[HIGH COURT OF AUSTRALIA.]

HAWKINS . . . . . APPELLANT;
PLAINTIFF,

AND

GADEN AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 10, 11, 12; *Nov.* 12.

Knox C.J., Isaacs and Starke JJ.

Principal and Agent—Solicitor and clerk—Sale of land—Vendor and purchaser—Trust estate—Settlement of purchase—Undertaking by vendor's solicitor to obtain removal of Registrar-General's caveat—Authority of clerk to give undertaking—Estoppel—Rescission of contract of sale—Liability of solicitor to purchaser—Damages.

A clerk of the defendants (a firm of solicitors) gave an undertaking to the plaintiff's solicitors, on the completion of the purchase of certain land, in the following form: "In consideration of settlement of this matter to-day we . . . undertake to satisfy the requisitions of the Registrar-General with regard to the withdrawal of caveat"—which had been lodged by the Registrar-General; this undertaking the clerk signed in the name of the firm.

Held, by *Isaacs* and *Starke* JJ. (*Knox* C.J. dissenting), upon the facts, that the defendants were personally bound by the undertaking and under a duty to satisfy the Registrar-General's requisitions as to the caveat.

Held, also, by *Isaacs* and *Starke* JJ., that the plaintiff was entitled to sue upon the undertaking; and that he was entitled to recover as damages the difference between the contract price and the value of the land.

Decision of the Supreme Court of New South Wales (Full Court): *Hawkins* v. *Gaden*, (1925) 25 S.R. (N.S.W.) 296, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by William Richard Hawkins against Edward Ainsworth Gaden, David William Roxburgh,

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Vero Read, Herbert Thomas Bell, Thomas James Ley, Charles Wolstenholme Rundle and George Ashwin Yuill, practising as Norton Smith & Co., solicitors, to recover damages for breach of an agreement alleged to have been made between them and the plaintiff. The action was, in March 1924, by consent, tried without a jury before *Street* A.C.J., who entered a verdict for the plaintiff for £1,750. On a motion to the Full Court by the defendants to set aside the verdict and to enter a nonsuit or a verdict for the defendants or to grant a new trial, the Full Court ordered that the verdict be set aside and a verdict entered for the defendants: *Hawkins* v. *Gaden* (1).

From that decision the plaintiff now appealed to the High Court.

The material facts are stated in the judgments hereunder.

Brissenden K.C. (with him *Davidson*), for the appellant. The respondents' clerk, Brady, had implied authority from the respondents to give the undertaking of 1st September 1923. As he was given authority to receive the purchase-money and to complete the purchase, he had authority to do all things necessary to complete the purchase according to the contract. The consideration for the undertaking was the settlement of the contract which then took place. The undertaking was a personal undertaking by the respondents, who were put by their clients in a position to do acts of this class, and this was the only way of completing the contract which would have been acceptable to the appellant. The subsequent correspondence shows a ratification by the respondents of the undertaking, and also shows the character of Brady's antecedent authority. The letter of 12th September 1923 from the respondents to the appellant's solicitors would convey to the receiver of it that the respondents had seen the undertaking and approved of it. Their conduct was such as to prevent them from saying that they did not authorize or acquiesce in the undertaking. They never suggested that the undertaking was not authorized until the action was brought.

Shand K.C. and *Halse Rogers*, for the respondents. The undertaking was given, not to the appellant, but to his solicitors. It

(1) (1925) 25 S.R. (N.S.W.) 296.

was an undertaking given by one solicitor to another to protect him from the consequences of a possible action by his client for negligence. The matter was not intended to be concluded by the payment of the balance of the purchase-money, and the vendors were still bound to endeavour to satisfy the requisitions of the Registrar-General. The undertaking "to satisfy the requisitions of the Registrar-General" meant that the respondents would produce all the material which the Registrar-General might require. The vendors were not relieved of their obligation under sec. 57 of the *Conveyancing Act* 1919 (N.S.W.) to give the appellant such a title as would enable him to have the transfer registered. The strongest way the undertaking can be read in favour of the appellant is that the respondents undertook the liability which was upon the vendors to satisfy the requisitions. It was not intended to put the appellant in a better position than he ever could have been in under the contract. It was not within the ostensible authority of the respondents' clerk, Brady, to guarantee on their behalf that the vendors would give a good title. There is no evidence of ratification by the respondents. To constitute ratification there must be an intention to ratify (*Phosphate of Lime Co.* v. *Green* (1)). There cannot be ratification by negligence. The parties entered into the undertaking on the basis that the contract of sale was one which the vendors had power to make and to carry out. There having been a mistake of fact as to that, the undertaking is not enforceable (*Leake on Contracts*, 7th ed., p. 229). The undertaking should be construed as a contract of indemnity only: if the contract of sale could not be performed the appellant was to be put back in the position in which he was before it was made; that is, the purchase-money was to be repaid to him.

Brissenden K.C., in reply. The undertaking, although given on behalf of the vendors, was signed in such a form as to impose a personal liability on the respondents (*Universal Steam Navigation Co.* v. *James McKelvie & Co.* (2)). When the undertaking was given it was intended that there should be a final completion of the

(1) (1871) L.R. 7 C.P. 43, at p. 56.

(2) (1923) A.C. 492, at p. 505.

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contract of sale which was thereby put an end to (*Farrer's Conditions of Sale*, pp. 46, 48).

Cur. adv. vult.

