specific performance. It was not an out and out refusal, and cannot be regarded as a refusal to perform an essential part of the contract, and, as the learned Chief Justice has said, there would have been sufficient compensation given by an action for damages if there was a cause of action at all.

For these reasons I agree with the judgment proposed, and that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellants, *S. E. Pile.*

Solicitors, for the respondent, *Henry Davis & Wolstenholme.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

HENRY CADD . . . . . APPELLANT;
DEFENDANT,

AND

WILLIAM CADD . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Principal and agent—Purchase of land—Creation of trust—Evidence.

In an action whereby the plaintiff sought a declaration that the defendant bought certain land as agent for the plaintiff and held it as a trustee for him, the plaintiff's case rested upon oral testimony. The Judge of first instance accepted the plaintiff's version of the facts and gave judgment for him. On appeal to the High Court,

Held, that the evidence did not establish the relation of principal and agent, and that the action failed.

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Rochefoucauld v. *Boustead*, (1897) 1 Ch., 196, considered and explained.

Decision of the Supreme Court of South Australia (*Homburg* J.) reversed.

APPEAL from the Supreme Court of South Australia.

An action was brought in the Supreme Court of South Australia by William Cadd against Henry Cadd, his brother, whereby the plaintiff alleged that he orally employed the defendant as his agent to buy for him for the sum of £1,000 from one R. C. Kitto the leasehold estate of Kitto in certain land held by Kitto under perpetual lease from the Commissioner of Crown Lands of South Australia, and that the defendant accepted such employment; that the defendant in pursuance of such employment obtained a transfer of the leasehold land and of the perpetual lease from Kitto to the defendant, and paid therefor the sum of £1,000 on account of the plaintiff to Kitto, and that the defendant entered into possession of the land. The plaintiff claimed a transfer of the leasehold land and of the perpetual lease from the defendant to the plaintiff on payment of the sum of £1,000 and certain interest thereon. The defendant, by his defence, denied that he bought the land as agent for the plaintiff, and by counterclaim alleged that the plaintiff, whom the defendant had allowed to enter in possession of the land under an agreement, which had since expired, for working the land as a farm, refused to give up possession of the land to the defendant. The defendant claimed possession of the land and £125 for mesne profits.

The action was heard by *Homburg* J., who gave judgment for the plaintiff. From this judgment the defendant now appealed to the High Court.

The facts and the material portions of the evidence are fully set out in the judgments hereunder.

Sir Josiah Symon K.C. (with him *Benham*), for the appellant. Accepting the authority of *Rochefoucauld* v. *Boustead* (1) as establishing the proposition that the denial by a trustee of a trust which he knows to exist is a fraud which prevents the trustee from relying on sec. 7 of the *Statute of Frauds*, then the onus is upon the plaintiff to establish clearly the existence of a trust.

(1) (1897) 1 Ch., 196.

Here the documentary evidence is all in favour of the defendant, and the plaintiff's evidence is more consistent with the view that the defendant bought the land for himself and verbally promised that he would sell the land to the plaintiff when the plaintiff was in a position to pay for it, than with the view that the defendant bought as agent for the plaintiff. A promise by the defendant to sell the land to the plaintiff is altogether inconsistent with the position the plaintiff takes up. [Counsel also referred to *James* v. *Smith* (1); *Kerr on Fraud*, 3rd ed., p. 425.]

Nesbit K.C. (with him *Uffindell*), for the respondent. This appeal is only against the findings of facts, and on the evidence this Court should not interfere with them. The words "I will buy the land for you," and a subsequent purchase by the speaker are sufficient to constitute an agency and a trust for the person to whom they were spoken: See *Heard* v. *Pilley* (2). No assent on the part of the *cestui que trust* is necessary, and, if it be, it cannot be suggested that there was no assent by the plaintiff.

[ISAACS J.—Is the mere breach of the particular contract which it is sought to enforce a fraud which will take the contract out of the *Statute of Frauds?*]

Not if the matter rests upon contract, but here the matter rests on agency and trust.

Sir Josiah Symon K.C in reply referred to *Scahill* v. *Wren* (3), *Lockhart* v. *Lynch* (4), *Coghlan* v. *Cumberland* (5).

Cur. adv. vult.

August 21.

GRIFFITH C.J. This is an appeal from a judgment of *Homburg* J. in favour of the plaintiff in an action by William Cadd against Henry Cadd. The plaintiff's claim was, in effect, for a declaration that the defendant purchased two pieces of land being Sections 16 and 256 in the Hundred of Tipara, which were held under perpetual lease from the Crown, as agent for the plaintiff, and held them as trustee for him. The essence of his

(1) (1891) 1 Ch., 384.
(2) L.R., 4 Ch., 548.
(3) 6 S.C.R. (E.) (N.S.W.), 38.
(4) 6 S.C.R. (E.) (N.S.W.), 40 (*n*).
(5) (1898) 1 Ch., 704.

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case is that the defendant originally acquired the land, and always held it, from the moment he acquired it, as trustee for the plaintiff, so that it was never the defendant's land, but in point of law was the plaintiff's. The land was acquired by the defendant by transfer from the previous holder, Kitto, under an agreement dated 1st October 1904. By that agreement the price was to be £1,000. A deposit of £20 was paid, £480 was to be paid on 1st February 1905, and the balance was to remain on mortgage for a term of five years bearing interest at the rate of 6 per cent. per annum, with the right to pay off the balance at any time. The agreement was subject to the consent of the Commissioner of Crown lands.

