[HIGH COURT OF AUSTRALIA.]

BLOMLEY . . . . . APPELLANT;
PLAINTIFF,

AND

RYAN . . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1954-1956.

SYDNEY, 1954, *June* 8-11; *July* 26-29; *Aug.* 27; *Sept.* 1; *Oct.* 5, 8, 11; *Dec.* 17.

Taylor J.

1955, *Aug.* 30, 31; *Sept.* 1, 2, 5; *Nov.* 5, 9;

1956, *Mar.* 28.

McTiernan, Fullagar and Kitto JJ.

Equity—Contract for sale and purchase of grazing property—Suit for specific performance brought by purchaser—Vendor aged and affected by long bout of rum drinking—Claim to set aside contract—Unconscionable bargain—Constructive fraud—Circumstances in which courts of equity will grant relief.

Held, by *McTiernan* and *Fullagar* JJ., *Kitto* J. dissenting, that upon the evidence adduced before him in a suit for specific performance brought in the original jurisdiction of the Court by the purchaser under a contract for the sale and purchase of a grazing property *Taylor* J. was justified in refusing the relief sought and in ordering instead at the instance of the vendor that the said contract be set aside upon the ground that it was an unconscionable bargain such that a court of equity would not enforce.

Discussion of the nature of equitable fraud and of the circumstances in which equity will relieve against unconscionable bargains.

Earl of Chesterfield v. *Janssen* (1751) 2 Ves. Sen. 125 [28 E.R. 82]; *Earl of Aylesford* v. *Morris* (1873) L.R. 8 Ch. App. 484; *Clark* v. *Malpas* (1862) 31 Beav. 80 [54 E.R. 1067]; 4 De G. F. & J. 401 [45 E.R. 1328]; *Longmate* v. *Ledger* (1860) 2 Giff. 157 (66 E.R. 67]; *Baker* v. *Monk* (1864) 33 Beav. 419 [55 E.R. 430]; 4 De G. J. & S. 388 [46 E.R. 968] and *Fry* v. *Lane* (1888) 40 Ch. D. 312, referred to.

Observations by *Fullagar* J. on the attitude of courts of equity to cases where a party to a contract resisting specific performance or seeking its rescission asserts that he was drunk at the time of entering into it. *Osmond* v. *Fitzroy* (1731) 3 P. Wms. 129 [24 E.R. 997]; *Cory* v. *Cory* (1747) 1 Ves. Sen. 19 [27 E.R. 864]; *Shaw* v. *Thackray* (1853) 17 Jur. 1045; *Vivers* v. *Tuck* (1863) 1 Moo. N.S. 514 [15 E.R. 794]; *Scates* v. *King* (1870) 1 V.R. (Eq.) 100; *Wiltshire* v. *Marshall* (1866) 14 L.T. 396; *Cooke* v. *Clayworth* (1811) 18 Ves. Sen. [34 E.R. 222]; *Dunnage* v. *White* (1818) 1 Swans. 137 [36 E.R. 329]; *Nagle* v. *Baylor* (1842) 3 Dr. & W. 60, referred to.

Decision of *Taylor* J., affirmed.

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APPEAL from *Taylor* J.

On 10th August 1953 Graham Dudley Blomley, a resident of the State of Queensland commenced a suit in the original jurisdiction of the High Court of Australia against Timothy Ryan, a resident of the State of New South Wales, seeking specific p[illegible] ance or alternatively damages in relation to a contract dated [illegible] April 1953 for the sale and purchase of a grazing property known as "Worrah" near Boggabilla, New South Wales, for the sum of £25,000, the plaintiff being the purchaser and the defendant the vendor. By his defence the defendant sought relief against the said contract by way of counterclaim on the ground of constructive fraud.

The action was heard by *Taylor* J., in whose judgment the relevant facts and the course of the trial of the action appear.

D. McCawley Q.C. and *R. W. Fox* appeared for the plaintiff up to 29th July 1954, after which date *B. P. Macfarlan* Q.C. and *R. W. Fox* appeared for the plaintiff for the remainder of the trial.

Gordon Wallace Q.C., *N. H. Bowen* Q.C., *C. L. D. Meares* Q.C. and *R. J. Ellicott*, for the defendant.

Cur. adv. vult.

Dec. 17, 1954.

