[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN GYPSUM LIMITED . APPELLANT;
DEFENDANT,

AND

HUME STEEL LIMITED . . . . . RESPONDENT.
PLAINTIFF,

THE AUSTRALIAN PLASTER COMPANY LIMITED . . . . . APPELLANT;
DEFENDANT,

AND

HUME STEEL LIMITED . . . . . RESPONDENT.
PLAINTIFF,

distinguished 86 B.L.R. 271

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Sept.* 22, 23.

MELBOURNE, *Oct.* 27.

Rich, Starke and Dixon JJ.

Mistake—Agreement for lease—Rectification—Negotiations—No concluded antecedent contract.

To give effect to an arrangement between two promoters of a company that one of them should become the lessee of premises to be taken over by the company for a period which would allow the lessee to perform some Government contracts for which the premises were required, the other promoter's solicitor, who registered the company and acted on its behalf, prepared a draft agreement for a lease providing a term of four years or the period occupied in performing the Government contracts, whichever should be the shorter. To this statement of the term the lessee objected through a solicitor on the ground that at the end of four years the contracts might not be finished, and asked for a proviso that the term should not end before the completion of the contracts.

This objection was made to the agents of the solicitor who prepared the draft. Upon receiving the objection he altered the draft so that the term became four years or the period occupied in performing the contracts, whichever was the longer, and sent an engrossment to his agents, who handed it to the lessee's solicitor, saying that his request had been agreed to and the alterations made. The lessee's solicitor either did not read or did not appreciate the provision, and his clients executed the agreement for a lease without reading it. It did not appear whether in making the alteration the solicitor for the company acted on his own discretion or acquainted his clients with the nature or effect of the alteration. The lessee performed the Government contracts before the expiration of four years and instituted proceedings for rectification in order to obtain relief from the rest of the term.

Held, that the purpose of the final meeting of the solicitors was not made to conclude an agreement, but to enable the lessee's solicitor to obtain and consider documents which included provisions as yet not completely agreed upon. The statement then made by the agents of the solicitor for the company was not made *animo contrahendi*, but to notify the other that the documents he had come to receive and consider included a compliance with his request. Apart from the suggested agreement made between the solicitors, there was no other concluded contract prior to the execution of the documents. All parties treated the plan upon which they were proceeding as a transaction which must be worked out and arranged among their solicitors, and did not regard themselves as having come to a definite agreement which needed no more than formal statement. There was, therefore, no concluded contract antecedent to the agreement for lease, and the agreement for lease could not be rectified.

Mackenzie v. *Coulson*, (1869) L.R. 8 Eq. 368; *Lovell and Christmas Ltd.* v. *Wall*, (1911) 104 L.T. 85; *Fowler* v. *Fowler*, (1859) 4 DeG. & J. 250; 45 E.R. 97, applied.

Held, also, that the dratsman of the disputed provision must have appreciated and intended its effect; therefore, in the absence of evidence of communications between himself and his clients about the provision, the lessee had failed to establish that the agreement for lease was expressed in its existing form by reason of mutual mistake.

Decision of the Supreme Court of South Australia (*Richards* J.) reversed on the facts.

CONSOLIDATED APPEALS from the Supreme Court of South Australia.

On 23rd February 1926 the respondent, Hume Steel Ltd., and the appellant the Australian Gypsum Ltd. (hereinafter also called "the Gypsum Company") agreed to acquire on their joint account the assets of an undertaking which included the premises subsequently demised to the respondent as hereinafter appears. The respondent

