[HIGH COURT OF AUSTRALIA.]

PACKER . . . . . APPELLANT;
PLAINTIFF,

AND

BABIDGE AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Oct.* 6.

SYDNEY, *Nov.* 22.

Latham C.J., Fullagar and Kitto JJ.

Vendor and Purchaser—Land sales control—Recovery of excess consideration—Landlord and tenant—Obligation of landlords under tenancy agreement to make payment of money to tenant "if and when (premises) sold"—Construction—Sale to tenant—Contract providing for specific purchase price and release of landlords' obligation—Consent of delegate subject to price stated in contract as maximum selling price—Proceedings for recovery of benefit of release—National Security (Economic Organization) Regulations (S.R. 1942 *No.* 76—*S.R.* 1946 *No.* 192), *reg.* 6AB.

Clause 10 of an agreement for the tenancy of certain land provided that, "if and when the said premises were sold", the landlord would pay to the tenant out of the proceeds of the sale the sum of £500 paid by the tenant under a cancelled agreement for the purchase of the land. Subsequently, while the tenancy was still in existence, the landlords agreed to sell the land to the tenant for £3,500. The contract of sale, after referring in a recital to the vendors' obligation under clause 10, provided that on completion of the sale all rights and liabilities of the vendors and purchaser under the tenancy agreement should merge and no moneys should be payable or allowable by the vendors to the purchaser by reason of the sale having been effected. The application made to the delegate of the Treasurer, pursuant to reg. 6 of the *National Security (Economic Organization) Regulations*, for his consent to the sale was accompanied by a copy of the contract of sale and a statement by the vendors that "the sale price and terms" were "£3,500 cash, existing tenancy to purchaser to merge in the purchase" and that the full selling price of the land was £3,500. It was also accompanied by a valuation of the land as at the requisite date at £3,527. The delegate gave his consent to the sale "subject to the maximum selling price of £3,500 (including Agent's Commissions, if any)". The purchaser paid £3,500 to the vendors. He claimed

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to recover, under reg. 6AB of the Regulations, the sum of £500 as having been received by the vendors in excess of the consideration provided for in the contract.

Held, that there was no excess consideration within the meaning of reg. 6AB, on the grounds, by *Latham* C.J. and *Kitto* J., that, even assuming that in the circumstances the vendors were liable under clause 10 to pay the purchaser the sum of £500, the consent of the delegate had been given to the whole transaction, including the release of any such liability; and, by *Fullagar* J., that on the execution of the contract clause 10 automatically ceased to operate so that the true consideration for the sale was £3,500.

Held, further (by *Latham* C.J. and *Fullagar* J.), that, on its proper construction, clause 10 of the tenancy agreement did not apply to the case of a sale to the tenant himself.

Per Latham C.J. and *Fullagar* J.: The liability created by reg. 6AB (1) is a personal liability, and, accordingly, a plea of *plene administravit* by an executor or administrator is no defence to a claim under reg. 6AB.

Decision of the Supreme Court of South Australia (*Mayo* J.) varied.

APPEAL from the Supreme Court of South Australia.

In 1924, Arthur Nathaniel Packer became tenant of land at Mooringa Avenue, Plympton, of which John Charles Babidge was the owner. The tenancy agreement also gave the tenant an option to purchase the land.

This option was exercised and £600 was paid on account of the purchase money. Packer was unable to complete the sale, which went off, but Babidge orally promised Packer that, if he later sold the land, he would pay Packer £500. In 1928 Babidge transferred the land to his wife, Ellen E. Babidge, who died in 1937.

On 25th August 1937 the executors of her will, Richard Foord Babidge and Jack Hansford Babidge, entered into a further tenancy agreement with Packer for a term of five years. This agreement contained a provision that, in the event of a sale of the land, the Babidges would pay to Packer out of the proceeds of the sale the sum of £500 "as compensation for improvements to the said property effected by the Tenant".

On 21st September 1942 the tenancy agreement was extended for five years on the same terms, except that, in respect of the payments of £500, a new clause (set out in full in the judgment of *Latham* C.J. (1)) was substituted for the clause relating to the matter in the 1937 agreements. (The new clause accurately stated the reason for the payment.)

(1) *see* pp. 607, 608 *post*.

