[HIGH COURT OF AUSTRALIA.]

GEORGE . . . . . APPELLANT;
DEFENDANT,

AND

ROACH . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1942.

ADELAIDE, *Sept.* 18.

MELBOURNE, *Oct.* 9.

Latham C.J., Rich and Starke JJ.

*Contract—Sale of business at price to be fixed by valuation—Valuation to be not less than specified amount for every pound profit—Refusal of valuer to value—Waiver by vendor—Recovery back of moneys paid.*

A contract for the sale of an agency provided that it should be purchased at the value placed on it by a named valuer and that such valuation should be not less than eighty-five pounds for every one pound profit per week. The valuer refused to value. The vendor purported to waive his right to a valuation and offered to accept eighty-five pounds for every one pound profit per week as the value.

*Held*, by *Rich* and *Starke* JJ. (*Latham* C.J. dissenting), that the provision for valuation was not for the sole benefit of the vendor and could not be waived by him and that the purchaser was entitled to recover back from the vendor moneys paid on account of the price.

Decision of the Supreme Court of South Australia (*Angas Parsons* J.): *Roach* v. *George*, (1942) S.A.S.R. 49, affirmed.

APPEAL from the Supreme Court of South Australia.

An agreement in writing dated 24th March 1941 between Lloyd George (the vendor) and Clifford Francis Angel (the purchaser) contained the following provisions:—"The vendor agrees to sell to the purchaser or his nominee and the purchaser agrees to buy goodwill, stock, plant (as set forth in the schedule hereto) newspaper and other agencies (excepting Radiola wireless agency) and lease of the vendor's business situated at Port Lincoln on the following terms and conditions:

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(*a*) The stock shall be purchased at cost price (excepting obsolete or damaged stock which shall be purchased by each party appointing a valuer for that purpose) or by the parties hereto agreeing upon one valuer. And such valuation shall be final and binding on the parties hereto.

(*b*) The purchaser shall pay the vendor the sum of two hundred pounds (£200) for the plant.

(*c*) The purchaser shall pay the sum of four hundred and fifty pounds (£450) for the goodwill of the vendor's shop trade.

(*d*) The newspaper agency shall be purchased at the value placed upon such newspaper agency by Mr. V. Solomon, circulation manager of the Advertiser Newspapers Ltd. Such valuation to be not less than eighty-five pounds (£85) for every one pound (£1) profit per week."

The agreement also provided that the purchaser should pay £100 on the signing of the agreement and the balance on the day of the purchaser's taking possession, which should be on or about 1st May 1941.

The sum of £100 was paid on the signing of the agreement.

By an agreement in writing dated 16th April 1941, Angel, in consideration of £125 paid to him by Arthur Keith Spencer, agreed to nominate Spencer as his nominee in respect of the agreement of 24th March 1941. By letter dated 18th April 1941, Spencer's solicitors notified George that their client had been nominated by Angel in connection with the agreement for sale and purchase, and suggested that a further £1,000 be paid on account of the purchase money on 1st May 1941, and that the nominee's taking possession should be postponed until 1st June 1941.

By letter dated 21st April 1941, from George to Spencer's solicitors, the former advised that he expected payment of £1,000 on 1st May but suggested that Spencer take over on 1st June 1941. Spencer's solicitors agreed to this by letter to George dated 24th April 1941. With that letter were enclosed cheques dated 1st May 1941 in George's favour for £1,000. These cheques were duly met.

Meanwhile, about 21st April 1941, Solomon, the circulation manager of Advertiser Newspapers Ltd. and the valuer named in the agreement of 24th March 1941, had told Spencer's solicitors that " we do not value agencies." About 23rd April 1941 he refused to sign a document stating that his valuation of the agency was eighty-five pounds for every one pound gross profit per week. He agreed that this was the proper basis of valuation, but he was not prepared to investigate the amount of gross profits per week. He

took out what his valuation would be on the assumption that certain figures placed before him were correct.