Now, as I have said, the plaintiff has to make out that the relationship of principal and agent or *cestui que trust* and trustee existed between him and the defendant when the purchase was made. The case depends on oral testimony, and there is a flat conflict of evidence. The learned Judge accepted the plaintiff's version of the facts, and that version we ought to accept unless undisputed facts or documents contradict it. The plaintiff and the defendant are brothers. In 1904 the plaintiff was in occupation of Section 16, one of the two blocks, under a halves agreement with Kitto for a term of three years, expiring on 1st February 1906. The defendant owned and lived on an adjoining farm. About the month of February 1904 the plaintiff agreed with Kitto to pay him in future £30 a year rent instead of half the produce. In August 1904 Kitto wished to sell both blocks, and asked £1,000 for them. He communicated this to the plaintiff, and promised to give him the first option of buying. What took place then is thus narrated by the plaintiff:—"Shortly after I had a conversation with my brother Harry on Section 16. The two farms are known as 'Go-Ahead.' I told Harry, 'Dick (that is Kitto) is going to sell Go-Ahead, Harry.' Harry said, 'Is he? What does he want for it?' I said, '£1,000.' He said, 'It is too much. You had better go down and see Dick and see what you can do about it. It will put you in a very bad place if anyone else buys it.'" Under the agreement with Kitto the plaintiff had made improvements to the house, and evidently he desired to make it his home. The plaintiff says that he then

went to see Kitto, and asked what terms he wanted, and that Kitto mentioned certain terms, amongst them that he wanted 7 per cent. interest on any balance of purchase money remaining unpaid. When the plaintiff and defendant next met, the plaintiff's narrative of what occurred is as follows:—it is this conversation which is mainly relied upon to support the plaintiff's case—"Harry asked, 'How did you get on with Dick?' I replied, 'He wants £100 down, £100 a year, and 7 per cent. on the balance.' Harry said, 'The interest is too high. You'll never make a do at that.' I replied, 'Don't you think so?' He replied, 'No.' He then said, 'I'll buy the place for you. You can have it as soon as you pay me what you owe me. You can then pay me what you can afford to pay every year, and the balance to stand at 5 per cent. In the meanwhile you can pay me 'the same rent as you pay Kitto—£30 a year.' He then said, 'I shall have to make an agreement with you against forfeiting the lease, as it is not allowed to sub-let it.' I replied, 'All right, I'll sign an agreement so long as you'll not enforce it against me.' He said, 'I will not enforce it, I only hold it to protect myself.'" Here I should point out that under the terms of a perpetual lease it is forfeitable if the land is sub-let without the permission of the Crown. The alleged arrangement, then, was that the plaintiff should formally execute an agreement similar to that which he originally had with Kitto in respect of Section 16, under which he would not be in form a tenant, but in occupation under a halves agreement, but would in substance be a tenant.

The plaintiff contends that by the words, "I'll buy the place for you," regardless of the context, the defendant constituted himself an agent, and therefore a trustee, for the plaintiff in respect of the land, if he should afterwards acquire it. In corroboration, the plaintiff relies upon statements said to have been made by the defendant on two subsequent occasions, one in October 1905, when the plaintiff was in possession of the land. The plaintiff in his evidence says as to this:—"In October 1905 I had a conversation with my brother. I was throwing out a hole for building purposes. He said that it would be a splendid thing when done, as it would be a nice thing to have rain water for the house. He said, 'You are giving too much for this place. Kitto

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was lucky to get £1,000 for the place.'" It is contended that that amounts to an admission by the defendant that the plaintiff really was the purchaser of the land from Kitto. That conversation is corroborated by the plaintiff's wife.

The other statement relied upon was deposed to by the plaintiff's wife alone, and is said to have occurred on 4th October 1904. She said:—"I was at Harry's place. He came from the sale" (of land at Moonta). "He said to me 'My word, Ada, Will gave too much for Go-Ahead.'" It is said that this goes to show that the defendant admitted that the plaintiff was the real purchaser of the land and not the defendant.

It appears that after the transfer of the land to the defendant, which was executed in February 1905, a halves agreement was made out between the plaintiff and the defendant for a term of two years. That agreement the plaintiff described in his evidence as a sham made to throw dust in the eyes of the Commissioner of Crown lands. The agreement as a matter of fact contained special terms carefully adapted to the circumstances of a proprietor dealing with his own land and with a person who was obtaining permission to cultivate it. That agreement was afterwards carried out, and in one instance was insisted upon by the plaintiff. In the course of a discussion he went away to look at the agreement in order to see what his rights were.

