *Snowden, Neave & Demaine*, Melbourne.

Solicitors, for respondents, *Blake & Riggall*; *Hamilton, Wynne & Riddell*, Melbourne.

B. L.

[HIGH COURT OF AUSTRALIA.]

CHRISTIE AND ANOTHER . . . . APPELLANTS; PLAINTIFFS,

AND

ROBINSON . . . . . RESPONDENT. DEFENDANT,

H. C. OF A. 1907.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

MELBOURNE, *May* 27, 28, 30, 31.

Vendor and purchaser—Deposit paid to agent of vendor—Rescission of contract—Recovery of deposit from vendor—Shareholder.

Griffith C.J., O'Connor, Isaacs and Higgins JJ.

By the conditions of a contract in writing for the sale of land and stock it was provided that a deposit of £500 should be paid by the purchasers to A. "as agent for the vendor." By another condition it was provided that as soon

as the purchasers had accepted title "the deposit shall be paid over to the vendor." The £500 was paid by the purchasers to A. and was never paid by him to the vendor. Subsequently in writing the contract was "cancelled by mutual consent" of the vendor and purchasers' title never having been accepted.

Held (*Isaacs* J. dissenting), that the purchasers were entitled to recover the £500 from the vendor.

Decision of the Supreme Court (*Hodges* J.) reversed.

APPEAL from the Supreme Court of Victoria.

The plaintiffs, Archibald John Christie and Walter Henderson Thomson, brought an action in the Supreme Court of Victoria against Edward Oswin Robinson for money had and received, "being the amount paid on 24th January 1905 by the plaintiffs to William Good, the agent of the defendant, as and for a deposit under a contract in writing, dated the 24th day of January 1905, made between the defendant and the plaintiffs, for the sale and purchase of certain leasehold land, and which contract was cancelled in writing by the plaintiffs and defendant by mutual consent on the 21st day of March 1905, whereby the said deposit became payable to the plaintiffs."

The contract in question, so far as material, was as follows:—

"Particulars and conditions of sale of leasehold land situate at and known as Melville Island, near Port Darwin, Northern Territory, South Australia.

"Particulars—All those portions of Crown land situate in the State of South Australia, known as the Northern Territory containing by estimation 2,400 square miles held under and particularly described in two Crown leases entered Vol. 25, Fol. 55, No. 2,224, and Vol. 25, Fol. 54, No. 2,225 respectively and issued under the *Northern Territory Land Act* 1890 to Edward Oswin Robinson, together with all the buffaloes thereon.

"1. The purchase money shall be the sum of £3,000 and the purchasers shall on the signing hereof pay a deposit of £500 to Mr. Wm. Good as agent for the vendor and pay the balance by instalments as follows, viz.:—£500 on acceptance of title as hereinafter provided and the balance by four promissory notes of £500 each with interest at the rate of £5 per centum per annum added to each promissory note and to be respectively dated at six, twelve,

H. C. OF A. 1907.

CHRISTIE v. ROBINSON.

eighteen, and twenty-four calendar months from the date hereof and shall sign the subjoined contract.

"2. The purchasers shall complete their purchase upon payment of the last of the said promissory notes but they shall be entitled to the possession of the land purchased by them upon their acceptance of title to such land and if from any cause whatsoever their purchase shall not be completed at the time above specified the purchasers shall pay interest on such of their instalments of purchase money as shall become overdue at the rate of £8 per centum per annum without prejudice however to the right of the vendor under the 7th condition.

"3. Upon or at any time after payment of the said deposit of £500 on account of the purchase money the vendor will sign a proper transfer of the property to the purchasers such transfer to be lodged in escrow as hereinafter provided.

"4. The titles to the property sold shall be produced to and a copy thereof may be made by the purchasers or their solicitor on application in that behalf to the vendor or his solicitor Mr. H. W. C. Simpson Equitable Building Collins Street Melbourne and the purchasers shall within ten days from the date hereof deliver to the vendor or his solicitor a statement in writing of all objections or requisitions (if any) to or on the title or concerning any matter appearing on the particulars or conditions and in this respect time shall be of the essence of the contract. All objections or requisitions not included in such statement to be delivered within the time aforesaid shall be deemed absolutely waived by the purchasers and in default of such objections and requisitions (if any) and subject to such (if any) and subject to the purchasers' rights under clauses 12, 13, 14 and 15 hereof the purchasers shall be considered as having accepted title.

"5. In case the purchasers shall within the time aforesaid make any objection to or requisition on the title or otherwise which the vendor shall be unable or unwilling to remove or comply with and such objection or requisition shall be insisted on it shall be lawful for the vendor or his solicitor (whether he shall have attempted to remove such objection or to comply with such requisition or not, and notwithstanding any negotiations or litigation in respect of the same) at any time by notice in writing to

annul the sale and within one week after giving such notice repay to the purchasers the amount of their purchase money or so much thereof as shall be paid in full satisfaction of all claims and demands whatsoever by the purchasers but without any interest costs or damage of any description.

"7. If the purchasers shall fail to comply with the conditions or shall not pay the whole of the deposit as aforesaid or shall not duly pay the said instalments of purchase money and interest or any of them as they become due then the whole of their purchase money shall immediately become due and payable and their deposit money and such other purchase money as shall have been paid shall be actually forfeited to the vendor who shall be at liberty without notice to rescind the contract . . . .

"12. The vendor guarantees and represents that there are at least 10,000 buffaloes on the Island, also that the Island is not excessively swampy inland and that the native inhabitants upon the Island are not more than ordinarily fierce as compared with the native inhabitants on the mainland of Northern Australia.

"13. The vendor agrees that he will be ready at Port Darwin in the Northern Territory aforesaid on or about the 1st March prox. to give the purchasers a full inspection of the Island and the buffaloes thereon. The vendor and purchasers will each pay his and their own expenses or share of the expenses in relation to the journey to Port Darwin and the inspection of the Island.

"14. The purchasers agree that they or one of them will proceed to Port Darwin so as to be there on or about the 1st March prox. so as to make the said inspection and they will immediately after such inspection subject to their rights hereunder accept the title to the land sold and pay the said further sum of £500 on account of the purchase money and make the said four promissory notes for the balance thereof and interest in favour of the vendor.