On 5th May 1941 Spencer died, and the Public Trustee assumed charge of his affairs. An arrangement was made between him and George for a further extension of time to 1st July 1941. On 14th June 1941 the Public Trustee wrote to "the Circulation Manager, the Advertiser Newspapers Ltd." asking specifically "whether you are prepared to value the newspaper agency." By letter of 17th June 1941 signed "Advertiser Newspapers Ltd. V. M. Solomon Circulation Manager" this question was answered as follows:—"After opinions received from our auditors . . . and the Authorised Newsagents' Association of South Australia, and we had given much thought to the question, we agreed, on 4th July 1939 that unauthorised country newsagencies for the sale of publications recognised by the newspaper companies and the Authorised Newsagents' Association be valued on the basis of eighty-five pounds for each one pound per week gross profit. There are variations in the amount of profit made by agents on some publications, the difference in profit to agents being in the numbers of newspapers delivered to homes, supplied to sub-agents or sold by boys on the streets. In addition, such agencies are vulnerable. As there is so much detail to be checked at the agencies concerned and agreed upon by seller and buyer, we do not value such agencies but indicate to unauthorised country agents the basis on which an agency be valued." On 19th June 1941 the Public Trustee's solicitors (formerly Spencer's solicitors) wrote to George claiming repayment of the sum of £1,100 on the ground (*inter alia*) that "Mr. Solomon has refused and still refuses to value the newsagency."

As payment was not forthcoming, Spencer's executrix brought an action in the Supreme Court of South Australia claiming the sum of £1,100. The defendant, by his defence, said that the valuation was for his benefit and that he waived such valuation. *Angas Parsons* J. gave judgment for the plaintiff for the amount claimed.

From this decision the defendant appealed to the High Court.

*Alderman*, for the appellant. The respondent cannot recover the £100 deposit, because there was no privity of contract. In effect Solomon made a sufficient valuation to satisfy the contract; all that was left was a matter of simple arithmetic. Alternatively, the appellant could, and did, and now does, waive the right to valuation (a right entirely in his favour) and accepts eighty-five pounds per pound as the value (*Williams* on *The Statute of Frauds*,

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(1932), p. 60; *North* v. *Loomes* (1)). The contract is not void for uncertainty, for the clause in question is, or can be made, certain (*G. Scammell and Nephew Ltd.* v. *Ouston* (2)). Through the voluntary payment with knowledge of the absence of a valuation, the respondent is estopped from setting up that Solomon made no valuation or has waived the right to take the point (*Thomas* v. *Brown* (3)). The same result follows if the matter is treated on the basis of there being a new contract which is to be interpreted in the light of the surrounding circumstances. There was no failure of consideration: the respondent got all she bargained for, namely, the rights of Angel under the original agreement (*Chapman* v. *Speller* (4)).

*Norman*, for the respondent. There was a novation of the original contract resulting in a new contract between Spencer and the appellant. Although the parties probably contemplated a valuation on the basis of so many pounds for each pound of gross profit, it was open to Solomon to value the agency on any basis he thought proper. The method chosen by the parties for fixing a minimum price did not alter Solomon's duty to make a proper valuation. There was no object in requiring a valuation if the parties merely contemplated an arithmetical calculation. One essential term of the contract is missing, namely, the period over which the profits are to be ascertained in order to fix the minimum price. The appellant has never waived the right to a minimum price. There was no evidence before the court as to the amount of the gross profits per week. The arbitrary figure named by Solomon was not a valuation, because it was a figure arrived at by the auditors of Advertiser Newspapers Ltd. Solomon had no power to delegate his function of making a valuation (*Ess* v. *Truscott* (5)). The payment of £1,000 was not an additional payment, but was part of the purchase money, and the extension of time was merely a voluntary waiting, not an alteration of the contract (*Ogle* v. *Earl Vane* (6)). Neither the extension of time nor the payment of the £1,000 cured the defect that no price could be fixed for the sale. As to waiver of clause conferring a benefit under contract, see *Rees* v. *Johnson* (7).