The defendant altogether denies the first conversation. The learned Judge, however, accepted the plaintiff's version. I proceed, then, on the assumption that the conversation took place exactly as deposed to by the plaintiff, which in view of the time which had elapsed is a large assumption. Now what does it mean? I read the words again: "I'll buy the place for you. You can have it as soon as you pay me what you owe me. You can then pay me what you can afford to pay every year and the balance to stand at £5 per cent. In the meanwhile you can pay me the same rent as you pay Kitto—£30 a year." If we take that to be exactly what was said, it seems to me that this follows—first, that the defendant was to buy the land in his own name; secondly, that he was to keep it until the plaintiff paid off the debt which he owed to the defendant—about £120; in the third place, that in the meantime the plaintiff was to be a tenant of

the defendant; fourthly, that after he ceased to be a tenant he might pay the price of the land as and when he could; fifthly that the plaintiff was to have the title when he had paid the price; sixthly, that in the meantime he was to pay 5 per cent. on the unpaid balance. Those points seem to me to be perfectly clear. One point only is doubtful, namely, whether the plaintiff was bound to take the land at all. Those are exactly the same conditions that arise on a contract of sale. It is said that on a contract of sale the vendor becomes a trustee for the purchaser. So he is, in a very qualified sense, and only for the purpose of giving effect to those terms of the contract which otherwise could not be given effect to. But it is the contract which is the basis of the trust. In my opinion, assuming the conversation to be as deposed to by the plaintiff, the consequences I have referred to necessarily follow, and the contract was in truth not a contract of agency at all, but a contract of sale, and, of course, if it was a contract of sale, this action will not lie because the contract is not in writing, and it is not contended that it is a case for specific performance.

Apart from this answer to the plaintiff's case, there are in evidence statements made by the plaintiff which make it extremely doubtful whether his version ought to be accepted. He says:—"About September 1905 I had a conversation with Harry about putting down a tank. I said, 'I cannot afford it, I shall have too much to pay if I take the place over.' He made a tank in his own paddock adjacent to mine. His farm adjoins Section 16. I asked him why he put the tank there and he said, 'It will serve the three paddocks'—meaning Section 16, Section 256 and his own—'and you will not have so much to pay if you take the place over.'" According to that conversation deposed to by the plaintiff, both parties treated it as entirely optional with the plaintiff whether he would take the place or not. Again, on another occasion, as late as 1907, the plaintiff swears that he said to the defendant:—"You have been well paid for all you have done. When you bought the land I was renting it from Kitto, and you agreed that I should do likewise with you until such time as I should be able to purchase." Then in cross-examination he said:—"The agreement was £1,000 purchase, 5

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per cent. interest. That was to start when I paid deposit on the land. Until then I had to pay £30 rent." Moreover, when the supposed agreement was made the defendant did not know what he himself would have to pay for the land. He knew that Kitto would sell for £1,000, but more than that was unknown. He did not know what interest he would have to pay. But whatever interest he would have to pay, he could only charge the plaintiff 5 per cent., and the payment of interest by the plaintiff would not begin to run for some indefinite time, for the plaintiff was only to pay interest after he had paid off the debt he then owed the defendant. Under these circumstances it seems to me that, if the conversation is capable of more than one construction — which I do not think it is — it is extremely improbable that it meant more than an offer by the defendant to do a kindness to his brother. That view is confirmed by the halves agreement which is alleged to have been a sham, but which appears to have been carefully drawn up on the model of the previous agreement with Kitto, but with several important variations. It was read over by the plaintiff before he signed it, and he afterwards insisted on the observance of some of its terms. Under these circumstances, in my opinion, there is no evidence at all of any agreement of agency, but, if there is any, the plaintiff's conduct is so inconsistent with the story he tells that, in the face of the denial of it by the defendant on oath, his story ought not to be accepted. For both the reasons I have given I think the plaintiff's claim fails.

The learned Judge relied on the case of *Rockefoucauld* v. *Boustead* (1), but in that case the agency relied upon was proved. There was no question really raised about it, and the other consequences followed. I think, therefore, that the judgment cannot be sustained, and that the defendant is entitled to judgment in the action. The defendant waiving any claim to mesne profits, there will be judgment for the defendant on the counterclaim for possession of the land.

BARTON J. I agree that this appeal must be allowed. The plaintiff's statement of claim rests upon an allegation that the

(1) (1897) 1 Ch., 196.

defendant was orally employed by the plaintiff as his agent to buy for £1,000 Kitto's perpetual leases, Sections 16 and 256 in the Hundred of Tipara, and that the defendant accepted the employment. The whole of the transaction on which the plaintiff bases his claim was conducted orally. The alleged authority was oral, the alleged agreement was oral, and there is not among the documents, so far as I can find, any writing which sustains the claim of the plaintiff. *Homburg* J. took the oral evidence, and came to a certain conclusion upon it. With reference to that conclusion I quote again the case of *Coghlan* v. *Cumberland* (1), referred to during argument, for this passage :—" When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge, even on a question of fact, turning on the credibility of witnesses whom the Court has not seen." That case was decided by an authority to which this Court always pays respect, and we have often acted upon the passage quoted. Taking guidance from it, I think that, so far as the conclusions of the learned Judge rest upon the credibility of the witnesses, we should be undertaking a task for which we are not particularly fitted if we were to disturb the conclusions of fact at which he has arrived. As to the conclusions of law, it is perfectly proper for us, if we differ from his legal interpretation of the facts once found, to found our judgment on that difference. In his opinion they constituted a trust, and it is for us so say whether, taking the learned Judge as having come to a right

(1) (1898) 1 Ch., 704, at p. 705.

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conclusion as to what those facts are, they do or do not establish a trust.

