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which he desires to put it. This is a denial to the plaintiff of his dominion over his own property. In our opinion a claim for an injunction to restrain such an interference with property of the value of £300 is a claim respecting property of that value within the meaning of sec. 35. The test suggested by the respondent, on the other hand, is that the amount of the plaintiff's claim is the price at which he could buy out the defendant. A plaintiff whose property is trespassed upon is not under any obligation to buy out the trespasser. The cases of *Amos* v. *Fraser* (1) and *Macfarlane* v. *Leclair* (2) are entirely in accord with this opinion.

We do not think it necessary to express any opinion on the other questions sought to be raised by the appellant, but which were not argued.

The appeal must therefore be allowed.

Solicitors, for appellant, *Stone & Burt.*

Solicitors, for respondent, *James & Darbyshire.*

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[HIGH COURT OF AUSTRALIA.]

MILNE . . . . . APPELLANT;
PLAINTIFF,

AND

JAMES . . . . . RESPONDENT.
DEFENDANT,

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ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

PERTH, *Oct.* 18, 19, 20, 21, 25.

Easement of support—Encroachment—Easement not created by deed—Agreement which should be specifically enforced by Court of Equity—Predecessor in title—Constructive notice—Specific performance—Declaration of right—Mandatory injunction.

Griffith C.J., Barton and O'Connor JJ.

(1) 4 C.L.R., 78. (2) 15 Moo. P.C.C., 181.

The appellant acquired an allotment of land in January 1904, and the respondent acquired the adjoining block to the west in March of the same year. There was a two-story building on the appellant's land, the western wall of which was supposed to be on the western boundary. The respondent's predecessors in title, intending to build on the block to the westward of the appellant's land, entered into an agreement, under seal, with the appellant's predecessors in title, dated 18th September 1896, whereby, after reciting that the parties were owners of adjoining blocks of land, that on the boundary of the land of a company called McLean Bros. & Rigg (the appellant's predecessors in title) there stood a wall belonging to the company, that the Messrs. Bickford (the respondent's predecessors in title) were about to build a wall upon the boundary of their land, and to excavate for its foundations, and, in the course of such excavation might bring down the company's wall, and that they had requested the company to allow them to do such underpinning and work on the foundations of the company's wall as might be necessary to prevent it from falling down, it was agreed that the company should give leave to Messrs. Bickford to enter on the company's land and underpin, shore up, and do such work as might be necessary to prevent the wall from falling, and it was further agreed that no right of lateral support should be acquired by the wall to be erected or by the owners of it at any time, any positive law or prescription notwithstanding, and that the wall to be erected should not nor should the company's wall "in any sense be or be considered to be a party wall between the lands and premises" of the parties. The intention indicated in this deed was not carried out, but Messrs. Bickford erected a building on the eastern side of their land supporting the beams of the first floor upon the company's wall. Evidence as to the circumstances of this was given by a witness who was at the time manager for the company. He said "Our building was on the ground then. It had been there for many years. We had some windows overlooking Bickford's land, and I pointed out to them that there might be some difficulty over the lights to those windows. After discussion, Bickford and I arranged that they should have the privilege of resting roof and girders on our wall and also to build up the windows and in consideration of this they were to underpin our wall and make it safe, which they did. A parapet wall was put on the top with my permission as an element of safety." On cross-examination he added: "It (the agreement of 18th September 1896) was the basis of the settlement. The wall was never to be considered in any sense a party wall. I daresay I gave the document to Milne. We were to do what we liked with our wall. We got nothing except the underpinning of the wall and the parapet wall on top. This was a protection against fire. The roof did not rest upon it."

When the appellant purchased the block in 1904 the deed of 18th September 1896 was handed to him, but he was told nothing about the arrangement referred to in the evidence above mentioned. A survey was made of the land, which showed that Messrs. Bickfords' building encroached on the company's land to the extent of about two and a half feet. The surveyor thought that there were two walls, and stated in evidence that he could not tell by

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inspection whether there were two walls or only one. Shortly after the parties had acquired their land a fire destroyed the appellant's building, but left the wall standing. It was only then that the appellant discovered that there was only one wall.

Held (1) that the alleged agreement was not one of which a Court would grant specific performance, and (2) that, even if it were, the evidence did not show such facts as would entitle a Court to infer that the appellant had constructive notice of it.

Decision of *Burnside* J. reversed.

APPEAL from the decision of *Burnside* J. dismissing an action brought by the appellant for a declaration of right, and a mandatory injunction to compel the respondent to remove a building, and the roof and beams thereof, from their attachment to the appellant's wall, and for damages. The facts are fully stated in the headnote and judgments hereunder.

Draper and *F. M. Stone*, for the appellant. The appellant had no knowledge of the verbal agreement upon which the respondent relies. All he had knowledge of was the deed of 18th September 1896 and the encroachment discovered by the surveyor at the time of his purchase. The deed clearly stated that there was to be no right of lateral support, and that the wall was to be in no sense a party wall, and this is borne out by the evidence. The respondent, under the provisions of the *Building Act* 1884 (48 Vict. No. 15), sec. 12, was bound to build the parapet wall. The agreement was not such a one as the Court would have ordered to be specifically performed: *Walpole* v. *Orford* (1). It was too uncertain and indefinite. At the most it was an easement of support terminable at the will of the grantors. The fact that the survey showed an encroachment was not sufficient to place the appellant on his guard, as the plan showed two walls and an encroachment by the plaintiff's building to a nearly corresponding extent upon the land to the east of it. There is a difference between a revocable licence and an easement.

[Counsel referred to *Hewlins* v. *Shippam* (2); *Wood* v. *Leadbitter* (3); *McManus* v. *Cooke* (4); *Jones* v. *Clifford* (5); *Transfer*

(1) 3 Ves. Jun., 402.
(2) 5 B. & C., 221.
(3) 13 M. & W., 838.
(4) 35 Ch. D., 681.
(5) 3 Ch. D., 779.

of Land Act (56 Vict. No. 14), sec. 68; *Gregory* v. *Alger* (1); *Union Lighterage Co.* v. *London Graving Dock Co.* (2); *Cullen* v. *Thompson* (3); *Oertel* v. *Hordern* (4); *Allen* v. *Seckham* (5); *English and Scottish Mercantile Investment Co. Ltd.* v. *Brunton* (6); *Ware* v. *Egmont* (7); *Agra Bank* v. *Barry* (8); *Plumb* v. *Fluitt* (9); *Underwood* v. *Hitchcock* (10); *Fry on Specific Performance*, 4th ed., p. 142.]