TAYLOR J. delivered the following written judgment:—

The plaintiff in this suit seeks a decree for specific performance of an agreement for the sale to him of the defendant's grazing property known as "Worrah" and which is situated near Boggabilla in New South Wales. Alternatively damages are claimed in respect of the defendant's refusal to complete the sale. The case is, of course, of a type in which a decree for specific performance is normally available but the defendant claims that the circumstances established by the evidence operated to render the agreement voidable at his option or, alternatively, show that this is a case in which the Court, in the exercise of its judicial discretion, should refuse to make such a decree. The circumstance that the latter defence was available only in answer in the plaintiff's primary claim for specific performance left the suit in such a form that it was possible that the claim for damages could succeed, although upon the evidence it might be proper to refuse a decree for specific performance and, indeed, although the evidence which made such a refusal proper was adequate to support a counterclaim for rescission of the agreement. Upon consideration of the matter after the termination of the hearing I formed certain views on the questions of fact involved in the case and it appeared to me that the

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attention of the parties should be directed to this possibility. Accordingly the suit was restored to the list and I intimated to counsel for the parties that the views which I held upon the evidence as it then stood would require me to refuse to make a decree for specific performance and that consideration should be given to the question of what other order or orders should be made. I further intimated to them that I had grave doubts whether justice did not require that further consideration should be given by the parties to the form of the pleadings and the parties were informed that I would be prepared to hear them on this aspect of the matter at some future time. At a later stage the defendant sought leave to amend his statement of defence by adding a claim for rescission alleging that " at the time of the signing of the contract of sale . . . and of the negotiations between the parties in connection therewith the defendant was an old man lacking in education, suffering from the effects of intoxication, mentally and physically weak, without proper advice, unable to protect himself and on unequal terms with the plaintiff all of which circumstances the plaintiff then well knew." The proposed amendment further alleged that the plaintiff " took advantage of the said circumstances of the defendant, that independent advice was not given to the defendant, that the plaintiff acted with undue haste and procured the said agreement of the defendant to the sale of the property . . . at a great undervalue and upon terms highly favourable to the plaintiff and unfavourable to the defendant." No objection was made to the substance of the amendment but counsel for the plaintiff objected that if the amendment were permitted at that stage it would result in serious prejudice to the plaintiff. In my view no question of prejudice arose and, being of opinion that it was proper to do so I allowed the amendment and gave leave to the plaintiff to call such further evidence, if any, as he might think fit. Pursuant to leave so given further evidence was called on behalf of the plaintiff.

The property known as " Worrah " comprises some 3,696 acres of land under settlement lease and for a number of years prior to the date of the agreement upon which the suit is based, namely 21st April 1953, it was worked by the defendant with the assistance of other persons. At the time of the hearing of the suit the defendant was seventy-nine years of age and in recent years his main help has been his nephew, one Cooney, though there also resided at the homestead a person referred to in the course of the evidence as " Scotty " or Scotty Turner. The property carried somewhat more than 3,000 sheep and 50 head of cattle. No doubt because of his age and general physical condition the thought of disposing of

" Worrah " had presented itself to the defendant's mind, and on 29th February 1952, he wrote, in answer to an inquiry by Mr. Gore, the immediate predecessor in business in Goondiwindi of Dalgety & Co. Ltd, " that this place will be for sale but not until the end of the year ". He added that the price would be £9 per acre and that he would let Mr. Gore know when he was ready to sell. In September of the same year, in response to a further inquiry, he informed the representative of Dalgety & Co. Ltd. at Goondiwindi by letter that the place would not " be for sale until I shear my sheep in May next ". At this time it was disclosed that E. F. Blomley, the father of the present plaintiff, was the prospective buyer. Nothing more occurred until early in April 1953. About that time the defendant paid a visit to the office of Dalgety & Co. Ltd. in Goondiwindi. The visit was not connected with any negotiations for the sale of his property but it is said that whilst the defendant was there he was asked when it would suit him for Blomley to have a look at " Worrah ". The defendant is alleged to have said that " he could come out and have a look at the place any time ". Pursuant to this conversation Stemm, the assistant manager of the branch of Dalgety & Co. Ltd. at Goondiwindi, and Blomley, together with the plaintiff, visited " Worrah " on Monday, 13th April 1953. They remained there for two or three hours during the course of which a brief inspection was made of portions of the property and the terms upon which Blomley and the defendant were respectively prepared to do business were discussed. Before referring with more particularity to the discussion which took place on 13th April I should mention that on the following Monday, 20th April 1953, Stemm and Blomley senior, accompanied by the latter's son-in-law, one Brian Doran, again came to " Worrah ". This was the day upon which it is alleged that the parties agreed upon the terms and conditions of sale and the day before the execution of the agreement. Blomley, accompanied by his wife and daughter, again visited the property on 22nd April 1953.