The following written judgments were delivered :—

KNOX C.J. This is an appeal from a decision of the Supreme Court setting aside a verdict for £1,750 found in favour of the present appellant. The action was tried by *Street* A.C.J. without a jury; and I adopt from his judgment the following statement of the facts proved at the trial :—" On 18th February 1921 the trustees of the will of the late James Shepherd agreed to sell a house and land at Randwick, forming part of the estate of the testator, to Dr. Manning for £9,500. The land is held under the provisions of the *Real Property Act* 1900. As they had no power of sale under the will, and as there were infants beneficially interested in the property, an order was obtained from the Court, under the provisions of the *Conveyancing and Law of Property Act* 1898, confirming the agreement. Dr. Manning did not complete his purchase, and, in exercise of the powers contained in the agreement, the trustees resold the property to the plaintiff. The price which he agreed to pay was £6,750. The agreement for the sale to him was made on 21st July 1922, but there was considerable delay in completing, owing, I think, to financial difficulties on his part, and it was not until 17th April 1923 that Messrs. John Williamson & Sons, his solicitors, sent to the defendants, the solicitors of the trustees, a draft transfer for perusal and approval. At the same time they made their requisitions on title, and amongst other things they required that a caveat which had been lodged by the Registrar-General should be removed before completion. For some reason or other, matters still drifted on, but on 9th August 1923 the defendants wrote to Messrs. John Williamson & Sons setting out the amount due for purchase-money and interest up to 31st July and asking for an early appointment to settle. On 31st August Mr. Percy Williamson made an appointment with Mr. Brady, a clerk in the employment of the defendants, to settle the matter on the following morning. Mr. Brady is a clerk in charge of conveyancing matters in the defendants' office, and it was he who dealt, on their behalf, with the carrying out of the sale. Mr.

Williamson was unable to keep the appointment himself, and he sent Mr. Hanna, one of his clerks, in his place. Some discussion took place between Hanna and Brady about the payment of the Federal land tax, the Registrar-General's caveat, and the defendants' authority to receive the purchase-money, and eventually Brady gave a written undertaking in the following form :—' 1st September, 1923.—Messrs. John Williamson & Sons, solicitors, 163 King Street, Sydney.—Dear Sirs,—Shepherd's Trustees to Hawkins—In consideration of settlement of this matter to-day we hereby undertake to see that the Federal land tax, so far as regards the subject land, is paid to date of possession, namely, 8th September, 1922, and we also undertake to satisfy the requisitions of the Registrar-General with regard to the withdrawal of caveat, and further to obtain an authority from the vendors for us to receive balance of purchase-money.—Yours faithfully, Norton Smith & Co., per J.A.B.' On that undertaking Hanna paid over the purchase-money and received a signed memorandum of transfer. Twelve days later, and presumably after the transfer had been lodged for registration, Messrs. John Williamson & Sons wrote to the defendants, in reference to their undertaking given on the settlement of the matter and enclosed a copy of a letter from the Registrar-General's Department. The defendants replied on the same day saying that the matter was receiving their attention. One of the requisitions subsequently made by the Registrar-General was an inquiry how the trustees proposed to show that they had power to sell to the plaintiff for £6,750. To meet this they applied to the Court to confirm the sale, but the application was refused and it was ordered that the property be re-submitted for sale by auction. Following upon that, the defendants wrote to John Williamson & Sons saying that, as the trustees were unable to comply with the requisition requiring the removal of the caveat, they rescinded the contract in pursuance of the provisions contained in it. The purchase-money paid by the plaintiff was afterwards refunded to him, and he now brings this action to recover damages from the defendants for the breach of the undertaking contained in their letter to John Williamson & Sons of 1st September, 1923." I add that the delivery up by the appellant of the transfer and certificate of title and the acceptance by him

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of the refund of purchase-money were expressed to be without prejudice to any claim by him against the vendors or against the respondents personally.

I agree with *Street* A.C.J. and *Gordon* J. in thinking that the undertaking contained in the letter of 1st September 1923, if binding on the respondents, imposed on them an absolute obligation to procure the removal of the caveat so as to permit of the registration of the transfer. In this view of the case the substantial question for decision is whether the respondents are bound by the undertaking given by Brady. In order to succeed in the action it was necessary for the appellant to establish either (a) that Brady had actual authority to give the undertaking, or (b) that he had ostensible authority to do so, or (c) that the respondents ratified Brady's act, or (d) that the respondents cannot now be heard to deny that Brady had authority. There was, in my opinion, no evidence of any actual authority to Brady to sign an undertaking such as this on behalf of the respondents. Brady's evidence was that he was forbidden to sign letters on behalf of the firm and that he had no express authority to give undertakings. This was corroborated by the evidence of the respondents, and I see no reason for refusing to accept the statement. But it was said that Brady had ostensible authority to give the undertaking because he was empowered by the respondents to carry to a conclusion on behalf of the vendors the transaction based on the contract of sale between them and the appellant. Dealing with this part of the case, *Ferguson* J. said (1):—

"The position was that Brady was empowered to carry to a conclusion on behalf of the vendors a transaction based upon the contract of sale. Before the property could be effectually transferred, it was necessary to satisfy the Registrar-General that the vendors had authority to make the sale. The vendors were under no obligation to do this; the contract did not contain a warranty of title on their part; and if they were not able to establish their authority to sell, they were at liberty to rescind the contract. In these circumstances Brady gave an undertaking which is interpreted as a warranty of title, not by the vendors but by his own employers, making them liable to the purchaser for damages if the vendors

(1) (1925) 25 S.R. (N.S.W.), at p. 312.

failed to satisfy the Registrar-General's requisitions. Was this within the scope of his ostensible authority? In my opinion it was not. His ostensible authority was limited to the doing of such acts as were reasonably incident to the performance of the work he was employed to do, and I do not think that the making of independent contracts between his employers and the purchaser, binding them by obligations which the agreement of sale did not impose upon their clients, was reasonably incident to the work of completing the purchase under that agreement. If such an undertaking were within the scope of his employment, then I should think it would be equally within the scope of his employment to undertake that his employers would pay a sum of money of any amount as a condition of the purchaser completing, or on the other hand Williamson & Sons' clerk might have bound them by a guarantee that their client would pay more than the stipulated purchase-money, or would waive his rights to a transfer of some specified part of the land described in the contract. I see no warrant for holding that the position of an articled clerk, or managing clerk, carries with it any such ostensible authority." I agree with the learned Judge in his conclusion and in the reasons by which he supported it, and I find it unnecessary to add anything to those reasons.

The next question for consideration is whether the respondents ratified the undertaking. On this question the appellant relied mainly on two letters of 12th September and on the alleged acquiescence of the respondents subsequently. These letters are in the words following:—"12th September 1923.—Norton Smith & Co., Hunter Street.—Dear Sirs,—Hawkins from Shepherd's Trustees—We refer to your undertaking given on the settlement of this matter and herewith enclose copy of letter received by us this morning from the Registrar-General's Department and shall be obliged if you will let us have the required information as soon as possible.—Yours faithfully, John Williamson & Sons." "12th September, 1923.—Messrs. John Williamson & Sons, solicitors, 163 King Street, Sydney.—Dear Sirs,—Shepherd's Trustees to Hawkins—We are in receipt of your letter of to-day enclosing copy of requisitions served upon you by the Registrar-General and we

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advise that the matter is receiving our attention.—Yours truly, Norton Smith & Co."

