[HIGH COURT OF AUSTRALIA.]

PETERSEN . . . . . APPELLANT;
PLAINTIFF,

AND

MOLONEY AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Sept.* 6, 7;

MELBOURNE, *Oct.* 16.

Dixon, Fullagar and Kitto JJ.

Principal and agent—Estate agent—Agent for vendor—Authority to receive purchase money—Whether implied—Burden of proving express authority—Whether evidence of authority or ratification—Acknowledgment of receipt of purchase money—Whether estoppel created—Judgment against one of two defendants—Whether amounting to election for purpose of appeal.

An estate agent, as such, was instructed by the vendor "to find a purchaser" for her house. The agent found a purchaser and received from him the whole of the purchase price. A contract of sale was executed and subsequently a transfer of the land in the form prescribed by the *Transfer of Land Act* 1893-1950 (W.A.) was signed and registered. To the vendor's action against the purchaser for recovery of the purchase price the purchaser pleaded that he had paid the estate agent who was the vendor's agent with authority to receive the purchase money. The estate agent was thereupon joined as a defendant and as against him the vendor (in the alternative) claimed the purchase price as money received by him for her use.

Held (1) that there was no evidence to support a finding that the agent had authority to receive the purchase money nor was there evidence of any ratification by the vendor; (2) that the acknowledgment in the transfer although evidence against the vendor did not create an estoppel; and (3) that the judgment obtained by the vendor in the court below as against the agent did not for the purpose of an appeal amount to an election to treat the agent as liable to the exclusion of the purchaser.

Morel Bros. & Co. Ltd. v. *Earl of Westmoreland*, (1903) 1 K.B. 64; (1904) A.C. 11; *Moore* v. *Flanagan*, (1920) 1 K.B. 919, distinguished.

Decision of the Supreme Court of Western Australia (*Walker* J.) reversed.

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APPEAL from the Supreme Court of Western Australia.

On 15th March 1949 the appellant with two other persons entered into a contract to purchase a furnished house and a vacant piece of land from one Tucker. In this transaction the respondent Pulbrook was acting as the vendor's agent. Settlement was effected on 5th May 1949, on which date the transfers were registered as were mortgages securing the purchase price, which was advanced to the purchasers by third parties. The purchase price was paid to the agent Pulbrook and he accounted for it to his principal Tucker. The appellant having entered into the contract of sale with Tucker, wished to sell the house which she was at that date occupying and she handed to Pulbrook the duplicate certificate of title and instructed him to find a purchaser. Pulbrook introduced the respondent Moloney and received from him the whole of the purchase money. A contract of sale was then signed by both parties, that is to say, by the appellant and by the respondent Moloney. The transfer of this property was dated 2nd May 1949 and was registered on 4th May 1949. The transfer was in the form prescribed by the *Transfer of Land Act* 1893-1950 (W.A.) and contained the words " in consideration of the sum of £500 paid to me ". Possession was given and taken on 8th May. On 1st June the appellant's solicitors wrote letters of demand to both the agent and to Moloney pointing out that the purchase money had not been paid over and threatened action against Moloney. The money was not forthcoming and the writ was issued as against Moloney only on 3rd June 1949. In answer to the appellant's claim for the purchase money, Moloney contended that he had paid it to Pulbrook, who he alleged was the appellant's agent and with authority to give a good receipt on her behalf. On 5th July 1949 an order was obtained joining Pulbrook as a defendant and as against him the appellant claimed in the alternative on the basis of money had and received. The respondent Pulbrook admitted receipt but claimed that he had paid the money to Tucker as part of the purchase money owing to her by the appellant and that he had made the payment on the appellant's instructions.

The trial judge held that Pulbrook had been authorized by the appellant to receive the purchase price on her behalf but that he had not accounted to her for it either by paying it to Tucker or in any other way and on these findings he entered judgment for the appellant as against Pulbrook and dismissed her claim as against Moloney. From this decision the appellant appealed to the High Court and by her notice of appeal asked that the whole

of the judgment be set aside and that in lieu thereof judgment be entered against Moloney.

L. D. Seaton K.C. (with him *R. A. Wallace*), for the appellant. An agent for the sale of land has no authority to receive any part of the purchase money: *Mynn* v. *Joliffe* (1). If the purchaser pays the purchase price to an agent before the due date then to that extent he makes the agent his agent and he makes the payment at his own risk: *Parnther* v. *Gaitskell* (2); *Cotman* v. *Orton* (3).