"15. As soon as the said purchasers have accepted the title as aforesaid the deposit shall be paid over to the vendor and upon payment of the further sum of £500 to the vendor and the making of the said promissory notes the said leasehold titles and the transfer thereof and the said promissory notes shall forthwith be lodged at the head office of the English Scottish and Aus-

H. C. OF A. 1907.

CHRISTIE v. ROBINSON.

tralian Bank Limited Collins Street Melbourne or wherever else the vendor and purchasers may in writing agree upon as an escrow pending the payment to the vendor of the balance of the purchase money and interest represented by such promissory notes."

On this document was endorsed:—"The above agreement cancelled by mutual consent 21st March 1905," and this endorsement was signed by the parties to the contract

By his defence the defendant denied that he had received the £500, and said that it was verbally agreed that the £500 should be paid to Good as stakeholder merely. He also denied that the contract was cancelled, but said that the endorsement was made on the contract merely to enable him to get back the documents of title to the land from the English Scottish and Australian Bank Limited. The defendant then counterclaimed for rectification of the contract, if, on the construction of the contract as written, it should be held that Good received and held the deposit as agent of the defendant, so as to accord with the true agreement between the parties, viz., that the deposit should be held by Good as a stakeholder merely. The defendant also counterclaimed for rectification of the memorandum of 21st March 1905 so that the true terms of the agreement for cancellation might be set forth, viz., that thenceforth the contract should be cancelled, abandoned or rescinded, and/or that, for the purpose of enabling the defendant to obtain the titles to the land from the English, Scottish and Australian Bank Ltd., at Melbourne, where they had been deposited, there should be endorsed on the contract a memorandum of cancellation of the contract.

The action was tried before *Hodges* J., who gave judgment for the defendant with costs. From this judgment the plaintiffs now appealed to the High Court.

Hayes, for the appellants. The £500 paid as a deposit is part of the purchase money: *Whitbread & Co. Ltd.* v. *Watt* (1); and having been paid to Good as agent for the vendor is recoverable from the vendor. Apart from clause 15 of the conditions there is no doubt that is so.

(1) (1901) 1 Ch., 911; (1902) 1 Ch., 835.

[ISAACS J. referred to *Ex parte Edwards*; *In re Chapman* (1).] In that case the money was wrongfully received by the agent, and at most it shows that the agent might be liable for money received on behalf of his principal, not that the principal would not be liable. Good was not in the position of a stakeholder. Clause 15 of the conditions makes no difference. It was not inconsistent with Good's position as agent for the respondent that he was to hold the deposit until the happening of a particular event. The money once paid over to Good was the respondent's money. The appellants could not recover the money from Good: *Ellis* v. *Goulton* (2). The facts do not support the claims for rectification.

Duffy K.C. and *Cohen*, for the respondent. The intention of the parties was that the deposit should be held by Good as a stakeholder, and, if the written contract does not carry out that intention, it should be rectified. The £500, which was in fact received by Good, was not received by him under the contract so as to make the respondent liable to repay it. In fact a cheque was accepted by Good instead of cash, as was provided by the contract. That cheque was at first dishonoured but was afterwards paid. On dishonour of the cheque there was an end of the conditional payment, and Good had no right to take a new payment without reference to his principal, who might have chosen to put an end to the contract. There was a breach of the contract by the appellants before the alleged cancellation, and that had the effect of giving the respondent a right of action and a right to treat the deposit as forfeited. The cancellation did not revest any right to the deposit in the appellants.

The contract as it stands entitled Good to hold the deposit as a stakeholder. The contract is adapted from Table A to the *Transfer of Land Act* 1890, the whole scheme being that the appellants shall go and look at the property before either party is bound. All the provisions are consistent with Good being a stakeholder. Payment to an agent is not in fact payment to his principal, but the principal is estopped from denying that he has been paid—it is a legal fiction. If money is paid to a person, who nominally receives

(1) 13 Q.B.D., 747, at p. 751. (2) (1893) 1 Q.B., 350.

H. C. OF A. 1907.

CHRISTIE v. ROBINSON.

it for certain parties, and no contract eventuates, the money being found in the hands of that person may be recovered from him: *Wells* v. *Birtchnell* (1); *English* v. *Gibbs* (2); *Abrahams* v. *Watson* (3). The costs of the commission were made costs in the cause, and there was no jurisdiction to give those costs to the appellants.

Hayes in reply. The meaning of costs in the cause is that they shall follow the event unless the Judge otherwise orders: *Urquhart* v. *Macpherson* (4); *Lund* v. *Campbell* (5); *M'Millan* v. *Read* (6), and *Groom* v. *Parkinson* (7) are opposed to *Wells* v. *Birtchnell* (1).

[The following authorities also were referred to during argument:—*Farebrother* v. *Prattent & Aitcheson* (8); *Gadd* v. *Houghton* (9); *Williams on Vendor and Purchaser*, p. 659; *Wright on Principal and Agent*, pp. 301, 459; *Paice* v. *Walker* (10); *Edgell* v. *Day* (11); *Harington* v. *Hoggart* (12); *Holland* v. *Russell* (13); *Powell* v. *Smith* (14); *Samuel* v. *Newbold* (15); *Mackenzie* v. *Coulson* (16); *Bentley* v. *Mackay* (17); *Cogan* v. *Duffield* (18); *Johnson* v. *Donaldson* (19); *Hampden* v. *Walsh* (20); *Furtado* v. *Lumley* (21); *Edwards* v. *Hodding* (22); *Smith* v. *Jackson & Lloyd* (23); *Annesley* v. *Muggridge* (24); *Duke of Norfolk* v. *Worthy* (25); *Norton on Deeds*, p. 75; *Leake on Contracts*, 4th ed., p. 143; *Smith on Master and Servant*, 5th ed., p. 349; *Bruner* v. *Moore* (26); *Earl of Lonsdale* v. *Church* (27); *Lord Salisbury* v. *Wilkinson* (cited by Lord *Eldon* L.C. in *Lord Chedworth* v. *Edwards* (28); *Koosen* v. *Rose* (29).]

Cur. adv. vult.

