[HIGH COURT OF AUSTRALIA.]

TOOHEY . . . . . APPELLANT;
PLAINTIFF,

AND

GUNTHER . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 17-19; *Aug.* 8.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

Vendor and Purchaser—Sale of land—Hotel property—Tied house—Certificate of title under Real Property Act—Mortgage by a previous proprietor—Bond for exclusive trade with mortgagee for several years with right to retain certificate of title as security—Discharge of mortgage—Effect upon bond—Clean certificate of title obtained by vendor's predecessor—Subsequent sale by registered proprietor—Notice of restrictive covenant in bond discovered by purchaser—Objection to title—Real Property Act 1900 (*N.S.W.*) (*No.* 25 *of* 1900), *secs.* 42, 43, 44—*Conveyancing Act* 1919 (*N.S.W.*) (*No.* 6 *of* 1919), *secs.* 55, 89.

In 1926 the respondent, who was the registered proprietor under the *Real Property Act* 1900 (N.S.W.) of certain land, sold the land to the appellant, together with the hotel thereon and the licence and goodwill thereof. Subject to a mortgage (which the respondent undertook to discharge prior to the completion of the contract) the respondent showed a clean title to the land on the face of the certificate. In 1901 a predecessor in title of the respondent, who had given a mortgage over the land and premises to a brewery company to secure moneys advanced by the company to him, which had been discharged and a new certificate issued to the mortgagor, had simultaneously with the instrument of mortgage given a bond, not mentioned by the respondent in the particulars of title or otherwise, tying the trade of the hotel to the company for all beers, &c., until 1935, and agreeing that the company should hold and retain possession of the certificate of title to the land until 1935 or until the bond was discharged. On discovering these facts the appellant refused to accept title on the ground that the tie so created would be binding on him as a purchaser with notice thereof; and the respondent thereupon forfeited the appellant's deposit under the contract and rescinded the contract.

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Held, by *Knox* C.J., *Isaacs*, *Higgins* and *Starke* JJ. (*Gavan Duffy* J. dissenting), that the appellant was not justified in refusing the title.

Decision of the Supreme Court of New South Wales (*Davidson* J.): *Toohey* v. *Gunther*, (1927) 28 S.R. (N.S.W.) 229, affirmed.

APPEAL from the Supreme Court of New South Wales.

By a contract dated 23rd November 1926 the appellant, John Stephen Septimus Toohey agreed to purchase from the respondent, Margaret Jane Gunther, certain land at Pennant Hills upon which was erected a hotel, together with the hotel furniture, fittings and effects and also the licence and goodwill of the hotel. Upon investigating the title to the land, which was under the *Real Property Act* 1900 (N.S.W.), the appellant discovered that one Astby, a predecessor in title of the respondent had, by a bond dated 13th April 1921, tied the trade of the hotel for a period extending until 12th February 1935, to Tooth & Co. Ltd., a company carrying on a brewery business. The appellant having refused to complete the purchase on the ground that the tie so created would be binding on him as a purchaser with notice, the respondent gave notice to the appellant that under clause 14 of the contract she had rescinded the contract and had forfeited the deposit paid by him.

The contract dated 23rd November 1926, amongst the conditions and terms of sale, provided (14) that "if the purchaser shall fail to comply with these conditions or any of them, or with the terms of sale, all moneys, bills and promissory notes which the purchaser shall have paid or given to the agent or to the vendor on account of the purchase, shall be absolutely forfeited to the vendor, and the vendor shall be at liberty to rescind the contract," &c.; and (15) that "if the vendor shall be unable or unwilling to comply with or remove any objection or requisition which the purchaser shall be entitled to make under these conditions and shall not waive within seven days after notice of intention to rescind the contract shall have been given to him . . . by the vendor . . . the vendor shall . . . be at liberty to rescind the contract, and upon returning to the purchaser all money, bills and promissory notes paid or given by the purchaser as aforesaid, shall not be liable to any sum for damages or expenses whatsoever incurred by the purchaser in and about the contract."

The bond above referred to was, as far as material, as follows :— " Know all men by these presents that I Frank Astby of Pennant Hills near Sydney in the State of New South Wales licensed publican am held and firmly bound to Tooth & Co. Limited a company duly registered under the *Companies Act* and carrying on business at the Kent Brewery George Street West in Sydney aforesaid (hereinafter designated the said Company) in the sum of nine thousand pounds to be paid to the said Company or its certain attorneys or attorney successors or assigns for which payment to be well and faithfully made I bind myself my heirs executors administrators and assigns firmly by these presents sealed with my seal dated this thirteenth day of April one thousand nine hundred and twenty-one. Whereas the said Frank Astby (hereinafter designated the said obligor which expression shall be read and construed so as to include not only the said Frank Astby but also his executors administrators and assigns and the successive licensees for the time being of the said hotel) has purchased the land described in the schedule hereunder written upon which is erected the Hampden Hotel and the licence and goodwill of the said hotel from John Michael Whelan and whereas the said Company at the request of the said obligor has agreed to advance to him on certain terms the sum of four thousand five hundred pounds to enable him to complete the said purchase and in consideration of such agreement to advance the said obligor has agreed to enter into the above-written bond as a contract independent of and collateral to any agreement by the said obligor to repay the amount of the said advance and to allow the said Company to hold and retain possession of the certificate of title hereinafter mentioned as a security for the performance of the conditions of this bond Now the condition of the said bond is such that if the said obligor from the date of the day hereof until the twelfth day of February one thousand nine hundred and thirty-five deal wholly and solely with the said Company its successors and assigns and with no other person or persons firm or firms brewer or brewers for all beers wines spirits and other liquors mineral and aerated waters and cordials sold used or to be used in and about the said hotel and premises and which the said obligor may require for consumption therein during such term as aforesaid and if the

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said obligor from the day of the date hereof during the said term does not sell or permit the sale and consumption upon the said hotel and premises of any articles other than such as shall have been purchased or taken of the said Company Then this obligation to be void and of no effect otherwise to be and remain in full force and virtue And it is hereby agreed and declared that the said Company shall not be bound to supply any articles other than what are manufactured brewed or supplied or imported by it or of which it has the agency in the said State of New South Wales And it is further agreed and declared that the said Company shall hold and retain possession of the certificate of title referred to in the schedule hereunder written until the said twelfth day of February one thousand nine hundred and thirty-five or until this bond is discharged." The schedule (so far as material) described the same land as that comprised in the contract of sale to the appellant.

On originating summons issued by the respondent as plaintiff against the appellant as defendant, the respondent applied to the Supreme Court—

(1) For a declaration that the defendant as vendor under the contract was not entitled to rescind the contract and retain the deposit paid by the plaintiff as purchaser thereunder;

(2) For a declaration that the defendant has not shown a good title to the lands and hereditaments the subject of the contract;

(3) For an order that the plaintiff is entitled to rescind the contract and that the same be rescinded accordingly and delivered up to be cancelled;

(4) For an order that the deposit of £1,000 paid by the plaintiff in connection with the contract be repaid to him with interest thereon together with the costs, charges and expenses properly incurred by him under the contract.

Certain questions of fact were raised on the affidavits filed by the parties, but it was agreed that the questions of law which arose should be determined in the Supreme Court on the assumption that the appellant had not at the date of the contract notice of the alleged tie to Tooth & Co. Ltd., and that the respondent and her

predecessors in title took with notice of such tie; leaving it open to the parties to agree to a subsequent determination of any issue of fact which it might be necessary to determine.