On 28th September and again on 10th October John Williamson & Sons wrote to Norton Smith & Co. referring, in the one case, to the letter of 12th September and, in the other, to previous correspondence requesting attention to the matter of the outstanding requisitions. The letter from Norton Smith & Co. of 12th September was drafted by Brady and signed by the respondent Rundle, a member of the firm, but evidence was given by each of the respondents that he did not see the undertaking of 1st September or know of its terms until the month of January 1924. There was evidence that the respondents did all they could to satisfy the requisition of the Registrar-General and to induce him to remove his caveat. I agree with *Gordon* J. and *Ferguson* J. in thinking that the facts proved afford no sufficient evidence of ratification. "To constitute a binding adoption of acts *a priori* unauthorized . . . there must be full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were" (per Lord *Russell of Killowen* C.J. in *Marsh* v. *Joseph* (1)). The evidence of the respondents, which I accept, establishes that at the relevant time none of them in fact knew the terms of the undertaking which had been given, and I can find no evidence of any such unqualified adoption of Brady's action in giving it as would justify an inference that they intended to make themselves responsible for his undertaking, whatever it was. It is true that the letter of 12th September from Williamson & Sons to Norton Smith & Co. refers to the undertaking, and that the reply to this letter was signed by Mr. Rundle. It is not suggested that his evidence that he did not see Williamson & Sons' letter should be disbelieved, and if this statement be accepted there was nothing to fix him with knowledge that any undertaking had been given. The letter which he signed, as *Ferguson* J. points out, contains no allusion to the undertaking, and might be written equally well by a person who had not seen it as by one who had. In substance I agree with the reasons given by *Gordon* J. and *Ferguson* J. in support

(1) (1897) 1 Ch. 213, at pp. 246, 247.

of their conclusion that the appellant had failed to establish that the respondents had ratified Brady's act in giving this undertaking.

This view is supported by the decision in *Fitzgerald* v. *Dressler* (1). In that case the majority of the Court held that the absence of evidence that the defendant's clerk had communicated to the defendant the bargain he had made was a fatal defect in the case of the plaintiff who sought to establish ratification of a promise made without authority by defendant's clerk. *Willes* J. said that, in the absence of positive evidence that the promise was communicated to the defendant or to his managing clerk, the jury would not have been warranted in assuming that it was, merely because the evidence was equally consistent with either supposition. In this case, as in that, the conduct of the respondents was as consistent with a desire to carry out the original contract as with an attempt to perform the undertaking given by Brady. There is, in my opinion, nothing to show that any of the acts done by the respondents after 1st September was done with the intention of adopting the act of Brady in giving the undertaking (see *Kent* v. *Thomas* (2)).

The remaining question is whether the respondents can now be heard to deny that Brady had authority. As I understand the contention on this point, it is in effect that the respondents' reply of 12th September to Williamson & Sons' letter of the same date should, either alone, or in conjunction with their omission to answer subsequent letters, be treated as a conclusive admission by them that Brady had authority to give the undertaking. Assuming that the letter referred to amounts to an admission of the fact of authority, I can find no evidence that the appellant acted on the alleged admission or was induced by it to alter his position; and the general rule is that an admission, though evidence against the person who made it, is not conclusive evidence so as to prevent him from averring the truth except as to a person who may have been induced by it to alter his condition (*Graves* v. *Key* (3)). In *Heane* v. *Rogers* (4) *Bayley* J. said: "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think

(1) (1859) 7 C.B. (N.S.) 374.
(2) (1856) 1 H. & N. 473, at p. 477.
(3) (1832) 3 B. & Ad. 313.
(4) (1829) 9 B. & C. 577, at p. 586.

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that he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him), and that transaction." In *Taylor on Evidence*, 11th ed., at p. 564, par. 839, the rule is stated thus: "Every admission, which has been made with the intention of being acted upon, and which has been acted upon by another person, is conclusive against the party making it, in all cases between him and the individual whose conduct he has thus influenced." In the absence of evidence that the appellant acted on the supposed admission, the respondents are not, in my opinion, debarred from asserting that Brady had no authority to give the undertaking sued on.

I think the appeal should be dismissed.

ISAACS J. As some important questions of law turn on the proper view to be taken of the facts, I narrate these as succinctly as they permit. By agreement in writing dated 21st July 1922 the trustees of the will of James Shepherd agreed to sell to the appellant certain land under the *Real Property Act* 1900, at Coogee, for £6,750. The agreement provided for an immediate deposit of £500, and that the balance £6,250 should be paid at any time within two months "on completion of transfer." It was also stipulated that the vendors were to pay all taxes up to the date of completion and that the purchaser should pay them thereafter. The deposit was paid, but up to 1st September 1923 the purchase was still uncompleted. In the meantime, on 22nd December 1921, the Registrar-General lodged a caveat forbidding registration of any dealing (*inter alia*) not consistent with the duties of the executrix and executors of James Shepherd. On 22nd January 1923 there was a part payment of £1,000, on 3rd April a further part payment of £2,000 and on 28th April a third instalment of £1,000. This left £2,250 of principal still unpaid. On 9th August 1923 Norton, Smith & Co., who are the present respondents and were then acting as the vendors' solicitors, wrote to Williamson & Sons, the purchaser's, that is, the appellant's, solicitors, setting out the state of the