(1) 19 V.L.R., 473; 15 A.L.T., 136.
(2) 9 N.S.W.L.R., 455.
(3) 7 N.S.W.L.R., 152.
(4) 3 V.L.R. (L.), 159.
(5) 14 Q.B.D., 821.
(6) 3 V.L.R. (L.), 284.
(7) 10 V.L.R. (L.), 14; 5 A.L.T., 171.
(8) 5 Price, 303.
(9) 1 Ex. D., 357.
(10) L.R. 5 Ex., 173.
(11) L.R. 1 C.P., 80.
(12) B. & Ad., 577; 9 L.J.K.B., 14.
(13) 1 B. & S., 424, at p. 436.
(14) L.R. 14 Eq., 85, at p. 91.
(15) (1906) A.C., 461.
(16) L.R. 8 Eq., 368.
(17) 4 DeG. F. & J., 279.
(18) 2 Ch. D., 44.
(19) 6 V.L.R. (Eq.), 121; 2 A.L.T., 12.
(20) 1 Q.B.D., 189.
(21) 6 T.L.R., 168.
(22) 5 Taunt., 815; 1 Marsh., 377.
(23) 1 Madd., 618.
(24) 1 Madd., 593.
(25) 1 Camp., 337.
(26) (1904) 1 Ch., 305.
(27) 3 Bro. C.C., 41.
(28) 8 Ves., 46, at p. 48.
(29) 76 L.T., 145.

GRIFFITH C.J. This is an action brought by the appellants against the respondent for the recovery of a sum of £500 paid as a deposit upon a contract for the sale of a certain property by the respondent to the appellants. The property was a large area of Crown land situated in the Northern Territory of South Australia, on Melville Island, and estimated to contain 2,400 square miles, held under Crown leases, with a herd of buffaloes. The price was £3,000, and the terms of payment of the purchase money were set out in the first clause of a contract in writing, dated 24th January 1905, as follows:—"The purchase money shall be the sum of £3,000 and the purchasers shall on the signing hereof pay a deposit of £500 to Mr Wm. Good as agent for the vendor and pay the balance by instalments as follows, viz.:—£500 on acceptance of title as hereinafter provided and the balance by four promissory notes of £500 each with interest at the rate of £5 per centum per annum added to each promissory note and to be respectively dated at six, twelve, eighteen and twenty four calendar months from the date hereof and shall sign the subjoined contract." Then followed conditions as to title under which the vendor undertook to make a good title with liberty to the purchasers to rescind under certain circumstances, in which case they were entitled to have the deposit repaid. The purchasers were to go to Port Darwin and thence to Melville Island to inspect the property, and the vendor guaranteed that there should be at least 10,000 buffaloes on the island, that the island was not excessively swampy inland, and that the native inhabitants were not more than ordinarily fierce. On the purchasers being satisfied on all these points they were to accept the title. By clause 15 of the conditions it was provided that:—"As soon as the said purchasers have accepted the title as aforesaid the deposit shall be paid over to the vendor and upon payment of the further sum of £500 to the vendor" the instruments of title were to be dealt with in a particular way. One of the purchasers went to Port Darwin and thence to Melville Island in accordance with the terms of the contract, but, after a partial inspection, some difficulties arose, and finally it was agreed that the contract should be rescinded. That rescission was effected in that part of the country on the 21st March 1905, when these words were written on

H. C. OF A. 1907.

CHRISTIE v. ROBINSON.

Griffith C.J.

the original agreement:—"The above agreement cancelled by mutual consent," and that was signed by the parties.

The appellants contend that, the contract being rescinded, they became entitled to get back their £500. So much is not disputed by the respondent. The appellants also contend that, on the rescission of the contract, the person to whom they should look for the repayment of the deposit is *primâ facie* the respondent, because, if money is paid to an agent, his principal is primarily responsible for that money. No doubt that is the general rule of law. In this contract Good is described as the agent for the vendor, and it is provided that the money is to be paid to him as agent for the vendor. The appellants say that that is sufficient, that the vendor has received the money, that he is no longer entitled to keep it, and that their cause of action is complete. The answer made by the respondent to that is that under clause 15 it was the duty of Good not to pay over the money to the respondent until the title was accepted, and that that clause so far controls the statement in clause 1 that Good is the agent of the vendor, that it transmutes Good's position from that of agent for the vendor to that of a stakeholder, who did not hold the money in the capacity of agent for one party rather than the other. If that be so, the respondent's contention is sound, and that view commended itself to *Hodges* J.

The general rule that a principal is the only person who can be sued, and that the agent cannot, is established by the English case of *Ellis* v. *Goulton* (1), and in accord with the decision in that case are two decisions of the Supreme Court of Victoria: *M'Millan* v. *Read* (2) and *Groom* v. *Parkinson* (3). That rule is subject to some exceptions. In the case of an auctioneer it has been settled for a long time that, if a deposit is paid to an auctioneer, though paid to him as agent for the vendor, he is personally liable. But it has never been suggested that in such a case the vendor is not also liable. So that the answer to the question whether Good is liable to repay the £500 does not conclude the question whether the respondent is liable or not. That that is the ordinary rule as to an auctioneer needs no authority. He is in a

(1) (1893) 1 Q.B., 350.
(2) 3 V.L.R. (L.), 284.
(3) 10 V.L.R. (L.), 14; 5 A.L.T., 171.

very hard position, as was pointed out by *Sir Thomas Plumer* V.-C. in *Smith* v. *Jackson* (1). He said :—"A deposit is peculiarly circumstanced. If the auctioneer pays it to the vendor, he does it at his peril; and if the purchase is not completed, the purchaser may recover it from the auctioneer, as appears from *Burrough* v. *Skynner* (2) and *Maberley* v. *Robbins* (3). If then the auctioneer cannot pay over the deposit to the vendor, is he to be considered as his agent? The vendor is responsible for the loss, if any, occasioned by the auctioneer; that was determined in *Fenton* v. *Browne* (4), in which case, the Master of the Rolls says :—'Upon a sale by auction the vendor determines who is to receive the deposit. The auctioneer is not a stakeholder of the purchaser; at least not of his choice. If he were a stakeholder for both parties, either would have a right to propose to change such stakeholder; and the party refusing takes upon himself the risk.'" And again shortly afterwards the same learned Vice-Chancellor in *Annesley* v. *Muggridge* (5) said :—"Pending the dispute as to the title, all the risk respecting the deposit rests with the vendor :—For though the auctioneer is, to a certain degree, a stakeholder for vendor and vendee, yet so far as respects any risk as to the deposit, the auctioneer is considered as the agent only of the vendor. I lately had occasion to consider this subject, on a question made, as to interest upon a deposit: (*Smith* v. *Jackson* (6)). The deposit is the vendor's money; and the risk belonging to it is his." So that the fact that an auctioneer may be sued for a return of a deposit in no way concludes the question so as to show that the vendor cannot be sued. The case of an auctioneer is one of the rare cases in which an agent is personally liable as well as his principal. The question, then, is whether the words in clause 15 so far control the general rule that the principal is liable, as to show that in this case Good was not really the agent of the vendor, but was a stakeholder standing in an independent position, and holding the money paid as a deposit to be paid by him either to the appellants or to the respondent according as the event should happen. The words of clause 1 are clear and

(1) 1 Madd., 618, at p. 620.
(2) 5 Burr., 2639.
(3) 5 Taunt., 625.
(4) 14 Ves., 150.
(5) 1 Madd., 593, at p. 596.
(6) 1 Madd., 618.