It appears that in August 1904 the plaintiff had a conversation with Kitto, the owner of the two perpetual leases, Sections 16 and 256, Section 16 being that which the plaintiff held from Kitto on an agreement to pay £30 a year rent, and Section 256 being the remainder of Kitto's land, which was occupied by one Bowden. The plaintiff ascertained from Kitto that he was thinking of selling the two sections, for which he wanted £1,000; and obtained from Kitto a promise to give him the first chance of purchasing. Of course that conversation was only admitted to explain the subsequent conversation between the plaintiff and the defendant which, according to the plaintiff, was as follows:—"I told Harry 'Dick (that is Kitto) is going to sell Go-Ahead, Harry.' Harry said 'Is he? What does he want for it?' I said '£1,000.' He said 'It is too much. You had better go down and see Dick and see what you can do about it. It will put you in a very bad place if anyone else buys it.'" Accordingly the plaintiff went to see Kitto and obtained his terms, which were £100 deposit, £100 a year, and the balance to bear interest at 7 per cent. Then the plaintiff went and saw his brother again, and as the conversation that then took place is the most material in the case I will read it again:—"Harry asked 'How did you get on with Dick?' I replied 'He wants £100 down, £100 a year and 7 per. cent. interest on the balance.' Harry said 'The interest is too high. You'll never make a do at that.' I replied 'Don't you think so?' He replied 'No.' He then said 'I'll buy the place for you. You can have it as soon as you pay me what you owe me. You can then pay me the same rent as you pay Kitto—£30 a year.' He then said 'I shall have to make an agreement with you against forfeiting the lease, as it is not allowed to sub-let it.' I replied 'All right, I'll sign an agreement so long as you'll not enforce it against me.' He said 'I will not enforce it, I only hold it to protect myself.' He also said 'You have borrowed from me for the plant, you may as well pay me interest as anyone else.' I then owed him about £120." Whatever the words "for you" mean, the defendant was to buy the place for the plaintiff. As soon as the plaintiff paid off what he owed—about £120—he

was to have the place if he would pay off every year what he could of the purchase money with interest at 5 per. cent. per annum, paying in the meantime £30 a year. It seems to me the case rests upon that conversation. Does it show a trust? For there is no proof of a trust unless this conversation, in the light, of course, of what followed, establishes it.

Then we find that Kitto enters into an agreement to sell the land to the defendant in his own name on 1st October 1904, and the plaintiff offers no evidence that on the treaty for this agreement he was even mentioned as the real purchaser. But in connection with the transfer there are declarations by Kitto and by the defendant. The defendant in his declaration says, among other things :—" I am cognizant of and will comply with the conditions of the lease," one of which is not to sub-let the land without the consent of the Commissioner of Crown lands. These transactions, so far as the documents are concerned, were conducted wholly in the name of the defendant, and in respect of these and other documents there is no word from which the existence of a trust, or indeed an agency, can be gathered. An agreement for halves was entered into between the brothers on 22nd February 1905, in which the defendant is designated " the proprietor " and the plaintiff " the cultivator." It is an agreement by which the plaintiff agreed to work, farm and cultivate the land for the defendant " at and for the hire and reward and upon the terms and in the manner hereinafter expressed." Then follow terms proper to such an agreement, and amongst them is the following :—" The proprietor agrees to pay the cultivator as remuneration for his services as aforesaid such a sum of money as shall be equal to one-half of the market value of the wheat grown upon the said land under this agreement." The only part of the agreement which can be said to place the possession of any part of the land in the plaintiff, apart from the implied permission to till in performance of his contract, is this :—" Cultivator to have one grass paddock." So that the plaintiff, whether thoughtlessly or not, committed himself in that ageeement to expressions from which the only inference that can be drawn—unless the oral evidence takes away its weight from the documentary evidence—is that the defendant in dealing with his brother was

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the proprietor of this land. I should mention here that there was a mortgage from the defendant to Kitto executed on 8th April 1905, about seven weeks after the halves agreement. The defendant had paid £500 of the purchase money by cash deposit, cheque and promissory note up to 1st February 1905, and the mortgage was to secure the balance of £500. That again is destitute of all expressions which could confirm the attempted implication of a trust from the conversation of August 1904.

Then a conversation relied upon by the plaintiff took place between him and his brother in October 1905, when the plaintiff was "throwing out a hole for building purposes." According to the plaintiff, his brother said it would be "a splendid thing when done, as it would be a nice thing to have rain water for the house," and continued: "You are giving too much for this place; Kitto was lucky to get £1,000 for the place;" to which the plaintiff replied, "I am satisfied with the price." Then we have a conversation between the brothers, early in 1906, with reference to a previous interview between them. The plaintiff's account of it is as follows:—"A few nights after I said to him, 'What deposit do you want down?' This was when I went to see him again. I do not think anyone was there. I also said, 'What about taking the place on?' He replied, 'Go on another year on halves.' I said, 'What deposit do you want?' He said, 'I want £300 and backer for the rest.' I said, 'I will give you £300 down,' and when he found I could give him £300, Herbert (defendant's son) said, 'We ought to have the grass off the land for two years, because we have been to a lot of trouble and expense.' I said, 'You can have the grass off the land, as I have no sheep and only require enough for my horses.'" Then, there is another conversation, in which reference is made by the plaintiff to a promise made, as he said, by the defendant, to hand over the place to him, and there appears to have been on that occasion some dispute between the brothers as to what the promise meant, and whether the defendant had said anything amounting to a promise at all. From time to time the plaintiff uses the words "offer," and "offer to purchase," and again speaks of a "deposit," and although Mr. *Nesbit* argued that, as he was an unlettered farmer, he should not be bound down to the legal

meaning of the word "deposit," yet he so uses it in connection with this transaction that one can scarcely doubt that he fully knew what the word meant. In connection with land purchases, farmers must understand the word as clearly as other people do.