Pilkington K.C. and *Northmore*, (*Hearder* with them), for the respondent. The respondent claims to be entitled to the support of his building. The agreement entered into by the respective predecessors in title still exists. When the appellant purchased he could see there was a building being supported by a wall on his ground, and his surveyor informed him of the encroachment. This should have placed him upon inquiry, and he must be taken to have had constructive notice of the easement of support.

[Counsel referred to *Duke of Devonshire* v. *Eglin* (11); *Hervey* v. *Smith* (12); *McManus* v. *Cooke* (13); *Dalton* v. *Angus* (14); *Allen* v. *Seckham* (5); *Hunt* v. *Luck* (15); *Landale* v. *Menzies* (16); *Delohery* v. *Permanent Trustee Co. of N.S.W.* (17); *James* v. *Stevenson* (18); *Agra Bank* v. *Barry* (8); *Jones* v. *Smith* (19); *Holmes* v. *Powell* (20)].

Draper, in reply, referred to *North British Railway Co.* v. *Park Yard Co.* (21); *Jones* v. *Smith* (22); *Vivian* v. *Moat* (23); *Doe* v. *Frowd* (24).

The following judgments were read :—

October 25

GRIFFITH C.J. The appellant and respondent are respectively the registered proprietors of two adjoining allotments of land

(1) 19 V.L.R., 565; 15 A.L.T., 22.
(2) (1902) 2 Ch., 557.
(3) 5 V.L.R. (Eq.), 147; 1 A.L.T., 15.
(4) 2 S.R. (N.S.W.) (Eq.), 37.
(5) 11 Ch. D., 790.
(6) (1892) 2 Q.B., 700.
(7) 4 D.M. & G., 460.
(8) L.R. 7 H.L., 135.
(9) 2 Anst., 432.
(10) 1 Ves., 279.
(11) 14 Beav., 530.
(12) 22 Beav., 299.
(13) 35 Ch. D., 681.
(14) 6 App. Cas., 740.
(15) (1902) 1 Ch., 428.
(16) 9 C.L.R., 89.
(17) 1 C.L.R., 283.
(18) (1893) A.C., 162.
(19) 1 Ha., 43.
(20) 8 D.M. & G., 572.
(21) (1898) A.C., 643.
(22) 1 Ph., 244.
(23) 16 Ch. D., 730.
(24) 4 Bing., 557.

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fronting the north side of Murray Street in a central part of the City of Perth, having acquired them in January 1904 and March 1904 respectively. The appellant's land lies to the east and the respondent's to the west. The frontages are 72 links and 68 links respectively, with a depth of 305 links. In the year 1896, when Perth was a very small town in comparison with what it has now become, there was upon the plaintiff's land a two-story building of brick and stone, the western wall of which was supposed to stand upon the margin of the land. The respondent's predecessors in title, Messrs. Bickford, being minded to erect a building upon their land, entered into an agreement under seal with the appellant's predecessors in title, a company called McLean Brothers and Rigg, dated 18th September 1896, whereby, after reciting that the parties were owners of adjoining blocks of land, that on the boundary of the company's land there stood a wall belonging to the company, that Messrs. Bickford were about to build a wall upon the boundary of their land and to excavate for its foundations, and in the course of such excavations might bring down the company's wall, and that they had requested the company to allow them to do such underpinning and work on the foundations of the company's wall as might be necessary to prevent it from falling down, it was agreed that the company should give leave to Messrs. Bickford to enter on the company's land and underpin, shore up and do such work as might be necessary to prevent the wall from falling, and it was further agreed that no right of lateral support should be acquired by the wall to be erected or by the owners of it at any time, any positive law or prescription notwithstanding, and that the wall to be erected should not nor should the company's wall "in any sense be or be considered to be a party wall between the lands and premises" of the parties. Messrs. Bickford proceeded to erect a two-story building which was higher than the company's building, and which faced Murray Street, standing about a chain and a half back from it. The intention evidenced by the deed of 18th September was, however, not carried out, and that agreement seems to have been abandoned. Instead of erecting a separate wall on the eastern side of their allotment they supported the beams of the first floor of their building upon the company's wall,

which they pierced for that purpose. The only evidence as to the circumstances under which this was done was given by a Mr. Eyers, who was at the time the company's manager, and who was called by the respondent. He said: "Our building was on the ground then. It has been there many years. We had some windows overlooking Bickford's land, and I pointed out to them that there might be some difficulty over the lights to these windows. After discussion Bickford and I arranged that they should have privilege of resting roof and girders on our wall and also to build up the windows and in consideration of this they were to underpin our wall and make it safe, which they did. A parapet wall was put on the top with my permission as an element of safety"; and in cross-examination: "It (the agreement of September) was the basis of settlement. The wall never was to be considered in any sense a party wall. I dare say I gave the document to Milne. We were to do what we liked with our wall. We got nothing except the underpinning of the wall and the parapet wall on top. This was as a protection against fire. The roof did not rest on it."

The respondent contends that under these circumstances an agreement should be inferred to grant an easement of support over the company's wall, and that, although an easement can only be created by deed, the agreement was one which would be specifically enforced by a Court of Equity, and was therefore binding upon the company and any purchaser from them with notice of the agreement. It clearly appears from the deed of September that both parties understood that the company's wall stood on the boundary of their land, so that there was no thought on either side of a grant of a right of occupancy of any portion of the company's land to Messrs. Bickford.

When the appellant purchased his allotment in 1904 the deed of 18th September 1896 was handed to him. At the same time he had a survey of the land made, from which it appeared that Bickfords' building encroached upon the company's land to the extent of about 2 feet 6 inches. The surveyor who made the survey assumed that there were in fact two walls at the line where the buildings adjoined, and so represented on his diagram. He said in evidence that he could not see by inspection whether

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in fact there were two walls or only one. The extent of the encroachment, however, is not affected by the fact that there was only one wall. The only difference is that while the surveyor and the plaintiff thought that the land encroached upon was in part occupied by a wall it in fact all formed part of the interior of Bickfords' building.