The agreement upon which the plaintiff relies was signed by the parties on the afternoon of 21st April 1953 in the office of Mr. Rogers, a solicitor, in Goondiwindi. The agreement evidenced by this instrument was an agreement by the defendant to sell " Worrah " to the plaintiff for the sum of £25,000, payable, as to £5 by way of deposit, as to £9,995 upon completion and as to " the balance then remaining, that is to say the sum of £15,000, by four equal annual instalments of not less than £3,500 on the first day of August in the year 1954, 1955, 1956 and 1957 together with interest thereon or on so much thereof as shall from time to time be owing

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calculated at £4 per centum per annum". The agreement was expressed to be subject to the consent of the Minister for Lands being given to the transfer and it was provided that the vendor should forthwith apply for such consent and that the purchaser should do all things necessary on his part to enable the vendor to obtain such consent including the completion of the necessary purchaser's declaration and, if necessary, the attendance of the latter at an inquiry ordered by the Minister. In the event of the consent of the Minister for Lands being refused or not being granted within three months from the date of sale either party was to be at liberty to cancel the sale upon notice in writing to the other.

It was alleged on behalf of the defendant that for some days prior to and upon the day when he signed this agreement his condition was such, as the result of over-indulgence in alcoholic liquor, that he did not possess the requisite contractual capacity. Alternatively, it was said that even if he was not incapable in this sense his mind was, to the knowledge of the plaintiff, so affected by drink as to place him at a grave disadvantage in transacting the negotiations and sale that, taken with the other features of the case, the remedy of specific performance should be withheld. The other features relied upon are to be found in the allegations that the defendant quite obviously was an old man of failing intellect, that the sale was at a very substantial undervalue, that the terms of the agreement were unfair, that the transaction was concluded with undue haste and without adequate advice being available to the defendant and that the purchaser's agent himself had contributed to the defendant's debilitated condition. This may also be taken as a short summary of the matters now relied upon to support the claim that the agreement should be set aside.

There is not the slightest doubt that the defendant is a man who for a number of years at least has engaged in drinking bouts extending over periods ranging from a few days to a week or more. Those witnesses called on behalf of the plaintiff who had an opportunity of observing the defendant from time to time were prepared to concede this sorry state of affairs and, indeed, frankly state that the bouts occurred at frequent intervals. I am satisfied that though the defendant's drinking habits may be so described with accuracy the statement of his habits in this brief fashion tends to under-rate his propensities and in no way indicates the condition to which his drinking bouts would reduce him or the degree to which the degeneration of his mental processes had been accelerated thereby. At the relevant time he had, I am quite sure, arrived at a

stage where a few drinks might quickly reduce him to a state of stupidity and, perhaps, even to total incapacity. The defendant's condition and habits were a matter of common knowledge in and around Goondiwindi and, even if Blomley senior was not fully aware of these matters, there is no doubt that Stemm had full knowledge of them. There is, I should think, no doubt that on many occasions during his bouts of drinking the defendant lost all capacity to transact even the simplest business matters though at other times during these periods he temporarily recovered from his excesses sufficiently to exercise those impaired faculties which were the legacy of his advanced years and habits. Between these two states there must, of course, have been many occasions when it was difficult or even impossible to determine the degree of understanding enjoyed by the defendant or, indeed, to say precisely when he commenced to emerge from a state of total incapacity.

There is good reason for thinking that the agreement of 21st April 1953 was executed by the defendant during the period over which one of these drinking bouts extended. Shearing operations commenced at " Worrah " on Monday, 20th April 1953, and continued for some ten or eleven days. Some of the shearers arrived at the property on the previous Saturday and Mr. Binney, the shearing contractor, and his wife arrived on the Sunday afternoon. There is evidence that shearing time generally coincided with some of the defendant's heaviest bouts and this occasion seems to have proved no exception. There may have been some exaggeration on the part of some of the witnesses called on behalf of the defendant but I accept substantially their evidence as to the defendant's drinking excesses which occurred at " Worrah " over this period and their description of the condition to which those excesses reduced him. In particular, I was impressed with the evidence of Mr. and Mrs. Binney concerning the condition and appearance of the defendant on their arrival on the Sunday afternoon and on the subsequent occasions when they had the opportunity of observing him. Notwithstanding the fact that Mrs. Binney exhibited a marked aversion to drinking habits and that her feelings might have inclined her to paint a somewhat more sordid picture of what she observed at " Worrah " than she might otherwise have done, I am quite satisfied that she attempted to give a true picture and that the actual state of affairs differed very little, if at all, from her description. I should, perhaps, add that the bedroom occupied by Mrs. Binney and her husband was adjacent to that of the defend- and and was separated from it by a wooden partition so that she and her husband were in a position to hear what went on during