appellant's indebtedness to 31st July 1923, after giving credit for the part payments and debiting interest on unpaid principal and certain rates and taxes. The total amount shown was £2,590 12s. 8d. The letter concluded: "*Please let us have an early appointment to settle.*" On 31st August an appointment was made, probably by telephone, to settle next day at 11 o'clock at the office of Norton Smith & Co. On 1st September 1923 a clerk of Williamson & Sons named Hanna attended the office of Norton Smith & Co. for the purpose of the settlement, and there saw Brady, an articled clerk, who was the sole person on that side dealing with the matter. Hanna handed Brady a cheque in favour of Norton Smith & Co. It does not appear whether the cheque was drawn by Williamson & Sons or not. Probably it was, but that is immaterial, since it was given and taken in full discharge of the purchaser's pecuniary obligation in respect of purchase-money, interest and rates, &c. The amount of the cheque is stated by Brady in oral evidence to have been £6,200 odd. But reference to the actual receipt shows that to be an error for £2,604 6s. 5d. The receipt, it is highly important to notice, was not signed by Brady, but by a clerk in the accountant's department, the cheque passing through the regular financial channel of the firm. The terms of the receipt indicate the intended finality of the settlement. Then Brady got the deeds handed to Hanna, the certificate of title and the executed and stamped memorandum of transfer. That memorandum would, of course, be in the statutory form and therefore be signed by the vendors and contain a receipt for the purchase-money in the body of the instrument. Sec. 39 of the *Conveyancing Act* 1919 has reference to such a receipt, but, as will be seen, an express precaution as to this was taken afterwards. The cheque and the documents having been exchanged and a receipt having been given for the certificate of title, the settlement was apparently complete. But Hanna having perused the documents handed to him asked:—(1) "What about this Registrar-General's caveat here?" (2) "Have you got an authority to receive and give receipts for payment of rates and taxes?"—meaning the Federal land tax. A conversation ensued, the terms of which are only material as helping to understand the circumstances in which the undertaking now sued was given.

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It may be taken from those circumstances that the settlement, which had so far proceeded, was treated by both the parties as incomplete until the undertaking was given, and then that the undertaking definitely closed the transaction of the day.

Five questions now call for decision :—(1) Does the undertaking purport to constitute a personal obligation of Norton Smith & Co. ? (2) If so, then to whom ? (3) What is undertaken ? (4) Had Brady authority originally or by ratification to give such undertaking ? (5) Damages. I take these questions in order.

(1) *Respondents' personal Obligation.*—The undertaking is signed "Norton Smith & Co., per J.A.B.," that is, per Brady. There is nothing to qualify the signature as a personal signature. Nor is there anything in the body of the document limiting the effect of the signature to a representative capacity. On the contrary, the undertaking "to obtain an authority from the vendors for us to receive balance of purchase-money" is inconsistent with the signature being on behalf of the vendors, because it cannot be that the same signature is capable of distributive effect (see *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (1)). The only suggestion is that the surrounding circumstances are sufficient to show the intention of the parties to limit the undertaking to agency. I am of opinion that that is not legally possible. The fundamental position is that stated by *Willes* J. in *Green* v. *Kopke* (2) : "Where the contract is reduced into writing, we must gather from its contents what was the intention of the parties." That is confirmed in *Cooke* v. *Wilson* (3) by *Cresswell* J. and *Crowder* J. In *Stewart* v. *Shannessy* (4) Lord *Kinnear*, with whose judgment the Lord President and Lord *Adam* concurred, said :—"The letter does not purport to make an engagement by the defender in the character of sales' manager to the companies and as binding them. It is an engagement by the defender in his own name. Now, the general rule as to the construction of such documents is laid down with precision by Mr. *Smith* in a note upon the case of *Thomson* v. *Davenport* (5), that 'where a person signs a contract in his own name without qualification he is

(1) (1915) A.C. 847, at p. 854.
(2) (1856) 18 C.B. 549, at p. 560.
(3) (1856) 1 C.B. (N.S.) 153, at pp. 162, 164.
(4) (1900) 37 S.L.R. 971, at p. 975.
(5) 2 Sm. L.C., 10th ed., at p. 368.

prima facie to be deemed to be a person contracting personally, and in order to prevent this liability from attaching it must be apparent from other parts of the document that he did not intend to bind himself as principal.'" "That" (continues Lord *Kinnear*) "is stated as the law of England, but there is nothing technical in it, it is a statement of the reasonable and just inference to be deduced from documents expressed in ordinary language, and passing in the ordinary course of business, and I have no hesitation in accepting it as a correct statement of the law of Scotland also." These observations place the matter on a very high ground, casting a serious onus on anyone challenging the primary effect of an unqualified signature. Finally, the passage adopted by the Scottish Court as the law of Scotland is confirmed in the passage cited by Dr. *Brissenden* from the judgment of Lord *Parmoor* in *Universal Steam Navigation Co.* v. *James McKelvie & Co.* (1). The undertaking, therefore, in my opinion does purport on its true construction to constitute a personal liability by Norton Smith & Co.

(2) *Appellant's Right to Sue.*—Next we have to inquire whether the appellant, Hawkins, can sue. That is disputed, the contention being that whatever undertaking Norton Smith & Co. personally gave must be understood to be given to Williamson & Sons only and not to their client. I am unable to assent to that. In terms, no doubt, the letter is addressed to Williamson & Sons only. But it is a fact, and, if that were necessary, it was a known fact, that they were acting in the matter of the settlement for Hawkins. The consideration for the undertaking is stated thus: "In consideration of settlement of this matter to-day." That is to say, without waiting for what the purchaser was entitled to wait for, namely, the removal of the caveat. But the settlement meant payment by the purchaser, either personally or by his agents. In *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* Viscount *Haldane* L.C. said (2):—"A principal not named in the contract may sue upon it if the promisee really contracted as his agent. But again, in order to entitle him so to sue, he must have given consideration either personally or through the promisee, acting as his agent in giving it." There is no question that the consideration moved in the relevant sense

(1) (1923) A.C., at pp. 505-506. (2) (1915) A.C., at p. 853.

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from Hawkins, and therefore we have to see whether the promise relied on is such that it must be taken to have been made, not to him, but to Williamson & Sons only. The undertaking, whether of the limited nature contended for by the respondents or of the full character asserted by the appellant, is unquestionably for the benefit and protection of the client, Hawkins. In a sense it would be a protection to the solicitors for the purchaser, but that might not be necessary and would be indirect. The direct protection it afforded was to Hawkins, who, having paid in full while the caveat remained, ran some considerable risk, to say the least of it. I need not enter minutely into the extent of that risk, and say no more than refer to the subject of waiver of objections and requisitions as dealt with in *Williams on Vendor and Purchaser*, 3rd ed., vol. I. pp. 176 et seqq. The appellant, therefore, was a competent plaintiff.