It also appeared from the survey that the building on the plaintiff's land encroached to a nearly corresponding extent upon the allotment to the east of it. The natural inference from these facts would be that the old building had been put up either in accordance with an erroneous survey or without any careful regard to actual boundaries. Such a mistake was very common in the early days of Australian settlement.

Shortly after the appellant and respondent had respectively acquired their land a fire occurred, destroying the appellant's building but leaving the wall standing. The actual facts were then found to be as above stated.

The action was brought by the appellant for a declaration of his right to the wall, and a mandatory injunction to compel the respondent to remove his building and the roof and beams from their attachment to his wall, and damages.

The case was tried before *Burnside* J., who held that the facts showed an agreement to create an easement of which the Court would decree specific performance as between the parties to it, and that the appellant when he purchased had constructive notice of the agreement.

The appellant contests both positions. He does not dispute that an agreement to create an easement may be inferred from the acts of parties, as in *Duke of Devonshire* v. *Eglin* (1), but he contends that in the present case it is impossible to infer any agreement of which the Court would grant specific performance, since an agreement which the Court will enforce must be certain and definite in its duration. Apart from the evidence of Eyers and the deed of 18th September 1896, all that we know is that Messrs. Bickford were in fact allowed by the plaintiff's predecessors in title to rest their beams upon the wall, and to put a parapet wall upon it. The respondent contends that the proper

(1) 14 Beav., 530.

inference to be drawn from those facts is that there was an agreement to grant an easement of support in perpetuity. In my opinion, having regard to the circumstances existing in the City of Perth in the year 1896, which was then in a state of transition from a small town to a large city, it is at least equally probable that an easement in perpetuity was not in the contemplation of either party, but that they took into consideration the probability that the company might not desire to pull down their wall for a considerable, though uncertain, time, and thought that it was worth while, until altered circumstances should make it reasonable to replace the old building on the company's land by a new one, to allow the wall to be used in the meantime for the common support of the old building and the new one. In this view the grant would be conditional, and terminable by a reasonable notice, *i.e.*, a notice sufficient to enable Messrs. Bickford to substitute other means of support resting on their own land. (Cf. *Landale* v. *Menzies* (1)). This view is strongly supported by the evidence of Eyers that the wall was in no sense to be regarded as a party wall, and that the company were to be at liberty to do what they liked with it, which seems to me to negative the idea of a perpetual easement. The point may be tested by supposing an action brought by Messrs. Bickford against the company for an injunction to restrain a threatened interference with the easement of support after it had been discovered that their premises encroached by 2 ft. 6 in. upon the company's land. Such an action would have been, in effect, an action for specific performance, and in my judgment there would have been two independent answers to it; (1) that the asserted agreement was indefinite and uncertain as to its duration, the only agreement which could be inferred with any degree of certainty being an agreement to grant an easement of support terminable at the will of the grantor, analogous to an agreement for a tenancy at will, of which specific performance will not be granted; and (2) that the relief claimed would go beyond the agreement, since it would compel the grantors to grant, in addition to the easement of support, a right to the perpetual possession of a portion of land as to which there was manifestly a mutual mistake of fact. As I have

(1) 9 C.L.R., 89.

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already pointed out, there was no thought on either side of a grant of a right of occupancy of land which did not belong to Messrs. Bickford, so that the Court would have been asked, in effect, to make a new agreement for the parties, and to enforce the new agreement. On both grounds the action would have failed.

This is sufficient to dispose of the present case; but I will proceed to deal with the question of constructive notice on the assumption that there was a valid agreement to grant an easement, of which specific performance might be decreed. The only fact of which the plaintiff had actual knowledge is, it is admitted, the fact that the defendant's building encroached on his land. The respondent appeals to the well known doctrine that visible occupation of land is notice of the title of the occupier. Upon the facts in the present case, therefore, the plaintiff, it is said, must be taken to have known of the title, if any, which the defendant had to occupy to the extent of the encroachment, and was accordingly put upon inquiry. So far I agree. But upon inquiry on that point he would only have found that the defendant had no title at all, and under the *Transfer of Lands Act* his own title was paramount. The respondent seeks to press the doctrine further, and contends that the appellant must be taken to have known all that he might have found out if he had inquired how and when the encroachment came to be made, and that this would have included the fact that the defendant's predecessors had acquired an easement upon adjoining land not encroached upon. No case was cited to us in which the doctrine of constructive notice has been so far extended, and it is now settled that that doctrine ought not to be extended: see *English and Scottish Mercantile Investment Co. Ltd.* v. *Brunton* (1). The case of *Allen* v. *Seckham* (2) was relied upon, in which *Brett* L.J. said:—"I conceive that when a person purchases property where a visible state of things exists which could not legally exist without the property being subject to some burden, he is taken to have notice of the extent and nature of that burden. But it seems that the rule goes further, and that when a state of circumstances exists which is very unlikely to exist without a burden, he is affected

(1) (1892) 2 Q.B., 700.

(2) 11 Ch. D., 790, at p. 795.

with notice." Then he referred to the case of an existing tenancy. On this I observe that in the present case it is admittted that the "visible state of things," *i.e.*, visible from the outside, did not include the fact of the defendant's beams resting on the plaintiff's wall. Moreover, the plaintiff had reason to believe from the deed of September 1896 that the defendant's building was in fact, as it was represented in the surveyor's diagram to be, complete in itself, and that its eastern wall was separate from the plaintiff's western wall. The principle laid down by the Court of Appeal in *Union Lighterage Co.* v. *London Graving Dock Co.* (1) seems to be very pertinent to the facts of the present case. In that case the question was whether an easement of support had been acquired by length of enjoyment. All the Court agreed that if the enjoyment had been *clam* it had not been acquired. *Vaughan Williams* L.J. thought that if the owner of the allegedly servient tenement had means of knowledge it was sufficient. But *Romer* L.J. said (2):—"Now, on principle, it appears to me that a prescriptive right to an easement over a man's land should only be acquired when the enjoyment has been open—that is to say, of such a character that an ordinary owner of the land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment. And I think on the balance of authority that this principle has been recognized as the law, and ought to be followed by us. In support of this statement I do not think it necessary to do more than refer to those parts, which deal with this point, of the speeches made by Lord *Selborne* and Lord *Penzance* in the House of Lords in *Dalton* v. *Angus* (3), and I gather that their views as there expressed on this point were not dissented from by the other members of the House who took part in the hearing of that case, and, indeed, Lord *Blackburn* said (4) that no prescriptive right 'can be acquired where there is any concealment, and probably none where the enjoyment has not been open.'" And *Stirling* L.J. said (5): "I think that *Dalton* v. *Angus* (3) establishes that there must be

