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O'Connor J.

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

as part purchase money. The sale having gone off owing to objections of the purchaser, the purchaser brought an action to recover the £500, and the vendor paid £450 into Court, claiming to be entitled to retain £50 as agent's commission. Evidence was given on behalf of the purchaser by hotel-brokers, who said their charge in such cases was £5 5s. or £10 10s. The purchaser having been nonsuited,

Held, that the nonsuit was properly set aside and a new trial properly ordered, there being evidence from which the jury might find what was a reasonable sum to be deducted as agent's commission.

Special leave to appeal from the decision of the Supreme Court of New South Wales (*Allan* v. *Resch's Ltd.*, 11 S.R. (N.S.W.), 228), refused.

APPLICATION for special leave to appeal.

The plaintiff brought an action against the defendants in the Supreme Court of New South Wales to recover £500, being money paid by the plaintiff to the defendants as part purchase money under a contract to purchase a certain hotel, the sale having fallen through because the application by the plaintiff for a licence was refused by the Licensing Bench owing to personal objections to the plaintiff.

The defendants paid £450 into Court and pleaded never indebted as to the balance. They claimed a right to retain £50, which represented 5 per cent. on the amount of the purchase money, as "agent's commission" under the following clause of the contract of sale:—"The purchaser agrees to attend at the Police Court, procure references, and to do all things necessary to get a transfer of the licence . . . but in case the transfer of licence shall be refused by the Licensing Bench, owing to objections to the said purchaser, the vendor shall be entitled to deduct the agent's commission from the moneys paid under this contract, and the balance, if any, shall be refunded to the purchaser by the vendor."

At the trial before *Pring* J. counsel for the plaintiff admitted that the defendants were entitled to deduct some amount for commission, but contended that it was for the jury to decide as to the amount.

Several hotel-brokers were called and gave evidence on behalf of the plaintiff. They were asked whether there was a trade usage in Sydney regulating the commission to be paid when an

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application for a licence had been refused by the Licensing Bench on account of objections personal to the objector. One witness said, "The invariable custom is to charge a nominal fee such as £5 5s. I have a form of contract. In that form it is expressly stipulated that £5 5s. only shall be paid. The usual rate of commission on the first £1,000 is 5 per cent." Another witness said, "Our custom is to charge £10 10s." Other witnesses gave similar evidence. At the close of the plaintiff's case *Pring* J. nonsuited the plaintiff.

On motion to set aside the nonsuit and for a new trial the Full Court held that there was evidence from which the jury might say how much might reasonably be deducted by the defendants in respect of commission, and they set aside the nonsuit and granted a new trial: *Allan* v. *Resch's Ltd.* (1).

Pitt, in support of the application. The burden was on the plaintiff to prove how much the defendants were entitled under the contract to deduct. The words "agent's commission" in the contract mean the amount actually paid to the agent assuming he did everything he was bound to do, and no question arose as to what was a reasonable sum to be paid. The attempt to prove a universal custom failed, and the evidence called to prove that custom is inadmissible to show how much the defendants were entitled to deduct. The effect of the judgment of the Full Court is to vary the terms of the written contract.

GRIFFITH C.J. delivered the judgment of the Court:—There is no reason to doubt the correctness of the decision leave to appeal from which is sought. Leave to appeal will be refused.

Special leave to appeal refused.

Solicitors, *Bradley & Son.*

B. L.

(1) 11 S.R. (N.S.W.), 228.