(3) *The Undertaking.*—The third question is what is undertaken? It has partly just been answered by anticipation. The consideration for it was the "settlement of this matter." "Settlement" means completion; "matter" means the contract of sale. Completion requires the title to be made out and the money to be ready, and, if therefore the conveyance is given and accepted and the money is given and accepted, the matter is settled (see per *Brett* L.J. in *Rayner* v. *Preston* (1)). In the circumstances narrated I construe the document of 1st September 1923 in this way:—The contract of sale being ended by the settlement, all rights of the purchaser, resting on the contract, to object to conveyance for any reason, either of title or conveyance, had gone. That was the consideration given for the promises in the document. Those promises were three: (1) the Federal land tax was to be paid; (2) to "satisfy" the Registrar's requisitions as to withdrawal of caveat; (3) to obtain from the vendors a formal authority to receive the money paid on the settlement. In other words, the "matter" was entirely closed between the purchaser and the vendors by the settlement, and the only safeguard taken by the purchaser was the triple undertaking of Norton Smith & Co. Apparently they saw no risk in giving that undertaking. As to the first and third, there could be none. As to the second, they believed there was none. But the

(1) (1881) 18 Ch. D. 1, at p. 11.

undertaking to " satisfy " the requisitions of the Registrar-General was absolute. The word " satisfy " cannot be cut down to mean " endeavour to satisfy " or " satisfy subject to a right to annul the whole transaction, by means of clause 14 of the completed contract." That clause, in my opinion, had gone for ever as soon as the settlement took place, and was deliberately adhered to and made the " consideration " for the triple undertaking. Any other construction is inconsistent with holding that the undertaking was by Norton Smith & Co. personally. That construction eliminates the vendors as undertaking anything. If, however, they are eliminated, so is their contract. On the other hand, if Norton Smith & Co. be the contracting party, they did not, and could not, contract to keep the vendors' contract alive. Their personal bargain must be construed according to its own terms. Having obtained absolute payment from the purchaser for their clients, the vendors, they promised absolute title, so far as the Registrar-General's caveat was concerned.

(4) *Brady's Authority.*—The fourth question depends on whether Brady's undertaking on behalf of Norton Smith & Co. can be supported by (a) ostensible authority, (b) actual authority or (c) ratification. I agree that the evidence is insufficient to establish ostensible authority. It cannot, in my opinion, be said, upon the evidence or from such common knowledge as Judges are assumed to share, that a solicitor's clerk entrusted with the completion of a conveyancing matter is thereby held out by his principals as having authority to bind them by such an undertaking. Nor do I think that, if the matter depended on direct and affirmative proof of ratification of all the terms of the bargain any more than on direct and affirmative proof of actual authority, the appellant's case could be sustained. There is, however, a very important and, as I consider, a decisive element in this case that determines this question against the respondents. It arises from the conduct of the respondents in relation to the appellant. On 1st September, as narrated, the settlement took place, and a large sum of the appellant's money was received on behalf of the respondents. The settlement took place in their office, they being represented by the person admittedly authorized to represent them for the purpose. He was authorized by them to do the very act of settlement of this matter, whatever

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that settlement would ordinarily comprehend. Receipt of the money and handing over the transfer certainly would be included. Brady handed over the cheque to the accountancy branch of his employers, and they must be presumed to have known of its receipt on their behalf. They must have promptly paid it into their banking account or have handed it over direct to their clients. At all events their clients got the money at some time. Now, although Williamson & Sons were not at liberty to assume conclusively, as from ostensible authority, that Brady was authorized to give the personal undertaking sued on, they were perfectly justified in believing, and obviously did believe, that Brady had actual authority to give it. They took the risk of that. Norton Smith & Co., however, could not play fast and loose with the matter. They are, it is true, not responsible to others for the manner in which they carry on their own business ; but, if they choose to carry it on so as to lead another person to believe there was authority in one of their employees, and thereby induce that person to pursue conduct to his prejudice, they must stand by the consequences. And that is the position here. From 1st September—when they received by the hands of Brady and their acting accountant Bailey, Williamson & Sons' cheque for £2,604 6s. 5d., described in the formal receipt as "amount due on settlement including adjustment of rates, taxes and interest to 1/9/23"—down to 12th September, there was no repudiation of Brady's act. Let us assume the fact that Brady failed to tell his employers the precise terms of the settlement. Assume further that they failed to inquire, relying on his prudence. But how was the opposite party to know of this indifference and confidence? On 12th September, however, Williamson & Sons wrote to the respondents direct—not to Brady or any other employee. The letter refers to "*your undertaking given on the settlement of this matter.*" It encloses a letter of the Registrar-General showing his requirements before he would be satisfied. A more direct reference to the undertaking could hardly be conceived. Again it may be said Norton Smith & Co. are at liberty to conduct their own affairs as they please. In this instance, it is said, the principals did not ask to see the undertaking but trusted to Brady. Again I say they did so at their peril of misleading Williamson & Sons. Their deputy

is, for this purpose, the principals themselves. The reply, signed by a member of the firm, acknowledged the letter and contents, and stated that "the matter is receiving attention." What could Williamson & Sons believe from that reply? Only this, in my opinion: that their belief in Brady's authority to settle on the terms stated was well founded. Three conclusions may ensue from that state of affairs: one is that, whatever the lack of express authority to give the undertaking, there was implied authority; the second is that there was ratification; the third is what is usually called estoppel against denying the authority. The first is a conclusion of pure fact; the second and third are conclusions of mixed fact and law.