C. R. Hopkins, for the respondent Moloney. The appellant's action in handing to Pulbrook the duplicate certificate of title estops her from denying Pulbrook's authority to receive the purchase price: *Brocklesby* v. *Temperance Permanent Building Society* (4). It matters not that the agent was acting in fraud of his principal: *Hambro* v. *Burnand* (5). Pulbrook purported to have received the purchase money as agent for the appellant. This fact and the fact that he had received such money were both known to the appellant and such receipt the appellant ratified and adopted.

The respondent Pulbrook was not represented on the appeal.

L. D. Seaton K.C., in reply. Ratification and estoppel were not pleaded and were not raised in the court below and these issues cannot be raised on appeal. Had the issue of ratification been open to the respondent, the facts are equivocal and the onus is upon the purchaser to prove the agent's authority to receive the money.

Cur. adv. vult.

Oct. 16.

The Court delivered the following written judgment:—

This is an appeal from a judgment of *Walker* J. in an action in which the plaintiff-appellant sued the two respondent-defendants in the alternative. The plaintiff sold and transferred to the defendant Moloney a house and certain furniture and other chattels for a total price of £700. The defendant Pulbrook acted as agent in the transaction, and Moloney paid to Pulbrook the full price of £700. Pulbrook did not pay any part of that sum to the plaintiff. The plaintiff accordingly sued Moloney for the price of the property sold and transferred, and in the alternative claimed as against

(1) (1834) 1 M. & Rob. 326 [174 E.R. 112].
(2) (1811) 13 East 432 [104 E.R. 439].
(3) (1840) 10 L.J. Ch. 18.
(4) (1895) A.C. 173.
(5) (1904) 2 K.B. 10.

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Pulbrook for money received by him on her account. Pulbrook is now a bankrupt and (as we were informed by counsel) undergoing a term of imprisonment for forgery. *Walker* J. gave judgment for the plaintiff as against Pulbrook, and for Moloney as against the plaintiff. The plaintiff appeals, claiming that she is entitled to judgment against Moloney.

The case is one of an unfortunately familiar type, in which (prima facie at least) one of two parties must, of necessity, suffer hardship. It is necessary to consider the evidence in some detail, but it is desirable to begin by looking at the pleadings.

The defence of the defendant Moloney was, in substance, a plea of payment. It alleged that he purchased the plaintiff's house and its contents through a duly authorized agent of the plaintiff, namely Pulbrook. And it alleged that on 28th March 1949 he paid the sum claimed to Pulbrook as the agent of the plaintiff and for and on account of the plaintiff. The plaintiff required particulars of the alleged authority of Pulbrook to receive the money, and the particulars given stated that the authority was given orally and was an authority to sell the plaintiff's house and contents for the sum of £700 and to apply the sum of £700 towards the purchase by the plaintiff of another property at Bayswater from a Mrs. Tucker, for whom also Pulbrook acted as agent. The defence of Pulbrook admitted that he received the sum of £700 from Moloney as agent for the plaintiff, and alleged that he had, with the authority and at the direction of the plaintiff, paid that sum to Mrs. Tucker. Particulars of authority to receive the money were given in terms identical with those given by Moloney. The plaintiff, in her reply to each defence, joined issue on the allegations contained in it.

In connection with sales and purchases of property the word " agent " is apt to be used in a misleading way. The legal conception of agency is expressed in the maxim " *Qui facit per alium facit per se* ", and an " agent " is a person who is able, by virtue of authority conferred upon him, to create or affect legal rights and duties as between another person, who is called his principal, and third parties. When a person is employed to find a buyer of property, he is commonly said to be employed as an agent, and the term " estate agent " is a common description of a class of persons whose business is to find buyers for owners who wish to sell property. But the mere employment of such a person under the designation of agent does not, apart from the general rule that the employer will be responsible for misrepresentations made by him, necessarily create any authority to do anything which will affect the legal