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was to occupy these premises until it completed an existing contract for the supply of steel pipes to the South Australian Government and future contracts of the same nature which it might thereafter obtain. Upon completing such contracts it was to sell its interest in the whole of the assets purchased, including the premises in question, to the Gypsum Company. Acting in pursuance of this joint arrangement the respondent made a contract dated 16th April 1926 with the owner of the undertaking by which the respondent became the purchaser thereof. In the events which happened the purchase-money became payable on 12th June 1926. On 14th May 1926 the Adelaide solicitor of the Gypsum Company, who had already discussed the matter with the respondent's solicitor, handed him a memorandum of a new plan for carrying it through. This plan was to form a new company to acquire from the respondent the undertaking which it had contracted to buy at the price it had agreed to give. The new company was to let to the respondent the premises required on the same terms as then existed between the Gypsum Company and the respondent. The respondent assented to this proposal, and the new company was incorporated on 11th June 1926. This new company was the appellant the Australian Plaster Co. Ltd. (hereinafter also called "the Plaster Company"). The respondent was represented by a solicitor in Adelaide, and the appellants by solicitors in Sydney and in Adelaide. These solicitors set about carrying into effect the arrangement between their respective clients. The appellants' Sydney solicitors sent to their Adelaide solicitors the first draft of the various necessary documents, including an agreement for lease of the premises previously referred to. This agreement for lease included a provision for a term of four years or the period occupied by the respondent in performing its Government contracts, whichever should be the shorter. After perusing the draft, and acting on instructions, the respondent's solicitor told the appellants' Adelaide solicitors that the limitation of four years was new, and that the respondent wanted a proviso added that if it were in the middle of a contract at the expiration of four years, it should be entitled to remain in possession until the completion of the contract. A note of the amendments required in the draft was dictated by the appellants' Adelaide solicitors and

forwarded to the appellants' Sydney solicitors. A copy of this note was also sent to the respondent's solicitor. The note did not state explicitly what the term of the lease was to be, and the Sydney solicitors altered the draft by converting four years from a maximum to a minimum period. The agreement was subsequently executed, and dated 21st June 1926.

In an action brought by Hume Steel Ltd. against the Australian Plaster Co. Ltd. and the Australian Gypsum Co. in the Supreme Court of South Australia, the plaintiff claimed rectification of the agreement of 21st June 1926 or to have such agreement set aside. *Richards* J. found that there was a mutual mistake, and ordered the rectification of the agreement for lease by substituting the word " shorter " for the word " longer " and by adding a proviso to the effect that if the lessee should continue to occupy the premises for the period of four years in performing Government contracts of the type referred to, and if at the expiration of that period the performance of such contracts should not be completed, then the term of the lease should be extended until completion of performance.

Other material facts appear sufficiently from the judgment hereunder.

The defendant companies now appealed to the High Court.

Cleland K.C. (with him *A. M. Moulden*), for the appellants. There was no mistake at all, or, if there were, it was a unilateral mistake on the part of the respondent as to the construction of a document (*Blay* v. *Pollard and Morris* (1); *Howatson* v. *Webb* (2)). There was no concluded agreement or common intention antecedent to the agreement sought to be rectified. There was nothing more than unconcluded negotiations. If the respondent made a mistake, it did so through its own negligence, and it can secure no relief (*Barrow* v. *Isaacs & Son* (3); *Mackenzie* v. *Coulson* (4)). There was no representation of fact but at most an expression of opinion as to the effect of the document. There was no representation at all which was intended to be acted upon (*Bisset* v. *Wilkinson* (5)). Either the respondent's solicitor read the document, in which case no representation was acted on; or he was negligent in failing to read it, and no

(1) (1930) 1 K.B. 628.
(2) (1908) 1 Ch. 1.
(3) (1891) 1 Q.B. 417, at p. 426.
(4) (1869) L.R. 8 Eq. 368.
(5) (1927) A.C. 177.

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representation made by the solicitor for the other side could relieve the respondent's solicitor from the performance of his duty towards his own client.

Mayo K.C. (with him *H. B. Piper*), for the respondent. On the evidence there was an antecedent agreement or at least a common intention (*Hussey* v. *Horne-Payne* (1); *Eadie* v. *Addison* (2)). The respondent was concerned only with the appellants' solicitor's ostensible authority and he had ostensible authority to accept, even if he had no real authority. His innocent misrepresentation was of fact, and it actually misled the respondent (*Wilding* v. *Sanderson* (3)).

[DIXON J. referred to *Bacchus Marsh Concentrated Milk Co.* v. *Joseph Nathan & Co.* (4).]