*Alderman*, in reply. Where a person paying moneys knows of the impossibility or strong improbability of performance, the moneys

(1) (1919) 1 Ch. 378, at p. 386.
(2) (1941) A.C. 251, at p. 255.
(3) (1876) 1 Q.B.D. 714, at p. 721.
(4) (1850) 14 Q.B. 621 [117 E.R. 240].
(5) (1837) 2 M. & W. 385 [150 E.R. 806].
(6) (1867) L.R. 2 Q.B. 275.
(7) (1884) 3 N.Z.L.R. 1.

cannot be recovered (*Law Quarterly Review*, vol. 56, pp. 534, 535). [He also referred to *Amalgamated Wireless (Australasia) Ltd.* v. *Associated Radio Co. of Australia Ltd.* (1).]

*Cur. adv. vult.*

Oct. 9.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment of the Supreme Court of South Australia (*Angas Parsons* J.) for £1,100 for the plaintiff in an action for money had and received.

The defendant, Lloyd George, carried on business at Port Lincoln as a newsagent and storekeeper. On 24th May 1941 he made an agreement in writing with one Angel to sell the business to Angel or his nominee. A. K. Spencer was accepted by George as the nominee of Angel. The contract provided for a valuation of the newspaper agency by V. Solomon, circulation manager of Advertiser Newspapers Ltd., " such valuation to be not less than eighty-five pounds (£85) for every one pound (£1) profit per week." Mr. Solomon did not make a valuation. Angel paid £100 and Spencer £1,000 on account of the purchase price. The time for settlement under the contract was extended by consent from 1st May 1941 to 1st June 1941. On 5th May Spencer died. The Public Trustee assumed charge of his affairs. An arrangement for a further extension of time to 1st July was made between the Public Trustee and the defendant. The Public Trustee, by a letter dated 19th June, alleged that the contract was unenforceable and void, and that he was entitled to repayment of the sum paid on account, namely £1,100, because " Mr. Solomon has refused and still refuses to value the newsagency." Caroline Roach, the plaintiff in the action and the respondent to this appeal, is the executrix of the will of Spencer deceased. She sued for £1,100 as upon a total failure of consideration.

The learned trial judge held that the refusal or failure of Solomon to value the newsagency business prevented the ascertainment of the price in the manner provided for in the contract, with the result that there was no enforceable contract (*Milnes* v. *Gery* (2) ; *Vickers* v. *Vickers* (3) ; *Morgan* v. *Milman* (4) ). He held that the deceased Spencer paid £1,100 on account of the purchase money under a worthless agreement, the contract being worthless because the nominated valuer declined to value.

It was argued for the appellant that Solomon had in fact valued the agency at £1,489 19s. 7d. But the evidence showed that this

(1) (1927) 33 A.L.R. 170.
(2) (1807) 14 Ves. 400 [33 E.R. 574].
(3) (1867) L.R. 4 Eq. 529.
(4) (1853) 3 DeG.M. & G. 24 [43 E.R. 10].

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was not the case. Solomon gave evidence that in his opinion eighty-five pounds per one pound of gross profit per week was a proper basis of valuation of a newsagency business, that he had been supplied with figures showing gross profit per week of £17 19s. 5d., that some corrections in these figures reducing them to £17 10s. 7d. were made by some person, that if the latter figures represented the weekly profit a proper valuation would be £1,489 19s. 7d., but that he did not know and had not checked the figures for profits. He said that it would be necessary to make a thorough investigation to ascertain profits and that he had not made such an investigation, but that it could easily be done. He said in evidence: "I never agreed to value this business and I have not done so." The figures mentioned related to some single unidentified week, and there was no evidence that they were accurate. It is, I think, clear that Solomon did not make a valuation.

When a sale is made at a price to be determined by the valuation of a third person, the valuation is a condition precedent, and if the specified valuer refuses to act the contract is not enforceable: see cases already cited. But in the present case the contract does not provide merely for a sale at a price to be determined by the valuation of Solomon.