position of his employer. He may, of course, be given any express authority which the employer thinks fit to give him, and estoppels may arise, but the law does not imply from the mere fact of employment to find a purchaser a general authority to do on behalf of the employer anything which may be incidental to the effecting of a sale. In the present case it is clear that the plaintiff employed Pulbrook to find a purchaser for her house and its contents. But it must, we think, be regarded as settled law that an agent employed to find a purchaser has no implied authority to receive the purchase money in the sense that a receipt by him is a receipt by his principal and will therefore discharge the purchaser: see *Mynn* v. *Joliffe* (1); *Drakeford* v. *Piercy* (2); *Egan* v. *Ross* (3) (per *Harvey* C.J. in Eq.) and *Butwick* v. *Grant* (4), in which *Horridge* J. considers certain dicta which might have been regarded as supporting the contrary view. On the other hand, the act of the agent in receiving the purchase money may, if he has purported to receive it on behalf of the vendor, though without authority, be subsequently ratified by the vendor. Here it is to be observed that the pleadings raise only the issue of actual authority in Pulbrook to receive the money on behalf of the plaintiff. There is no plea of ratification, or of anything said or done subsequent to payment which could have the effect of substituting Pulbrook for Moloney as the person liable to the plaintiff, and there is no plea of estoppel. It is also to be observed that the prior authority pleaded is not in terms an authority to receive money but an authority to sell property and apply the proceeds in a particular way. Such an authority obviously involves or implies an authority to receive the proceeds, but the actual terms of the authority pleaded are not without importance.

If we put on one side for the moment a conflict of evidence as to certain matters which were put as bearing on Pulbrook's authority, we find that, although the witnesses were not agreed on many matters of detail, the nature and course of the two transactions relevant to this case emerge fairly clearly. The documentary evidence is, of course, of great importance.

In March 1949 the plaintiff was the owner of a house in Brisbane Terrace, Perth, and of its contents. She lived in the house with her son-in-law and daughter, Mr. and Mrs. Menner. She was an elderly woman, and it seems to have been common ground throughout that Menner had the fullest authority to act on her behalf

(1) (1834) 1 M. & Rob. 326 [174 E.R. 112].
(2) (1866) 7 B. & S. 515; 14 L.T. 403.
(3) (1928) 29 S.R. (N.S.W.) 382, at p. 388; 46 W.N. 90, at p. 93.
(4) (1924) 2 K.B. 483, at pp. 487, 488.

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both in the transaction with Mrs. Tucker and in the transaction with the defendant Moloney. The house was found too small for the household, and on 15th March 1949 the plaintiff and Mr. and Mrs. Menner entered into a contract to buy from Mrs. Tucker a larger house at Bayswater. In this transaction Pulbrook acted as agent for Mrs. Tucker, and it was this transaction that first brought the plaintiff and the Menners into contact with Pulbrook. It will tend to clarity if we follow this transaction through to its completion before approaching the transaction with Moloney, which developed, so to speak, alongside it.

The price stated in the contract of 15th March was £900, but the Controller of Land Sales under the *Land Sales Control Act* 1948 (W.A.) would not approve of a sale at a higher price than £800. The necessary alterations in the contract were thereupon made and initialled by all the parties, and the controller appears finally to have approved of the sale at £800 on 7th April 1949. In the meantime arrangements appear to have been made (without any contract in writing) for the purchase by the plaintiff and the Menners of Mrs. Tucker's furniture in her house at Bayswater for the sum of £250, and of a vacant block of land adjoining Mrs. Tucker's house from the Girl Guides' Association for the sum of £50. The three transactions thus required that the plaintiff and the Menners should find a total sum of £1,100. They were able to borrow through the agency of a company named Snowden and Willson Pty. Ltd. a sum of £1,200, which, after allowing for commission and expenses, would leave them with a small sum over and above what they were required to pay to Mrs. Tucker. This was to be secured by a first mortgage for £900 over Mrs. Tucker's land, the Girl Guides' land and a block of land owned by Mr. Menner, a second mortgage over Mrs. Tucker's land and the Girl Guides' land, and bills of sale over the chattels bought from Mrs. Tucker. Transfers, mortgages and bills of sale were duly executed, and all were registered on 5th May 1949. On 28th April the plaintiff and the Menners had given written authority to Snowden & Willson to pay the sum of £1,100 to Mrs. Tucker's solicitors, and Mrs. Tucker had given written authority to her solicitors to pay the sum of £1,100 "being the total amount due by you to me" to Pulbrook. The money was accordingly paid to Pulbrook. On 6th May Pulbrook cashed a cheque for £1,500 and paid to Mrs. Tucker a sum of money which apparently satisfied her that she had received the total amount to which she was entitled. It may be mentioned here that it would appear that Mrs. Tucker and her husband had, immediately

after the sale of her property, gone to live in another State and that it was because of their intention so to do that Mrs. Tucker wished to sell. It would, therefore, be unsafe to draw any inference from the fact that Mrs. Tucker was not called as a witness at the trial.