On 30th June 1947 a contract was signed for the sale of the land by the Babidges to Packer for the price of £3,500. A recital in the contract referred to the provision in the tenancy agreement, and the extension thereof, that a payment should be made to Packer in the event of a sale of the land, and clause 12 of the contract provided that, on completion of the sale and purchase, "all the rights and liabilities of the Vendors and the Purchaser under the said tenancy agreement and extension thereof shall merge and that no moneys shall be payable or allowable by the Vendors to the Purchaser by reason of this sale having been effected . . . "

Application was made, pursuant to reg. 6 (1) of the *National Security* (*Economic Organization*) *Regulations*, for the consent of the delegate of the Commonwealth Treasurer, and a copy of the contract was submitted to him. He gave his consent to the transaction "subject to a maximum selling price of £3,500 (including Agent's Commission, if any)". The purchase price of £3,500 was duly paid, and the land was transferred to Packer.

Packer then sued in the Local Court of Adelaide for payment to him by the Babidges of the sum of £500 as excess consideration within the meaning of reg. 6AB of the *National Security* (*Economic Organization*) *Regulations*. It was held that the existence of excess consideration had been established, but that the Babidges, being executors, were entitled to rely on the plea of *plene administravit* and, in the circumstances of the case, were protected by it.

On appeal to the Supreme Court of South Australia, *Mayo* J. held that, having regard only to the terms of the documents, the provision for payment of the £500 should not be applied to the case of a sale to the tenant himself, but that, as the parties had treated the provision as applying to such a sale, they should be dealt with upon the basis which they had themselves adopted. Upon that basis the £500 was recoverable. Nevertheless, his Honour applied sub-reg. (2) of reg. 6AB (which gives the Court a discretion), refused to give judgment in favour of Packer, and dismissed the appeal.

From this decision Packer appealed to the High Court.

F. G. Hicks (with him *R. Homburg*), for the appellant. At the time of the application for the consent of the delegate, the full facts as to the consideration were deliberately suppressed. The terms of the tenancy agreements were not disclosed to him. There is no ground on which the discretion under reg. 6AB (2) can fairly be exercised against the appellant.

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A. K. Sangster, for the respondents. The discretion was properly exercised against the appellant. He was aware of the matters now complained of in time to withdraw from the transaction. The sale contemplated by the tenancy agreements was a sale to third parties. *Mayo* J. was not justified in saying that the parties adopted the basis that the agreements applied also to a sale to the tenant. They may have acted as they did through caution or on a mistaken view of the legal position. Accordingly, reg. 6AB is not applicable. In any case the delegate consented to the whole transaction actually entered into.

F. G. Hicks, in reply.

Cur. adv. vult.

Nov. 22.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from the Supreme Court of South Australia (*Mayo* J.) dismissing an appeal from a special magistrate upon a proceeding by A. N. Packer to recover what was alleged to be excess consideration received by the vendor upon a sale of land by the respondents R. F. Babidge and J. H. Babidge to Packer. The defendants were the executors of their mother, Mrs. Ellen E. Packer. The delegate of the Treasurer of the Commonwealth had consented to the sale of the land at a price of £3,500. The terms of the contract of sale, which had been produced to the Treasurer, provided that the purchaser should release the vendor from an obligation to make a payment to him in accordance with a term of the tenancy agreement between the defendants as landlords and the plaintiff as tenant. Under the tenancy agreement the defendants were bound to pay to Packer £500 if the land were sold. There is a controversy as to whether this provision applied in the case of a sale to the tenant himself.

The tenant Babidge sued under *National Security* (*Economic Organization*) *Regulations*, S.R. 1946, No. 192, reg. 6AB, for £500, described as excess consideration received by the vendors. Regulation 6 (1) of the *National Security* (*Economic Organization*) *Regulations* provides that, except as provided by Part III. of the regulations, a person shall not, without the consent in writing of the Treasurer of the Commonwealth, *inter alia*, purchase any land. Regulation 6AB is in the following terms :—

" (1) Where, after the commencement of this regulation, consent has been given under regulation 6 of these Regulations to any transaction or proposed transaction, and the person from whom the land, option or lease is to be or has been purchased, taken or

otherwise acquired accepts or has accepted in respect of the transaction or proposed transaction any consideration in excess of the consideration provided for in the terms of the transaction or proposed transaction as so consented to, the person who has paid or given the excess consideration may, notwithstanding that he is or may be concerned in a contravention of these Regulations in relation to the transaction, but subject to the next succeeding sub-regulation, recover the amount or value of the excess consideration as a debt from the person to whom it was so paid or given by action in any court of competent jurisdiction.

(2) The court in which any such action is brought may, if, in its discretion, it considers that the circumstances of the case so warrant, refuse to give judgment for the plaintiff, or give judgment for the plaintiff in respect of part only of the amount or value of the excess consideration."