The originating summons was heard by *Davidson* J., who declared that the defendant was entitled to rescind the contract of sale and forfeit the deposit paid therein, and ordered the plaintiff to pay the defendant's costs: *Toohey* v. *Gunther* (1).

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

Further material facts are stated in the judgments hereunder.

Teece K.C. (with him *S. A. Thompson*), for the appellant. The judgment in the Supreme Court was wrong in four respects: (1) in deciding that the bond amounted to a clog on the equity of redemption; (2) in deciding that the discharge of the mortgage effected a discharge of the bond; (3) in deciding that the tie did not bind the land or the trade of the hotel in the absence of the ownership by Tooth & Co. Ltd. of any dominant tenement, and (4) in deciding that the title was not too doubtful to be forced on a purchaser. (1) As to the first error, the bond was an independent agreement to the agreement in the mortgage to repay: it was given in consideration of the agreement to lend. The case is governed by *G. & C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co.* (2), and not by *Noakes & Co.* v. *Rice* (3). In a case decided by *Harvey* J. on 7th November 1924, *Caldwell's Wines Ltd.* v. *Armstrong* (4), it was decided that a bond of this kind falls within the principle of *Kreglinger's Case*, which sets out the conditions under which, by a contract between a mortgagor and a mortgagee the mortgagor's property can still be fettered after payment of the mortgage debt. If a personal covenant binds the assignee of land who has notice of it, it renders the land less saleable, and it is a ground of objection to the title. The obligation under the bond continued notwithstanding that the mortgage debt had been paid (see *Catt* v. *Tourle* (5)). In *Noakes & Co.* v. *Rice* the tie was not imposed by an independent covenant but was a term of the instrument of mortgage. A mortgage may be given to secure performance of other obligations

(1) (1927) 28 S.R. (N.S.W.) 229.
(2) (1914) A.C. 25.
(3) (1902) A.C. 24.
(4) Not reported.
(5) (1869) L.R. 4 Ch. 654.

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than payment of money (*Santley* v. *Wilde* (1)). So far as the bond here is concerned, it provides for an equitable mortgage by deposit of title deeds, which is different from a mortgage under the *Real Property Act*. That equitable mortgage was created to secure the payment of any damages when ascertained. (See *Rice* v. *Noakes & Co.* (2).)

[STARKE J. referred to *In re Cuban Land and Development Co.* (1911) (3).]

In that case security was given not only for payment of the debt but also for payment of a sum of money on the winding up of the company. As to the bond being a collateral agreement, in *Tooth & Co.* v. *Parkes* (4) it was held that it could be enforced quite independently of the mortgage.

[STARKE J.: In *Fairclough* v. *Swan Brewery Co.* (5) Lord *Macnaghten* says that it is immaterial that the two things are in two documents.]

That case was followed in the *Caldwell Case* (6).

[HIGGINS J. referred to sec. 65 of the *Real Property Act* 1900 and *Groongal Pastoral Co.* v. *Falkiner* (7).]

(2) As to the effect of the discharge of the mortgage, that does not release the obligation contained in the bond. In the *Groongal Pastoral Co.'s Case* (7) the personal liability was contained in the mortgage itself. (3) *Davidson* J. held that the tie was in the nature of an equitable easement and that it was not binding on a purchaser because Tooth & Co. Ltd. had no dominant tenement. A tie of this kind is a personal covenant binding on purchasers with notice, notwithstanding that it is not in a registered instrument (see *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* (8) and *Catt* v. *Tourle* (9)). In *Staples & Co.* v. *Corby and District Land Registrar* (10) it was decided that a tie of this kind cannot be registered. This bond would be interpreted in equity as an undertaking to perform the conditions therein. Sec. 89 of the *Conveyancing Act* 1919 (N.S.W.) is not applicable to a tie of this nature: it applies

(1) (1899) 2 Ch. 474.
(2) (1900) 2 Ch. 445, at p. 458.
(3) (1921) 2 Ch. 147.
(4) (1900) 21 N.S.W.L.R. (Eq.) 173.
(5) (1912) A.C. 565, at p. 570.
(6) Not reported.
(7) (1924) 35 C.L.R. 157.
(8) (1926) A.C. 108.
(9) (1869) L.R. 4 Ch. 654.
(10) (1900) 19 N.Z.L.R. 517.

only to covenants in the nature of equitable easements—it contemplates covenants entered into for the benefit of other land. A brewer's tie is never entered into for the benefit of any other land: it is for the benefit of trade. As to the *Real Property Act*, see *Canaway's Real Property Act*, notes to sec. 43.

[ISAACS J. referred to *Wellington City Corporation* v. *Public Trustee* (1).]

Sec. 43 was not intended to do away with the rights of persons who had rights under trusts, but it gave those persons an alternative mode of asserting their rights by caveat. Here there is a personal liability which, by reason of the doctrine in the *Lord Strathcona Case* (2), is binding on the conscience of the person who gives the bond. (4) Whatever may be the law applying to the title in this case, the title is so doubtful that the purchaser was asked to buy a probable lawsuit (*Palmer* v. *Locke* (3); *In re Hollis' Hospital Trustees and Hague's Contract* (4)).

[KNOX C.J. How do you make out that the tie is an objection to title ?]

Under the contract the property was sold as a "free house," and the existence of a tie is an objection to title (*Jones* v. *Edney* (5)).

[ISAACS J. referred to *Smith* v. *Colbourne* (6).]

If this is a doubtful title which ought not to be forced upon the appellant, then he is entitled to the benefit of sec. 55 of the *Conveyancing Act* 1919 and to get the deposit back. (See *In re Nichols' and Von Joel's Contract* (7); *Fry on Specific Performance*, 6th ed., p. 411, pars. 879 *et seqq.*)

Flannery K.C. (with him *Wickham* and *Mason*), for the respondent. (1) As to the first objection raised to the judgment, there was here but one transaction, which was a transaction by way of mortgage. Money was to be advanced by Tooth & Co. Ltd. and that advance was secured by the instrument of mortgage, a bill of sale and the bond. Whatever form the security took is immaterial. In *Kreglinger's Case* (8) Lord *Parker of Waddington* summarizes the

(1) (1921) N.Z.L.R. 423.
(2) (1926) A.C. 108.
(3) (1881) 18 Ch. D. 381.
(4) (1899) 2 Ch. 540.
(5) (1812) 3 Camp. 285.
(6) (1914) 2 Ch. 533, at p. 541.
(7) (1910) 1 Ch. 43.
(8) (1914) A.C., at p. 56.

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principle to be drawn from the three cases mentioned by him. If as a matter of construction the mortgage transaction can be isolated from the stipulation for a collateral advantage, then the matter comes within *Kreglinger's Case* (1); but, if it cannot, it comes within *Noakes' Case* (2). (2) As to the second objection, the discharge of the mortgage operated as a discharge of the covenants of the bond as well as the land, whether they were separate transactions or one transaction only: the bond is an encumbrance as being part of the security for the payment of the mortgage debt. (See *Groongal Pastoral Co.'s Case* (3).) (3) As to the third objection, if the covenant alleged to be imposed on the respondent is a restrictive covenant, sec. 89 of the *Conveyancing Act* 1919 applies. Whether that section was declaratory of the law that already existed or whether it is a statutory enactment of what is to be the law, the tie binds neither the land nor the business of the hotel. As to sec. 43 of the *Real Property Act* 1900, the alleged interest of Tooth & Co. Ltd. does not appear upon the certificate of title; consequently the title shown by the respondent is a clean title (see sec. 35 of the *Real Property Act* 1900) and the appellant would be unaffected by this particular restrictive covenant. (4) As to the fourth objection, the appellant seeks to recover his deposit. He could have proceeded at common law or under sec. 55 of the *Conveyancing Act* 1919, but he has raised the matter on originating summons. If the question of doubtful title has to be determined by the Act, the respondent relies on *Alexander* v. *Mills* (4). This Court is fully seised of the matter and should determine the litigation between these parties. (See *Smith* v. *Colbourne* (5).)