The inference is that the representation was acted on (*Redgrave* v. *Hurd* (5); *Smith* v. *Chadwick* (6)). The mistake was one as to the contents of the document, not as to its construction. The evidence shows that neither party knew of the four years' minimum term. There was no plea of negligence, and in any event the appellants cannot rely on any negligence induced by their own representation. [Counsel also referred to *Craddock Bros.* v. *Hunt* (7) and *United States of America* v. *Motor Trucks Ltd.* (8).]

Cleland K.C., in reply.

Cur. adv. vult.

Oct. 27.

THE COURT delivered the following written judgment:—

These are consolidated appeals from a judgment of the Supreme Court of South Australia by which rectification was ordered of so much of an agreement for a lease as specified the duration of the term. The instrument bore the date 21st June 1926, and was made between the appellant the Australian Plaster Co. Ltd. as lessor and the respondent Hume Steel Ltd. as lessee. The premises leased were

(1) (1879) 4 App. Cas. 311.
(2) (1882) 47 L.T. 543.
(3) (1897) 2 Ch. 534.
(4) (1919) 26 C.L.R. 410, at p. 451, per *Higgins* J.
(5) (1881) 20 Ch. D. 1.
(6) (1884) 9 App. Cas. 187.
(7) (1923) 2 Ch. 136.
(8) (1924) A.C. 196.

some lands and buildings at Thevenard. The term of the lease was expressed in the alternative as a period of four years from the date thereof, or for such time from the date thereof as the lessee should be performing an existing contract for the supply of steel pipes to the South Australian Government, and any further or other contract or contracts which it might thereafter during the said term of four years obtain from the Government for the manufacture and supply of steel pipes, whichever should be the longer. The rent reserved, which was at the rate of £1,000 per annum, was made payable at the end of the term. By the order under appeal, this provision was rectified by substituting the word "shorter" for "longer," and by adding a proviso to the effect that if the lessee should continue to occupy the premises for the period of four years in performing the Government contract or other contracts obtained as aforesaid, and at the expiration of that period the performance of the Government contract or contracts should not be completed, then the term of the lease should be extended until the lessee should complete such performance. The effect of the provision, as it was expressed in the instrument, was to give the lessee a term of uncertain duration dependent upon the time occupied in performing its Government contracts, not being less than four years. The effect of the provision, as rectified, is to give the lessee a term of uncertain duration extending to the end of the performance of its Government contracts, whether then existing or afterwards obtained before the end of the term of four years. Before rectification the term of the lease was such as to involve the lessee in a liability for rent of a total sum of not less than £4,000 payable at the end of the term. After rectification the liability for rent was wholly commensurate with the duration of the Government contracts. In fact the respondent's Government contracts were all performed by 30th April 1928, less than two years from the date of the lease. The actual duration of the term is a matter of importance, not only to the appellant the Australian Plaster Co. Ltd., which is the lessor, but also to the appellant the Australian Gypsum Ltd. The Australian Gypsum Ltd. made a contract with the respondent, bearing the same date as the agreement for a lease, namely, 21st June 1926, by which it agreed to buy from the respondent 7,500

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shares in the Australian Plaster Co. Ltd. for the sum of £7,500 cash at the date when the lease terminated and the lessee (the respondent) delivered possession of the premises to the lessor. The plaintiff, the respondent, therefore considered the Australian Gypsum Ltd. a proper party to the action. A brief description is necessary of the transaction of which these instruments formed a part. On 23rd February 1926 the respondent and the appellant the Australian Gypsum Ltd. made a contract by which they agreed between themselves that they should acquire on their joint account the assets of an undertaking which included the premises afterwards demised to the respondent. The price was not to exceed £20,000, of which the Australian Gypsum Ltd. was to contribute £12,500 and the respondent £7,500 in the first instance. The respondent was to occupy such premises until it completed its Government contracts, then existing or thereafter made. Upon completing them, it was to sell its interests in the whole of the assets purchased, including such premises, to the Australian Gypsum Ltd. for the sum of £7,500 "less a sum calculated at the rate of £1,000 per annum from the date of the contract of purchase to be entered into with" the owner of the undertaking "to the date of" the respondent "giving up possession in accordance with this agreement which shall be the date fixed for the payment of the purchase-money." Acting in pursuance of this joint arrangement, the respondent made a contract dated 16th April 1926 with the owner of the undertaking by which the respondent became the purchaser at the price of £20,000. The date of completion under this contract depended upon contingent events which so fell out that the purchase-money became payable on 12th June 1926. On 14th May the Adelaide solicitor of the Australian Gypsum Ltd., who had already discussed the transaction with the respondent's solicitor, handed to him a memorandum of a new plan for carrying it through. The plan was to form a new company to acquire from or through the respondent the undertaking which it had contracted to buy at the price it had contracted to give. The new company was to give a lease to the respondent of the premises it required "on the same terms as now exist between the Australian Gypsum Limited and" the respondent. Although the document handed over did not expressly say so, the