(1) (1902) 2 Ch., 557.
(2) (1902) 2 Ch., 557, at p. 570.
(3) 6 App. Cas., 740.
(4) 6 App. Cas., 740, at p. 827.
(5) (1902) 2 Ch., 557, at p. 574.

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some knowledge or means of knowledge on the part of the person against whom the right is claimed. The present case seems to me to stand on the same footing as if the rods and ties had been placed in the land which now belongs to the plaintiffs, while that land, as well as the land now belonging to the defendants, was in the hands of their common predecessor in title, Henry Green. His devisees in 1877 sold to the plaintiffs, without reserving any right in respect of the ties and rods, the existence of which is not shown to have become actually known to any agent of the plaintiffs until a recent date. The ties and rods are between twenty and thirty in number, and there are only two of which any visible signs appear under an inspection of the exterior of the plaintiffs' property. Even as regards these two, the traces might, as it seems to me, be reasonably regarded as forming merely part of the camp-sheathing of the plaintiffs' own property. There are, no doubt, cases in which the owners of property have been held to be affected with notice of that which might have been discovered by the exercise of reasonable diligence (see, for example, *Hervey* v. *Smith* (1); *Phillipson* v. *Gibbon* (2)); but the learned Judge came to the conclusion that in this case such a notice ought not to be attributed to the plaintiffs; and I am unable to differ."

Here, as I have already said, it is admitted that the fact that the defendant's beams rested upon the plaintiff's wall could not be discovered upon an inspection of the exterior of the buildings, nor is there any evidence that it was a visible fact which could be discovered by an inspection of the inside of the plaintiff's building, even if the plaintiff ought to have made such inspection, which I doubt. Under these circumstances I have great difficulty in holding that the fact is one which would have been discovered by the exercise of such reasonable diligence as was called for under the circumstances, and I am disposed to think that it would be an unwarranted extension of the doctrine of constructive notice to impute knowledge of the fact to the plaintiff. On this point also, therefore, it seems to me, as at present advised, that the respondent fails.

If, however, it could be held that there was an agreement to

(1) 22 Beav., 299. (2) L.R. 6 Ch., 428.

grant an easement of support terminable at the will of the grantor upon reasonable notice, and if such an agreement would be ordered to be specifically performed, and if the plaintiff had constructive notice of it, I think that the letter of 24th October 1905 by which the defendant was required to remove the upper part of the wall, followed by the defendant's reply of 28th October 1905 asserting a right to an easement in perpetuity, amounted to such a determination of the agreement as was sufficient to disentitle the defendant to ask specific performance of it, as he does in effect by setting it up as a defence to this action.

It is suggested that the plaintiff's letter was written *alio intuitu*, and was not intended to operate as a determination of an agreement of the existence of which he was not aware. But, if knowledge of the agreement is to be imputed to him, I think that any action on his part inconsistent with the continuance of the easement must equally be imputed to an intention to exercise his rights under the agreement, although it was not (as it could not be) specifically referred to.

The plaintiff is, therefore, entitled to a declaration that the wall and the additions erected thereon are his property, and that he is entitled to a perpetual injunction to restrain the defendant from continuing to support the girders, beams and roof of his building upon the plaintiff's wall, or, adopting the new practice, to an order directing the defendant to disconnect his building and such girders, beams and roof from such wall (see *Jackson* v. *Normanby Brick Co.* (1)). But it will be sufficient at present to make the declaration of right, with liberty to apply. The plaintiff is also entitled to an inquiry as to damages, and to the costs of the action.

BARTON J. As *Burnside* J. observed in his judgment after trial, "it is clear that at law an easement can only be created by an instrument under seal, but if there be an agreement to grant an easement for a good and substantial consideration, equity considers it, as between the parties and persons taking with notice, as granted." The agreement relied on being merely

(1) (1899) 1 Ch., 438.

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verbal, and the controversy not being between the immediate parties to it, but between their successors in title, the defendant, now respondent, cannot validly answer the claim of the plaintiff, the appellant, unless he affirmatively establishes, first, the existence of an agreement enforceable between the parties as he seeks to enforce it, and next, that the appellant purchased with notice of it. Otherwise the appellant is entitled under his certificate to free and absolute dominion over the wall and any erection added to it, in terms of his claim.

Has the respondent then made out such an agreement? Equity will not enforce a contract of which the terms are not clear and defined: See *per* Lord *Loughborough* L.C. in *Walpole* v. *Orford* (1). The alleged agreement of 1896 seems rather a vague one. McLean Bros. & Rigg Ltd., the appellant's predecessors in title, had a building on Lot 6, which had stood there for a good many years —we are not told how many. William and Harry Bickford, the respondent's predecessors, had decided to erect a building on Lot 5 adjoining the then existing building on Lot 6. The only witness who deposed to the arrangement between these parties was a Mr. Eyers, who acted in the matter for McLean Bros. & Rigg under their power of attorney. He speaks of a dispute, which presumably the agreement was to settle, but does not say what the dispute was. It was "arranged" that the Bickfords should have the privilege of resting their roof and girders on McLean Bros. & Rigg's wall, and also of building up some windows in their house. In consideration of this the Bickfords were to underpin the wall on Lot 6 and make it safe, which they did. A parapet wall, Mr. Eyers adds, was put on the top with his permission "as an element of safety"—"as a protection against fire." If the witness had ended there this part of the respondent's case would have been much stronger. But on cross-examination the witness said that the wall never was to be considered as in any sense a party wall, and that McLean Bros. & Rigg were to do as they liked with their wall. The first of these expressions is quite inconsistent with the nature of the easement claimed, and the second is scarcely compatible with the existence of any sort of binding agreement for the use of the