Teece K.C., in reply, referred to *In re Fawcett and Holmes' Contract* (6).

Cur. adv. vult.

The following written judgments were delivered:—

Aug. 8

KNOX C.J. By contract dated 23rd November 1926 the appellant agreed to purchase from the respondent certain land upon which was erected a hotel, together with the hotel furniture, fittings and effects and the licence and goodwill of the premises. Upon

(1) (1914) A.C. 25.
(2) (1902) A.C. 24.
(3) (1924) 35 C.L.R. 157
(4) (1870) L.R. 6 Ch. 124, at p. 131.
(5) (1914) 2 Ch., at p. 544.
(6) (1889) 42 Ch. D. 150, at pp. 157-159.

investigating the title to the land, which was under the *Real Property Act*, appellant received notice that one Astby, a predecessor in title of the respondent, had tied the trade of the hotel to Tooth & Co. Ltd. for a period extending until the 12th day of February 1935. The appellant having refused to complete the purchase on the ground that the tie so created would be binding on him as a purchaser with notice, the respondent gave notice to the appellant that she had rescinded the contract and forfeited the deposit under clause 14 of the contract. Appellant then took out an originating summons claiming declarations (1) that the respondent was not entitled to rescind the contract or to retain the deposit, and (2) that the respondent had not shown a good title to the lands the subject of the contract, and claiming an order that the contract be rescinded and the deposit repaid to the appellant. Certain questions of fact were raised on the affidavits filed by the parties, but it was agreed that the questions of law which arose should be determined in the Supreme Court on the assumption that the appellant had not at the date of the contract notice of the alleged tie to Tooth & Co. Ltd., and that the respondent and her predecessors in title took with notice of such tie; leaving it open to the parties to agree to a subsequent determination of any issue of fact which it might be necessary to determine. On these assumptions *Davidson* J. held that the respondent was entitled to rescind the contract and to forfeit the deposit; and it is from that decision that this appeal is brought.

The state of the title as disclosed on the register was as follows:— On 13th April 1921 Frank Astby became the registered proprietor under the *Real Property Act* of the land in question. On the same day Astby executed in favour of Tooth & Co. Ltd. a memorandum of mortgage of the land in the form required by the *Real Property Act*. By memorandum of lease dated 12th May 1922 Astby leased the land to Reginald James Kerr for five years from 11th May 1922. On 31st May 1922 a statutory discharge of the mortgage of 13th April 1921 in the form required by sec. 65 of the *Real Property Act* was indorsed on the memorandum of mortgage, and on 13th June 1922 the Registrar-General, in pursuance of the same section, made an entry in the register book noting that such mortgage was discharged. On 1st June 1923 Astby executed a memorandum of mortgage in

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favour of one Patrick Kennedy. By memorandum of transfer dated 15th November 1924 Astby transferred the land to T. C. Trautwein subject to the leases to Kerr and the mortgage to Kennedy. The mortgage to Kennedy was discharged and discharge registered on 16th June 1925. By memoranda of mortgage dated respectively 15th November 1924 and 1st June 1925 Trautwein mortgaged the land to Astby. On 16th June 1925 these mortgages were transferred to the Bank of New South Wales. By memorandum of transfer dated 21st May 1926 Trautwein transferred the land to the respondent subject to the mortgages to the Bank of New South Wales and to the lease to Kerr. On 27th August 1926 the mortgages to the Bank of New South Wales were discharged and the discharge registered. By successive transfers of the lease to Kerr, which it is unnecessary to specify in detail, that lease on 12th May 1926 became vested in the respondent. By memorandum of mortgage dated 27th August 1926 respondent mortgaged the land to the City Mutual Life Assurance Society Ltd. All the dealings mentioned above were duly registered and notified on the folium of the register book constituted by the certificate of title of the land. The memorandum of mortgage from Astby to Tooth & Co. above referred to was expressed to be given as collateral security for the repayment of £4,500 lent by the mortgagee and the enjoyment, fulfilment and observance of all the payments, privileges, powers, estates and covenants set forth in the bond and bill of sale of even date given by the mortgagor to the mortgagee, and contained a covenant by the mortgagor to make all the payments, observe and perform all the covenants, submit to and confirm all the privileges, licences and powers contained in or conferred by the said bond and bill of sale, and a covenant that the mortgagee should, so long as any covenant remained to be performed under the bond or bill of sale, retain possession of the certificate of title of the mortgaged property whether to (? from) a purchaser of the equity of redemption or otherwise. The effect of the registration of the discharge of this mortgage was to discharge the personal obligation of the mortgagor under any covenant contained in the memorandum of mortgage (*Groongal Pastoral Co.* v. *Falkiner* (1)). The bond referred to in the memorandum of mortgage was

(1) (1924) 35 C.L.R. 157.

in the penal sum of £9,000. It contained recitals that Astby had purchased the land and hotel, that the Company had agreed to advance him the sum of £4,500 to enable him to complete the purchase, and that he had agreed to enter into the bond as a contract independent of and collateral to any agreement to repay the amount of the advance and to allow the Company to hold and retain the certificate of title of the land as a security for the performance of the conditions of the bond. The condition of the bond was that if the obligor, his executors, administrators and assigns and the successive licensees of the hotel should, from the date of the bond until 12th February 1935, deal solely with the Company for all liquors, &c., sold used or to be used in and about the said hotel and premises the obligation should be void and of no effect. This document contained an agreement that the Company should hold and retain possession of the certificate of title above referred to until 12th February 1935 or until the bond should be discharged.

The bill of sale was over the furniture, stock-in-trade and chattels then on or thereafter to be brought on to the hotel and premises and the licence, goodwill and business of the hotel. It contained covenants (a) to deal solely with the Company for thirteen years and ten months from 7th April 1921 for all liquors, &c., to be sold or used in the hotel, (b) to pay weekly for all goods supplied, (c) that the Company should hold and retain possession of the certificate of title to secure the performance of the covenants above referred to, and (d) to pay on demand the sum of £4,500 advanced by the Company and all other sums intended to be thereby secured, and until such demand to pay the principal money of £4,500 by equal monthly instalments of £42 9s. 1d. each. The proviso for redemption was conditioned on payment of the amount secured by the bill of sale and performance of the covenants therein contained.

Apart from any question as to the effect of the *Real Property Act* on the contention of the appellant that, as purchaser of the land with notice of the condition restricting its use, he would hold the land subject to the restriction, it seems to me that there is no distinction in substance between the facts of this case and those dealt with in *Noakes & Co.* v. *Rice* (1). This is an ordinary case of the advance

(1) (1902) A.C. 24.