Summed up, the matter seems to come to this. There is one conversation between the brothers in which the not very definite words, "I'll buy the place for you," are used, and from them Mr. *Nesbit* manfully argues that, as the words are not qualified by anything else in the conversation as to the relation to be constituted between the plaintiff and the defendant, they show, and are evidence of a purchase in which the defendant buying in his own name was to be a trustee for the plaintiff. It seems to me, looking at the case as a whole, that those words are open to more than one meaning. They are open to the interpretation that the place was to be bought for the plaintiff in the sense that some benefaction toward him was intended by the defendant—who had already befriended the plaintiff—when the defendant had become the purchaser. Again, they may mean that the defendant was to be the purchaser in the fiduciary sense contended for by Mr. *Nesbit*. And, again, they may mean that the defendant was to buy the place, and being the purchaser, promised, without any apparent consideration, that he would befriend the plaintiff by allowing him, when his means would permit, to purchase from the defendant on terms to be afterwards agreed upon.

Of the three meanings the last is perhaps the most reasonable, and the most probable in view of the documents. But it would be sufficient to say, and I will put it so, that the phrase is open to several interpretations which are equally consistent with the rest of the case and the documents.

I need not refer any further to the other conversations except to say that the mention of a promise and offers of a deposit lend greater probability to the view that there was to be in the future a purchase by the plaintiff from the defendant than that a trust for the plaintiff was created at the time. The plaintiff cannot establish his case by mere reliance on one out of two or three different propositions equally consistent with his evidence.

It does not seem that the matter warrants a more extended reference to the facts. It may be wondered why the plaintiff

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did not, upon a state of facts perhaps more consistent with an agreement by the defendant to sell to the plaintiff, bring an action for specific performance of that agreement. The answer to that is that, the agreement not being in writing, the plaintiff must have proved part performance. But the only fact he could have relied on as evidence of part performance was possession, and unfortunately for him the only possession he had is referable only to the halves agreement. That in my view is a probable reason why the plaintiff was not advised to bring an action for specific performance. It seems to me that he is in no better plight by alleging a trust upon the evidence he has brought forward. Seeing that it lies upon the plaintiff to show a case in which a trust is either the only, or distinctly the most reasonable and probable, construction to put upon the evidence, he cannot succeed by proving a state of facts equally consistent with that and with something else. I think therefore that the claim must fail, and in the circumstances it follows that the counterclaim must be allowed except as to mesne profits, which are not pressed for.

O'CONNOR J. read the following judgment:—

I agree that this appeal must be allowed. The facts have been so fully dealt with in the judgments delivered that I do not think it necessary to enter upon them in any detail.

The learned Judge in the Court below has set out the findings of fact on which he has entered judgment for the respondent. It is, in my opinion, unnecessary to determine whether those findings are entirely justified by the evidence or not, because, in the view that I take of the case, the judgment cannot be supported, even on the facts which the learned Judge has found. The respondent rests his case on the ground that the law does not permit an agent to hold for himself without his principal's consent the benefit of a purchase made by him on his principal's behalf. In such a case the agent becomes trustee for his principal with all a trustee's liabilities and obligations, and he cannot escape from that position by pleading that the agency was not created by a writing. Founded as it was on such well recognized principles, the soundness of the legal basis of the

claim was, as I understand, not seriously questioned. It is in the proof of the facts to which that law must be applied that the respondent, in my opinion, has failed completely. The whole case turns upon what was the real effect, as both parties understood it, of a conversation between these two brothers, no other person being present, in August 1904, just about three years before the hearing in the Court below. Some things in the case are, I think, beyond controversy. The appellant, who appears to be in comfortable circumstances, had helped his brother in the purchase of agricultural implements, £120 being then owing on a loan by him for that purpose. I am satisfied that in making the purchase from Kitto he acted from a desire to preserve his brother's home, and that, with the intention of letting him have the farm afterwards on reasonable terms, he took action when he did to prevent the place being sold over his brother's head. The difficulty is to determine in what form he expressed his intention at the conversation referred to. Turning now to the conversation, which I need not repeat in detail, the material words are: "I will buy the place for you." The respondent's case, in reality, rests on the last two words. If they were not used the claim could have no possible foundation. I assume that they were used as the learned Judge has so found. The question is in what sense were they used by the appellant and understood by both parties? Was it, as the respondent contends, in the sense of an undertaking to buy the farm as agent on the respondent's behalf, or was it in the sense of a mere statement of the appellant's intention to buy the farm for himself, with the view of allowing the respondent to have it afterwards at the price paid to Kitto, the amount to be repaid to the appellant on the terms stated? The remainder of the conversation is consistent with either view. If the appellant had constituted himself a trustee, the terms mentioned were those on which he was to receive his indemnification. If he had not done so, but had merely stated his intention to let the respondent buy the farm from him later on, those were to be the terms of payment. In either case it would be reasonable that the title should remain in the appellant. The rights of the parties, therefore, must depend on the inference which under all the circumstances ought to be drawn as to the meaning of the