H. C. OF A. 1907.

CHRISTIE v. ROBINSON.

Griffith C.J.

unambiguous, and the matter appears to me a mere question of construction. I am unable to say that in any view of the case the words in clause 15 are such as to put Good in a different position from that of an auctioneer under ordinary circumstances. If the effect of clause 15 were that Good was the agent of both parties and not the agent of the vendor to receive the money as stated in clause 1, a different result would follow. But all that clause 15 says in express words is what happens under the law in regard to an auctioneer in ordinary circumstances, and I do not think Good is in any stronger position than that of an auctioneer. I am therefore of opinion that, whether Good is or is not liable to repay the £500 to the appellants, the respondent is. There is another way, perhaps, of arriving at the same result. Clause 15 may be regarded as a collateral promise by the vendor that he will leave the deposit in the hands of a designated person resident in Victoria for a specified time. Or possibly it may be regarded as a term of the agency between the vendor and the agent to whom the money is paid that that agent shall not be called upon to pay the money over to his principal until the happening of a certain event. Possibly it also imports an implied promise by the agent on his own behalf to the purchaser that he will not do. But all that is quite consistent with the agent being the agent of the vendor. The value of such a promise as suggested made by the vendor may be great or little. The damages for the breach of it would be quite different from the amount of the deposit. If, instead of the thing deposited being money it had been a valuable security, this would be obvious. I am of the opinion, therefore, that the words in clause 15 do not qualify the unambiguous words of clause 1, and that the maxim of *respondeat superior* applies.

Another defence to the action was set up by the respondent by way of counterclaim. He claims to have the contract rectified by getting rid of the words "as agent for the vendor" in clause 1. It is not necessary to go into detail with regard to this claim. There is no doubt that the words "shall be paid to Good as agent for the vendor" in clause 1 were put in with the full knowledge of both parties; they were the exact words they intended to use. Whether they had an exact knowledge of the legal effect

of those words, or apprehended the consequences that would follow from those words, is immaterial. Apart from that, I think there is nothing whatever, even on the respondent's own version, to raise a shadow of a claim to rectification.

There is also a claim for rectification of what is called the cancellation of the agreement, that is, the memorandum of cancellation or rescission, by substituting another agreement which it is said the parties entered into. It is said that the original agreement was to endorse the memorandum of cancellation on the contract as a sort of fictitious document, to be used to enable the respondent to get the instruments of title back from the bank in which they had been lodged under the contract. That is a suggestion which is not supported by any evidence whatever.

In the course of the argument I suggested the case of an ordinary sale of land by an auctioneer with a deposit paid to him. Afterwards, the sale goes off, or the contract is rescinded by mutual consent of the vendor and purchaser without reference to the auctioneer. I suggested that in a case of that kind the purchaser would clearly be entitled to recover the deposit from the vendor. I do not think any answer has been given to that position, and I think the position here is the same. I am therefore of opinion that this appeal should be allowed.

O'CONNOR J. I am of the same opinion. The case differs in no way, except for the special provisions of clause 15, from the ordinary case of a contract for the sale of land with stock upon it, which has been rescinded, and in respect of which a deposit has been paid to the vendor. In this case the deposit was paid to Good, who brought the parties together, and who is described in clause 1 of the conditions of sale as agent for the vendor. It is not denied that, in the circumstances that have arisen, the appellants having paid £500 to Good for which they have received no consideration, and the contract having been rescinded, are entitled to recover their money from some one. But the respondent, the vendor, contends that it is not from him the money is to be recovered, but from his agent. Now, that is a result of a contract and its cancellation which does not ordinarily occur; but it is said that that result must occur in this case because

H. C. OF A. 1907.

CHRISTIE v. ROBINSON.

O'Connor J.

of the special nature of this contract. The first clause in express language provides that the deposit of £500 shall be paid to Good as agent for the vendor; as to the legal effect of that provision there can be no doubt. It is hardly necessary to cite authorities upon the question, but it may be worth while to refer to some words of *Bowen* L.J.'s judgment in *Ellis* v. *Goulton* (1) which describe very concisely the position where money is paid under the circumstances specified in clause 1. He says:—"When a deposit is paid by a purchaser under a contract for the sale of land, the person who makes the payment may enter into an agreement with the vendor that the money shall be held by the recipient as agent for both vendor and purchaser. If this is done, the person who receives it becomes a stakeholder, liable, in certain events, to return the money to the person who paid it. In the absence of such agreement, the money is paid to a person who has not the character of a stakeholder; and it follows that, when the money reaches his hands, it is the same thing so far as the person who pays it is concerned as if it had reached the hands of the principal." That is to say, in such a case the ordinary rule of principal and agent applies, and the money which has been received by a man's agent is treated as if it had been received by himself. Such must be the effect of clause 1 of the contract unless its operation has been modified by clause 15. The latter clause provides that as soon as "the deposit shall be paid over to the vendor and upon payment of the further sum of £500 to the vendor and making of the said promissory notes" the documents of title and the promissory notes shall be lodged in a certain bank. The words "as soon as the purchasers have accepted title" is explained in the contract to mean "as soon as the purchasers have inspected the property and satisfied themselves that it is up to the guarantee in clause 12." On the face of it there is no obligation thereby imposed on the agent to pay over the money, nor anything inconsistent with the legal position brought about by his receipt of the money as agent for the vendor under clause 1. But, it is said, that from clause 15 a contract must be implied under which Good is to hold the money as agent for the purchasers as well as for the vendor.

(1) (1893) 1 Q.B., 350, at p. 352.