The relevant clause in the contract is:—

"The vendor agrees to sell to the purchaser or his nominee and the purchaser agrees to buy goodwill, stock, plant (as set forth in schedule hereto) newspaper and other agencies (excepting Radiola wireless agency) and lease of the vendor's business situated at Port Lincoln on the following terms and conditions:—

(*a*) The stock shall be purchased at cost price (excepting obsolete or damaged stock which shall be purchased by each party appointing a valuer for that purpose) or by the parties hereto agreeing upon one valuer. And such valuation shall be final and binding on the parties hereto.

(*b*) The purchaser shall pay the vendor the sum of two hundred pounds (£200) for the plant.

(*c*) The purchaser shall pay the sum of four hundred and fifty pounds (£450) for the goodwill of the vendor's shop trade.

(*d*) The newspaper agency shall be purchased at the value placed upon such newspaper agency by Mr. V. Solomon, Circulation Manager of the Advertiser Newspapers Ltd. Such valuation to be not less than eighty-five pounds (£85) for every one pound (£1) profit per week."

The effect of par. *d* is that the purchaser must pay to the vendor whatever sum is fixed by Solomon as the value to be placed upon

the newspaper agency, but that such value is not to be less than eighty-five pounds per every one pound of profit per week. Solomon is not required to ascertain or to state any amount of profits per week, or to apply any particular multiplier to any such amount. He is simply to fix a lump sum value—but the value, and therefore the price, is to be not less than the amount ascertained by multiplying by eighty-five the amount of profits per week, whatever those profits may be. A valuation by Solomon can produce only one effect: it may increase, but it cannot diminish, the price to be paid by the purchaser. The undertaking of the purchaser is to pay £ (85 x X) — X being a readily ascertainable figure (as the evidence of Solomon shows)—or any larger sum which Solomon may fix as the value.

Thus the provision for valuation by Solomon is entirely for the benefit of the vendor. If the vendor is content to accept without any valuation the smaller ascertainable sum as a full satisfaction of the price, there is nothing to prevent him waiving his right to a possibly greater sum fixed by a valuation by Solomon. The vendor waived this right in his pleading and at the Bar.

This waiver does not rest upon any alleged agreement with the purchaser. It consists simply in the abandonment of a right to have a valuation of which the vendor, if he chose, could take full advantage. The waiver does not affect any other provision in the contract. Every term in the contract remains in full force and effect, except that the vendor does not insist upon his right to valuation so as possibly to obtain a higher price than that which the contract says the purchaser is to be bound to pay in any event. No right of the purchaser is or can be prejudiced or affected in any degree by such a waiver.

The purchaser, however, protests that he is entitled to have a valuation so that he may have the privilege of paying a higher price than the minimum price fixed by the contract. Upon the ground of this (as I venture to think) impertinent pretext, he refuses to perform the contract at all. In my opinion the law does not support him in this attitude.

In *Hawksley* v. *Outram* (1) certain provisions in a contract were held to be inserted "simply and purely for the benefit of the purchaser." *Lindley* L.J. said: "If there is any doubt whether they are binding upon the vendors, and the purchaser waives them, what have the vendors to complain of?" (2). *Lopes* L.J. said: "It is perfectly clear that" (these provisions are) "intended solely for the benefit of the purchaser; the purchaser, therefore, is at liberty to relinquish them, and, if he does so, it is immaterial whether he

(1) (1892) 3 Ch. 359. (2) (1892) 3 Ch., at p. 376.

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could have successfully insisted on them" (1). See also *Morrell* v. *Studd and Millington* (2). These cases must be distinguished from such a case as *Rees* v. *Johnson* (3), where the court had to consider a contract to sell land at a price, not being less than £40,000, to be ascertained by the valuation of two valuers. No valuation was made. It was held (if I may say so, obviously rightly) that the purchasers could not compel the vendor to complete upon payment to the vendor of the minimum price of £40,000. The principle of *Hawksley* v. *Outram* (4) would have been applicable, however, if specific performance had been claimed by the vendor, not by the purchasers, and if the vendor had been willing to accept £40,000 as the full price.