The facts proved before the learned special magistrate were that Packer was in 1924 a tenant of the land in relation to which the controversy now arises, the land then being owned by J. C. Babidge, the father of the defendants. On 28th January 1924 Packer entered into a contract to buy the land from J. C. Babidge and paid £600 on account of the purchase money. He was unable to complete the sale, which went off. But J. C. Babidge verbally promised to him that if he sold the land he would pay Packer £500. The extra £100 disappeared from the vision of the parties and the obligation was always stated as an obligation to pay £500 upon a sale of the land. It is unnecessary to examine the evidence as to the conversation between the parties in 1924 because express provisions relating to this matter were subsequently embodied in tenancy agreements.

J. C. Babidge transferred the land to his wife Ellen E. Babidge in 1928. Mrs. Babidge died in 1937 and her two sons, the defendants in these proceedings, obtained probate as executors of her will. They were willing and concerned to carry out the agreement which their father had made with Packer. A tenancy agreement for five years was made on 25th August 1937 between the defendants and Packer. This agreement contained the following provision in clause 9 :—

"That if the Landlords sell or agree to sell the said premises or any part thereof they may determine this agreement by giving to the Tenant one calendar month's written notice of their desire so to do."

Clause 10 of the agreement was as follows :—

"If and when any such sale by the Landlords is effected the Landlords will pay to the Tenant out of the net proceeds thereof

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the sum of Five hundred pounds (£500) as compensation for improvements to the said property effected by the Tenant."

The description of the £500 as compensation for improvements was inaccurate. On 21st September 1942 the tenancy agreement was extended for five years on the same terms as were contained in the agreement of 1937, except that the following was substituted for clause 10 of the agreement :—

" 10. Whereas the Tenant many years ago agreed to purchase the said premises and paid the sum of Five hundred pounds (£500) on account of the price thereof and subsequently the said Agreement for Purchase was cancelled on condition that the said sum of Five hundred pounds (£500) should be refunded to the tenant if and when the said premises were sold the Landlords hereby agree that if and when such sale is effected they will pay to the Tenant out of the net proceeds thereof the said sum of Five hundred pounds (£500)."

Packer continued to occupy the land as tenant until 1947, when he was informed that the defendants had an offer from another person to purchase the land for £4,000. If the defendants had accepted this offer they would have been bound to pay to Packer £500 out of the £4,000. Therefore an offer of £3,500 from Packer was as good, from the point of view of the defendants, as an offer of £4,000 from the other person if upon a sale to Packer they did not have to pay to him the £500 mentioned in the tenancy agreement. Packer offered £3,500 and agreed to release the defendants from the obligation to pay him £500. A contract of sale between the defendants and the plaintiff was signed on 30th June 1947. The contract contained the following recital :—

" Whereas the Vendors are the landlords and the Purchaser the tenant named in a certain tenancy agreement dated the 25th day of August 1937 and in an extension thereof dated the 21st day of September 1942 relating to the property hereinafter referred to and whereas the said tenancy agreement and extension thereof provide for determination of the term by the landlords in the event of a sale of the property and for a payment by the landlords to the tenant in the event of a sale of the property and whereas the landlords have now agreed to sell and the tenant to purchase the property as hereinafter appears."

The purchase price was stated as £3,500 and it was provided that the purchaser should apply to the Commonwealth Treasurer for consent as required by the *National Security (Economic Organization) Regulations*. Clause 12 of the contract was as follows :—

" It is hereby expressly agreed and declared that on settlement day as aforesaid and on completion of the said sale and purchase

all the rights and liabilities of the Vendors and the Purchaser under the said tenancy agreement and extension thereof shall merge and that no moneys shall be payable or allowable by the Vendors to the Purchaser by reason of this sale having been effected. . . . "

An application for the consent of the delegate of the Treasurer was made after discussion between the parties. The plaintiff left it to the defendants' solicitors to put the application into proper form. A copy of the contract was forwarded to the delegate together with a valuation of the land as at 10th February 1942 at the sum of £3,527. The delegate gave his consent to the purchase by Packer from the defendants of the land " subject to a maximum selling price of £3,500 (including Agent's Commission, if any) ".

Packer then instituted proceedings for the payment of £500 by the defendants, relying upon reg. 6AB (1) of the *National Security (Economic Organization) Regulations*, which has already been quoted.