It appears to me that Brady must have enjoyed the unbounded confidence and trust of the firm in his experience and prudence in relation to settlements of contracts. He undoubtedly gave some undertakings. He says he never gave one like this before; but he evidently gave some on his own responsibility. It is incredible that those he gave were not signed by him. That inference arises both from the nature of the matter and from the fact that, while he took care to get Bailey to sign the receipt for the cheque, he himself signed the undertaking in this case. The absolute trust in him, evidenced by sending the letter of 12th September without requiring the production of the letter to which it was an answer, is incontrovertible, provided his honesty is assumed, and it must be assumed. Though he apparently did not tell his principals the exact terms of the undertaking, he did not apparently conceal from them that there had been an undertaking of some kind. Altogether the conclusion of fact I arrive at is that Brady, though forbidden to sign ordinary correspondence letters and not authorized to give receipts for money, was implicitly trusted to do his best for the firm in relation to that class of acts known as settling conveyancing matters, including undertakings not obviously unreasonable; I conclude, that is, that in fact he was implicitly allowed, and therefore authorized, to act for the firm in such matters with a legal discretion. Subsequent events confirm that conclusion. But besides confirming that conclusion they satisfy the second and the third conclusions above referred to. As to ratification a very apposite instance of

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the application of the principle is found in *Hunter* v. *Parker* (1). There *Parke* B. was speaking of a shipowner whose ship had been sold by an auctioneer abroad whose authority to do so was denied. Ratification was relied on against him. He urged want of sufficient knowledge. *Parke* B. said as to this:—"The jury found that the sale was ratified with knowledge, but perhaps there was not sufficient proof of knowledge of all the particulars of the sale. In our opinion, however, this is not material; for as the plaintiff received the balance of the purchase-money from the vendee's agent without objection, and thereby induced him to suppose the sale to have been regularly made with his consent, and to part with the price, he must be taken either to have known and approved of the mode of sale, or to have waived all objection to it; the conduct of the plaintiff amounted therefore to a ratification of every thing that could be ratified by parol; and therefore sanctioned the delegation of authority to the auctioneer, and the sale by him; and put the vendee in the same situation as if the plaintiff had expressly directed the sale to be made in the form in which it was made." The analogy of that to the present case is that the money, though originally not received by the principals themselves, was retained by them without objection for a considerable period during which the purchaser was out of the money. The observations of *Parke* B. as to ratification therefore apply equally to this case.

The third ground, though called estoppel, is not far removed from the finding of fact of authority or ratification stated as an inference. The estoppel arises from the circumstances that unless some definiteness and finality be attached to business communications intended to influence or assure the recipient, no transaction by correspondence would be safe. On 28th September Williamson & Sons again write referring to their letter of the 12th and pointing out that the Registrar-General's requisitions have not been "satisfied" and asking for attention. No answer was given. Similarly as to a further letter on 10th October. There never was at any time a disavowal of Brady's authority to make the stipulation, so as to bind Norton Smith & Co. It is true that there was in the letter of 3rd April 1924, a denial of liability to the appellant. That is

(1) (1840) 7 M. & W. 322, at p. 342.

quite consistent with the argument we have heard based on the construction of the document. In any case it was too late to save the position. Assuming the appellant—whose money (see the letter of 3rd April 1924) it was that Norton Smith & Co. held—was prejudiced by the conduct of the respondents in relation to the undertaking (*Farquharson Bros. & Co.* v. *King & Co.* (1)), I am unable to see how they can be heard to deny Brady's authority even though my primary conclusion be not sustained. The transaction of the settlement itself was made through the regular and authorized channel for doing such business with the respondents; it was done at their express invitation of 9th August, an invitation which on the evidence must have been sent by the firm personally, and the money reached the firm. That in itself imputes knowledge of the transaction generally. As regards the other person, the firm was under a duty to correct promptly any error that prejudiced him. Negligence or reliance on their own employees is no absolution for their neglect of other persons' rights. Proceeding further, the direct bringing under their notice, and requesting performance of the undertaking with what followed, raises the question whether the respondents' letter of 12th September would, in the words of *Bowen* L.J., adopted by Lord *Brampton* in *George Whitechurch Ltd.* v. *Cavanagh* (2), "be reasonably understood in a particular sense by the person to whom it is addressed." In my opinion, it would be undoubtedly understood as standing by all the terms of the settlement referred to. That standing by would confirm the belief of Williamson & Sons that Brady was actually authorized by his principals to make the settlement as it was framed in its entirety, or, if not, that the firm had elected, with knowledge, to ratify it rather than undo the settlement and return the money. It is a material circumstance in that connection that Brady had very considerable authority in any event, and that circumstance operates not merely to create the original belief in his actual authority, but also to confirm the belief in that authority or the adoption of any excess. The respondents are, in my opinion, precluded from relying upon evidence to contradict the understanding produced by their conduct if the appellant was thereby induced to pursue any course

(1) (1902) A.C. 325, at p. 330.

(2) (1902) A.C. 117, at p. 145.

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of action or inaction to his prejudice. It would be unjust and unfair. (See per *Neville* J. in *In re Sugden's Trusts*; *Sugden* v. *Walker* (1), and per Lord *Cozens-Hardy* in *Lloyd's Bank* v. *Cooke* (2).) That result does not in the smallest degree depend on the knowledge which the respondents personally had of the true facts. It does not matter whether they had in fact the means of knowledge, or whether their clerks by design or omission kept them in ignorance. The law is most distinctly stated by Lord *Shand* in *Sarat Chunder Dey* v. *Gopal Chunder Laha* (3) thus:—"The principle on which the law . . . rests is, that it would be most inequitable and unjust to him" (that is, the person induced to act) "that if another, by a representation made, or by *conduct* amounting to a representation, has induced him *to act as he would not otherwise have done*, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it. *If the person who made the statement did so without full knowledge, or under error, sibi imputet.*" The last question is as to prejudice. That may arise either from action or inaction. (See *Dixon* v. *Kennaway & Co.* (4) and *McKenzie* v. *British Linen Co.* (5).) *Craine* v. *Colonial Mutual Fire Insurance Co.* (6) is an instance of detriment by remaining out of possession and not taking steps to resume it. The pecuniary amount of the prejudice is not the test. *Channell* J. dealt with that very satisfactorily in *Compania Naviera Vasconzada* v. *Churchill & Sim* (7), and *Scrutton* J. in *Martineaus Ltd.* v. *Royal Mail Steam Packet Co.* (8). If it were the test, the remedy might often be worse than the disease. The Court might be compelled to try a series of intricate collateral issues. In the present case, in order to test the prejudice, we have to regard the position in which Hawkins stood when Norton Smith & Co.'s reply of 12th September was received. He had undoubtedly paid £2,604 on the faith of the whole undertaking. The transaction, if adopted by Norton Smith & Co. in any part, was necessarily