The utmost that can be implied by way of contract between the agent and the purchasers is that the agent shall not pay over the deposit to the vendor until title has been accepted. That is a very different thing from an agreement that the agent shall hold it for the purchasers. If it is to be taken that that clause does create a contractual relation between Good, the agent, and the purchasers, the only contractual relation that can be spelled out is that Good undertakes that he will not pay over this money to the vendor until a certain event has happened. The only damages that could be recovered for the breach of a contract of that kind would be the amount of loss if any which could be shown to have occurred by reason of the payment of the money to the vendor. In fact the money had never been paid over to the vendor, and it is hard to see how a cause of action such as I have mentioned could arise upon the facts. In regard to any implication from clause 15 of a contract between the agent and the purchasers that he should hold the money for them, I am entirely unable to agree with the learned Judge of the Court below. Clause 15 therefore does not give the purchasers any right of action against the agent. Their rights are against the principal. Otherwise they would be placed by the contract in the extraordinary position of being obliged to pay the £500 to the agent, and, in the event of the contract falling through, would be unable to recover that deposit either from principal or agent. It can hardly be supposed it was intended that, in a contract of this kind, the provisions of clause 15 would so operate to cut down the plain meaning of clause 1.

It is of course necessary, in construing the contract, to endeavour to bring about some kind of agreement and coherence between these two clauses. *Hodges* J. has endeavoured to do so. He sees that, if any meaning is to be given to clause 1, Good must be treated as at some time holding the money on behalf of the vendor, and his decision is that that time does not arrive until the acceptance of title by the purchasers. Not until then, he says, does Good hold on behalf of the vendor. The difficulty in the way of that construction is that it does not give full value to clause 15, because, during the whole period from the time the money is paid to Good until acceptance of title, including

H. C. OF A. 1907.

CHRISTIE v. ROBINSON.

O'Connor J.

the period of inspection of the property during which the contract might come to an end, the purchasers are in the position of having nobody from whom they can recover their deposit in the event of the contract falling through. That cannot be the meaning of the contract. There is one way only of construing the contract so as to harmonize both clauses. It is this. The vendor stipulates in clause 1 that the money shall be paid into the hands of his agent. As soon as it is so paid it becomes the vendor's money. But he stipulates by clause 15 that he will leave that money of his in the hands of the agent until after acceptance of title. That binds him to leave it in his agent's hands to be operated upon for the purchasers' benefit in any way the law enables it to be dealt with. One way suggested in argument is by writ of foreign attachment. Another way in which it might be reached is by garnishee proceedings. If judgment were recovered against the vendor for the amount of the deposit, the money could be attached in the hands of the agent. It is not necessary to inquire what the parties had in their minds as to the mode in which the money might be used to the purchasers' advantage. It is beyond doubt that leaving the money in the hands of the agent pending the completion of the contract would be a substantial benefit to the purchasers, and I think it is the benefit which this contract intended to confer upon them by clause 15. The words of the clause imply, not only a prohibition against the agent paying over the money to the vendor until a certain event happens, but it equally prohibits the vendor receiving the money from his agent until that event happens. By this construction the operation of every part of the contract is secured. The money is paid by the purchasers into the hands of the vendor's agent. It becomes the vendor's money and the vendor is responsible for it. In the event of the contract coming to an end, the vendor must return it to the purchasers. During the progress of the contract, until acceptance of title takes place, the vendor undertakes that that money of his in the hands of his agent shall remain there, and shall not be dealt with by himself. That, I think, is the meaning of the contract, and, in the events that have happened, reading the contract as a whole, it leaves the vendor liable to the purchasers for the deposit which

his agent has received, and they are entitled to sue the vendor for it in the form of an action for money had and received.

With regard to the claim for rectification, I shall only say that I entirely concur with the judgment of my learned brother the Chief Justice. I think there is nothing, either on the facts or on the construction of the agreement, to bring the vendor within the rule which entitles the Court to interfere by rectifying contracts. On these grounds I am of opinion that the appeal should be allowed.

ISAACS J. read the following judgment. The defendant's various claims for rectification are not in my opinion sustained by the evidence, and the case must be determined by the effect of the written contract.

I have, however, the misfortune to differ as to this part of the case from my learned colleagues, and I regret that I have not been able to come to the same views on a question of such general importance as the common form of contracts for the sale of land. But, in my opinion, the judgment of *Hodges* J. was correct and should be affirmed.

The plaintiffs' claim is for money received and nothing else. For reasons to be presently stated, it appears to me impossible, consistently with justice, to substantially transform the claim at this stage into an action of a totally different character.

In order to enable the plaintiffs to succeed in an action for money received it is essential to prove the defendant's receipt of the money. He may have received it personally or by an agent. But if it is alleged that the receipt was by the hands of an agent, it must, as I understand, be shown that the money was under the control or direction of the principal so that he either had, or could on demand have had the money or its equivalent. On this ground Lord *Ellenborough* decided the case of the *Duke of Norfolk* v. *Worthy* (1).

The contract in the present case was a private sale made personally by the plaintiffs as purchasers and the defendant as vendor. The only material clauses are the first and the fifteenth. The first clause provides:—"The purchase money shall be the

(1) 1 Camp., 337.

H. C. OF A. 1907.

CHRISTIE v. ROBINSON.

Isaacs J.

sum of £3,000 and the purchasers shall on the signing hereof pay a deposit of £500 to Mr. William Good as agent for the vendor," &c.

If that clause stood unqualified as to the terms upon which the deposit was paid, it would fall within the case of *Ellis* v. *Goulton* (1). In that case the sale was by auction, but the conditions of sale required the purchaser to pay a deposit to the vendor's solicitor " as agent for the vendor and on account of the vendor." There was no word in the conditions, nor any circumstance to modify the condition of payment referred to, and it was the plain duty of the solicitor to pay over or account for the money to his principal the instant he was called upon to do so. Lord *Esher* M.R. pointed out in the *Law Reports* (2) that there was nothing in the circumstances to raise any trust between the plaintiff and the solicitor, and he said :—" There was no relation of principal and agent, and no bailment as between the plaintiff and Jackson." In the same report *Bowen* L.J. said (3) :—" It is the same thing so far as the person who pays it is concerned as if it had reached the hands of the principal. If so, it is impossible to treat money paid under these circumstances and remaining in the hands of the agent as there under any *condition* or subject to any trust in relation to the payer."