(1) 3 Ves. Jun., 402.

wall, and seems to point rather to a revocable licence, though perhaps only to be revoked with such reasonable notice as to enable the Bickfords to provide against undue damage; for if there were anything more than a licence, how could the right to do as they liked with their wall be preserved to the owners of it? This evidence creates at least very great uncertainty as to the real nature of any arrangement that was made, and whether it was permanent or temporary. If it was terminable upon notice, the Court would probably not enforce it specifically, as its decree could be forthwith rendered nugatory by the giving of the necessary notice. The respondent's counsel endeavoured to account for the expression "the wall never was to be considered in any sense a party wall" by pointing to its use in the agreement under seal of 18th September in the same year, presently to be discussed, and suggesting that the witness was merely quoting from that document. But that is at the best conjecture, and does not clear up the statement, "We were to do as we liked with our wall." Moreover, I think the suggested explanation was afterwards disclaimed by leading counsel for the respondent. The evidence without explanation is most damaging to the respondent's case. It is a further important consideration that neither of the predecessors seem to have known, as we know now, that the wall on Lot 6 was not built up to the boundary. Nothing was said to show that either of the parties suspected this, or that the one side thought that they were obtaining the use of more land than they owned, or the other that they were sacrificing any. In fact the conversation appears to have occurred within three months of the execution between them of the agreement under seal already mentioned, in which it is recited that the wall of Lot 6 stands on the boundary; and it is throughout the deed treated as standing there. Thus the building that the Bickfords were about to put up would not, so far as either side then knew, encroach on Lot 6. But we know now that the arrangement to let the Bickfords build up to the wall could not have been carried out without encroachment. It cannot be assumed that the appellant's predecessors would have assented to any arrangement at all which involved an encroachment, had they then known the true boundary. Such a thing, indeed, is highly improbable. The

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arrangement was thus arrived at under a material mistake of fact common to the parties, and equity would not have enforced it after the discovery of the truth: *Jones* v. *Clifford* (1).

If, then, the case rested on the proof of a clear, definite, and enforceable agreement, there would be almost insuperable obstacles to the conclusion that the defence had been so far established.

But the defence appears to me to fail in its other essential ingredient, that of notice.

The notice alleged is constructive, not actual, for it is not set up that the appellant, when he purchased, had any actual knowledge at all of the verbal agreement alleged.

Constructive notice was defined thus by *Eyre* C.B. in *Plumb* v. *Fluitt* (2):—"Constructive notice I take to be in its nature no more than evidence of notice, the presumptions of which are so violent that the Court will not allow even of its being controverted"; and Lord *Chelmsford* L.C. adopted and expanded this definition in *Espin* v. *Pemberton* (3). In *Ware* v. *Egmont* (*Ld.*) (4) Lord *Cranworth* L.C., after pointing out that "it is highly inexpedient for Courts of Equity to extend the doctrine," and that a person not having actual notice should not be treated as if he had notice unless the circumstances enable the Court to say that he ought to have acquired the knowledge with which it is sought to affect him by imputing notice, said:—"The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross and culpable negligence."

In *Allen* v. *Seckham* (5) the Court of Appeal held that the mere fact of there being windows in an adjoining house which overlooked a purchased property was not constructive notice of any agreement giving a right of access to the light of them. The opinion of *Hall* V.C. to the contrary was over-ruled, and it is evident that all the Lords Justices doubted the case of *Hervey* v. *Smith* (6) "the case of the chimney pots," as *Cotton* L.J. called it,

(1) 3 Ch. D., 779.
(2) 2 Anst., 432, at p. 438.
(3) 3 DeG. & J., 547.
(4) 4 D.M. & G., 460, at p. 473.
(5) 11 Ch. D., 790.
(6) 1 Kay & J., 389; 22 Beav., 299.

on which the respondent placed some reliance before us. *James* L.J. plainly showed his opinion that the doctrine of constructive notice had already (1879) gone far enough. He said (1):—"I am of opinion that the decision of the Vice-Chancellor cannot be sustained on the ground on which he put it, and that it would be very dangerous to carry the doctrine of constructive notice to this length. That doctrine, as applied by the Vice-Chancellor, would come to this, that a purchaser is to be held to have constructive notice of every agreement relating to any structure which he sees on the adjoining ground." (It seems to me that if we adopt the argument of the respondent we shall carry the doctrine to the length which his Lordship thought dangerous.) *Brett* L.J., in the same case, said (2): "The doctrine of constructive notice ought to be narrowly watched and not enlarged. Indeed, anything 'constructive' ought to be narrowly watched, because it depends on a fiction. We are, however, bound by the authorities, and I conceive that when a person purchases property where a visible state of things exists which could not legally exist without the property being subject to some burden, he is taken to have notice of the extent and nature of that burden. But it seems that the rule goes further, and that when a state of circumstances exists which is very unlikely to exist without a burden, he is affected with notice." As the same Judge, when Master of the Rolls, declared thirteen years later in *English and Scottish Mercantile Investment Co.* v. *Brunton* (3), "In a series of cases Lords *Cottenham*, *Lyndhurst* and *Cranworth*, Lord Justice *Turner* and the late Master of the Rolls, *Sir George Jessel*, have said that the doctrine ought not to be extended one bit farther; all the Judges seem to have agreed upon that. In *Allen* v. *Seckham* (4) I pointed out that the doctrine was a dangerous one. It is contrary to the truth. It is wholly founded on the assumption that a man does not know the facts, and yet it is said that constructively he does know them." It would seem that the statement of the law made by *Brett* L.J. in *Allen* v. *Seckham* (4) indicates the limit beyond which the highest authorities were not prepared to carry the doctrine; an impression

(1) 11 Ch.D., 790, at p. 794.
(2) 11 Ch.D., 790, at p. 795.
(3) (1892) 2 Q.B., 700, at p. 708.
(4) 11 Ch.D., 790.

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which is strengthened by a perusal of the case of *Union Lighterage Co.* v. *London Graving Dock Co.* (1).