The learned special magistrate held that there was excess consideration within the meaning of the regulation but that the defendants were not personally liable because they had been carrying out their duty as executors. They had pleaded *plene administravit*. The onus was therefore on the plaintiff to prove assets (see *Halsbury's Laws of England*, 2nd ed., vol. 14, p. 436). Packer failed to prove assets and therefore judgment was given for the defendants. The basis of the judgment of the learned special magistrate therefore is not to be found in the application of reg. 6AB (2). The judgment was based upon the proposition that the plea of *plene administravit* protected the executors from liability for the debt created by the regulation. I do not agree with this interpretation of the regulation. In a case in which reg. 6AB (1) operates the consequence produced is that the amount or value of the excess consideration becomes a debt from the person to whom it was paid or given and is recoverable by action in any court of competent jurisdiction. This regulation deals with vendors and purchasers of land simply in their capacity as vendors and purchasers. If an executor or administrator or trustee sells land and takes what the regulation describes as excess consideration, the amount of that excess consideration simply becomes a debt owed by him. He has contravened the regulations by selling for a consideration in respect of which the necessary consent has not been given. In my opinion he is unable to protect himself from the consequences by relying upon his character as executor or administrator or trustee. In other words, the liability created by reg. 6AB (1) is in all cases a personal liability.

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Upon appeal *Mayo* J. held that upon a strict construction of the tenancy agreement clause 10 did not apply where the sale was to the tenant himself. He held, however, that the parties had treated the clause as applying to such a sale and therefore that they should be dealt with upon the basis which they had themselves adopted. Upon that basis a benefit exceeding £3,500, consisting in the release from the obligation to pay £500 out of the proceeds of sale, had been given by the purchaser to the vendor and the amount of £500 was therefore prima facie recoverable. His Honour, however, applied reg. 6AB (2) and refused to make an order in favour of the plaintiff on the grounds that the sum of £500 sought to be recovered was not an amount recently paid in cash by the purchaser and that full information as to the extra consideration had been given to the delegate of the Treasurer.

The first question which arises upon the appeal is whether clause 10 of the tenancy agreement made in 1942 is applicable in the case of a sale to the tenant or only in the case of a sale to some other person. If upon a sale to the tenant the clause did not apply so that upon such a sale there was no liability to pay £500 to the tenant, then the release of the liability to which that clause refers was a release of nothing and there was accordingly no excess consideration paid or received upon the sale and accordingly no right to recover under reg. 6AB (1).

In my opinion clause 10 does not apply in the case of a sale to the tenant. Clause 10 of the 1942 tenancy agreement refers to the prior agreement that a sum of £500 should be " refunded " to the tenant if and when the premises were sold. This provision contemplates an actual payment of money to the tenant. The clause provides that if and when a sale is effected the landlords will pay to the tenant out of the net proceeds thereof £500. This clause assumes the receipt of the proceeds of sale by the landlord and provides for the payment out of such proceeds of £500 to the tenant. In my opinion, as *Mayo* J. held on the proper construction of the words, the clause does not apply to a sale to the tenant himself. If this is the case, then, as already stated, there was no excess consideration upon the sale to the tenant.

But if a contrary view is taken of the effect of clause 10 of the tenancy agreement so that it is held that the vendors did receive the benefit of a release of the obligation to pay £500, it becomes necessary to inquire whether that release, which, upon the view suggested, was certainly valuable consideration, constituted excess consideration within the meaning of reg. 6AB.

The regulation deals with cases where consent has been given under reg. 6 to any transaction or proposed transaction. It provides for the recovery of excess consideration where the vendor has accepted " in respect of the transaction or proposed transaction any excess of the consideration provided for in the terms of the transaction or proposed transaction as so consented to ". In the present case the delegate of the Treasurer consented to the transaction of sale actually proposed by the parties. He was given a copy of the contract of sale. That contract most plainly provided that the consideration was to be £3,500 paid in money and the release from an obligation to make a further payment to the purchaser. The delegate consented not merely to the amount of £3,500 as purchase money but to the transaction and to the terms of the transaction of which the payment of that amount of £3,500 was only a part. The essential thing for the delegate to consider was the amount of consideration which was proposed to be paid. It is quite obvious in the present case that the consideration was not merely £3,500, but £3,500 plus what was specifically described as a release from a liability. It was that transaction to which the delegate gave his consent. Accordingly no consideration in excess of the consideration provided for in the terms of the proposed transaction was paid or received. Thus, even upon the view that the release was a release from a real liability, there was no excess consideration within the meaning of reg. 6AB and therefore it was rightly held that the plaintiff's claim should fail. The appeal should therefore be dismissed.