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by a brewery company to the intending purchaser of a hotel of the whole or part of the money necessary to enable him to complete the purchase, on condition that he ties the trade of the hotel and gives security for repayment. The transaction was, in my opinion, a single and undivided contract, and not two distinct contracts; and the covenant or condition tying the trade of the hotel appears to me to have been really a term of the mortgage and not merely a collateral agreement outside and clear of the mortgage. As Lord *Macnaghten* said in *Noakes & Co.* v. *Rice* (1), the transaction was nothing more than an ordinary mortgage to secure an advance of money with a superadded obligation offending against the settled principles of equity. I agree with *Davidson* J. in thinking that the provision that the mortgagee should retain the certificate of title of the land as security for the performance of the condition of the bond notwithstanding payment of the mortgage debt is repugnant to the contractual right of the mortgagor to redeem, and is therefore void. As the learned Judge pointed out, no such provision was contained in the securities which were the subject of the decision in *Tooth & Co.* v. *Parkes* (2). Even if the title to the land were not under the *Real Property Act* I should be prepared to hold that in the circumstances of this case the restrictive condition imposed by the bond was not enforceable after the discharge of the mortgage. But the title to the land the subject of this contract is under the *Real Property Act*, and, in my opinion, the provisions of that Act afford a conclusive answer to the contention of the appellant that the respondent has not shown a good title to the land; or, stated in another way, that the appellant taking a transfer from the respondent with notice of the alleged restrictive condition would hold subject to that condition. The register book shows that at the date when Astby transferred the land to Trautwein the mortgage to Tooth & Co. had been discharged, and by force of sec. 42 of the *Real Property Act* Astby as registered proprietor of the land held it subject only to the mortgage to Kennedy and the lease to Kerr, "but absolutely free from all other encumbrances, liens, estates, or interests whatsoever," with certain immaterial exceptions. It is true that while Astby remained registered proprietor of the land a personal obligation in

(1) (1902) A.C., at p. 31.

(2) (1900) 21 N.S.W.L.R. (Eq). 173.

respect to the land which had been created by him might be enforceable against him notwithstanding the omission from the register of a notification of such obligation. For instance, a covenant restricting the use of the land entered into by him might, in a proper case, have been enforced by the covenantee by way of an injunction to restrain a breach of the covenant. But when the transfer from Astby to Trautwein was registered, Trautwein came within the protection of sec. 43 of the Act, which provides that except in the case of fraud no person taking a transfer from a registered proprietor shall be affected by notice direct or constructive of any unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such unregistered interest is in existence is not of itself to be imputed as fraud. The unregistered interest of Tooth & Co. could not be asserted against Trautwein unless fraud could be established against him, even on the assumption agreed to, namely, that Trautwein had notice or knowledge of the obligation constituted by the bond entered into by Astby (see *Wicks* v. *Bennett* (1)). If this be so, it is immaterial whether the respondent had or had not notice of the tie, for she also when purchasing and taking a transfer from Trautwein, the registered proprietor, was protected by sec. 43 against all unregistered interests. It may be observed that if Trautwein had sued for specific performance of his contract to sell to the respondent, or if the respondent, having become registered proprietor, had sued for specific performance of her contract to sell to the appellant, the certificate of title would, by force of sec. 44 of the Act, have been conclusive evidence that the vendor had a good and valid title to the land for the estate therein mentioned.

For these reasons I am of opinion that the appellant has failed to establish that the respondent has not shown a good title to the lands the subject of the contract. It was urged on behalf of the appellant that, as Tooth & Co. had made a claim to be entitled to enforce against the appellant the obligation contained in the bond, the title was not one which should be forced upon the appellant. The observations of Lord *Cozens-Hardy* M.R. and *Swinfen Eady* L.J. in

(1) (1921) 30 C.L.R. 80.

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Isaacs J.

Smith v. *Colbourne* (1) and of *James* L.J. in *Alexander* v. *Mills* (2) seem to me to dispose of this contention.

In my opinion the appeal should be dismissed.

ISAACS J. The purchaser's objection to title by reason of which he refused to proceed with the contract was that the bond given by Astby to the brewery company still subsists and contains a restrictive covenant which would bind him in the use of the land purchased. The contract is dated 1926. The vendor was and is the registered proprietor of the land under the *Real Property Act*. The bond, of course, is not registered. The mortgage given by Astby at the same time had been discharged in 1922, before Mrs. Gunther became registered proprietor; so that even her predecessor in title, Trautwein, was registered proprietor free from the mortgage when he transferred to Mrs. Gunther in 1924. The vendor at the time of the contract held, and still holds, a clean certificate of title except for a mortgage to an assurance company as to which no question arises. I will assume, without deciding, that on the principle of the *Lord Strathcona Case* (3) the obligation of the bond given by Astby would, if originally valid and binding with respect to him, enure so as to constitute by the common law a restrictive covenant charging the property in the hands of a purchaser with notice from the mortgagor. Nevertheless, for two reasons, I am of opinion that the bond, even if not itself discharged, as the respondent contends, by the discharge of the mortgage, gives rise in the circumstances of this case to no objection to title. The first reason arises under the equitable doctrine of preserving intact the equity of redemption. The second follows from the provisions of the *Real Property Act*, which, singularly enough, almost escaped attention.

The bond on its own individual construction unquestionably contains an obligation which would prevent and impede the redemption of the property mortgaged by means of the instrument of mortgage of even date, although full payment were made of principal, interest and costs, that is to say, redemption in as free and unfettered a condition as before the mortgage was given. Not only does it

(1) (1914) 2 Ch., at pp. 541, 544. (2) (1870) L.R. 6 Ch. 124.
(3) (1926) A.C. 108.

bind the obligor to trade for a fixed term not necessarily ending with the payment of the debt, but it stipulates that for a fixed period or until the bond is discharged the obligee (who was the mortgagee) should hold and retain the certificate of title to the land, the subject of the mortgage and of the purchase. The last-mentioned stipulation is very important in view of the control it gives to the mortgagee, because, as Lord *Macnaghten* said in *Bradley* v. *Carritt* (1), "you cannot do indirectly that which you must not do directly." Were the obligation and stipulation in the bond valid and operative when made? The central principle governing the determination of that question is stated by Lord *Macnaghten* for the Privy Council, in *Fairclough* v. *Swan Brewery Co.* (2), in these words: "It is now firmly established by the House of Lords that . . . equity will not permit any device or contrivance being part of the mortgage transaction or contemporaneous with it to prevent or impede redemption." The House of Lords case referred to was *Samuel* v. *Jarrah Timber and Wood Paving Corporation* (3), where the reason for the rule appears at pp. 326 and 327. To this statement of the law, Lord *Parker of Waddington* gave his assent in *Kreglinger's Case* (4). It thus appears that, if the bond were given either (a) as part of the mortgage transaction or (b) contemporaneously with that transaction, the obligation and stipulation referred to would be inoperative. The appellant contends that the bond, though given contemporaneously, was not part of the mortgage transaction but was a separate and independent instrument. One answer is that, even so, the bond on construction comes within the principle stated by the two supreme judicial tribunals of the Empire, and within the mischief which that principle is intended to guard against. The other answer is that the contention is true only if the expression "mortgage transaction" is limited to the narrow sense of the mortgage instrument creating the formal legal relation of mortgagee and mortgagor under the Act. That by force of the statute is necessarily a separate instrument, a circumstance which plays an important part later, but in no way alters the broad character of the transaction from which it flows

(1) (1903) A.C. 253, at p. 261.
(2) (1912) A.C., at p. 570.
(3) (1904) A.C. 323.
(4) (1914) A.C., at p. 60.