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each night and the early hours of the morning in the plaintiff's bedroom which, during the period of the shearing operations, he shared with "Scotty" Turner. On one point, however, Mrs. Binney was in error. She said that on 20th April the defendant did not leave his bed. But she appears to have left the house before Stemm and the defendant went downstairs and saw nothing of the latter whilst he was absent from his room. Her error did not, in my opinion, proceed from any desire to exaggerate or mislead the Court. Corroboration for the allegation that the defendant was indulging his weakness for rum at this time—if corroboration is necessary—is to be found in the answer given in cross-examination by Brian Doran, who was present with Stemm and Blomley at "Worrah" on 20th April, that the defendant looked as if he was recovering from a drinking bout and in the evidence of Mr. Folk, the Manager for Dalgety & Co. Ltd. at Goondiwindi, that on the morning of 21st April the defendant looked an older and sicker man than he had ever remembered. For obvious reasons neither Doran, who is the plaintiff's brother-in-law, nor Folk, who is Stemm's immediate superior, were anxious to give evidence which ran counter to that of the plaintiff's father and Stemm, but nevertheless they were not prepared to support other evidence which spoke of the defendant both on 20th and 21st April as appearing to be in normal health. Upon the evidence I have no doubt that the defendant's drinking bout on this occasion extended from some little time before Saturday, 18th April, until, at least, towards the end of the following week and that there were many occasions during this period when he was quite incapable not only of transacting the simplest forms of business but even of attending to the most elementary of his bodily requirements.

Both Stemm and Blomley senior say that on Monday, 13th April, the defendant named £30,000 as his price for "Worrah", that he showed no inclination to recede from this figure and that it was after this figure was named that Blomley said he was not prepared to pay more than £25,000. The plaintiff's evidence is much the same but the defendant maintains that he insisted on £9 per acre and did not name any total figure. I have difficulty in understanding why the defendant without any process of bargaining should have departed from his previously stipulated price of £9 per acre, but I find it impossible to place any real reliance on his evidence. He has, I am sure, little or no recollection of the events of that day. On the other hand I am by no means satisfied that the brief account given by the other three witnesses who were present, of the discussions which took place on that day contained

a complete account of the discussion which took place as to price. Probably the figure of £30,000 was mentioned at some stage but I am not prepared to conclude that the conversation as deposed to by those three witnesses constitutes a full and complete account of the discussions. This, however, is not vital to a determination of the case for it is not suggested that agreement was reached that day and the discussions concluded with the suggestion that the defendant should think the matter over during the ensuing week. Before leaving this occasion I should refer to one other aspect of the discussion. It is alleged that on this occasion the defendant said that if he sold the property he would not require the whole amount of the purchase money and that he would be prepared to sell on terms. Following upon this Blomley senior said that in those circumstances his son, the plaintiff, would be the purchaser if a sale on terms eventuated.

When Stemm, Blomley and Doran came to "Worrah" about 3 p.m. on the following Monday, 20th April, the defendant was lying on his bed. The previous night he had drunk himself practically, if not entirely, into a state of insensibility but nevertheless during the night and early hours of 20th April he and Scotty Turner, who was sharing his room with him, had more to drink. About 7 a.m. he was "lying sprawled across the bed" and about 8 a.m. or 9 a.m. he had more to drink. Apparently he had not undressed during the night, and it is more than probable that at least on several of the nights succeeding 18th April he went to bed in the suit of clothes which he was wearing when the shearers commenced to arrive. On arrival at "Worrah" on the 20th Stemm went up to the defendant's room and subsequently he and the defendant came downstairs to the kitchen where Blomley then was. Both Stemm and Blomley gave evidence to the effect that the defendant did not appear to be other than his normal self. Stemm maintained that he showed no signs of having been engaged in a drinking bout and Blomley said that the defendant was not sick and did not appear to be sick. I find it impossible to accept this evidence. The defendant was known to both of these witnesses and although at that time he may not have been incapable of coherent speech his appearance alone must have been such as to give some real indication of his condition. It was in these circumstances that Stemm produced a bottle of rum and invited the defendant to drink with them. Both Blomley and Stemm assert that the defendant refused but the others drank and, shortly thereafter, all four proceeded towards the shearing shed. As Stemm and the defendant walked towards the shearing shed, followed by Blomley