It is argued that it was "the duty" of the appellant, having regard to the "visible state of things," to make further inquiry, which would have resulted in the discovery of the verbal agreement. Apart from the question of the likelihood of such a state of things existing without a burden—which I shall presently point out to have been a considerable likelihood in the circumstances known to the appellant—the argument as to duty receives comment in the speech of *Lord Selborne* in *Agra Bank Ltd.* v. *Barry* (2):—"It has been said in argument that investigation of title and inquiry after deeds is 'the duty' of a purchaser or a mortgagee; and, no doubt, there are authorities (not involving any question of registry) which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possible holder of a latent title or security. It is merely the course which a man dealing *bonâ fide* in the proper and usual manner for his own interest, ought, by himself or his solicitor, to follow, with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design, inconsistent with *bonâ fide* dealing, to avoid knowledge of the true state of the title." So here, the knowledge of the encroachment gained by survey did not put the appellant under any duty to the respondent to make further inquiry as to what, as we shall see, must have sufficiently appeared to him to be a trespass, most probably in error. Whether such further inquiry was a duty to himself, or not, is not the question. But in the circumstances which were known to him, the omission to make it cannot be held evidence of any design to avoid knowledge of the true state of the title or evidence of anything else inconsistent with *bonâ fide* dealing.

For what were the circumstances known to the appellant when he became the purchaser early in 1904? The building of McLean Bros. & Rigg, destroyed some months later by fire, still stood on Lot 6. But the condition of its western wall was not fully revealed then, nor till after the fire had uncovered it. Not till

(1) (1902) 2 Ch., 557.

(2) L.R. 7 H.L., 135, at p. 157.

then did the appellant know of the beams and girders which the respondent had inserted in the wall. The building erected by the Bickfords on Lot 5 stood joined to that on Lot 6. Whether there was one wall or two between them could not then be accurately known to the appellant; but there was much to warrant the belief that there were two. First, the surveyor who made the identification survey for him in January could not see on inspection, nor I take it could the appellant, whether there was one wall or two, and there was nothing then visible from which to infer that there was only one. But the surveyor evidently inferred that there were two walls, for the plan he handed to the appellant with his report denotes two. There is nothing from which we can conclude that the appellant knew more than his surveyor. He says that he was unaware of the existence, by which I think he must mean the condition, of the wall until June 1904, when the fire occurred, and I have no doubt the condition of which he was unaware was its existence as only a single wall. His surveyor had indicated two walls, and it would be reasonable on his part to accept the indication; indeed, he says that "he thought the John Hunter building was supported on its own wall," that being the Bickfords' building, and "did not know there was only one wall." He says he was misled by the plan—*i.e.*, to that extent. Of course he knew from the report and plan that there was an encroachment by the John Hunter building.

The plan appended to the surveyor's report showed not only an encroachment on the West to the extent of 3.6 links by the Bickfords' building being brought up to a wall or walls on Lot 6, but also an encroachment by the buildings of the appellant's predecessors which extended 3.2 links into Lot 5 on the East. Thus the encroachment suffered on the West by the appellant's predecessors was balanced within half an inch by another committed by them on the East. That circumstance would convey to a purchaser the idea of a successive shifting eastwards, by common mistake, of the boundaries of the several allotments, rather than the idea of a succession of easements in the course of which his own property had become the servient tenement on the West to the dominant tenement on the East.

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Then there was the parapet wall, for the existence of which the provisions of the *Building Act* 1884, sec. 12, would sufficiently account.

These things then are all that were to be seen by a purchaser. Can it be said in reason that there existed visibly "a state of things . . . which was very unlikely to exist without a burden?"

But the appellant has, as purchaser, received from Eyers, the attorney of his predecessor in title, the deed of 18th September 1896. It is singular that Eyers does not seem to have said a word to him about any verbal agreement subsequent to that deed and superseding it. For the deed itself is totally inconsistent with the substituted arrangement to which Eyers deposes. If the appellant believed the deed to have remained in force, as he had every reason to believe, then such a verbal arrangement as is contended for was the last thing he would suspect. That deed told him, first, that the only wall in existence at its date stood on the boundary of Lot 6; next, that the predecessors of the respondent were at that time about to build a wall on their boundary of Lot 5, and that the parties feared that the excavation necessary for the purpose would bring down the wall on Lot 6 unless it were protected from collapse by underpinning and other necessary work; thirdly, that the appellant's predecessors had therefore by this deed granted the respondent's predecessors a licence to enter Lot 6 and carry out the necessary protective work; fourthly, that the respondent's predecessors on Lot 5 (who were obviously intended by the misdescription "parties of the first part" in the *testatum*) covenanted with the appellant's predecessors on Lot 6 in consideration of such licence that the wall to be erected on Lot 5 was not to acquire any right of lateral support from the existing wall on Lot 6; and lastly, that neither the intended new wall nor the existing one should be, or be considered to be, a party wall.

Taking this deed, together with the facts then visible on the land, and those then known to him as the result of the identification survey, would it have suggested itself to any purchaser of ordinary prudence as a probability that there was any agreement for an easement or any other binding agreement burdening his dominion

over his own wall, or that he was likely to discover any such thing by inquiry? It was a fair inference from the deed and the visible state of things that the deed had been acted on; that the Bickfords had years before built an eastern wall of their own up to the wall on Lot 6, after underpinning the latter in accordance with the licence, the operation of which was therefore long since spent; that his own wall was in no sense a party wall; that his neighbour had acquired no right of lateral support—in fine, that there was now no impediment to his absolute dominion over the wall on his land. In view of that situation I cannot accept the argument that his knowledge of the western encroachment put him on his inquiry. As has been pointed out, there were encroachments of practically equal extent, on the eastern as well as the western side, and if warranted, as I think he then was, in believing the deed to have been acted on, he was equally justified in believing that what then appeared to have been done had been done in accordance with it, but in error as to the true boundary, and by no means in execution of an agreement for an easement, permanent or terminable by notice.

I cannot see, therefore, that the appellant, even assuming the verbal agreement set up to have existed as an enforceable one, ought to have acquired knowledge of it. Not only does his conduct appear to have been reasonably prudent, but the circumstances known to him were not such as to suggest that upon inquiry he would find his land subject to the alleged burden, or indeed to any burden at all.