The result in the present case is that, the vendor abandoning his right to obtain a higher price as the result of a valuation, there is a good subsisting contract. The sum of £1,100 has therefore not been paid for a consideration which has failed, in whole or in part. The money was paid under a contract which the defendant is willing to perform and which he can be compelled to perform.

I am therefore of opinion that the action of the plaintiff should have been dismissed and that the appeal should be allowed.

RICH J. In this appeal, as the relevant facts are set out in the judgment of the learned trial judge, I propose to deal with the main arguments advanced on behalf of the respondent.

In support of par. 7 of the statement of defence it was contended on behalf of the appellant that he had waived the condition of valuation provided for in clause 1 (*d*) of the agreement the subject of the litigation between the parties. There are no doubt cases where particular clauses in an agreement which are simply and solely for the benefit of a party and are severable may be waived by that party (*Fry* on *Specific Performance*, 6th ed. (1921), p. 175; *Lloyd* v. *Nowell* (5), distinguishing *Hawksley* v. *Outram* (4)). But as I read the agreement I consider that the subjects of the agreement are indissoluble: that in clause *d*—the newspaper agency—being the main subject, those in clauses *a*, *b* and *c* being subsidiary or ancillary to it. The whole forms one entire contract, and clause *d* is not severable, so that this case does not fall within the category of cases such as *Hawksley* v. *Outram* (4), *Morrell* v. *Studd and Millington* (2), *North* v. *Loomes* (6). It was the essence of the bargain that the price mentioned in clause *d* should be fixed in accordance

(1) (1892) 3 Ch., at p. 378.
(2) (1913) 2 Ch. 648, at p. 660.
(3) (1884) 3 N.Z.L.R. 1.
(4) (1892) 3 Ch. 359.
(5) (1895) 2 Ch. 744.
(6) (1919) 1 Ch. 378, at p. 386.

with the agreement. In ascertaining the price the valuer agreed upon by the parties would be guided by the profits as he estimated them. In the circumstances the condition precedent not having been fulfilled there was "no existing contract" until the price was ascertained: *Loftus* v. *Roberts* (1), where *Vaughan Williams* L.J. refers to the cases of *Milnes* v. *Gery* (2) and *Vickers* v. *Vickers* (3), cited by *Angas Parsons* J. in his judgment—See also *Benjamin* on *Sale*, 7th ed. (1931), pp. 159, 160; *Dart* on *Vendor and Purchaser*, 8th ed. (1929), p. 222.

It was then contended that the purchaser's conduct had shown that he had waived the performance of the condition precedent. "A waiver must be an intentional act with knowledge." "When parties, who have bound themselves by a written agreement, depart from what has been so agreed on in writing, and adopt some other line of conduct, it is incumbent on the party insisting on, and endeavouring to enforce, a substituted verbal agreement, to show, not merely what he understood to be the new terms on which the parties were proceeding, but also that the other party had the same understanding —that both parties were proceeding on a new agreement, the terms of which they both understood" (*Earl of Darnley* v. *Proprietors &c. of London, Chatham, and Dover Railway* (4)). The conduct relied on by the respondent in this case is the payment of £1,000 by a cheque dated 1st May 1941 on account of the purchase price. That payment was made to comply with the request of the respondent contained in his letter to the solicitors of the appellant's predecessor dated 21st April 1941: "I have to advise that I expect Mr. Spencer" (the nominee under the contract of the original purchaser) "to pay the sum of £1,000 on May 1st." Moreover, it does not appear that the Public Trustee, who was at the time the administrator of Spencer's estate, or his solicitors knew that the valuer had refused to act. In a letter to the respondent dated 12th June 1941 they say: "Re Sale of Business of A. K. Spencer deceased. A prospective purchaser from our client, the Public Trustee, has just called on us and advised us that Mr. Solomon, the Valuer nominated in the contract, is not prepared to value the newspaper round. . . . In view of this unexpected development we propose to communicate with Mr. Solomon forthwith and also refer the matter to our client for his instructions."