FULLAGAR J. I agree that this appeal should be dismissed with costs.

It is clear, I think, that the Local Court was wrong in giving effect to the plea of *plene administravit*. The defendants were not sued as executors, and, if they were liable at all, they were liable personally. The plea did not disclose a defence: it was plainly demurrable.

The appeal to the Supreme Court was dismissed by *Mayo* J. in the exercise of the discretion given to the court by reg. 6AB (2). If I had thought that the matter ever reached the stage at which the discretion became exercisable, I think it unlikely that I should have been prepared to say that *Mayo* J. wrongly exercised his discretion. But the plaintiff, in my opinion, failed to establish any cause of action, and no exercise of discretion became necessary.

The answer to the plaintiff's claim seems to me to be that clause 10 of the agreement of 25th August 1937, as amended by the agree-

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ment of 21st September 1942, did not, as a matter of construction, cover the case of a sale to the plaintiff himself. The amended clause 10 is still to be read as following the original clause 9, and, when it is so read, it seems to me to be clear, if it were not otherwise clear, that a sale to the plaintiff was not in the contemplation of the parties and cannot be brought within the terms of their contract. It was no doubt a sensible precaution to insert in the contract of sale a provision for the discharge of any obligation created by clause 10. But the position was simply that clause 10 automatically ceased to operate when the contract of sale to the plaintiff was executed. It may well be that the parties thought otherwise, and thought that they were or might be entering into a contract of sale under which the true consideration was not £3,500 but £3,500 plus the release of an obligation to pay £500. If they so thought, they were, in my opinion, wrong, and the consequences of what they did must depend not on whether they thought that they were contravening the regulations but on whether they were in fact and in law contravening them.

It is quite true that, by selling the land to the plaintiff for £3,500, the defendant received the same net sum as he would have received if he had sold the land to anybody else for £4,000. But this was only because selling the land to the plaintiff did not involve him in an obligation to pay away £500 out of the proceeds of sale, whereas selling the land to anybody else would have involved him in such an obligation. This circumstance could not alter or affect the position that the true consideration for the sale to the defendant was £3,500, and reg. 6AB has no application to the case.

KITTO J. The events out of which this litigation arises occurred while regs. 6 and 6AB of the *National Security* (*Economic Organization*) *Regulations* were in force by virtue of the *Defence* (*Transitional Provisions*) *Act* 1946. Regulation 6, so far as material, provided that a person should not, without the consent in writing of the Treasurer, purchase any land. Regulation 6AB provided as follows :—" (1) Where, after the commencement of this regulation, consent has been given under regulation 6 of these Regulations to any transaction or proposed transaction, and the person from whom the land, option or lease is to be or has been purchased, taken or otherwise acquired accepts or has accepted in respect of the transaction or proposed transaction any consideration in excess of the consideration provided for in the terms of the transaction or proposed transaction as so consented to, the person who has paid

or given the excess consideration may, notwithstanding that he is or may be concerned in a contravention of these Regulations in relation to the transaction, but subject to the next succeeding sub-regulation, recover the amount or value of the excess consideration as a debt from the person to whom it was so paid or given by action in any court of competent jurisdiction.

(2) The court in which any such action is brought may, if, in its discretion, it considers that the circumstances of the case so warrant, refuse to give judgment for the plaintiff, or give judgment for the plaintiff in respect of part only of the amount or value of the excess consideration."

On 30th June 1947 a contract in writing was made by the respondents (therein called the vendors) and the appellant (therein called the purchaser) whereby the vendors agreed to sell to the purchaser and he agreed to purchase from them the land comprised in a certain certificate of title for the price of £3,500. The purchaser was to apply forthwith at his own cost to the Commonwealth Treasurer for consent as required by the *National Security (Economic Organization) Regulations*. The agreement recited, *inter alia*, that the vendors were the landlords and the purchaser the tenant named in a certain tenancy agreement and in an extension thereof relating to the property sold, and that the tenancy agreement and extension thereof provided for the determination of the term by the landlords in the event of a sale of the property and for a payment by the landlords to the tenant in that event.

By clause 12 of the agreement it was provided that on settlement day (which clause 4 provided should be 30th June or fourteen days from the date of the Treasurer's consent, whichever should be the later) and on completion of the sale and purchase, all the rights and liabilities of the vendors and the purchaser under the tenancy agreement and extension thereof should merge, and that no moneys should be payable or allowable by the vendors to the purchaser by reason of the sale having been effected.