The plaintiff, having, in conjunction with the Menners, purchased the house at Bayswater with its contents, wished to sell the house in Brisbane Terrace and its contents, and she employed Pulbrook to find a purchaser. The house and contents were advertised by Pulbrook at £900, but it would appear that a valuation had been obtained and that the plaintiff was willing to sell for £700, £500 for the house and £200 for the contents. On the morning of Saturday, 26th March 1949, the defendant Moloney, in response to the advertisement, called on Pulbrook, who sent him out to the house. Having inspected it, Moloney immediately said that he would buy. He seems to have been very anxious to get the property, and he returned to Pulbrook's office and paid to Pulbrook the sum of £500, £50 in cash and £450 by cheque. The cheque was paid by Pulbrook into his account at the Union Bank on the Saturday morning. On Monday, 28th March, Moloney paid to Pulbrook the further sum of £200, and later on the same day a contract for the sale of the house for £500 was signed by both parties. The plaintiff and the Menners naturally did not wish to give possession to Moloney until they had got possession of the Bayswater house, and there was some delay, which is sufficiently explained by the necessity of making the financial arrangements referred to above. A transfer of the Brisbane Terrace property to Moloney was executed, which bears date 2nd May 1949 but was probably executed considerably earlier. This instrument was registered by Pulbrook on 4th May 1949. It was in the statutory form, and contained the words " in consideration of the sum of £500 paid to me ". Possession was given and taken of the Brisbane Terrace property and of the Bayswater property on 8th May.

Towards the end of May, nothing having been received by the plaintiff in respect of her property, Menner, having endeavoured without success to communicate with Pulbrook by telephone, consulted his solicitor, Mr. Kott. Mr. Kott wrote letters of demand both to Moloney and to Pulbrook. Both letters indicate a knowledge or belief at that stage that Pulbrook had actually received the money from Moloney, but this knowledge or belief may have been derived only from a telephone conversation between Mr. Kott and Pulbrook, which is referred to in the letter to Pulbrook. Both letters, read as a whole, purport to treat

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Pulbrook as Moloney's agent, and the letter to Pulbrook threatens action not against him but only against Moloney. The action was originally commenced against Moloney only, Pulbrook being later added, pursuant to leave given in chambers, as an alternative defendant.

The only record which we have of his Honour's reasons for judgment is in the following terms:—"As to claim against Moloney: Evidence sufficient to justify a finding that Pulbrook did have authority to receive purchase money from Moloney, and therefore Plaintiff's claim against Moloney fails. As to claim against Pulbrook: Pulbrook has not established to satisfaction of Court that he had authority from Plaintiff to use £700 received from Moloney towards payment of purchase money payable in purchase of the Bayswater property from Mrs. Tucker, and Pulbrook has failed to account sufficiently to the Plaintiff in relation to £700 received by Pulbrook from Moloney. Therefore, Plaintiff's claim against Pulbrook succeeds".

Now the plaintiff and Menner firmly denied throughout that any authority to receive any part of the purchase money for the Brisbane Terrace property had ever been given to Pulbrook. The burden of proving that such authority had been given was upon Moloney, and there was, strictly speaking, no evidence whatever that Pulbrook had, at the time when he received the money from Moloney, authority to receive it on behalf of the plaintiff. It is true that Pulbrook said:—"There was a verbal authority from the plaintiff to me to apply the £700 for the Brisbane Terrace deal towards settlement of the Tucker deal". But this was said in cross-examination, and Pulbrook had already in examination-in-chief said that he had been instructed to use the £700 "towards paying part of the purchase price of Tucker's property", but that this was *after* he had received the £700 from Moloney.

But in truth it does not matter whether we regard Pulbrook's evidence as amounting to evidence of prior authority or not. For there was *no other* evidence of any such authority, and the learned judge expressly said that he disbelieved this evidence given by Pulbrook. And, if this evidence was disbelieved, there was no evidence whatever to justify his Honour's finding "that Pulbrook did have authority to receive the purchase money from Moloney".