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and of which it forms part. "The mortgage transaction" in this connection must be understood in the wider sense as the general comprehensive arrangement or agreement made between Astby and the brewery company whereby the Company was to advance £4,500 and Astby was to execute the mortgage, the bill of sale and the bond. (See per Lord *Parker* in *Kreglinger's Case* (1).) Had the bond been executed on a later date, the fact that in truth it was part of the mortgage transaction would bring it within the principle quoted. It was argued, notwithstanding the contemporaneous execution of the instruments, that because the bond says "whereas the said Company at the request of the said obligor has agreed to advance to him on certain terms the sum of £4,500," &c., the bond was an independent contract based on the promise to advance, and so proclaims itself. Much the same could be said of the recital in the bill of sale. The true principle of construction in such cases is stated by *Knight Bruce* L.J., when delivering the judgment of the Privy Council in *Shaw* v. *Jeffery* (2), as follows: "When the same parties execute contemporaneously several instruments relating to different parts of the same transaction, all must be considered together; all must be examined in order to understand each; apparent inconsistencies are to be reconciled; and where there are real inconsistencies, the governing intention of the parties is still to be collected from a consideration of the language of all the instruments, and effect given to it." Applying that principle, no doubt can exist that the three documents are integral parts of the same wide transaction, intended to regulate as a totality the relations and rights and obligations of the parties with reference to the advance of £4,500, and therefore incapable of being treated as independent of each other in the only sense that would avail the mortgagee, and, therefore, the present appellant. (As an instance, see *Reeve* v. *Lisle* (3).) Apart, therefore, from any special statutory difficulty and resting solely on the recognized rules of equity, the appeal fails.

But it would be unwise to ignore the effect of the statute which governs so much of the property law of New South Wales, the

(1) (1914) A.C., at p. 48.

(2) (1860) 13 Moo. P.C.C. 432, at pp. 456-457.

(3) (1902) A.C. 461.

Real Property Act of 1900. From the state of the title in November 1926, as narrated, it is plain that the vendor was free from the bond obligation and stipulation referred to. The certificate of title mentioned in the bond had been cancelled and another, differently numbered, had been issued. Sec. 43 of the Act then left her free, as it had already left Trautwein free, from any possible restriction arising from the bond. It would be obviously an abridgment of the registered proprietor's rights if in such a case his or her purchaser could, until actual registration, be bound by an obligation to which the proprietor was not subject. The case of *Waimiha Sawmilling Co.* v. *Waione Timber Co.* (1) is authoritative on this point. Singularly enough that case immediately precedes the *Lord Strathcona Case* (2). On this ground also, and independently, the appeal fails.

It is consequently unnecessary, with one exception, to determine other questions raised. But, in passing, I would not be understood, as at present advised, as assenting to the view that the mere discharge of the mortgage instrument also operated in law as a discharge of the bond. The one remaining question necessary to determine is whether the Supreme Court should have refused to force the title on the purchaser because it was too doubtful. I think there are two answers to this point. One is that on the admitted facts it cannot properly be said, in the presence of such supreme and clear authority as exists, that there is any doubt with respect to the title offered. *Kreglinger's Case* (3) was placed in the forefront as raising a new platform for discussion. In my opinion that case determined nothing new, except that it decided the construction of the particular agreement then under consideration and removed doubts as to collateral advantages that, on examination, did not fetter redemption. As I read that case, it sets itself in the main to explain that throughout the decisions of authority cited in the judgments there is one unvarying principle of law, namely, that a mortgage cannot at the time of the mortgage transaction in any way fetter or lessen redemption, since that would be repugnant to the inherent character of the mortgage transaction. Then the case

(1) (1926) A.C. 101. (2) (1926) A.C. 108.
(3) (1914) A.C. 25.

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proceeds to show that, since in order to apply that principle to a given case it is always necessary by construction or evidence, or both, to ascertain the facts, different minds may easily arrive at different conclusions on that preliminary investigation. As to that branch it is pointed out (see particularly pp. 39-40, 56-59) the previous cases exhibited varying opinions, but that still left the central principle of law untouched, and this was already well established and in no way altered or added to by *Kreglinger's Case* (1). That case, therefore, removed one possible doubt, created no new one, and as to all legal doctrines is in complete harmony with the prior decisions of authority. That is the first answer to the point mentioned. The second answer is found in the case of *Smith* v. *Colbourne* (2).

I agree that this appeal should be dismissed.

HIGGINS J. In my opinion, condition 14 of the contract, under which the vendor claims to be entitled to rescind the contract and to treat the deposit as forfeited, does not apply to the facts of this case at all. But I concur with my learned brothers that, if condition 14 did apply, the bond for exclusive dealing with *Tooth & Co. Ltd.* —"the tie"—would not be operative as against the transferees from Astby or as against the plaintiff, the unregistered purchaser from *Mrs. Gunther*, the last transferee. My reason, however, for this latter view is not based upon the *Real Property Act* 1900, but upon the principle recently defined and explained by the Judicial Committee in *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* (3).

The position under the judgment now under appeal is very unusual and anomalous; and the judgment, if it is right, involves great hardship to the appellant, the purchaser. If the bond under which Tooth & Co. Ltd., the brewers, claim a trade tie over this hotel, does not involve such a tie notwithstanding the express words used, the plaintiff has been misled by a decision of the Supreme Court in 1900, *Tooth & Co.* v. *Parkes* (4), and by English cases such as *Catt* v. *Tourle* (5) and *Luker* v. *Dennis* (6), as well as by the confident claim of the brewers. The plaintiff cannot be seriously blamed for

(1) (1914) A.C. 25.
(2) (1914) 2 Ch. 533.
(3) (1926) A.C. 108.
(4) (1900) 21 N.S.W.L.R. (Eq.) 173.
(5) (1869) L.R. 4 Ch. 654.
(6) (1877) 7 Ch. D. 227.

refusing to take the property until he should be shown that the tie did not exist as against him. He made his contract to buy without any notice whatever of the bond (though the vendor had notice), and agreed to pay a price which would naturally have been less if the tie existed; but now he has to lose the £1,000 which he paid as deposit and to pay all the costs of the litigation. He has been gallantly fighting for the brewers who have caused him all this trouble and expense, and yet the brewers are not even bound by the decision, for they have not been made parties though they could have been (*Equity Act* 1901, 4th Sched., r. 7).

I find I have to restate the position briefly. On 23rd November 1926 the plaintiff agreed to buy from the defendant, the registered proprietor of the land under the *Real Property Act* 1900, the Hampden Hotel with its land, furniture, licence, &c., for £23,000, and paid £1,000 deposit. Particulars of title were supplied next day, which did not mention any bond. On 26th November the plaintiff's solicitors sent their requisitions; and one requisition was: "Are there any rights or easements over or affecting the property not disclosed by the certificate of title?" The answer (2nd December) was: "Not aware of any, but purchaser must rely on his own inquiries"; and see requisitions 21 and 24 and replies thereto. Yet the vendor knew of the bond—the bond given by her predecessor, Astby. Before the ten days allowed for requisitions had expired, the brewers gave notice to the plaintiff by letter of this bond of Astby's, dated 13th April 1921, and said that the defendant vendor had received notice thereof before she completed her purchase (exhibit 6). The plaintiff's solicitors at once—on the very same day—sent a copy of the letter to the defendant's solicitors, and very naturally asked "What do you intend doing in this matter?" adding "we think this is a serious objection . . . and we must be satisfied on same." In a further letter of 3rd December the plaintiff's solicitors stated "unless you can satisfy us on the matter in our said letter we cannot consent to the matter going through next Tuesday," and referred the defendant to the case of *Tooth & Co.* v. *Parkes* (1). I must here interpose in my narrative by explaining how extremely relevant was this reference to the case

(1) (1900) 21 N.S.W.L.R. (Eq.) 173.