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and Doran, Stemm claims that he said to the defendant "What is your price today Tim?" This inquiry was the first inquiry as to price that day and was made at Blomley's suggestion. According to Stemm, and, as he admits, a little to his surprise, the defendant immediately replied "£25,000". Blomley claims to have overheard the defendant's reply, but the parties are said to have proceeded to the shearing shed without any further relevant discussion. On their return to the homestead Stemm produced a form of contract and asked the defendant in Blomley's presence if he would like to sign an agreement for sale there and then, but according to both Stemm and Blomley, the defendant said he would prefer his solicitor to prepare the contract and with this Blomley agreed. Thereafter, it is said, the date for completion was discussed and delivery of possession in the month of August following was agreed upon. Subsequently during the afternoon it was arranged that the defendant should go to Goondiwindi, a distance of some forty miles, on the following day to see the solicitor selected by both parties and Stemm undertook to come out to "Worrah" and drive him both into Goondiwindi and home again. Upon a consideration of the evidence I have no doubt that during the afternoon of the 20th the defendant's condition was such that he was incapable of considering the question of the sale of his property with any real degree of intelligent appreciation of the matters involved and that this was so must have been reasonably apparent to both Stemm and Blomley. No doubt Stemm, and possibly Blomley, may have seen the defendant on other occasions in a not dissimilar condition and may, perhaps, have induced themselves to think that as Ryan wished to dispose of his property they were not in all the circumstances doing him a grave injustice by undertaking to relieve him of it for the sum of £25,000.

If the conversation on 20th April as to the price required by the defendant took place just as Stemm related in his evidence I do not doubt that he was surprised by the defendant's reply to his inquiry. Evidence as to the value of the property was given on behalf of both the plaintiff and the defendant and the lowest value placed on the property was £30,907. Mr. McGregor, a stock and station agent, called by the plaintiff, gave this as his estimate of the value of "Worrah" in April 1953, but he said that in August it was worth £34,602. Between these two months there had, he said, been a big movement in land values and in the case of "Worrah" he estimated the increase at approximately £1 per acre. I am quite unable to appreciate the grounds upon which it is suggested that such an increase occurred and I prefer the

evidence of Mr. Boland, a valuer, called on behalf of the defendant, that there is nothing to suggest that the value of the subject land altered appreciably between April and August 1953. Mr. Boland valued the property as at the former month for grazing purposes—exclusively of the chattels which were included in the agreement at £33,444 or slightly over £9 per acre, and I accept his estimate. The plaintiff's father, on the other hand, said that on 13th April he was of the opinion that £5 per acre was a fair price for "Worrah" but I do not believe that his estimate could have been so erroneous. Nor would such a view be consistent with his reasonably obvious eagerness to obtain it for his son at £25,000. I am satisfied, having regard to the experience of both Stemm and Blomley, that they believed that the purchase of "Worrah" at £25,000, and upon the terms of the contract subsequently executed, represented not only a good bargain but a purchase at a very substantial undervalue. In these circumstances I cannot help but feel that Stemm's suggestion that the defendant might there and then on 20th April sign the form of agreement produced by him indicated a desire to conclude the matter before the defendant should have an opportunity of considering the deal to which, apparently, he had that day assented or appeared to assent. Counsel for the plaintiff pressed upon me that there was nothing unusual in Stemm's suggestion but whether or not it is usual for formal agreements for the sale of substantial properties to be concluded in this fashion—and I should think most decidedly it is not—there was every reason why this deal should not have been so concluded. There was no urgency about the matter: completion was not to take place for more than three months, the defendant at his best was an old man of failing intellect, he was in the condition which I have briefly attempted to describe and he had had no independent advice of any kind. Stemm did not, however, press the defendant to adopt his suggestion. Instead, as I have already said, he arranged to come out again to "Worrah" on the following morning and take the defendant to Mr. Rogers's office. This he did, but in the meantime he saw Rogers, apparently on behalf of both parties, and gave instructions for the preparation of a draft agreement. It must have been quite late in the afternoon when Stemm and Blomley left "Worrah" but about 6.30 p.m. that evening the former telephoned Rogers and made an appointment for 7.30 p.m. that night. Stemm, accompanied by Folk, attended on Mr. Rogers at that hour and gave instructions for the preparation of the contract. Stemm, I believe, did not propose to allow the grass to grow under his feet and exerted himself to ensure that the

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contract in its final form should be signed no later than the following day. It was said in evidence that it is the practice in this part of the State to arrange for a formal contract to be drawn up and executed immediately upon the conclusion of negotiations for the sale of any substantial property, but if this was the practice there was every reason in the circumstances of this case why it should have been departed from. But whether or not the expedition with which the written agreement was executed merely represented an observance of such a practice or sprang from a desire to conclude the matter before a period of sober reflection on the defendant's part is of little consequence, for the fact is that the rapid course of events did not afford any opportunity for any form of sober reflection on his part. I should, perhaps, add that Stemm's suggestion on 20th April that the contract should be forthwith signed at "Worrah" rather suggests the latter as the reason for haste.