proposal included the term that the respondent should apply and pay for 7,500 fully paid £1 shares in the new company, and that the Australian Gypsum Ltd. should take these over from the respondent at their face value when its lease terminated. The respondent assented to this proposal, and the solicitors for the respective parties set about carrying it into effect. The new company was incorporated on 11th June 1926 under the name of the Australian Plaster Company Limited, and is one of the appellants. It was in order to carry out this arrangement that the agreement for a lease and the contract dated 21st June 1926 were executed. The respondent satisfied the learned Judge who tried the action that neither its directors nor its solicitor intended to agree to a minimum term of four years, and that on its side the agreement for a lease was expressed by mistake in such a way as to provide for a minimum term. He considered, however, that the Sydney solicitor of the appellants, who drafted the agreement and the amendments thereto on their behalf, appreciated that this was the result of the clause specifying the term as he finally drew it. But the learned Judge held that the appellant's Adelaide solicitor, who handed over the completed draft to the respondent's solicitor, when doing so, concluded an agreement between the parties which contained no such term. He therefore rectified the instrument in such a way as to accord with the agreement which he found was thus made in fact. The circumstances upon which he based this conclusion must now be stated.

All the documents needed to give effect to the arrangement between the promoters of the appellant the Australian Plaster Co. Ltd. were drawn in Sydney. The solicitor who represented the respondent was a member of the firm of solicitors in Adelaide, another member of which was one of its directors. The appellants were also represented by solicitors in Adelaide. When the appellant's Sydney solicitors sent to its Adelaide solicitors the first draft of these documents, for production there to the respondent's solicitors, the agreement for a lease was found to include a provision prescribing a term of four years, or the period occupied by the respondent in performing its Government contracts, whichever should be the shorter. At the instance of the member of his firm who was a

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director, the respondent's solicitor objected to this. His instructions were to get it struck out if he could do so, but if it was going to cause any trouble "to let it go" as it was probable that the respondent would not require the use of the premises for so long a period. Acting upon these instructions, he told the appellant's Adelaide solicitor that the limitation of four years on the respondent's occupation of the premises was new, and it was the first time anything of the sort had been mentioned; if the respondent was in the middle of a contract at the expiration of four years, it would be awkward for it to go out of possession; it wanted a proviso added that in such a case it should be entitled to remain in possession until the completion of the contract. The appellant's Adelaide solicitor dictated a note of the amendments required in the draft, and upon this subject the note contained two references. The first said "the limitation of four years to the length is new. Proviso must be made that if Hume Steel Ltd. are in the middle of a contract at the expiration of four years they are to retain possession until that contract is finished." The second referred to the draft agreement for the sale of shares to the Australian Gypsum Ltd., and said "The date of the lease commences from the day of settlement, term of lease to be extended beyond the term of four years to the expiration of any contract then in force." These notes were sent to the Sydney solicitors, and another copy was given to the respondent's solicitors. But a telegram was also sent by the appellant's Adelaide solicitor to its Sydney solicitor. This said: "Lease of works after four years to run until then existing contracts finished." As a result of these communications, the Sydney solicitor conceived the idea of altering the draft so that the four years should become a minimum period instead of a maximum. He was not called as a witness, and, although the member of the directorates of the appellant companies with whom he was in consultation, one Rodgers, gave evidence, the learned Judge did not accept his testimony, and it is not possible to say how far, if at all, he was referred to in relation to the alterations. However this may be, the learned Judge was "convinced that no one except the draftsman knew of the alteration until long after the document was executed, and that the draftsman made the alteration owing