It should be explained that Pulbrook's story was, in effect, that the transaction with Mrs. Tucker was a "black market" transaction. The true consideration, according to him, for the sale of the Bayswater property was not £1,100 but £1,800. The

£700 for the sale of the plaintiff's property was, he said, required by the plaintiff and the Menners to provide the difference between the ostensible price and the real price payable to Mrs. Tucker. No authority to receive, or to deal with, the £700 was ever suggested by him apart from the direction to use it for this purpose. It should also be stated that there were the strongest reasons for disbelieving Pulbrook's evidence, and one would certainly think that his Honour's view of it was correct. The witness himself was open to the gravest suspicion. His story necessarily involved an allegation of grossly fraudulent conduct on the part of the plaintiff and the Menners. If it were true, it meant not merely that they had entered into a transaction which contravened the *Land Sales Control Act* and had conspired to deceive the controller, but that they were—or at least that Menner was—deliberately attempting to defraud Moloney or Pulbrook. For, if Pulbrook did with their authority pay the £700 by way of secret consideration to Mrs. Tucker, their claim against Pulbrook was dishonest, and it is difficult to imagine anything more dishonest than their claim against Moloney. If Pulbrook was authorized to pay, but did not pay, the £700 to Mrs. Tucker, they were simply making an attempt to rob Moloney of £700 either for the benefit of Mrs. Tucker or for their own benefit. No serious attack seems to have been made on the character of the plaintiff or of Menner, and it would have been surprising if the learned judge had been prepared to find them guilty of such conduct on the evidence of Pulbrook. Moreover (though this was not perhaps essential to his story) Pulbrook based his evidence on the supposition that the contract with Mrs. Tucker was not signed until after the Brisbane Terrace property had been sold. In fact, as we have seen, the contract with Mrs. Tucker was signed on 15th March and the contract with Moloney not until 28th March.

The view (which seems inescapable) that there was (if Pulbrook was disbelieved, and he was disbelieved) no evidence to support his Honour's finding that Pulbrook had authority to receive the purchase money is prima facie sufficient to dispose of this appeal in favour of the appellant. The only plea made by Moloney was that Pulbrook had authority to receive the money on behalf of the plaintiff. There was no evidence, apart from evidence which was (most probably, rightly) disbelieved, to support this plea. The judgment should, therefore, have been in favour of Pulbrook and against Moloney. Pulbrook would, of course, be liable to Moloney, but no third-party proceedings were instituted. All

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this seems clear enough, but there are two matters which have required a good deal of consideration.

The first arises out of certain evidence which might have been regarded as supporting the view that there had been a ratification by the plaintiff of the receipt by Pulbrook of the sum of £700. The evidence in question does not support the plea of prior authority to receive the money, and, as has already been observed, there was no plea of ratification. It is doubtless because ratification was neither pleaded nor argued before him that *Walker* J. made, so far as appears, no specific finding on this evidence. Some attention, however, was given to it before us. The evidence in question is to the effect that the plaintiff or Menner (whose knowledge would be the plaintiff's knowledge) knew at an early stage that Moloney had paid money to Pulbrook. Moloney said that on the afternoon of 26th March he revisited the house in Brisbane Terrace and told Menner that he "had paid the money to Pulbrook". He also said:—"I told them I had paid the purchase money to Pulbrook. They told me they knew I had." It does not appear who "they" were or when this alleged conversation took place. Moloney also said:—"I told Menner and the plaintiff that I was going to Pulbrook to fix up the deal". This would be on 26th March. He followed this with a statement as to what he meant and would be understood to mean, but this, of course, was not admissible evidence. Pulbrook said that on 26th March he told the plaintiff and Menner that Moloney was buying the property and had paid him £500 during the week. He said that they said:—"Yes, Moloney has been out and told us that he has paid a deposit on the place". All this evidence was denied by the plaintiff and by Menner.