It is apparent that, if the money had been held by the solicitor under some condition in relation to the payer, the opinion of the learned Lord Justice would have been different. His opinion is more fully reported in the *Law Journal*, which differs not in substance, but is more explicitly, and, perhaps, more clearly expressed. The importance of the case justifies me in quoting his words (4):— " When upon a sale of land a deposit is paid by the purchaser, which is to be returned if the sale goes off, the purchaser may stipulate that the person to whom the deposit is paid shall hold it, not merely as the agent of the seller, but subject to terms as regards the purchaser himself; and where that is done, it converts the person to whom the deposit is paid into a stakeholder. But where no such special agreement, express or implied, is made,

(1) (1893) 1 Q.B., 350; 62 L.J.Q.B., 232.
(2) (1893) 1 Q.B., 350, at p. 352.
(3) (1893) 1 Q.B., 350, at p. 353.
(4) 62 L.J.Q.B., 232, at p. 235.

and the deposit is simply paid to the agent or solicitor of the vendor, he is not a stakeholder at all, but merely the agent of the seller; and it follows that the moment the money reaches his hands it is the same thing, so far as the person who pays it is concerned, as if it had reached the hands of the principal—that is to say, the vendor—and the payment is in law payment to the vendor. If so, it is impossible to treat the money which remains in the hands of the agent as there under any condition, or subject to any trust as regards the purchaser. The counsel for the plaintiff was unable to resist the stress of authority that the solicitor to the vendor, unless the contrary is agreed upon, is the agent of the vendor to receive the deposit on his behalf, and is not a stakeholder." But that case, which is strenuously relied upon for the plaintiffs, seems to me to have no relevancy except as a contrast to the present case. What was absent from the contract in *Ellis* v. *Goulton* (1) is expressly made part of the contract here. Clause 15 says:—"As soon as the purchasers have accepted the title as aforesaid the deposit shall be paid over to the vendor" &c.

For my part I cannot imagine any doubt as to the meaning of this provision. Until title is accepted, the deposit is to remain in the hands of Good, and then, and not till then, is it to be paid over to the vendor. Up to the moment of acceptance of the title, the vendor had no vestige of right to get that deposit into his hands—he could not control its possession, he could not recover it. Any arrangement between him and Good by which it should pass into the vendor's hands would have been a distinct fraud upon the purchasers. Whatever Good's agency meant, it clearly did not extend to handing that money over to Robinson except in one event. Robinson then was in this position. He never in fact received a penny of the money; in the events which happened he never became entitled to receive a penny of it. How then can he be treated as having received it? *Duke of Norfolk* v. *Worthy* (2) does not support such a claim; nor does *Ellis* v. *Goulton* (1). *Edgell* v. *Day* (3), also relied upon for the plaintiffs, is essentially different from this case. The conditions there baldly provided

(1) (1893) 1 Q.B., 350.
(2) 1 Camp., 337.
(3) L.R. 1 C.P., 80.

H. C. OF A. 1907.

CHRISTIE v. ROBINSON.

Isaacs J.

that the deposit should be paid to the defendant "as agent for the vendor." The vendor's executrix claimed to have the deposit paid over to her; the defendant refused on the ground that he was entitled to retain it until completion of the purchase. The contract contained no provision for retention, and on this ground the plaintiff succeeded. *Erle* C.J. said (1):—"He (the defendant) clearly owes no duty to the purchaser." *Willes* J. said the condition was "the same as if it had been provided that the deposit should be paid into some bank to the account of the vendor." His Lordship's simile meant, of course, that the vendor could have immediately drawn out the money and spent it.

That case also seems to stand in marked contrast to the one now under consideration. But there are other cases which bear a strong analogy to the present instance in point of principle.

In *Edwards* v. *Hodding* (2), an auctioneer received a deposit on property sold by auction, and actually paid the deposit over to his principal. But he paid it over with knowledge that there were objections to the title, and was held liable to repay the deposit to the purchaser. *Chambre* J. said (3):—"This is not an absolute payment by the plaintiff to the defendant as the vendor's agent, but a conditional payment; or, as it is more properly called, a deposit. The defendant receives it, knowing the condition, that there should be a good title; and he knows that that condition is not performed: he nevertheless takes on himself, with this knowledge, to pay over the money, which he was not warranted in doing; and therefore the judgment must be for the plaintiff." In the report of the same case, but on the application for the rule *nisi*, *Gibbs* C.J. says (4):—"Has it ever been decided that an auctioneer is at liberty to pay over the money immediately? It is not paid to him for the use of the principal, but it is placed in his hands as a deposit, to be paid over, when his principal shall have made out a good title. What situation would the purchaser be in, if this were otherwise? He goes to the auctioneer, as to a solvent person, often without knowing who is the vendor, on the faith that a good title will be made: and if the auctioneer might pay over the deposit

(1) L.R. 1 C.P., 80, at p. 85.
(2) 5 Taunt., 815.
(3) 5 Taunt., 815, at p. 820.
(4) 1 Marsh., 377, at p. 379.

immediately, great fraud would be practised." So also *per Erle* C.J. in *Holland* v. *Russell* (1). When this contract is looked at, every word uttered by these learned Judges seems applicable. An island at the other end of this Continent is purchased, as to which important representations are made, verifiable only after inspection and at a considerable distance of time; specific directions are given that the money is to remain in Good's hand until the title is examined and the island inspected, and yet it is urged that the vendor could, immediately the deposit was lodged, have successfully demanded it from the depositary. It may be observed that in *Horsfall* v. *Handley* (2), the ground on which *Edwards* v. *Hodding* (3) was decided was approved.

It therefore seems to me that Good received the money—though as the defendant's agent—yet not "entirely as agent for the vendor" (*per Keating* J. in *Edgell* v. *Day* (4), and *Bowen* L.J. in *Ellis* v. *Goulton* (5)), and upon the express condition that it was to be held until title was accepted; that he obtained it by a tripartite arrangement between the plaintiffs, the defendant and himself; and whether his relation towards the plaintiffs in this regard be called a contract, a bailment, or a trust, is immaterial, because it certainly created a duty in him to retain the deposit until the event happened which would entitle the defendant to have the money, a duty in the plaintiffs to leave it there in the meantime, and a corresponding duty in the defendant not to demand it before the plaintiffs had accepted title. Lord *St. Leonards* states the rule thus:—"Where a man is completely the agent of the vendor, a payment to him is in law a payment to the principal": *Sugden's Vendors and Purchasers*, 14th ed., p. 53. Title never was accepted. The contract was cancelled by mutual consent. No fault of either the plaintiffs or the defendant can be looked upon as the cause of the contract going off, and therefore it becomes in this action a simple question as to whom the depositary should hand the money. What is his duty when that moment arrives? It is manifest the money is not the agent's, and he cannot retain it for himself. The

(1) 4 B. & S., 14, at p. 17.
(2) 8 Taunt., 136.
(3) 5 Taunt., 815.
(4) L.R. 1 C.P., 80.
(5) 62 L.J.Q.B., 232, at p. 235.