I am therefore of opinion that his appeal should be allowed.

O'CONNOR J. It is clear that the respondent has used the land and wall as complained of and that, unless he establishes his defence, the appellant is entitled in some form to the relief which he claims. The respondent's documentary title affords him no justification, but he relies upon a verbal agreement for adequate consideration made and acted upon between the predecessors in title of both parties, whereby the land and building became subject to the burden which has been imposed upon them. As the agreement was not by deed, and the appellant was a *bonâ fide* purchaser for value, it is conceded that the respondent cannot

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succeed unless he establishes what amounts to an equitable easement binding on the respondent, that is to say, an agreement of such a nature and made under such circumstances as would justify a Court of Equity in granting specific performance. In addition to that he must show that the respondent purchased with notice of the agreement. Both these branches of the defence were argued by counsel. But I do not think it necessary to express any opinion upon the first branch having regard to the view I take of the facts relied on in support of the second branch. If the respondent fails to establish notice to the appellant he can have no justification as against him, however complete his answer might have been if the original party to the agreement had been the party complaining. It was not suggested that there was actual notice of the agreement, but the respondent relied on facts which he contends constitute constructive notice to the appellant. In investigating facts relied on to establish constructive notice, it is well to bear in mind some observations of Lord *Esher* M.R. in *English and Scottish Mercantile Investment Co.* v. *Brunton* (1), he says:—"Constructive notice or knowledge, as I have said, is an equitable doctrine wholly; it is a doctrine not known to the common law, but it must now be dealt with and acknowledged by the Courts which administer the common law. It is, therefore, necessary for us to see how far the doctrine extends and is to be carried out, and to consider its nature and limits as laid down by the Judges who invented and have applied it. Of late years, after the doctrine had been invented and put into form, the Chancery Judges saw that it was being carried much further than had been intended, and they declined to carry it further. In a series of cases Lords *Cottenham*, *Lyndhurst*, and *Cranworth*, Lord Justice *Turner*, and the late Master of the Rolls, *Sir George Jessel*, have said that the doctrine ought not to be extended one bit farther; all the Judges seem to have agreed upon that. In *Allen* v. *Seckham* (2) I pointed out that the doctrine is a dangerous one. It is contrary to the truth. It is wholly founded on the assumption that a man does not know the facts; and yet it is said that constructively he does know them."

(1) (1892) 2 Q.B., 700, at p. 708. (2) 11 Ch. D., 790.

The principles to be applied where it is sought to infer constructive notice from facts, of which actual knowledge is brought home to the party sought to be affected, have been explained in several cases. The respondent's counsel relied on Lord Justice *Brett's* statement in *Allen* v. *Seckham* (1), which is as follows:— "The doctrine of constructive notice ought to be narrowly watched and not enlarged. Indeed, anything 'constructive' ought to be narrowly watched, because it depends on a fiction. We are, however, bound by the authorities, and I conceive that when a person purchases property where a visible state of things exists which could not legally exist without the property being subject to some burden, he is taken to have notice of the extent and nature of that burden. But it seems that the rule goes further, and that when a state of circumstances exists which is very unlikely to exist without a burden, he is affected with notice." Then follow instances of the application of the principle. The fact that a tenant is in possession of the land, or some portion of it, has been held to be notice to the purchaser of what the tenant's rights are. A certain visible arrangement of chimneys in a house on the land, the existence of a sea wall, of an archway leading to a neighbour's back land, have been held to be notice to the purchaser in each case of burdens and obligations on the property purchased. If it were shown that in this case the appellant knew, or could have seen, if he took ordinary care in the examination of his purchase, that both buildings were supported by a common wall, wholly within McLean Brothers and Rigg's boundary, and that the joists and rafters of the Bickford Building rested on that wall, that would no doubt amount to knowledge of a state of circumstances very unlikely to exist without some kind of agreement imposing a burden. But the evidence is that the appellant did not know of that state of things. Nor was it apparent to the eye, nor could it have been ascertained by an intending purchaser, unless, as Surveyor Stefanoni says, the walls were tested by holing through them. The only fact of which, according to the evidence, the appellant was aware, and it is the fact upon which the respondent's counsel mainly rested his case, was that the Bickford Building, in abutting

(1) 11 Ch. D., 790, at p. 795.

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against the McLean Brothers and Rigg's wall, encroached substantially on McLean Brothers and Rigg's land. That fact would not in itself indicate to an intending purchaser that there was only one wall supporting the two buildings. But Mr. *Pilkington* contends that knowledge of the encroachment imposed on the appellant the duty of inquiry as to the extent and manner of the encroachment, and that, if he had made the inquiry, he must have acquired knowledge of the agreement. In dealing with the bearing of facts of that kind on the question of constructive notice, another aspect of the circumstances must be taken into account. Where no inference of the existence of the burden could be directly drawn from certain facts, yet they are such as ought to put a purchaser upon an inquiry, in the course of which he would, with ordinary care, obtain knowledge of other facts from which the reasonable inference of a burden on the land might directly be drawn, then the statement of Lord *Esher* last quoted, if it is to be taken as a guide, must be supplemented by the considerations adverted to by Lord *Cranworth* in *Ware* v. *Lord Egmont* (1) in the following passage:—"Where a person has actual notice of any matter of fact, there can be no danger of doing injustice if he is held to be bound by all the consequences of that which he knows to exist. But where he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the Court to say, not only that he might have acquired, but also, that he ought to have acquired, the notice with which it is sought to affect him—that he would have acquired it but for his gross negligence in the conduct of the business in question. The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence."