At this stage I pause to mention that Walter Joseph Doran, who is the father of Brian Doran and the owner of the grazing property which adjoins "Worrah" on the eastern side, gave evidence to the effect that on 15th April 1953 the defendant offered to sell "Worrah" to him for £25,000. The defendant is alleged to have said that Doran "could have the offer" and to have added that there was "no hurry" and that Doran "could decide at any time". In cross-examination it rather appeared that if a firm offer was made it was made to Doran as a personal favour but it is not without significance that within a few days and without further reference to Doran the defendant proceeded to sell the property to the plaintiff. I have grave doubts whether the defendant really made a firm offer to sell to Doran at this figure, but, if he did, it was as a personal favour to Doran and it was almost immediately forgotten by him. Perhaps if such an offer was made the defendant's condition was, at the time, the same as it was on the occasion towards the end of the shearing operations when he offered a number of rams to Binney as a present. The present was refused, Binney feeling that the defendant "Was too stupid" to make it and that he would forget having made it. But whatever the explanation is it is clear, I should think, that on 20th and 21st April the defendant had no recollection whatever of having made any offer to Doran.

The principal events of 21st April have given me considerable concern, but I am satisfied that during the preceding night the defendant was again grossly intoxicated and that in the morning when Stemm called for him his condition was far from normal.

At an early hour that morning he was, I should think, barely sensible of what was going on around him, though his condition may have improved a little during the drive to Goondiwindi. Nevertheless he was that morning in Goondiwindi older and sicker than Folk had ever seen him. Yet Stemm says he was quite sober and normal. Accepting Folk's statement and Mrs. Binney's evidence, as I do, I find it impossible to accept Stemm's evidence on this point. No evidence was given by Stemm of any conversation between him and the defendant during the drive to Goondiwindi and I doubt if at least for some part of this drive the defendant was reasonably capable of intelligent conversation. But Rogers says that when Stemm brought the defendant to his office about 11.30 o'clock that morning his state of health appeared to be the same as it had been since he had known him and that there was not the slightest suggestion that he was in any degree under the influence of liquor. He says that the defendant in the course of a ten minute conversation, after Stemm had left his office to go in search of Blomley, said, in reply to an inquiry as to what he would do after selling "Worrah", that he was getting on in years and that he intended buying a small place near Parramatta and that he would then retire. When Blomley and Stemm joined them the draft contract was read through and the amount of the deposit and other details agreed upon. The amount of the deposit, it is said by this witness, was suggested by the defendant himself though Blomley appears to think that it was his suggestion. In the face of Rogers' evidence I am not prepared to find that upon arrival at his office the defendant entirely lacked contractual capacity. It is, I think, probable that he had temporarily recovered from his over night excesses to have something more than a hazy understanding of what was going on, but I am quite convinced that if the execution of the contract had been left until his drinking bout had run its course and he had recovered from its effects he would have refused to execute a contract for the sale of his property for £25,000 or to sell upon terms comparable with those contained in the agreement upon which this suit is brought. I have little doubt that independent advice from a person having some knowledge of the value of the property and acquainted with the condition of the defendant on the 20th and of the events of that day might well have produced the same result. But he had no advice of this kind. Probably his condition was no different from that in which many of the witnesses had seen him on many other occasions, and Rogers, believing that he understood the nature of the transaction, did not concern himself with its fairness or with the events which had led to the meeting in his

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office. Indeed, as Rogers frankly says, he had no knowledge of the value of "Worrah" and consequently was quite ignorant of the fact that the sale was being made at a very substantial undervalue. Moreover, he knew nothing of the circumstances in which the arrangement of the previous day had been made. On Rogers's evidence I think it probable that at the time of the execution of the agreement the defendant had so far temporarily regained his senses as to enable him to appreciate the purpose of his visit to Rogers's office and the nature of the transaction under discussion. At that time he was probably capable of understanding the general purport of the instrument which he was asked to and did in fact execute. It was not a complicated dealing and was not, I think, beyond the understanding and comprehension of the defendant at that time. But whilst I feel this is the proper conclusion upon the evidence I am satisfied that at no time was his participation in the transaction accompanied by any reasonably intelligent consent to it. At the best his failing mental equipment left him at a distinct disadvantage in negotiating with Stemm and Blomley and when there is added to this the fact that the negotiations and the execution of the agreement took place in the course of one of his periodical drinking bouts an explanation may be found for his consent to sell his property for a figure some £8,000 or £9,000 below its real value. Although the fact that the sale was at an undervalue is by no means sufficient to conclude the type of issue which arises in cases such as the present, it is a feature which is not without considerable significance when it is borne in mind that it is not suggested that the transaction should be regarded as other than a business dealing (cf. *Johnson* v. *Buttress* (1)) and when it appears that the defendant might have secured a price of at least £8 per acre from the witness Barden, one of his near neighbours who was on good terms with him and with whom he had formerly carried on some business activities in partnership. On the day before the agreement was signed the defendant was in no condition to negotiate intelligently for the sale of his property; his condition must have been known to both Blomley and Stemm and, if it be the fact that on that day he simply and immediately nominated the sum of £25,000 as his price for "Worrah" this must have surprised both of them. The property was worth a great deal more and I do not doubt that both Blomley and Stemm had some knowledge of its real value. The expedition with which Stemm thereafter sought to conclude the deal was not unassociated with the thought that it might not be possible to obtain the execution of a contract at