H. C. OF A. 1907.

CHRISTIE v. ROBINSON.

Isaacs J.

vendor's conditional right to it has ceased, for, if it would have been improper to pay it over to him while the contract subsisted, it must be unquestionably wrong to hand it to him after the contractual obligation is dissolved. Justice leaves no other course open than to return it on demand to the payer whose condition of deposit has become impossible. Good was, by the express words of the contract, precisely in the same position as by implication of law the auctioneer was in in *Harington* v. *Hoggart* (1), of whom *Parke* J. said:—"It appears to me that the situation of an auctioneer is this: He receives a sum of money, which is to be paid in one event to the vendor, that is, provided the purchase is completed; and in the other, if it is not completed, to the vendee: he holds the money, in the meantime, as stakeholder; and he is bound to keep it, and pay it over, upon either of those events, immediately." It is not that he is arbitrarily styled "stakeholder," and then that certain obligations attach to him, it is because the law first attaches certain just obligations to him, and then by force of these he is for convenience termed a stakeholder. The same obligations attach here to Good, in my opinion, by reason of the very words of the bargain, he, like the auctioneer, is agent for the vendor for one purpose, but only conditionally, and by reason of clause 15 he becomes conditionally agent or bailee for the purchaser. Until payment over to the vendor clauses 1 and 15 both describe the £500 as a "deposit" only, and not as purchase money. This construction gives effect to both the first and the fifteenth clauses of the agreement. The plaintiffs' argument ignores the latter.

Edwards v. *Hodding* (2) is an authority that the plaintiffs could recover the money from Good. *Story on Agency*, sec. 300, lays down the doctrine as follows:—"If a party, who has paid money to an agent for the use of his principal, becomes entitled to recall it, he may upon notice to the agent, recall it, provided the agent has not paid it over to his principal, and also provided no change has taken place in the situation of the agent since the payment to him, before such notice."

No change by payment or accountancy has in fact taken place,

(1) 1 B. & Ad., 577, at p. 588. (2) 5 Taunt., 815.

nor, as I view the situation, could it honestly and lawfully have taken place.

I cannot therefore see how any claim for money received could have been successfully opposed by Good or can possibly be maintained against Robinson.

But it is said that, conceding a claim for the deposit as money received could be sustained against Good, the claim can equally be maintained against Robinson.

There are certain well known circumstances in which a vendor may be called upon to repay to a purchaser the amount of his deposit, although paid to a stakeholder. The subject is considered and dealt with by *Sir John Romilly* M.R. in *Rowe* v. *May* (1). His Honor said :—" Where a purchaser pays a deposit on his purchase money to the auctioneer, and it is lost, on whom does the loss fall ? If the matter goes off, because the vendor cannot make a good title, it is the vendor's duty to repay the deposit, and the loss occasioned by the non-completion ; and in case an action were brought against him for breach of the contract, the amount of the deposit not repaid would be part of his loss, and the purchaser would be entitled to add it to the damages ; so if the contract be completed, and the deposit cannot be recovered from the auctioneer, who for this purpose is the agent of the vendor, it will be the vendor's loss, and not that of the purchaser."

This passage indicates that the law does not in such a case treat the deposit as money received by the vendor so as to be recoverable as such ; and that it is only recoverable, if at all, as part of damages where the purchase goes off through the vendor's default, and that loss of the deposit must be proved. Even then if the title is only doubtful, the purchaser, though he may rescind, cannot, it seems, get back his deposit : See *per Lindley* L.J. in *Nottingham Patent Brick and Tile Co.* v. *Butler* (2).

Reference to the earlier cases of *Smith* v. *Jackson* (3) ; *Annesley* v. *Muggridge* (4) ; and *Fenton* v. *Browne* (5) will show that the vendor's responsibility for the deposit in the case of an auctioneer

(1) 18 Beav., 613, at p. 616.
(2) 16 Q.B.D., 778, at p. 789.
(3) 1 Madd., 618.
(4) 1 Madd., 593.
(5) 14 Ves., 144, at p. 150.

H. C. OF A. 1907.

CHRISTIE v. ROBINSON.

Isaacs J.

depends on the fact that the depositary was his selection, and that where a party is offered the opportunity of obtaining a safer stakeholder and refuses to accept him, but insists on retaining the one originally chosen, he must bear the responsibility in case of loss. Lord *St. Leonards* thus states the rule in his *Vendors and Purchasers*, 14th ed., at p. 52 :—" And a loss by the insolvency of the auctioneer will, it seems, in every case, fall on the vendor, who nominates him, and whose agent he properly is."

But these considerations give rise to issues of fact that have never been raised, and require for their determination testimony that has never been thought necessary to adduce.

It seems to me unfair to the defendant now to depart from the one clear cut issue upon which the plaintiffs' case was rested and denied, and, applying the rule in *Annesley* v. *Muggridge* (1) and other cases of that class, or even construing the contract with a view of holding the defendant responsible for the mere failure of Good to restore the plaintiffs' deposit on demand, independently of insolvency (as to which latter construction I offer no opinion), to treat the action as one for damages, fixing the amount at the sum represented by the deposit, without any issue as to demand upon or refusal by Good, or his financial ability, or as to any other of the elements of liability considered essential in the cases referred to.

Upon the facts as they appear outside the written contract the objections I have alluded to are more than technical, because Good was apparently the selection of the plaintiffs, and therefore the defendant, to whom he was a stranger, should at least have the opportunity of testing the facts and forcing the plaintiffs to satisfy the Court why they did not press the gentleman specially chosen by them to retain their deposit, and why he did not repay it.

Some reliance was placed upon clause 5 of the agreement as aiding the plaintiffs' construction that the money was to be regarded as already in the defendant's hands. In addition to the reasons already given, it appears to have been framed to limit the defendant's liability as laid down in *Rowe* v. *May* (2).