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conversation to which I have referred. In that respect this Court stands in the same position as the learned Judge of first instance, and, as was pointed out in *McLaughlin* v. *Daily Telegraph Newspaper Co. Ltd.* (1), is not bound, as it would be on a mere question of credibility, to give any more weight to the inference drawn by the learned Judge than it is fairly entitled to on grounds of reason. The respondent's case, resting as it does on an oral statement which is open to an interpretation for or against his claim, the onus rests upon him to establish that the interpretation in favour of his claim is that which is most consistent with all the facts and probabilities. In such circumstances one naturally looks to contemporary documents for light. There are only two of importance: the appellant's declaration, and the halves agreement. The declaration of proprietorship under the *Government Leases Act* was necessarily made for the purpose of duly vesting in the appellant the legal title on the Government register. Apart from the moral aspect of the matter, to which I need not refer, the only comment necessary is that the making of the declaration would be essential in either view of the facts, and the making of it by the appellant cannot, it seems to me, be taken as inconsistent with the meaning which the respondent seeks to put upon the conversation. The halves agreement stands in a different position. *Primâ facie*, it affords a strong corroboration of the appellant's case. It was entered into deliberately and apparently after full consideration, without any indication in the making of it that it was intended to be a mere sham. It was afterwards acted upon just as one would expect it to be if the appellant's view of the position were the true view. The respondent has urged upon the Court an explanation which has about it a certain plausibility. The poorer brother, dependent for the preservation of his home on the richer, was so situated, it is said, that it was difficult for him to resist entering into the agreement. Assuming that explanation to be well founded, the only effect is that that corroboration of the appellant's case fails. On the other hand, the respondent's version is left entirely without corroboration by contemporaneous writing. Nor do I find in the facts and circumstances of the case any substantial support

(1) 1 C.L.R., 243.

of his position. On the contrary, it seems to me that all the facts and all the business probabilities which must be weighed in determining the value of his contention are entirely against it.

I am therefore of opinion that the respondent has failed to discharge the onus which rests upon him of establishing that the expressions of doubtful import upon which his whole case rests should be interpreted so as to support his claim. I therefore agree that the learned Judge did not draw the right inference as to the meaning of the conversation, and that his judgment was therefore erroneous and should be set aside, and that this appeal should be allowed.

ISAACS J. read the following judgment:—

The respondent by this action has undertaken to establish that as between him and the appellant the purchase from Kitto was his from the very beginning, the payments were made for him and by way of advance to him, that the appellant always held it on his behalf, and that the instant the appellant became the legal owner of the property, the respondent was by virtue of their personal relations the owner in equity, but with a very limited liability to indemnify his trustee. The statement of claim alleged a simple case of agency, and the advance of money, and unless these circumstances in some form can be considered as proved I see no possibility in this case of raising the fiduciary relation necessary to create a trust.

The respondent's evidence as to the trust is entirely oral, but that in itself presents no difficulty. The repudiation by any person of the terms upon which he has been entrusted with the legal title to property is a fraudulent use of another's confidence, and the Statute is not intended to cover fraud: *In re Duke of Marlborough*; *Davis* v. *Whitehead* (1); *Rochefoucauld* v. *Boustead* (2).

The respondent accordingly has assumed the burden of proving that by means of the agency employment he has entrusted the respondent with the legal title. Mr. Justice *Homburg* believed his story, disbelieved the appellant, thought the evidence suffi-

(1) (1894) 2 Ch., 133. (2) (1897) 1 Ch., 196.

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cient to raise the fiduciary relation, and declared the appellant a trustee.

The words upon which all the respondent's case really hangs are these, "I'll buy the place for you." These are the pivotal words.

We have not, it is true, the advantage of observing the demeanour of the witnesses, or of forming an opinion based upon their mode of giving evidence, or the vocal emphasis upon any particular words, and if the case turned upon the credibility of the respondent as contrasted with that of the appellant or his witnesses or the intonation of any of the expressions used, I should act upon the rule laid down in the cases of high authority referred to in the judgment of this Court in *Dearman* v. *Dearman* (1), and including a decision of the House of Lords. But there are many other considerations to be borne in mind, and we should not be doing our duty as a Court of Appeal, according to the rules formulated in the cases I have referred, if we did not give weight to those considerations.

Here we have four distinct features, altogether independent of personal demeanour and emphasis, and some at least of them of superior importance. They are :—

1. The actual words deposed to by the respondent himself as constituting the trust relied on ;

2. The surrounding circumstances also narrated by himself with reference to which the words were used, and therefore necessary to understand them ;

3. Other statements in his own evidence, which, granting his credibility, must also receive the full weight ; and

4. Documents.

As to the actual words themselves (p. 4 of transcript, lines 25 to 37), it is of course possible that a statement "I'll buy the place for you" would establish a fiduciary relation. But in the connection with which they are found here, there are many reasons for doubting that result even if nothing beyond the mere words were found. They are followed by the statement "You can have it as soon as you pay me what you owe me." If the employment were one of agency it would be remarkable that the agent should

(1) 7 C.L.R., 549.