The acknowledgment of payment in the transfer does not create an estoppel against the plaintiff (*Burchell* v. *Thomson* (1), per *Lush* J.), but it is evidence against her, though in the circumstances not strong evidence, and (whatever may be said of the evidence of Pulbrook) the evidence of Moloney is by no means inherently improbable. If it were found that the plaintiff executed the transfer with knowledge that Moloney had paid the full amount of the purchase price to Pulbrook, it is arguable that the proper inference would be that she had ratified the receipt of the money by Pulbrook. The fact that the learned trial judge has made no findings on these matters is doubtless due to the fact that this view of the case was neither pleaded nor presented to him at the trial. But the fact remains that he has made no such findings,

(1) (1920) 2 K.B. 80, at p. 86.

and it seems quite impossible for a court of appeal to say that the evidence of Moloney and Pulbrook should be accepted and then to hold that it established ratification. It might be enough to say that, in such a case as this, such issues ought not to be allowed to be raised for the first time in a court of appeal. If they had been raised at the proper time, further evidence might have been directed to them. But the evidence, as it stands, is, in our opinion, not really sufficient to establish ratification. Pulbrook received the purchase money before any contract was made, and he did not purport to receive it on behalf of the plaintiff: neither the receipt which he gave for the £500 nor that for £200, which he indorsed on the inventory, contains any reference to any person as his principal. Moreover, the relevant alleged words and acts of the plaintiff and Menner are not really unequivocal, and only unequivocal words or acts will suffice to establish ratification. The language of *Rich* J. in *Taylor* v. *Smith* (1) (a case in which a similar issue was raised) seems appropriate to this case. His Honour (2) said:—"After careful consideration of all the evidence and documents in the case, I cannot find that full knowledge . . . has been proved, or that the circumstances of the alleged ratification are such as to warrant the clear inference that Smith was adopting the act at all events and under all circumstances".

There is one passage in the evidence of Moloney, which might have been put as a "holding out" by Menner of Pulbrook as having authority to receive the sum of £200, which was paid on 28th March, so as to estop the plaintiff from denying Pulbrook's authority to receive that sum. Moloney said:—"When we checked up the inventory on Monday, the 28th March, I told Menner I would go in and pay Pulbrook the money for the furniture, and Menner said 'That will be all right'". This view was not put even before us, but it was suggested before us (though the point was not really argued) that the evidence already considered in connection with ratification would found a plea of estoppel in favour of Moloney. But there is no finding that conversations denied by Menner took place, and in this case such pleas could not be considered for the first time on appeal. It would seem, in any case, that a necessary element in the second estoppel would be that Moloney had been led by acts or words of the plaintiff or Menner to refrain from taking steps against Pulbrook which might have resulted in obtaining repayment from him. And again the evidence, as it stands, cannot be regarded as establishing this.

(1) (1926) 38 C.L.R. 48.

(2) (1926) 38 C.L.R., at p. 60.

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The truth of the whole matter seems to be that Moloney or his advisers chose to stand or fall by Pulbrook's story that he had been instructed to pay the £700 to Mrs. Tucker in order to make up a full price of £1,800. In two passages in his evidence Moloney endeavoured himself to support this story. He said that, when he first met Menner, Menner told him that Mrs. Tucker's property was costing them £1,800, and that they had "practically nothing, only the £700 we get on the sale of this place". He also said (this evidence appears to have been admitted without objection) that Mr. and Mrs. Tucker had told him that they were "not selling until they got the full £1,800". Now, the learned trial judge (with good reason, as we think) did not accept Pulbrook's story, and in fact it was not true that the plaintiff and the Menners had practically nothing except the £700, for Mrs. Menner owned a house, and Menner himself owned a block of land, which house and land were used by them to finance the transaction with Mrs. Tucker. These consideratons make it difficult to believe, in face of Menner's denial, Moloney's account of his conversation with Menner. This in turn must throw doubt on Moloney's evidence wherever it is in conflict with that of Menner, and this doubt serves to reinforce the view that matters which were not raised at the trial, and on which there are no specific findings, ought not (apart altogether from the state of the pleadings) to be considered for the first time on appeal.

The other matter which has required some consideration is this. The case is clearly one of alternative liability. Either Moloney or Pulbrook might be liable to the plaintiff, but both could not be. In such a case a final election to treat either as liable would preclude the plaintiff from proceeding against the other, and it is a well-settled general principle that, while the commencement of an action against one of two persons alternatively liable *does not*, the entry of judgment against one of them *does*, constitute a final and irrevocable election: see *Morel Bros. & Co. Ltd.* v. *Earl of Westmoreland* (1). In the present case the plaintiff (as she was clearly entitled to do) proceeded against both of the persons possibly liable, claiming alternatively as against each. After *Walker* J. had pronounced his decision she entered judgment against Pulbrook. Did this amount to a final election to treat Pulbrook as liable to the exclusion of Moloney? Apart from appeal, clearly it would amount to such an election. But the judgment was subject to appeal, and we do not think that the plaintiff can, by suing in the alternative and having judgment against