(1) 1 Madd., 593.

(2) 18 Beav., 613.

HIGGINS J. read the following judgment. I am of opinion that this appeal should be allowed. The principal difficulty is in the interpretation of the contract between the plaintiffs and the defendant, dated the 24th January 1905. Under condition 1, it was provided that "the purchasers shall on the signing hereof pay a deposit of £500 to Mr. William Good *as agent for the vendor* and pay the balance by instalments." But under condition 15 it was provided that, "as soon as the said purchasers have accepted the title as aforesaid *the deposit shall be paid over to the vendor.*" The contract was (as it was termed) "cancelled" by mutual agreement on the 21st March 1905; and the case has been argued on the assumption that "cancelled" is equivalent to "rescinded," the vendor and purchasers being remitted to their original positions—(see also *In re Jamieson and Newcastle Steamship Freight Insurance Association* (1)). The purchasers, therefore, sue the vendor for the £500, as money had and received and repayable to the plaintiffs as on a failure of consideration. The claim is not for damages. The defendant urges that he did not receive the money—that he was not entitled to receive it—as title was not accepted; and that the plaintiffs' remedy is against Good. But for condition 15, it is clear that the defendant would be liable as Good's principal, for the payment is made to Good, "as agent for the vendor"—*Ellis* v. *Goulton* (2); *Groom* v. *Parkinson* (3). But the defendant relies on the provision in condition 15, that "the deposit shall be paid over to the vendor" on acceptance of title. There are no negative words forbidding an earlier payment over; but it may be assumed, for my present purpose, that such a prohibition is implied. At first sight, there is no inconsistency between these conditions. Under condition 1 the payment to Good is a payment to the vendor; but under condition 15 the vendor undertakes not to take the deposit out of Good's hands until title has been accepted. There may be a receipt of money and responsibility for the money received, coupled with a stipulation that the money shall not be used. A vendor may surely authorize the payment of purchase money into a certain account at a certain bank, but agree that he

(1) (1895) 2 Q.B., 90, at pp. 93, 95.
(2) (1893) 1 Q.B., 350.
(3) 10 V.L.R. (L.), 14; 5 A.L.T., 171.

H. C. OF A. 1907.

CHRISTIE v. ROBINSON.

Higgins J.

will not draw on that account till a certain event happen. In an action to rescind the contract, or even in an action to enforce the contract, I see no difficulty in enforcing such a stipulation as to the withdrawal of money by an injunction. Condition 5, also, which enables the vendor to annul the contract if the purchasers persist in an objection to title, prescribes that the vendor shall "repay" the purchase money already paid. This must refer to the deposit; it assumes that the vendor has received the deposit which he "repays," and that he has received it before title is accepted. The learned Judge of the Supreme Court, however, seems to regard condition 1 as making Good agent of the vendor only in the event of the contract going on, being carried out. It is obvious that the mere insertion of the words suggested—"if the contract goes on"—would not fit this construction, as they would qualify not only the agency of Good, but also the payment to Good. The provision is that the purchasers shall, "on the signing hereof" pay a deposit of £500 "to Mr. William Good as agent for the vendor," and pay other sums at other times. I can find no sufficient reason for refusing to give to condition 1 its natural meaning—the meaning that Good is, on the signing of the contract, to take the £500 as the vendor's agent—that he becomes the vendor's agent on receipt of the money. Moreover, I find it very difficult to make out what effect is given, on the construction adopted by Mr. Justice *Hodges*, to the words, "as agent for the vendor." If Good were a mere neutral stakeholder, it would be his duty, if the contract were carried out, to pay the deposit to the vendor; and if the contract failed for want of title, &c., it would be his duty to pay it to the purchasers: *Harington* v. *Hoggart* (1); *Hampden* v. *Walsh* (2); *Gaby* v. *Driver* (3). The words, "as agent for the vendor," are not an idle formula. If the deposit were profitably invested by the agent, the profits, as well as the deposit, would belong to the vendor; whereas, if Good was a mere stakeholder, the profits would not belong to the vendor: *Harington* v. *Hoggart* (4). It will be noticed that I have come to my conclusion on the construction of this particular contract, which prescribes that Good shall receive the deposit "as agent for

(1) 1 B. & Ad., 577, at pp. 586, 588, 589.
(2) 1 Q.B.D., 189, at pp. 194, 195.
(3) 2 Y. & J., 549.
(4) 1 B. & Ad., 577.

the vendor." I desire not to commit myself to any opinion with regard to the liability of a vendor in the case of the deposit being paid to a mere stakeholder.

As for the counterclaim to rectify the contract, it was not necessary for the Judge, taking the view of the contract that he did, to make any order. This counterclaim seems to be based on a misconception of the jurisdiction of equity to rectify contracts. It claims that, "*if, on the construction of the said contract as written, it should be held* that the said William Good received the deposit of £500 as agent for the defendant, then the substance of the actual agreement between the plaintiffs and the defendant is not correctly stated therein," and he counterclaims "to have the said contract rectified, so as to accord with the true agreement between the parties, that the said deposit should be received and held by the said William Good *as a stakeholder only*." Equity does not rectify a contract because one party—or both parties—misunderstood its effect. In ordinary cases of rectification, some word or clause has been omitted or inserted by mutual mistake—a mistake of fact as to omission or insertion, not a mistake of law as to construction: *Johnson* v. *Donaldson* (1). In this case, also, there is no evidence of mistake, even on the part of the defendant, so far as regards the words in condition 1, "as agent for the vendor." If the defendant's evidence be accepted, he thought that he was to get the £500 paid over to him at once, and his mistake, such as it was, would appear to be as to the effect of the words on which he now relies in condition 15. Or, on another possible construction of his evidence, the defendant did not understand that Good was to receive the deposit at all—even as stakeholder; and yet the counterclaim is for a rectification of the contract so as to affirm Good's right to receive, but to receive it as stakeholder. The findings of fact in the judgment—that the provision that the money was to be paid to Good was inserted at the plaintiffs' request, and in spite of opposition on the part of the defendant—seem to be irrelevant to any issue; and the finding that both parties meant Good to hold the money until title was accepted, does not entitle the defendant to any order on the counterclaim.

Appeal allowed. Judgment for the plaintiffs.

(1) 6 V.L.R. (E.), 121; 2 A.L.T., 12.