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of *Tooth & Co.* v. *Parkes* (1). In that case, as the result of a very able and learned discussion of the English cases as they then stood, in 1900, it was held that a bond for exclusive trading was enforceable against transferees of the land, although a mortgage which contained a covenant to the same effect was discharged ; and, on the authority of *Catt* v. *Tourle* (2) and other cases not then overruled, it was assumed throughout the discussion that the bond would be binding on transferees or assignees of the hotel although not appurtenant as a benefit to any land held by the obligee. Defendant's solicitors declined " to recognize any matters other than what are on the title," not saying that the tie was invalid, or why, but referring to other cases which have no real bearing on the validity of the bond. On 21st December the plaintiff having refused to accept transfer of the licence under the circumstances, the defendant notified him that in exercise of the power conferred by condition 14 of the contract she had forfeited the £1,000 deposit and rescinded the contract.

Now, this originating summons was issued on 4th February 1927 ; and the first declaration sought is that the defendant " is not entitled to rescind the said contract and retain the deposit." This fairly raises the question whether, even if the defendant is right in saying that the bond is invalid or discharged, condition 14 applies to the circumstances which I have stated. The point was, as I understand from p. 78 of the transcript, taken before the primary Judge ; but it has not been argued before us. I am surprised ; for there is, to say the least, substantial ground for the view that condition 14 does not apply to the circumstances, but that condition 15 does. Under condition 14 the deposit becomes forfeited for failure of the purchaser to comply with the conditions ; but under condition 15 it is not forfeited—it has to be returned to the purchaser. Condition 14 applies to the general case of mere failure of the purchaser to comply with the conditions, for instance, by repudiation or by failure to make payments in time ; but condition 15 applies to the special case where the vendor is " unable or unwilling to comply with or remove any objection or requisition which the purchaser shall be entitled to make under these conditions," and

(1) (1900) 21 N.S.W.L.R. (Eq.) 173. (2) (1869) L.R. 4 Ch. 654.

the vendor gives specific notice of intention to rescind the contract, and the purchaser does not waive the objection or requisition within seven days. In such a case, the purchaser gets back his deposit, but without damages or expenses. The word " rescind " is common to both powers ; and rescission prima facie involves a return to the *status quo ante* the contract. It is all a question of construction of the particular contract ; but the burden lies on the vendor, who framed the conditions, to show clearly that the deposit was to be forfeited to him under the circumstances (see *Williams on Vendor and Purchaser*, 3rd ed., vol. II., p. 1014 ; *Harrison* v. *Holland* (1)). I am strongly inclined to think that the vendor here has exercised the wrong power, and that therefore she is not entitled to retain the deposit. But, as the point has not been argued, I shall proceed, at present, to consider the position as if condition 14 did apply to the facts of this case.

The purchaser has argued that a bond given by one Astby on the same date as his mortgage to Tooth & Co., 13th April 1921, for exclusive dealing with that firm of brewers, and purporting to bind not only Astby but his assignees and the successive licensees of the hotel until 12th February 1935, would bind the hotel in the hands of the plaintiff as purchaser if the plaintiff had notice of the bond before conveyance ; and here the notice was given to the plaintiff on 2nd December 1926, after the contract but before conveyance. The land is under the *Real Property Act* 1900, but Toohey has not yet been registered ; and, prima facie, therefore, Toohey would be under the same liability to the brewery company as if the land were under the old law.

Now, the learned Judge has found that the bond would not impose any burden on the land, in the hands of a purchaser even having notice, for each of three reasons : (1) that the bond would be a " clog " on the equity of redemption, and therefore inoperative on the discharge of the mortgage ; (2) that the mortgage " incorporated " the conditions of the bond, and the discharge of the mortgage therefore discharged the bond ; (3) that under sec. 89 of the *Conveyancing Act* 1919 no purchaser of land is to be affected by any covenant restrictive of the use of the land where the

(1) (1921) 3 K.B. 297 ; (1922) 1 K.B. 211.

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instrument does not define "the land to which the benefit of the covenant is intended to be appurtenant."

It is curious that though sec. 89 of this important Conveyancing Act has been mentioned, no mention has been made of sec. 164, which deals directly with "Purchasers; when affected by notice." This section imposes a wholesome limitation on the doctrine whereby people who purchase land are treated as bound by contracts which they did not make, and which do not appear on the certificate or title deeds: "A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless (*a*) it is within his own knowledge" or would have come to his knowledge if searches had been made as ought reasonably to have been made by him. What searches or inquiries, reasonable to make, should have been made by this purchaser? But I pass to sec. 89; and, in my opinion, it clearly shows that a mere restrictive covenant, without more, does not bind transferees or purchasers of the land, even with notice of the covenant. The covenantee must be interested in land—defined land—for the benefit of which the covenant was made. I felt some difficulty at first from the fact that the section relates to restrictive "covenants," and not expressly to bonds; but there are authorities for treating bonds (under seal) as covenants (see *Turner* v. *Wardle* (1), and per Lord *Blackburn* in *Russell* v. *Watts* (2)). In any event, the doctrine as recently laid down by the authority of the Judicial Committee clearly extends to bonds as well as to bipartite agreements under seal (*Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* (3); see also *Price Bros. & Co.* v. *Corporation d'Energie de Montmagny* (4) and *Formby* v. *Barker* (5)). The case of *London County Council* v. *Allen* (6) before the Court of Appeal is a striking instance of the application of the doctrine. There the London County Council gave its sanction to the laying out of a street on land, the owner covenanting, for himself and his assignees, not to build across the end of the street, as an extension of the street might become necessary. The covenantor himself remained, of course, liable on his covenant; but his assignees were held not to be bound by the covenant, even though they had notice thereof

(1) (1834) 7 Sim. 80.
(2) (1885) 10 App. Cas. 590, at p. 611.
(3) (1926) A.C. 108.
(4) (1927) A.C. 363.
(5) (1903) 2 Ch. 539, at p. 554.
(6) (1914) 3 K.B. 642.

—because the County Council neither owned nor was interested in any adjoining or neighbouring land to which the benefit of the covenant would apply. This is an extreme case, and there is much force in the comment made by *Scrutton* L.J. on the appeal at p. 673, as well as by *Avory* J. in the divisional Court, in favour of public bodies seeking to impose restrictions for the public benefit. But the fact that the principle has been carried so far makes the case an excellent illustration of the strength of the principle. Equity, in short, acts as to restrictive covenants with notice in analogy to the time-honoured principles of law as to easements—the law recognizes easements appurtenant but not (so-called) easements in gross (*Ackroyd* v. *Smith* (1); *Rangeley* v. *Midland Railway Co.* (2), per Lord *Cairns* L.J.).

If this view is right, there is no need for me to give a final opinion as to the other reasons stated in the judgment for holding that the bond does not impose any burden on the land in the hands of transferees, even with notice. As in the fable the one effective trick of the squirrel enabled him to escape from the hounds, and to ignore the thousand clever tricks of the fox, this one fatal objection to the brewery's claim would end the matter, so far as I am concerned. But my opinion may be wrong; and, as counsel have addressed themselves at greater length to the other two points, I think that I ought to state my present attitude with regard to them. I am by no means satisfied that the bond can be treated as a clog on the equity of redemption, or as becoming inoperative on the discharge of the mortgage. It seems, to my mind, clear that, according to the most recent decision given by the House of Lords on the subject, a bond such as that before us is capable of being enforced although the land has been relieved of the burden of a mortgage to secure an advance (*Kreglinger's Case* (3)). The only difficulty is, does the discharge of the mortgage in *this case* relieve the land of the burden of the bond also; and this is merely a question of construction of the particular documents.