(1) (1903) 1 K.B. 64; (1904) A.C. 11.

one defendant, be precluded from maintaining on appeal that the judgment against that defendant should be discharged and that judgment should go against the other defendant. This is what the plaintiff seeks on this appeal, for her notice of appeal asks that *the whole* of the judgment of *Walker* J. should be set aside and that *in lieu thereof* the judgment should be against Moloney. She has never asked, or put herself in a position where she must be treated as asking, for a judgment against both defendants. Herein the case differs from *Morel Bros. & Co. Ltd.* v. *Earl of Westmoreland* (1) and from *Moore* v. *Flanagan* (2). In each of those cases the plaintiff had obtained judgment against one of two defendants, of whom one but not both might have been liable, and then, without setting aside or seeking to set aside that judgment, had sought judgment against the other. This offended against the rule stated by *Atkin* L.J. (as he then was) in *Moore* v. *Flanagan* (3) that " a plaintiff cannot sue an agent to judgment and then sue the principal ". The plaintiff in this case is not offending against that rule. It is to be noted that, although the rule is often stated in terms which would seem to make it depend on election, *Vaughan Williams* J. (as he then was) in *Hammond* v. *Schofield* (4) said :—" The basis of this defence is not the election or unconscious election, if there can be such a thing, of the plaintiff, but the right of the co-contractor when sued in a second action on the same contract to insist, though not a party to the first action, on the rule that there shall not be more than one judgment on one entire contract ". This passage is quoted by *Scrutton* L.J. in *Moore* v. *Flanagan* (5). *Moore* v. *Flanagan* (2) was not, and this case is not, a case of " co-contractors ", but the same rule is applicable, and it must rest on the same basis. There must not be more than one judgment where there is only one antecedent obligation. What *Vaughan Williams* J. said in *Hammond* v. *Schofield* (6) seems to be in accord with what Lord *Cairns* said in *Kendall* v. *Hamilton* (7). In *Buckingham* v. *Trotter* (8) *Darley* C.J., speaking for the Full Court, said :—" The principle to be deduced from the authorities is that, in the case of principal and agent, the election to sue one or the other is not concluded until after final judgment has been obtained against the one or the other, but, after obtaining this final judgment against the one, *so long as it remains of record*, no action is maintainable against the other, lest such second action

(1) (1903) 1 K.B. 64 ; (1904) A.C. 11.
(2) (1920) 1 K.B. 919.
(3) (1920) 1 K.B. 919, at p. 928.
(4) (1891) 1 Q.B. 453, at p. 457.
(5) (1920) 1 K.B. 919, at p. 925.
(6) (1891) 1 Q.B. 453.
(7) (1879) 4 A.C. 504, at pp. 514, 515.
(8) (1901) 1 S.R. (N.S.W.) 253, at p. 261 ; 18 W.N. 217.

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bring about the inconvenient results alluded to by Lord *Cairns* in *Kendall* v. *Hamilton* " (1). Here the plaintiff asks that judgment against the one shall no longer remain of record but that judgment against the other shall be substituted for it. There is no rule which prevents her from doing this.

The appeal should be allowed, and the whole of the judgment of *Walker* J. set aside. In lieu thereof it should be adjudged that the plaintiff do recover from the defendant Moloney the sum of £700, and that the plaintiff do recover nothing from the defendant Pulbrook. The defendant Moloney should pay the plaintiff's costs of this appeal, and her costs of the action. There should be no order as to the costs of the defendant Pulbrook either in the Supreme Court or in this Court.

Appeal allowed with costs. Wholly discharge judgment of Walker J. In lieu thereof adjudge that the plaintiff do recover from the defendant Thomas Francis Moloney the sum of £700 with costs and that the plaintiff do recover nothing from the second named defendant James Arthur Pulbrook. No order as to the costs of the respondent defendant Pulbrook in this Court or in the Supreme Court.

Solicitors for appellant: *Kott & Wallace.*
Solicitors for respondent Moloney: *C. R. Hopkins.*

F. T. P. B.

(1) (1879) 4 A.C. 504, at pp. 514, 515.