(1) (1917) 1 Ch. 511, at p. 516.
(2) (1907) 1 K.B. 794, at p. 804.
(3) (1892) L.R. 19 I.A. 203, at p. 215.
(4) (1900) 1 Ch. 833.
(5) (1881) 6 App. Cas. 82, at 91.
(6) (1920) 28 C.L.R 305; (1922) 2 A.C. 541; 31 C.L.R. 27.
(7) (1906) 1 K.B. 237, at pp. 250, 251.
(8) (1912) 17 Com. Cas. 176; 28 T.L.R. 364.

adopted in its entirety (*Union Bank of Australia* v. *McClintock* (1)). Norton Smith & Co., if they denied the undertaking, were bound to restore instantly the money to Hawkins. But, unless they did that, he certainly stood in a very difficult position, as *Street* A.C.J. has very clearly pointed out. It had been paid on settlement with the vendors, and not to Norton Smith & Co. for their own benefit. To proceed against the vendors would not have been an easy task, but the assurance of Norton Smith & Co. of 12th September naturally deprived Hawkins of all possibility of attempting, as against the vendors, to undo the settlement, even if any had possibly existed. Unless, therefore, Norton Smith & Co. at once returned the money, Hawkins was not merely out of the use of his money but was also in the position of bearing an owner's responsibilities for property, and otherwise in a difficult position, which it is not incumbent to measure. The chain of the respondents' liability in either aspect is therefore complete, and it only remains to consider the damages.

(5) *Damages.*—On the assumption of failure as to other points, Mr. *Shand* did not contest either the appellant's right to damages or the amount awarded. Nevertheless, I have thought it right to consider the question of damages.

If I thought that by the rescission that took place (see the series of letters of 8th March to 29th April) and the return of money, the foundation of the appellant's claim had been destroyed, I should feel bound to say so. If his right to damages rested on the original contract of sale, that having gone, there would be nothing by which to measure any loss. But his right does not depend on that. It depends on the contract with the respondents, which still stands, and that right was carefully preserved in the correspondence referred to. Had there been no rescission, the position would have been that Hawkins would have lost all that he had paid the vendors by reason of the settlement, and also the difference between that amount and the value of the property. The rescission when offered was a means of minimizing his loss. He took that opportunity, as he was bound to do, as regards the respondents; and so he reduced the

(1) (1922) 1 A.C. 240.

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damages recoverable. But the difference is properly recoverable. The quantum is not disputed.

I would add a few words with respect to the case of *Fitzgerald* v. *Dressler* (1), to which my attention has been drawn by my brother the Chief Justice. That was a case where no act of the defendant could be pointed to as any evidence whatever of his assent to the bargain made by his clerk. The Court nonsuited the plaintiff, and there are observations that a jury cannot act on probabilities. It entirely depends on what is the sense attributed to the word "probabilities." Lord *Loreburn* L.C. said in *Richard Evans & Co.* v. *Astley* (2): "Courts, like individuals, habitually act upon a balance of probabilities." This was adopted by the Privy Council, speaking by *Duff* J. in *Canadian Pacific Railway Co.* v. *Pyne* (3). See *Cofield* v. *Waterloo Case Co.* (4), where I have discussed the matter. What distinguishes *Fitzgerald* v. *Dressler* from the present case is that here there is a very distinct act of the respondents—their letter of 12th September—which, as an answer to the letter of 1st September, it is impossible to regard as no evidence in itself of their knowledge of Brady's undertaking. It seems to me, especially when we see how carefully the judgments in *Fitzgerald* v. *Dressler* were rested on the cheque being referable to another transaction, that we cannot say the present case is governed by that case. Once there is evidence, the fact is open, and how it should be determined depends on the particular circumstances of the case.

The result of these considerations is that the appeal should, in my opinion, be allowed and the judgment of *Street* A.C.J. restored.

STARKE J. The primary question in this case is whether the defendants authorized Brady to give the undertaking of 1st September 1923. Authority may be expressly given, or it may be implied or inferred from circumstances or from the conduct of the principal. No express authority, general or special, was proved in the present case, but there was evidence, in my opinion, from which an authority in Brady to give the undertaking might be implied or inferred.

(1) (1859) 7 C.B. (N.S.) 374.
(2) (1911) A.C. 674, at p. 678.
(3) (1919) 48 D.L.R. 243, at p. 246.
(4) (1924) 34 C.L.R. 363, at p. 375.

Brady was an articled clerk of the defendants in charge of their conveyancing business and acting for them in connection with carrying out a contract of sale of certain lands from Shepherd's trustees to the plaintiff Hawkins. On the completion of this contract he gave the undertaking in question. Some undertakings, Brady said, were quite usual on the completion of contracts for the sale of land; and he instanced undertakings in reference to the payment of rates and taxes, and the authority of solicitors to receive payment of the purchase-money. But no safe inference can be drawn from this evidence, because Brady had apparently no authority to sign such undertakings, and was required to submit them to one of the principals of the firm which employed him. However, after the undertaking of 1st September 1923 had been given, the plaintiff's solicitors, on 12th September 1923, wrote to the defendants referring to the "undertaking given on the settlement of this matter" and requesting them to "let us" (the plaintiff's solicitors) "have" certain "information as soon as possible." The defendants, on 12th September, acknowledged this letter, and added that the matter was receiving their attention. On 28th September the plaintiff's solicitor wrote a second time to the defendants requesting their attention to the matter as soon as possible. The defendants did not reply until 8th March 1924, when they said that their clients were unable to comply with the plaintiff's requisitions and were therefore prepared to refund the plaintiff's money together with interest and the costs of investigating title. On 21st March the defendants confirmed this information and purported on behalf of their client to rescind the contract of sale. The plaintiff's solicitors, under date 26th March, acknowledged this letter, saying that as the defendants' clients had now adopted the definite attitude that they were not going on with the contract, the plaintiff took up the position that he had a claim for damages against the defendants for breach of their undertaking of 1st September 1923. And on 3rd April the defendants replied that they wished it to be clearly understood that they "disclaimed any obligation or liability of any kind whatever to your client in the matter." In that correspondence the defendants did not deny that Brady had authority to give the undertaking,

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and that is some evidence that he had such authority (see *Miller* v. *Lawton* (1)).