The comments of Lord Justice *Lindley* (*Bailey* v. *Barnes* (2)) on that passage are also useful in the same connection. He says: "'Gross or culpable negligence' in this passage does not import any breach of a legal duty, for a purchaser of property is under no legal obligation to investigate his vendor's title. But

(1) 4 D. M. & G., 460, at p. 473. (2) (1894) 1 Ch., 25, at p. 35.

in dealing with real property, as in other matters of mercantile dealing, regard must be had to the usual course of business; and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way." Under guidance of the principles laid down in these judgments, I now come to the consideration of the facts upon which the respondent relies, and which must of course be viewed in connection with all the circumstances surrounding the making of the purchase. At the outset, I make the preliminary assumption that the respondent has established the existence of an agreement, such as he alleges, between his own and the appellant's predecessors in title. I take it also to be proved that the appellant, when he purchased the property, had no actual knowledge of the agreement, and was not aware that the wall was in fact used as a wall of Bickford's building adjoining, or that it bore the weight of the upper wall, and of the joists and rafters of that building. Under these circumstances, the appellant's position was that of a purchaser who has contracted to buy a piece of land, having on it an old building, against a wall of which the neighbour on the west side has erected his building, there being nothing in the appearance of the buildings, where they join, to indicate a common wall between them. Looking at the title deed he finds that the land is under the *Transfer of Land Act*, and that no easement is shown either upon the register or upon the deeds. There is, however, handed over to him about the same time as the title deeds (and this correction of the evidence agreed to by the parties must fairly I think be made) the agreement under seal of 18th September 1896. There is no evidence that the respondent was informed that the agreement had not been carried out. Upon these facts either of two assumptions might reasonably be made by the appellant. He might assume that the agreement embodied in the document had not been carried out: in that case the document would tell him nothing. Or, he might assume that it had been carried out; in that case the document would indicate that the Bickfords had underpinned the wall of McLean Brothers and Rigg's building,

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but had erected their own wall to carry their own building. On that assumption, which the appellant would be quite justified in making, he would naturally take it for granted that each building was supported by its own independent wall. Before completing the purchase the respondent took the usual course of having an identification survey made. The state of things ascertained by the survey appears in the surveyor's report of 9th January 1904. It shows that most of the allotment was covered by an old building. On the West side its wall was not on the boundary, there being a space between the wall and the boundary on that side of from 3.6 links at the lower end, to .4 of a link on the upper or Murray Street end. But on the eastern side the old building encroached over the boundary on to the adjoining allotment. The overlap on that side being 2.7 links at the lower end, 2.2 links about the middle of the line, and 3 links at the upper or Murray Street end. The plan and report also show that Bickford's building, about a chain in depth, encroached on the western side so as to abut against the wall of the old building, an encroachment of from 3.6 links to 3 links over the boundary as shown in the appellant's title deeds. Mr. Stefanoni who made the survey points out in his evidence that his plan shows two walls adjoining on the western side, in other words, indicates that Bickford's building rested entirely on its own independent walls. He assumed that that was so, admitting at the same time that there was nothing in the appearance of the buildings as they stood adjoining to indicate whether there was one wall or two. Upon the fact of this encroachment, brought to the appellant's knowledge under these circumstances, the respondent relies, and he puts his case in this way :—The intending purchaser of an allotment upon which such an encroachment was apparent might, he says, have been reasonably expected to inquire by what right the Bickford building had been extended over the boundary and had occupied so substantial a portion of the McLean Brothers & Rigg's allotment. That inquiry must have led him to a knowledge of the agreement. Having failed to make the inquiry, Equity will not permit him now to deny the knowledge he could have thus acquired. Applying to that contention the rule laid down by Lord *Cranworth* in *Ware* v. *Lord*

Egmont (1) the real matter for determination may therefore be stated as a definite issue in the following form:—Are the facts such as to enable the Court to say that the appellant not only might have acquired, but that he ought to have acquired, a knowledge of the agreement, and that he would have acquired that knowledge but for his negligent conduct of his own business. The onus is upon the respondent of establishing the affirmative of that issue. It is for him to put forward facts upon which the Court may reasonably find in his favour. If, on the facts proved that finding cannot be reasonably inferred, or if he has left the matter doubtful, he must fail.

With every respect to the learned Judge of first instance, I can see no reasonable ground for holding that a purchaser, placed in the circumstances in which the plaintiff stood, was neglectful of his own interests merely because he failed to inquire as to the reason of the encroachment of an adjoining building. From the deed of September 1896, from the report of his surveyor, and from the appearance of the buildings where they adjoined, he might very reasonably come to the conclusion that each building had its own independent wall, and that the encroachment indicated no more than that the Bickfords had built the wall on the portion of McLean Brothers and Rigg's land. There may be circumstances in which it might fairly be expected from a man conducting his business with ordinary prudence that he would in his own interests inquire into the reasons for a substantial encroachment on land which he is about to purchase, but in the circumstances of the present case I can see no reason why a prudent man, doing what was careful and business-like in his own interests, might not well pass such an encroachment as this without inquiry. It is apparent from the surveyor's plan that what the appellant lost by his neighbour's encroachment on the western side he substantially gained by his own encroachment on his neighbour on the eastern side, and he might very fairly conclude that Bickford's trespass was merely the result of a series of inaccurate occupations pushing all the buildings to the eastward, and which affected equally all the owners of allotments in the neighbourhood. If taking that view he elected to treat the encroach-

(1) 4 D. M. & G., 460, at p. 473.

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ment as not affecting the value of his purchase in any substantial way I can see in that no indication of a failure to inquire arising from that negligence of the appellant's own interests which the respondent was bound to establish. For these reasons I am of opinion that the respondent has failed to establish facts from which a Court could fairly infer that the appellant had constructive notice of the agreement upon which the defence is founded. It follows that, in my view, the judgment of the learned Judge of first instance to the contrary must be set aside, and a declaration and order must be made in the appellant's favour. As to the form of the declaration and order I agree with my learned brother the Chief Justice.

Appeal allowed.

Solicitors, for appellant, *Stone & Burt.*
Solicitors for respondent, *James & Darbyshire.*

H. V. J.

[HIGH COURT OF AUSTRALIA.]

RESCH'S LIMITED . . . . . APPELLANTS;
DEFENDANTS,

AND

ALLAN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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MELBOURNE, *June* 8.

Griffith C.J., Barton and O'Connor JJ.

Contract—Interpretation—Evidence—Contract going off—Refund of purchase money—Deduction of commission.

By a contract in writing for the sale of a hotel it was provided that, in case the transfer of the licence should be refused by the Licensing Bench owing to objections to the purchaser, the vendor should be entitled to deduct the agent's commission from the moneys paid under the contract, and that the balance should be refunded to the purchaser by the vendor. £500 was paid