No doubt the bond will be set out in full in the report of this case; it needs close scrutiny. It has nothing whatever to do with

(1) (1850) 10 C.B. 164. (2) (1868) L.R. 3 Ch. 306.
(3) (1914) A.C 25.

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the securing of the payment of the advance of £4,500 made by Tooth & Co. to Astby; it has everything to do with the securing to Tooth & Co. of an exclusive right to the trade of this hotel until 1935. The only condition of the bond is as to the exclusive trading. There is a recital of an agreement (in *consideration* of the agreement to advance £4,500) "(1) to enter into the bond as a contract independent of and collateral to any agreement to repay the amount of the said advance," and (2) to allow the Company to hold the certificate of title as a security for the performance of the conditions of the bond (that is, the condition for exclusive dealing). Thus the consideration for the bond is the *agreement* to advance—because Tooth & Co. *agree* to advance, Astby agrees to enter into the bond for another purpose. One agreement is the consideration for the other agreement. The condition of the bond is followed by two clauses which may fairly be called covenants: (1) that the Company shall not be bound to supply liquor, &c., not brewed, &c., by itself; and (2) that the Company shall hold a certain certificate of title until 12th February 1935 or until this bond is discharged. It may be noticed that the particular certificate of title to be held is identified by date, volume and folio; it is not the *present* certificate of title. So far, it is clear from *Kreglinger's Case* (1) that the payment of the mortgage debt would not relieve the obligor of the obligation of the bond as to exclusive dealing; the bond has nothing to do with the equity of redemption, the right to redeem under the mortgage. The bond is no "clog" on the equity of redemption under the mortgage. The provisions of the bond for the retention of the certificate of title by the brewers until 12th February 1935 (or until discharge of the bond) afforded a security for the fulfilment of the obligation as to exclusive dealing; and as an equitable mortgage to secure a different loan could not be treated as a "clog" on the equity of redemption under the legal mortgage, *a fortiori* such a provision as the bond contains for the retention of the certificate as security for the fulfilment of an independent obligation as to exclusive dealing could be so treated. The covenants in the mortgage are based on one consideration; the covenants and conditions in the bond are based on another.

(1) (1914) A.C. 25.

There is nothing in the mortgage as to exclusive dealing. The two documents do not "form one agreement" or cover only one transaction. In the case of *Noakes & Co.* v. *Rice* (1), on which the defendant here relied, there was no such bond. As Lord *Parker* explains it in *Kreglinger's Case* (2):—"There was a proviso for reconveyance of the public-house to the mortgagor upon payment on demand or without demand of all moneys thereby covenanted to be paid. There was, therefore, a contractual right to a reconveyance whenever the mortgagor thought fit to pay. The tie, however," (which was in the mortgage itself and covered by the same consideration) "was for the whole term of the lease, and was clearly *inconsistent with and repugnant to this right.* It was therefore bad." The judgment here treats the provisions of the bond —all the provisions—as being "incorporated in the mortgage"; but this view is not, I think, justified. There is certainly some difficulty in determining the precise effect of the words of the mortgage in "collaterally" securing the "enjoyment fulfilment and observance of all payments privileges powers estates and covenants set forth in the bond . . . and the bill of sale of even date herewith"; but even if we take the view which is the most favourable to the vendor here, there is no authority for saying that where a mortgage secures exclusive dealing by one covenant, and another instrument secures exclusive dealing by its condition or by another covenant, a release of the mortgage with its covenant operates as a release of the bond with its covenant or condition. A principal obligation remains although its collateral support may be taken away. Moreover, when I look at the form of the discharge indorsed on the mortgage and registered, I find strong ground for the opinion that it was meant to apply only to the amount of £4,500 advanced, and to the burden on the land imposed by the mortgage. The words are: "Received from Frank Astby this 31st day of May 1922 the sum of £4,500 being in full satisfaction and discharged" (*sic*) "of the within obligation." The word used is "obligation," not "obligations"; and £4,500 being the exact amount advanced, there is no room for the amount payable for goods supplied or secured under the bill of sale or for the money payable under the bond.

(1) (1902) A.C. 24. (2) (1914) A.C., at pp 56, 57.

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As for the case of *Groongal Pastoral Co.* v. *Falkiner* (1), I do not think that it affects this case, or is affected by it. There, there was only one instrument, a mortgage, and it was held that a receipt, in (almost) the same form as here, not only put an end to the burden on the land but put an end to the personal covenants in the mortgage, including a covenant to pay income tax so far as attributable to the interest. What has such a decision to do with this bond which, by agreement, is to be treated as independent of and collateral to the agreement to repay the amount of the advance ? I may add, in passing, that the form of discharge used for this mortgage cannot accurately be called " statutory " : for there is nothing in the Act that prescribes this form or " directs " it " to be used," although it is found in the 9th Schedule to the *Real Property Act* 1900 among certain forms which are by the Act prescribed or directed to be used (see secs. 56, 65, 103, 104, &c.).

As for the suggestion now made by my learned colleagues, that the provisions of the *Real Property Act* by themselves completely relieve the purchaser from all danger from Tooth & Co.'s tie, I must say, with all respect, that I cannot concur. The purchaser, Toohey, has not yet been registered as transferee. Even if Trautwein, by becoming registered as transferee—even if Mrs. Gunther, by becoming registered as transferee—has been freed from the tie restriction by virtue of sec. 42, it by no means necessarily follows that the purchaser from Mrs. Gunther—Toohey—is freed. The purchaser has not reached the haven of safety provided by sec. 42, even if this case does not come within the exception of fraud ; he is not " absolutely free " from all " encumbrances, liens, estates, or interests " that do not appear on the register. Sec. 43 merely relieves a purchaser of the old-time necessity for searches, &c., and from notice of any trusts or unregistered interests ; " and the knowledge that any such trust or unregistered interest is in existence shall not of *itself* be imputed as fraud." But the very form of this expression shows that such knowledge may be a relevant, vital fact in establishing fraud. Then, as to the exception of fraud in secs. 42 and 43, what is it but fraudulent to take land from A which you know to belong to B, or to take land freed from all restrictions

(1) (1924) 35 C.L.R. 157.

when you know that B has a negative easement over it? (See *In re Nisbett and Potts' Contract* (1) for "negative easements.") It is no answer to say that the word "fraud" is not used in the affidavits (see per Lord *Macnaghten—Reddaway* v. *Banham* (2)): "fraud . . . is the true ground on which the Court is governed in the cases of notice." These were the words of Lord *Hardwicke* L.C. in the leading case on notice (*Le Neve* v. *Le Neve* (3)). To come to the specific case of restrictive covenants as to the use of land, the question as stated by Lord *Cottenham* L.C. in *Tulk* v. *Moxhay* (4) was "whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. *Of course, the price would be affected by the covenant*: and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken." In this case Astby is still bound by the bond as to exclusive dealing with Tooth & Co. until 1935; and the plaintiff, having notice of the bond, would be assisting in the evasion of the obligation of the bond if he took the title under the circumstances. It is not necessary for me to come to a final decision as to the effect of the *Real Property Act* 1900 in the present case; but this I can say, with confidence—that if the purchaser here had to rely on that Act alone for immunity from the tie, the title ought not to be forced on him.