I adopt what was said by *Sargant* L.J. in *Chillingworth* v. *Esche* (5): "Then on the basis that the contract is conditional, what is

(1) (1902) 18 T.L.R. 532, at p. 535.
(2) (1807) 14 Ves. 400 [33 E.R. 574].
(3) (1867) L.R. 4 Eq. 529.
(4) (1867) L.R. 2 H.L. 43, at pp. 57, 60.
(5) (1924) 1 Ch. 97, at p. 114.

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the result of the payment of the deposit? One obvious object of such payment was that it should form a deposit in the ordinary way if and when the contemplated definite contract was subsequently signed and exchanged."

In the absence, therefore, of intention and knowledge of all the relevant circumstances, I am of opinion that this argument also fails and that the appeal should be dismissed.

STARKE J. In this action the plaintiff—the respondent here—claimed as executrix of one Spencer deceased to recover from the defendant—the appellant here—the sum of £1,100 paid in respect of the purchase of, *inter alia*, a newspaper agency as upon a failure of consideration. Judgment was entered for the respondent in the Supreme Court of South Australia for the sum of £1,100, from which judgment an appeal is brought to this Court.

By an agreement dated 24th March 1941 the appellant sold to one Angel the goodwill, stock, plant, newspaper and other agencies, and lease of the appellant's business upon certain terms and conditions. One of these was that the newspaper agency should be purchased at the value placed upon such newspaper agency by a named valuer; such valuation to be not less than eighty-five pounds for every one pound profit per week. Other considerations were also set forth in the agreement, but the agreement is entire and not divisible in performance. The purchaser agreed to pay and did pay £100 on the signing of the agreement and the balance was payable on the day of taking possession by the purchaser, which, it was agreed, should be on or about 1st May 1941. By mutual consent and agreement a novation of the agreement took place, and Spencer was substituted for Angel. A new agreement was thus created between the appellant and Spencer upon the terms of the old agreement. But there was some variation in its terms: the £100 already paid by Angel was treated as paid by Spencer, who repaid Angel, and it was agreed that £1,000 should be paid, and it was paid on 1st May on account of the purchase money, and the balance on 1st June 1941. Spencer died on 5th May 1941 and the respondent is his executrix. The valuer named in the agreement, despite the contention of the appellant to the contrary, did not value the newspaper agency in accordance with the term of the agreement, and declined to do so. He stated the accepted basis for valuing a newspaper agency such as was sold, but he declined to ascertain the weekly profit or make any valuation. Under these circumstances a claim was made by the personal representative of Spencer for the return of the sum of £1,100 paid by him.

There is no doubt that the provision for a valuation of the newspaper agency is an essential term of the agreement. And it is equally clear that in the case of an agreement to sell at a price to be fixed by some valuer the agreement is not enforceable unless the price has been so fixed; the agreement to sell is made subject to a condition precedent that the price shall be so fixed, and unless the condition be performed the agreement is not effective (*Milnes* v. *Gery* (1); *Vickers* v. *Vickers* (2)). There are cases in the books such as *Dinham* v. *Bradford* (3) and *Richardson* v. *Smith* (4) in which agreements have been specifically enforced though a valuation has not been made in accordance with the terms of the agreement, but in these cases it was not the "very essence and substance" of the agreement that no agreement was made except through the medium of valuers. In the present case the provision for a valuation is, as already mentioned, the heart and essence of the agreement. The court could not specifically enforce the agreement, without a valuation, against the vendor (*Rees* v. *Johnson* (5)). And as a general rule an agreement to be specifically enforced by the court must be mutual (*Fry* on *Specific Performance*, 6th ed. (1921), p. 219).