to a misapprehension" of what the respondent's solicitors desired. When the appellant's Adelaide solicitor handed this draft to the respondent's solicitor he said:—"Those are the engrossments. They have agreed to the alterations you asked for, and these alterations have been made." This was in accordance with a statement in a letter he had received from his Sydney principals which, referring to his letter to them, said: "Our client has agreed to the amendments noted therein, and we have accordingly made the necessary amendments and have engrossed the agreements for execution." The respondent's solicitor looked at the documents and handed them back. He either did not read, or did not appreciate the effect of, the alteration in the term of the lease. He said that he relied upon the statement that the amendments had been agreed to and had been made. The execution of the agreements had by this time become urgent, because the date of this interview was 17th June and the time for settling with the owners of the undertaking had been extended, at some cost, to 21st June. The respondent's solicitor at once telegraphed his approval of the documents to his client in Melbourne, where, because of this urgency, duplicate engrossments had been sent, and these were at once executed. None of the directors nor the secretary read them. It is upon these facts that the learned Judge found that there was a mutual mistake.

The question at once arises whether, before the execution of these instruments, there was any agreement between the respondent and the appellant the Australian Plaster Co. Ltd. "Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts. But it is always necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified; and that such a contract is inaccurately represented in the instrument" (per *James* V.C. in *Mackenzie* v. *Coulson* (1)). In *Lovell and Christmas Ltd.* v. *Wall* (2), after citing this passage, *Fletcher Moulton* L.J. (as he then was) said: "And, to my mind, it is not only clear law, but it is absolutely necessary logic, that there cannot be a rectification unless there has been a pre-existing

(1) (1869) L.R. 8 Eq., at p. 375. (2) (1911) 104 L.T. 85, at p. 91.

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contract which has been inaptly expressed." In *Fowler* v. *Fowler* (1) Lord *Chelmsford* said :—" It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and must also be able to show exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement." The requirements thus enunciated might be satisfied if the view of the learned Judge be right that the solicitors representing the parties in Adelaide concluded an agreement between them on 17th June 1926 when the completed drafts were handed over. Unfortunately, however, this view gives to the transaction between the solicitors on that occasion a complexion which is not compatible with its evident purpose. They had been engaged in the mutual discussion of the provisions to be contained in documents which were to constitute the transaction between the parties. They met to enable the respondent's solicitor to obtain and consider the final draft, or perhaps, duplicate engrossments of the documents which included the provisions as yet not completely agreed upon. When he was informed by the appellant's solicitor that his request had been conceded, he could not understand the appellant's solicitor then and there to be communicating to him, irrespective of the contents of the documents he handed over, that his clients finally assented to an agreement. The appellant's solicitor was manifestly stating the effect of the alterations which his principal had made in the document and was doing so not *animo contrahendi*, but to inform the respondent's solicitor that the documents he had come to receive and consider included a compliance with his request. In point of fact the provision now in dispute in the lease does give effect to the request of the respondent's solicitor that the term should be prolonged

(1) (1859) 4 DeG. & J. 250, at p. 265; 45 E.R. 97, at p. 103.