stipulate as to when his principal might have his own property, even though he were able to pay for it beforehand. It is not an unreasonable stipulation for the true owner, speaking to a struggling brother whom he was then willing to befriend, and telling him that when he has succeeded in clearing off a minor existing obligation he may assume a heavier one. The words proceed :—" You can then pay me what you can afford to pay every year, and the balance to stand at 5 per cent." This assumes the time when the respondent has paid off his existing debt, and has acquired the land; he is then to be at liberty to pay as much as he can afford, and to pay 5 per cent. interest on the balance. This position is, *primâ facie*, inconsistent with initial agency, because that would entail immediate liability to recoup, and in the meantime continuous liability to repay with interest, not necessarily at 5 per cent., but at whatever rate was paid by the agent. The evidence continues :—" In the meanwhile you can pay me the same rent as you paid Kitto—£30 a year." The supposed agent was thus to lose the interest of money actually paid, and interest on money owing, was to pay rents and legal expenses all of which would be fully £60 a year, and yet would rent the land to the rightful owner, and at only half the cost to himself. The position is altogether unreasonable as a business proposition, and business was not entirely eliminated. Then reference is made to an agreement which would enable the respondent to live on the land and work it as a tenant would, but yet so as to avoid liability to forfeiture, and according to the respondent, the appellant said, " I only hold it to protect myself." The respondent's protection was apparently not thought of, it was only the protection of the alleged agent. It was suggested in argument that as the appellant was expending the money no other protection was needed. But that argument overlooks the central fact that the respondent's great anxiety was to remain there, and a forfeiture would have disorganized all his plans. The whole arrangement in any respect was begun and carried through for his protection.

Therefore the words put forward as constituting the trust, so far from being clear and conclusive, are pregnant with improbability. The supposed *cestui que trust* was at liberty to delay

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payment of the outstanding debt indefinitely, and therefore indefinitely to defer taking over the land, and the consequent repayment of the outlay, and the payment of interest, and so leave his trustee a loser every year, while, according to him, the land was always his for a neat £1,000 if he could pay it down.

Coming now to the surrounding circumstances, it is practically forced upon the mind that it was the fear of Kitto selling to some stranger who might not renew William's agreement that impelled him to inquire about the purchase. William had not the means to purchase the land, not even purchase implements (p. 3, line 16), and, in my opinion, it is an irresistible conclusion, having regard to the antecedent negotiation, that Harry in saying "I'll buy the place for you" meant, "As Kitto intends to sell I'll buy the place for your sake and relieve you of the anxiety lest you should be turned out." To that he added a promise to sell on advantageous terms. The keynote of the case may be found in the respondent's own words (p. 8, line 14):—"It is true as Harry said to me that it would put me in a bad place if somebody else bought the farm; and if I had had to leave the farm my stock and implements would have been useless to me until I found another place." It was therefore occupation, and not ownership, which formed William's chief anxiety. His future power to purchase was problematical.

The third feature to which I have adverted, namely, other statements in respondent's own evidence, include the following facts:—

(*a*) The share agreement was acted on; that is, from the beginning the appellant provided wheat and manure, and afterwards half the cornsacks, and the respondent cultivated as agreed on, and divided;

(*b*) About September 1905, in the course of a conversation with Harry about putting down a tank, William said: "I cannot afford it, I shall have too much to pay *if* I take the place over."

This involves two points—first, a contingency as to the respondent taking the place over at all; and next, the liability to pay more for a tank improvement that Harry was to construct and pay for. The evidence proceeds to the effect that when Harry made a tank to serve his own farm and Nos. 16 and 256,

William asked him why he did so, and Harry replied, "It would serve the three paddocks, and that William would not have *so much* to pay if he took the place over." Again the same two points, both inconsistent with the respondent's view.

(*c*) The respondent in various places uses or accepts expressions opposed to his existing proprietorship, as "I am willing to take on the place as agreed" (p. 5, line 28); "what deposit do you want?" (p. 5, line 39); "I said I could not pay a big deposit" (p. 6, line 9); "I asked him are you going to hand the place over?" He considered for a while, and then said "No, I can't sell." I said "Very well, we are going on with the case" (p. 6, line 25).

The last of the four special features consists of the documentary evidence. The agreement of purchase of 1st October 1904 is of course in the name of Henry. It is common ground that it was to be. But that fact, nevertheless, in itself raises a strong presumption against the respondent. He must displace the ordinary effect of the instrument.

If a man who has put his hand to a document purporting to be an honest, fair, regular, and formal agreement, afterwards, when his advantage clearly points that way, disputes it as being a sham or fraudulent concoction, his testimony ought to be clear, consistent, and conclusive, otherwise a Court ought not to accept his statement.

A document of the nature supposed is not to be lightly disposed of, and when it apparently forms one of a number of consistent circumstances equally opposed to the view of fraud, and especially when it has been acted on as real and honest, the parol evidence of the party disputing it must be overwhelming before a Court can reasonably act upon it. See *Story's Equity Jurisprudence*, sec. 152, and *Howland* v. *Blake* (1), where the American Supreme Court applied the principle.

Then there are the consequent documents: Kitto's application for leave to transfer, dated 1st October 1904, and Henry Gadd's statutory declaration of 4th November 1904, which was to my mind an elaborate, though necessary, piece of deception if the respondent is correct, although quite in order otherwise. Then there is the mortgage by Henry Cadd to Kitto, dated 8th April

(1) 97 U.S., 624.