But the appellant contends that the provision for the valuation of the newspaper agency is inserted in the agreement solely for his benefit and he offers, and, by his pleading, waives and relinquishes his rights to such a valuation (*Hawksley* v. *Outram* (6); *Morrell* v. *Studd & Millington* (7)). In my opinion, it is not true that provision for a valuation is solely for the benefit of the vendor. The ascertainment of profits is necessarily the basis of any valuation, and it is as much for the benefit of the purchaser as the vendor that profits should be investigated and ascertained by the valuer, whether the amount to be paid is the minimum fixed by the agreement or more. Further, the argument assumes, I think, that the agreement, according to its true construction, stipulates that the minimum price mentioned therein should be the value of the newspaper agency unless the valuer fixes a higher price. The argument is attractive and perhaps achieves a just result. But it is contrary to the terms of the agreement, and, as I think, to the decided cases. The value of the newspaper agency is fixed through, and by means of, a valuation, and by no other means. Unless a valuation is made the parties have not agreed upon the sale price of the subject matter of the agreement and the agreement does not become effective.

(1) (1807) 14 Ves. 400 [33 E.R. 574].
(2) (1867) L.R. 4 Eq. 529.
(3) (1869) 5 Ch. App. 519.
(4) (1870) 5 Ch. App. 648.
(5) (1884) 3 N.Z.L.R. 1.
(6) (1892) 3 Ch. 359.
(7) (1913) 2 Ch. 648, at p. 660.

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Further contentions were that the sum of £1,100 was paid in consideration of a rearrangement of times for paying portion of the purchase money and that the payment was made with full knowledge of the facts and should therefore be regarded as a voluntary payment (*Thomas* v. *Brown* (1); *Remfry* v. *Butler* (2)). The moneys were not paid in consideration of the rearrangement of times but as portion of the purchase money under the new contract the consideration for which, for the reasons already given, has failed. And it is not established by the evidence that the payment, or any part of it, was made with a full or any knowledge of the fact that the valuer refused to make a valuation. £100, portion of this sum of £1,100, appears to have been paid on or about 16th April, and a cheque for £1,000 payable on 1st May 1941 was forwarded to the appellant on 24th April 1941.

About 21st April 1941 the valuer said that he did not value newspaper agencies and refused to sign a document stating that his valuation of the agency was eighty-five pounds for every one pound of gross profit per week. But he agreed that was the proper basis of valuation, though he was not prepared to investigate the profit. He said he would obtain the opinion of his firm's accountant and he took out what his valuation would be on the assumption that certain figures were correct. The matter was left in this state until June 1941, when the personal representative of Spencer heard that the valuer was not prepared to value the newspaper agency. Thereupon a letter was written to the appellant. "In view of this unexpected development we" (the solicitors for the personal representative) "propose to communicate with" (the valuer) "forthwith and also refer the matter to our client for his instructions." The valuer was communicated with and replied as follows:—"After opinions received from our auditors . . . and the Authorised Newsagents' Association of South Australia, . . . we agreed, on July 4 1939 that unauthorised country newsagencies for the sale of publications recognised by the newspaper companies . . . be valued on the basis of £85 for each £1 a week gross profit. There are variations in the amount of profit made by agents on some publications, the difference in profit to agents being in the numbers of newspapers delivered to homes, supplied to sub-agents or sold by boys in the streets. In addition, such agencies are vulnerable. As there is so much detail to be checked at the agencies concerned and agreed upon by seller and buyer, we do not value such agencies, but indicate to unauthorised country newsagents the basis on which an agency be valued." The result was a claim in June 1941 by the

(1) (1876) 1 Q.B.D. 714. (2) (1858) E.B. & E. 887 [120 E.R. 740].

personal representative of Spencer for the return of £1,100, on the ground, *inter alia*, that the valuer " refused and still refuses to value the newsagency." It was not clear, I think, until the middle of June 1941 that the valuer would not make the valuation required under the agreement of the parties.

A suggestion was also made that Spencer did not pay £100 to the appellant, but he paid it to Angel, who had paid that sum to the appellant. And the appellant acknowledged that he had received from Spencer the sum of £100, portion of the purchase price already paid by Angel to him.

In my opinion, the judgment below was right and this appeal should be dismissed.

*Appeal dismissed with costs.*

Solicitors for the appellant, *Alderman, Reid & Brazel.*

Solicitors for the respondent, *Norman, Waterhouse, Chapman & Johnston.*

C. C. B.