I may add that the cases have not been impugned in argument which decide that secs. 42 and 43 do not protect a purchaser who has not yet been registered (*Wicks* v. *Bennett* (5); *Gibbs* v. *Messer* (6); *Templeton* v. *Leviathan Co.* (7); *Cowell* v. *Stacey* (8); *Baker's Creek Consolidated G.M. Pty. Ltd.* v. *Hack* (9)); also, that the *Real Property Act* 1900 was not one of the grounds on which the primary Judge in his judgment against the purchaser, or one of the grounds on which counsel for the vendors, relied.

(1) (1905) 1 Ch. 391; (1906) 1 Ch. 386.
(2) (1896) A.C. 199, at p. 219.
(3) (1747) 2 Wh. & T. Eq. (9th ed.) 157, at p. 164.
(4) (1848) 2 Ph. 774, at pp. 777, 778.
(5) (1921) 30 C.L.R. 80.
(6) (1891) A.C. 248, at p. 254.
(7) (1921) 30 C.L.R. 34.
(8) (1887) 13 V.L.R. 80.
(9) (1894) 15 N.S.W.L.R. (Eq.) 217.

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As for the title being one that should be forced upon the purchaser under the circumstances, the primary Judge seems to me to have stated in his judgment the right principle as accepted up to date (*Smith* v. *Colbourne* (1)). I should differ from him, of course, in his application of the principle if this case rested on the first and second objections ; for I regard those objections as unsound. But the third objection—that which involves the doctrine that the covenant or bond for exclusive dealing cannot bind assignees of the covenantor or obligor, unless the vendor has land to which the benefit of the tie is appurtenant, has been so recently settled in the *Lord Strathcona Case* (2) that I cannot see any reasonable doubt that the objection would be fatal to the brewers' claim. There seems to me to be no "reasonable decent probability" of the brewers pressing their claim as against the purchaser, notice or no notice. It is to be regretted, however, that the brewers were not added as parties to the summons, as they could have been under rule 7 of the 4th Schedule to the *Equity Act* 1901 ; for then they could be conclusively bound, and not free—as they are free—to raise the claim again in future and cast a cloud on the title to the prejudice of future transfers.

My conclusion is, firstly, that condition 14 does not apply to this case, and that the deposit should be returned. But if I am wrong in this, then, secondly, that the plaintiff was not bound by the tie, and must therefore lose his deposit.

As to costs :—If my first conclusion be accepted, the plaintiff ought to get all the costs of the summons and of this appeal. But if it be not accepted, I recognize that the mere fact of hardship to the plaintiff is not a sufficient ground in itself for refusing to the defendant her costs if the defendant's conduct has been unimpeachable throughout, and if she has succeeded on a clear-cut issue of law. But here the vendor had notice of the alleged tie when she made the contract with the plaintiff, and failed to mention it in the conditions, although she did mention a shorter tie for six months (see exhibit 8) and stipulated (condition 23) that no objection should be made by the purchaser in respect thereof. Then, when the purchaser was informed of the bond, his requisition to be satisfied

(1) (1914) 2 Ch. 533. (2) (1926) A.C. 108.

as to it, or to get an indemnity against the brewers' claim met with no assistance from the vendor—not even a denial of the bond's validity. The fair order would seem to me to be that each party should bear his own costs of the summons and of the appeal.

GAVAN DUFFY J. In my opinion the defendant was not justified in forcing the plaintiff to accept the title which has been offered to him. I base my opinion on the law as it was expounded by the Courts up to the time when the contract was rescinded, but I am strengthened in my opinion when I observe the divergent reasons relied on by my colleagues in their judgments in the present case.

STARKE J. On 23rd November 1926 the vendor, Margaret Jane Gunther, sold to the purchaser, John Septimus Toohey, certain land at Pennant Hills, on which were erected the hotel and premises known as the Hampden Hotel, together with the hotel furniture, fittings and effects in the premises, and also together with the hotel licence and goodwill of the premises. The contract stipulated that the title to the land was under the *Real Property Act* of New South Wales. The vendor furnished to the purchaser an abstract, or particulars of her title to the land, as follows :—" The land is the whole of the land in the certificate of title volume 3031 folio 199. The property is subject to mortgage to the City Mutual Life Assurance Society which will be discharged prior to completion." Investigation showed that one Frank Astby became the registered proprietor of the land in April 1921, that he on 15th November 1924 transferred it to Theodore Charles Trautwein, who became registered as the proprietor thereof and obtained a new certificate of title (vol. 3876, fol. 99) in his name, and that Trautwein on 21st May 1926 transferred the land to the vendor Gunther, who then became the registered proprietor. Subject, therefore, to the mortgage to the City Mutual Life Assurance Society which the vendor undertook to discharge prior to completion, she made a clean and good title to the land.

By force of the *Real Property Act* 1900, sec. 42, the vendor, " except in case of fraud," held the land subject to such encumbrances, liens, estates or interests as might be notified on the register

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book, but absolutely free from all other encumbrances, liens, estates or interests whatsoever, except certain interests immaterial to this case. And by sec. 43, "except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase-money or any part thereof, or shall be affected by notice direct or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud." The purchaser might safely, I should think, have accepted the vendor's title as shown in the abstract, but he made investigations and discovered that Frank Astby, on 18th April 1921, gave a bond to Tooth & Co., tying the trade of the Hampden Hotel for all beers, wines, spirits and other liquors, mineral and aerated waters and cordials until 12th December 1935. The purchaser refused to accept title in view of his knowledge of this bond, and the vendor forfeited the purchaser's deposit under the contract and rescinded the contract.

A vendor and purchaser summons was now issued by the purchaser for a declaration that the vendor was not entitled to rescind and forfeit his deposit, and also for a declaration that the vendor had not shown a good title to the land, and for other relief. When the summons came on for hearing it appeared that the parties were not agreed as to the facts, and it was arranged that the summons should be heard on the assumption that the purchaser had not before entering into the contract received notice of the bond, and that the vendor and her predecessors in title took with notice of the bond and the tie, leaving open to the parties to agree to a subsequent determination of any issue of fact if this should become necessary. In my opinion, this was a most unfortunate arrangement which obscured the real point of the case and led to elaborate arguments upon some difficult and out-of-the-way branches of the law the consideration of which is not necessary for a proper determination of the case. "Except

in case of fraud," the vendor made a good title to the land. The suggested fraud was that she took her title to the land with notice of the bond or tie. We know nothing of the circumstances under which she got this notice or why it was disregarded. To invalidate the vendor's title, however, her act must have been dishonest, " and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest " or instrument (*Assets Co.* v. *Mere Roihi* (1); *Waimiha Sawmilling Co.* v. *Waione Timber Co.* (2)). The admission made for the purposes of argument in this case does not enable us to say that the vendor or her predecessors in title were guilty of any fraud in becoming registered as proprietors of the land.

If my view be right, then the vendor made a good title to the land and nothing has been proved, by evidence or admission, which in any way disturbs or clouds the title or renders it doubtful. Consequently the order of the learned Judge was right and should be affirmed.

Appeal dismissed with costs.

Solicitors for the appellant, *S. J. Bull & Son.*

Solicitors for the respondent, *Murphy & Moloney.*

(1) (1905) A.C. 176.

(2) (1926) A.C., at p. 107