The tenancy agreement as amended by an extension agreement contained a clause (clause 10), which recited that the tenant many years before had agreed to purchase the property and had paid £500 on account of the price thereof, and that subsequently the agreement for purchase had been cancelled on condition that the £500 should be refunded to the tenant if and when the property should be sold; and the landlords agreed that if and when such sale should be effected they would pay the £500 to the tenant out of the net proceeds thereof.

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The appellant applied for the Treasurer's consent to the purchase. His application stated that the total purchase price was £3,500, and to the question : " Has any contract or transaction dependent on or in any way contingent upon the approval of this transaction been entered into ? " the reply was made : " Copy contract for sale and purchase herewith." The application was in fact accompanied by a copy of the contract. The application was also accompanied by a statement by the vendors which set out that " the sale price and terms " were " £3,500 cash, existing tenancy to purchaser to merge in the purchase ", and that the full selling price of the land was £3,500. With the application there was submitted a valuation of the property by a Mr. Shuttleworth of the firm of Shuttleworth & Letchford, in which the valuer stated his opinion that the property would realize £3,527 if offered for sale on 10th February 1942 (the date as at which the regulations required the valuation to be made), and that this was a fair and reasonable value as at that date. The Treasurer was given no information as to the terms of the tenancy agreement and the extension thereof, or as to the amount which according to those terms was to be paid by the landlords to the tenant in the event of a sale.

On 3rd July 1947 the delegate of the Treasurer gave his consent in writing to " the purchase " of the property by the appellant from the respondents, " subject to a maximum selling price of three thousand five hundred pounds (£3,500) (including agent's commission if any) ".

The purchase was completed in accordance with the contract, and the appellant then sued the respondents in the Local Court of Adelaide to recover £500 under reg. 6AB, his case being that clause 12 of the contract operated on completion of the purchase to release the respondents from a liability to make the payment referred to in the recitals, that the release was a consideration in excess of the consideration provided for in the terms of the transaction as consented to by the delegate of the Treasurer, and that the value of the excess consideration was £500.

Judge *Ronald* in the Local Court, and *Mayo* J. on appeal, refused the appellant the relief he sought. In the view I take of the case it is unnecessary to examine the reasons given by their Honours for their respective decisions.

In order to succeed, the appellant had to establish that the Treasurer's consent was given under reg. 6 to a specific actual or proposed transaction of purchase, and that the respondents accepted

in respect of that transaction a consideration in excess of the consideration provided for in the terms of the transaction as so consented to. The only transaction of purchase which the parties ever entered into or proposed to enter into was that provided for by the contract of 30th June 1947. It was to that transaction and no other that consent was sought, and in my opinion the consent given cannot be construed as a consent to any other than that transaction. The inclusion in the consent of the words " subject to a maximum selling price of three thousand five hundred pounds (£3,500) (including agent's commission if any) " had no effect, in my opinion, except to point out to the parties that neither by a payment of agent's commission by the purchaser nor otherwise were they at liberty to increase the amount to be paid by the purchaser beyond the £3,500 which was the selling price under the contract.

It was contended for the respondents that on its true construction clause 10 of the tenancy agreement as altered by the extension agreement did not entitle the appellant to be paid £500 in the event of the property being sold to himself, and that therefore the provision in clause 12 of the contract of sale that no moneys should be payable or allowable to the appellant by reason of the sale having been effected did not operate to give the respondents any benefit which could be regarded as consideration in excess of the purchase price of £3,500. I shall assume in favour of the appellant that this contention is not well founded.

The court was invited by counsel for the appellant to hold that as the only valuation submitted to the delegate of the Treasurer was a valuation of £3,527, and as the terms of the tenancy agreement and extension thereof were not disclosed to him and the recital in the contract of sale was by itself insufficient to acquaint him with the real nature and extent of the obligation in respect of which clause 12 thereof was to operate, he should not be taken to have consented to the release which the clause produced. But if he did not consent to that release he did not consent to any actual or proposed transaction at all, for there was no such transaction other than that provided for by the contract which included clause 12. In my opinion the whole transaction, including the release, was consented to, and if that be so it follows that no consideration in excess of that provided for by the terms of the transaction as consented to was accepted by the respondents ; but if this view of the matter be not correct, the alternative is that no valid consent was given to any transaction, and reg. 6AB cannot

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be invoked as conferring any right of action upon the appellant. On either view the appellant must fail.

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *F. G. Hicks.*

Solicitors for the respondents, *Moulden & Sons.*

B. H.