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1905, with its personal covenant to pay with interest at 6 per cent. The cheque for £380 is not so important, but the promissory note for £107 2s. 6d., being an addition of 7 per cent. for 12 months time to pay £100, is to my mind extremely important in view of the contention that Henry was a mere agent of William. In addition to these documents, there is Ex B., the cultivation agreement of 22nd February 1905, which ran for two years from 1st February 1905. That document was not a mere formal document. It was framed on the pattern of Kitto's corresponding agreement, but contains some very significant differences. The last seven lines are new, and bear the impress of a real working arrangement carefully thought out. "All the wheat to be sold in the proprietor's name"—that is Henry's name. No such provision was found in Kitto's, and it was unnecessary if the only intention were to throw dust in the eyes of the Lands Department. "Proprietor" is elsewhere defined as meaning Henry Cadd. No stronger provision than the sale of the wheat in Henry's name could be inserted in contradiction of William's present contention. Then, "the cultivator is to provide half the cornsacks and the proprietor the other half." Under Kitto's agreement the proprietor had not to provide any sacks, so here we have the agent under what William calls a sham contract required to incur further outlay. The remaining stipulations are such as practical men might insert if they were minded to have a real working system, but are not provisions likely to have been devised as pretences, unless we regard the parties as a pair of extremely subtle and unnecessarily cautious conspirators.

If that cultivation agreement was a genuine bargain, the respondent has not a shred of a case. He disposes of the agreement in a breath, by declaring it a sham and that it was expressly agreed not to be carried out, notwithstanding its practical provisions and business-like stipulations. Again, he is confronted by a stubborn fact. He admits it was faithfully carried out from beginning to end. How does he meet that awkward circumstance? He explains it by suggesting compulsion. No overt threat is asserted, no expostulation as to that agreement, nothing but the suggestion of the situation is advanced to account for it. But even this is not consistent. If there was compulsion it began at once, and

before disputes arose; it took the early and certainly strange form of the appellant insisting upon supplying the respondent with wheat and manure, and in due time with his due proportion of corn sacks. We are invited to imagine the respondent accepting this assistance under compulsion and reluctantly yielding to the tyranny of the appellant forcing benefits upon him. But once the wheat, manure, and sacks were supplied, what possible reason can be honestly offered for not sharing the product? Without a single word of writing to support his case, without being able to point to a solitary act of the appellant inconsistent with the appellant's position, forced to deny the reality of his own written bargain, claiming to have schemed to deceive the Lands Department, compelled to explain his own continued conduct by palpable improbabilities, he asserts that the appellant first generously and voluntarily made him the equitable owner of the land, and then, under family pressure, fraudently deprived him of it.

There are some portions of the evidence relied on by the respondent, and referred to in the learned Judge's reasons, as recognition of William being the real purchaser, but these are after all not inconsistent with quite another view.

I am very clearly of opinion that the respondent's case of trust must fail and the appeal be allowed. I do however think that—and this is what the evidence mostly relied on by the respondent as accepted by *Homburg* J. refers to—Henry promised to let William have the land, that is sell it to him, for £1,000 with interest on unpaid capital at 5 per cent. Very probably for family reasons, but undoubtedly as a fact, Henry has gone back on his promise; but as there was no consideration and no writing to evidence it, or part performance to supply the want of writing, the law provides no remedy. It is and must remain a matter of conscience; and it is only relevant here to give meaning to the actual words originally used, and to explain the testimony of Mrs William Cadd (p. 9) as to October 1904 and of the respondent as to October 1905 (p. 5).

I would add a reference to a case decided in America which is very similar to this in its principal feature: *Dunphy* v. *Ryan* (1).

(1) 116 U.S., 491.

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Appeal allowed. Judgment appealed from discharged. Judgment for the defendant on the claim and on the counterclaim for possession.

Solicitors, for the appellant, *Symon, Rounsevell & Cleland* for *Page*, Moonta.

Solicitors, for the respondent, *Nesbit, Webb & Nesbit* for *Uffindell*, Moonta.

B. L.

Cons *R D Werner & Co Inc v Bailey Aluminium Products Pty Ltd* 85 ALR 679

Interpreted *R D Werner & Co Inc v Bailey Aluminium Products* 13 IPR 513

Expl *Gum v Stevens* (1923) 33 CLR 267

Appl *McGlashan v Rabett* (1909) 9 CLR 223

Cons *R D Werner & Co Inc v Bailey Aluminium* 25 FCR 565

[HIGH COURT OF AUSTRALIA.]

THE LINOTYPE CO. LTD. (IN LIQUIDATION) . APPELLANTS; OPPONENTS,

AND

MOUNSEY . . . . . RESPONDENT. APPLICANT,

ON APPEAL FROM THE COMMISSIONER OF PATENTS.

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MELBOURNE, *June* 1, 2, 14.

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

Patent—Application for patent—Opposition—Want of novelty—Prior publication—Substantial identity—Want of inventiveness—Patents Act 1903 (*No.* 21 of 1903), *sec.* 56.

The word "novel" in sec. 56 (*e*) of the *Patents Act* 1903 is to be read in the sense in which it has always been used in patent law, and (*Higgins* J. dissenting) the objection permitted by that sub-section includes an objection that the alleged invention is substantially identical as to the degree of inventiveness with a process or "manner of manufacture" already known to the public, in other words, that the difference is not sufficient to differentiate that which has gone before from that which is claimed.

An application for letters patent for an alleged invention, for cleaning the two edges of the matrices of linotype machines by means of two pairs of brushes in two particular places, was opposed on the ground of want of