But the defendants gave evidence on their own behalf. That of Rundle and Bell is the most important, for Rundle signed the letter of 12th September, whilst Bell signed those dated 21st March and 3rd April 1924. The letter of 12th September was presented by Brady to Rundle, who, placing implicit confidence in Brady—no doubt, rightly—signed the letter without requiring any explanations or even seeing that to which it purported to reply. But if so, Rundle and his firm must take the responsibility of any admissions which Brady thought proper to make in the correspondence which he prepared on behalf of the firm. The usual business inferences should be drawn from correspondence conducted on such a system, and the Courts ought not to refuse to draw those inferences because the principal did not investigate the matter or properly appreciate its contents or effect, and relied too much upon his clerk. Bell, upon his attention being called to his letter of 3rd April, said that he did not "know that his firm ever repudiated the undertaking; they repudiated any liability or obligation to the plaintiff Hawkins." That statement, however, rather strengthens the evidence in favour of the authority of Brady, for Bell seems prepared to abide by the undertaking but takes a view of its legal effect that frees his firm from any liability to the plaintiff.

The plaintiff in this case was induced to alter his position on the faith of the undertaking itself, and the subsequent correspondence did not, I think, result in any further alteration of his position or otherwise prejudicially affect him. But the responsibility of the defendants depends not so much upon estoppel as upon a sound business and legal inference to be drawn from the correspondence carried on in the circumstances stated.

In my opinion, the proper conclusion on the facts proved in the case is that Brady had authority to give the undertaking sued upon in this action.

Ratification by the defendants of Brady's act in giving the undertaking was also relied upon. But this view presupposes an act done without authority and an affirmance of it with full knowledge of all

(1) (1864) 15 C.B. (N.S.) 834.

the material circumstances under which it was done. The evidence in this case does not, in my opinion, warrant that finding.

The legal effect of the undertaking remains for consideration. When a party undertakes, without any qualification, to satisfy requisitions or to obtain an authority to receive money, that must mean that he is the person to whom the other party is to look for performance of the promise (*Burrell* v. *Jones* (1); *Hall* v. *Ashurst* (2); *H. O. Brandt & Co.* v. *H. N. Morris & Co.* (3); *Universal Steam Navigation Co.* v. *James McKelvie & Co.* (4)). The defendants are, therefore, personally liable upon the undertaking. But what is the meaning of the undertaking? The contract of sale, it was argued, was kept open and not completed, and a promise given that the obligations of the vendors under the contract would be performed. Thus it followed, according to the argument, that the parties would be remitted to their rights under the contract of sale if the defendants' undertaking were not fulfilled. Though the argument is attractive, and perhaps would result in all parties being replaced in the position which it would be fair for them to occupy, still, in my opinion, it cannot be sustained. A transfer or conveyance does not extinguish the contract of sale; but when a purchaser accepts title, and pays his purchase-money and the vendor transfers or conveys the land sold to the purchaser, then the "main duties" of the contract have been performed, and the parties are discharged in relation to them (*Williams' Vendor and Purchaser*, 3rd ed., vol. II., pp. 988-989). Now, that is precisely what the parties or their representatives did at the meeting of 1st September 1923: they settled or completed the contract of sale; the purchaser took the title, and paid his purchase-money, and the vendors delivered the transfer or conveyance and ultimately also gave possession of the land. The main obligations of the contract were thereby discharged. But the purchaser, in consideration of so acting, required an independent or collateral promise from the defendants in relation to their authority to receive the purchase-money, and also in relation to certain obligations of the contract which were taken, for the purposes of the settlement,

(1) (1819) 3 B. & Ald. 47.
(2) (1883) 1 Cr. & M. 714.
(3) (1917) 2 K.B. 784.
(4) (1923) A.C. 492.

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as duly performed and discharged. The promises of the defendants were absolute, and not conditioned upon any right of the vendor or anyone else to rescind or set aside the contract or the settlement, and to repay the money with interest and costs if the vendors or the defendants were unable to comply with the requisitions of the Registrar-General. Indeed, such a condition would be quite inconsistent with the settlement and the undertaking which was given. The defendants or their clerk may not have appreciated the effect of the undertaking, and that is, no doubt, unfortunate. The construction, however, of the undertaking does not depend upon the understanding of the defendants, but upon the legal effect of the words which they have used in that document. Further, can the plaintiff sue upon the undertaking? It is given to Williamson & Sons, his solicitors, and was said to have been given to them for their own protection and benefit. But it would have been a grave dereliction of duty on the part of Williamson & Sons to complete the contract of sale knowing that the title was not clear of objection, and to protect themselves and not the plaintiff against such a risk. There is no difficulty, in my opinion, in holding that the undertaking was given to Williamson & Sons for the benefit of the plaintiff and was taken by them for that purpose (cf. *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (1)).

Lastly the defendants contested, to some extent, the amount of damages assessed by the present Chief Justice of the Supreme Court of New South Wales. The Chief Justice rejected the rule in *Bain* v. *Fothergill* (2), and I did not understand the defendants to question that part of the decision; nor do I think it could be successfully challenged. The defendants, however, as I understood the argument, relied upon the fact that the plaintiff received back his purchase-money with interest and costs, and restored the land to his vendors. That was said to amount to a rescission or cancellation of the contract of sale, and incidentally to discharge the defendants of their undertaking or to render it ineffective in the events which had happened. But that is not, in my opinion, the true view of the facts. The contract of sale was completed, and all the plaintiff had to rely upon was the undertaking. He always maintained the

(1) (1915) A.C., at pp. 855, 859.

(2) (1874) L.R. 7 H.L. 158.

personal liability of the defendants upon this document, and in receiving back his purchase-money, &c., and restoring the land to the vendors, he did no more than diminish his loss in respect of the breach of the undertaking by the defendants.

The appeal should, in my opinion, be allowed and the judgment of *Street* A.C.J. restored.

Appeal allowed. Judgment appealed from discharged. Verdict for plaintiff for £1,750 *restored. Respondents to pay costs in Supreme Court and of this appeal.*

Solicitors for the appellant, *John Williamson & Sons.*

Solicitor for the respondents, *T. Russell.*

B. L.