(1) (1936) 56 C.L.R. 113, at pp. 135-136.

this price after a period of sober reflection upon the part of the defendant. To what extent, if at all, the defendant may have been induced by Stemm on 20th April to agree to the price of £25,000 I am unable to say but I am satisfied that Stemm knew that day that the defendant was in no condition to negotiate intelligently and it is reasonably clear to me that unless the deal was concluded quickly it was quite likely that it would not have been concluded at all. The night of 20th April did not afford the defendant any opportunity for sober reflection ; on the contrary I doubt if on the morning of 21st April the defendant had any real recollection of the discussions of the previous day. Nevertheless, he was taken from his room by Stemm and, probably, some little time before he arrived at Rogers's office he knew the purpose of his intended visit. What was his position then ? He is an old man of weak and failing intellect. He was that morning sicker and older than Folk ever remembered. Though some degree of understanding had temporarily returned to him his condition was not such as to enable him to make an adequate analysis of the position in which he then stood or to make any attempt to safeguard his own interests. The intervention of Rogers did not in any way assist the defendant to do either of these things ; he was concerned rather with the conveyancing aspects of the transaction and in obtaining information for this purpose concluded that the defendant was contractually capable. But he had no knowledge of the events of the previous day or of the real value of " Worrah ". If he had possessed this knowledge I think it is probable that the agreement would not have been signed that day or at all. In all the circumstances of the case I am satisfied that the defendant has brought himself within the principles which were applied in *Clark* v. *Malpas* (1) ; *Baker* v. *Monk* (2) ; *Longmate* v. *Ledger* (3) and *Fry* v. *Lane* (4) and to which reference was made in *Wilton* v. *Farnworth* (5).

Whilst it was conceded that if the circumstances as I have found them to be constituted the whole of the relevant facts, the defendant would be entitled to resist a decree for specific performance the plaintiff contends that there is an additional circumstance which should be taken into account. It is said that after the making of the agreement the defendant deliberately affirmed it and elected to proceed with it. I am, however, satisfied that this was not so. The defendant's drinking bout, during which the agreement was

(1) (1862) 31 Beav. 80 [54 E.R. 1067] ; 4 De G. F. & J. 401 [45 E.R. 1238].
(2) (1864) 33 Beav. 419 [55 E.R. 430].
(3) (1860) 2 Giff. 157 [66 E.R. 67].
(4) (1889) 40 Ch. D. 312.
(5) (1948) 76 C.L.R. 646.

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executed, continued for some days after 21st April 1953 and I think it is probable that at its conclusion the defendant had, at the best, a hazy recollection of what had occurred. I am by no means satisfied that when Mr. Piddington saw him on 23rd April the defendant had any clear picture of what had occurred and I doubt if he obtained any precise knowledge until some two months later when he sought and obtained a copy of the contract. It was not until some little time after he obtained a copy of the contract that he raised objections to the sale but his conduct in the meantime was not, in my opinion, such as to disentitle him to resist the claim for specific performance or to seek to set the agreement aside.

For the reasons given I am of the opinion that the plaintiff's suit should be dismissed and that upon the defendant's counterclaim there should be a decree for the rescission of the agreement of 21st April. In these circumstances it is unnecessary to refer to the defences which were based upon the provisions of the agreement dealing with the requirement that the consent of the Minister for Lands should be obtained.

From this decision the plaintiff appealed to the Full Court.

B. P. Macfarlan Q.C. and *R. W. Fox* (with them *G. H. Bullock*), for the appellant.

B. P. Macfarlan Q.C. There was here no relationship of influence of a kind calling for the intervention of a court of equity. The trial judge erred in regarding the case as falling within the principle of *Clark* v. *Malpas* (1). A court of equity does not intervene merely because a person is sick, old or illiterate. Those qualities only become relevant where there is a condition of dependency by such a person upon another. There is here no evidence of any such condition. The respondent is found to have had capacity on the day he executed the contract and both the respondent and the appellant were at arms length on that day. The respondent carried the onus of establishing facts from which the Court could say that there had been an unconscientious use of power and this he failed to do. [He referred to *Johnson* v. *Buttress* (2) and *Wilton* v. *Farnworth* (3).] *Taylor* J. found that sickness, age and illiteracy

(1) (1862) 31 Beav. 80 [54 E.R. 1067]; 4 De G. F. & J. 401 [45 E.R. 1238].