for the full duration of the performance of the respondent's Government contracts. The difficulty does not arise from any failure to comply with this request, but from the further effect produced by the alteration made in the draft by which four years became a minimum term. The appellant's solicitor did not refer to, if he appreciated this consequence, but, so far as it went, his statement to the respondent's solicitor was correct. But it is an unwarrantable inference that either he intended, or was understood, to promise or agree to any terms on behalf of his clients other than those actually contained in the documents. He was doing no more than producing for the consideration of the opposite party the instruments to which his principal agreed on behalf of their clients and making such observations as he thought appropriate in aid of that consideration. No agreement, therefore, was made or communicated at this interview between the solicitors upon which rectification can be founded. But, apart from this suggested agreement, it is difficult to find any concluded contract between the respondent and the appellant the Australian Plaster Co. Ltd. antecedent to the execution of the written documents. It is true that the respondent and the appellant the Australian Gypsum Ltd. had concurred in a general arrangement for the promotion of the Australian Plaster Co. Ltd. for the purpose of carrying into effect a plan or scheme, including the grant of a lease to the respondent upon the terms of the agreement between the respondent and the Australian Gypsum Ltd., which would put the respondent in occupation during, and only during, the performance of its Government contracts. Further, it is no doubt true that this plan or scheme formed the basis of the transaction to be expressed in the documents one of which was the agreement for a lease now in question.

The respondent might plausibly contend, if there were no further facts, that the intention of the promoters should be attributed to the Company promoted, and so all parties might be treated as possessing a common intention continuing up to the execution of the agreement for a lease that the term should be for the period of the Government contracts and no more. But, apart from any question which this might raise as to the distinction between a common intention and an actual antecedent agreement, it neglects

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most material facts. The plan or scheme upon which they were proceeding had been propounded as an alternative by the appellant the Australian Gypsum Ltd. and although the respondent had assented to, or approved of, the proposal, it is clear that all parties treated it as a transaction which must be worked out and arranged among their solicitors, and did not regard themselves as having come to a definite agreement which needed no more than formal statement. When the Sydney solicitor for the appellants introduced in the first draft of the agreement for a lease a maximum term of four years, the respondent regarded the length of the term as a matter open for discussion and negotiation. Whether the appellants' solicitor so drafted this provision because of instructions, as one part of the learned Judge's reasons suggests, or upon his own responsibility, must be uncertain in view of his Honor's rejection of Rodgers's testimony. When he redrew the provision with the result that four years became a minimum, we do not know whether he communicated this fact to any officer of the appellant the Australian Plaster Co. Ltd., although it is clear enough that two years later Rodgers either did not know or had forgotten that such an alteration had been made. It is, however, incredible that the draftsman of the provision did not appreciate its effect and intend that four years should be a minimum term. The draftsman was a solicitor acting wholly in the interests of one party to the agreement. He was not charged with the responsibility of reducing to form what already had been agreed to, but his task, at least in the case of this provision, was to express what he considered his client was prepared to agree to. Whether he had a general authority from his client to decide for it what should be adopted as the term of the lease, or whether, as often happens, he knew that his mind upon the subject would determine his client's actions, or whether he acted upon the explicit instructions of his client, or whether he acted without instructions and in a way in which his client would not have approved, the fact remains that the task of settling the provision was committed to him, and the only term which the Australian Plaster Co. Ltd. intended to agree upon was that which he might specify in the document which he settled. He definitely chose to draw the provision upon its behalf in a form which gave

it a tenant for four years at least, and whether the Company by its directors or by any other officer did or did not then understand the matter, it did not intend that that term should be otherwise than its solicitor advised or determined. In other words, the respondent cannot establish, as it must to succeed, that down to the execution of the instrument, the appellant, the Australian Plaster Co. Ltd., by its officers, solicitors, or agents authorized in that behalf, intended that the term of the lease should not include a minimum period of four years. It therefore failed to prove that the instrument was expressed in its present form by reason of a mistake which was mutual.

It was suggested that the respondent might succeed upon the ground that, in spite of the form of the document, the parties were never really *ad idem*. It is enough to say that they each intended to contract in terms of the document, and the contract it purports to express is no less binding because one of them mistook what it said and the other was content to rely upon its solicitor.

The appeal should be allowed with costs. The judgment below should be set aside and the action dismissed with costs.

Appeal allowed in each case. Judgment of the Supreme Court of South Australia discharged. In lieu thereof order that the action be dismissed with costs. Respondent to pay the costs of the appeal.

Solicitors for the appellants, *Moulden & Sons.*
Solicitor for the respondent, *T. L. Griffiths.*

C. C. B.