(2) (1936) 56 C.L.R. 113, at pp. 134-136.

(3) (1948) 76 C.L.R. 646, at pp. 654, 655.

coupled with undervalue were sufficient to set aside the transaction but he failed to consider the effect of those facts upon the appellant or to inquire whether there had been an unconscientious use by the appellant of some relationship existing between them. The appellant made no unconscientious use of the position in which he found himself. [He referred to *Spencer Bower* on *Actionable Non-Disclosure* (1915) par. 428 p. 390; *Jenyns* v. *Public Curator* (Q.) (1)]. The evidence establishes that the respondent elected to affirm the contract with knowledge that he had the right to repudiate it and he cannot now resile from that position: see *Spencer Bower* on *Actionable Non-Disclosure* (1915) par. 446 p. 412; *Allcard* v. *Skinner* (2); *Wright* v. *Vanderplank* (3); *Stafford* v. *Stafford* (4).

[FULLAGAR J. This would appear to be simply a case where the respondent was too drunk to appreciate exactly what he was doing. Should he not disaffirm within a reasonable time after regaining his sobriety and in default of so doing be held bound by his contract?]

Yes. [He referred to *Matthews* v. *Baxter* (5); *Gibbons* v. *Wright* (6).] The trial judge having found that the respondent had capacity, drunkenness as such could not be a defence. There was clearly evidence that the respondent affirmed the contract and he is bound thereby.

R. W. Fox. The amendments to the defence ought not to have been allowed. The case was never conducted at the trial upon the basis that it fell within the line of authority commencing with *Clark* v. *Malpas* (7) which was only introduced after judgment was reserved for some time and after the trial judge had given certain indications as to his views on the matter. His Honour exercised his discretion wrongly in allowing the amendment and in failing to take into account the serious prejudice which would result to the plaintiff from the amendment at so late a stage. On the way the case was conducted the plaintiff has every right to assume that he would at least recover damages and his costs and he was deprived of these by the amendment. An amendment after the close of evidence should only be allowed in exceptional circumstances and there were none here. The amendment creates in effect an entirely

(1) (1953) 90 C.L.R. 113, at pp. 132, 133.
(2) (1887) 36 Ch. D. 145, at pp. 173, 186, 187, 191.
(3) (1856) 8 De G. M. & G. 133, at p. 147 [44 E.R. 340, at p. 345].
(4) (1857) 1 De G. & J. 193, at p. 201 [44 E.R. 697, at p. 701].
(5) (1873) L.R. 8 Ex. 132, at pp. 133, 134.
(6) (1954) 91 C.L.R. 423.
(7) (1862) 31 Beav. 80 [54 E.R. 1067].

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new case which the plaintiff had no adequate opportunity to meet by re-opening his case. [He referred to *Edvain* v. *Cohen* (1); *Abigail* v. *Lapin* (2).] Specific performance or alternatively damages should have been awarded the plaintiff in this action. If the Court is not prepared to accede to that submission then a new trial should be granted.

N. H. Bowen Q.C. (with him *R. J. Ellicott*), for the respondent. The trial judge was correct in holding that there was here advantage taken of a situation of inequality and that the contract was one which equity would set aside. The jurisdiction to set aside unconscientious bargains is one which has not been limited by equity to cases where there is a relationship of influence. It is an old established ground for equitable relief: see *Earl of Chesterfield* v. *Janssen* (3); *White and Tudor's Leading Cases* 9th ed. (1928) vol. 1, p. 248; *Kerr* on *Fraud and Mistake* 7th ed. (1952) p. 225 et seq.; cf. *Halsbury's Laws of England* 2nd ed., vol. 15, p. 282. The circumstances in which this jurisdiction has been exercised in relation to sales of land present great variety: see *Clark* v. *Malpas* (4); *Longmate* v. *Ledger* (5); *Baker* v. *Monk* (6); *Fry* v. *Lane* (7); *Evans* v. *Llewellin* (8); *Harrison* v. *Guest* (9); *Wilton* v. *Farnworth* (10); *O'Rorke* v. *Bolingbroke* (11); *Wood* v. *Avery* (12); *Dunnage* v. *White* (13); *Permanent Trustee Co. of New South Wales Ltd.* v. *Bridgewater* (14); *Harris* v. *Richardson* (15); *Kerr* on *Fraud and Mistake* 7th ed. (1952) pp. 225, 226; *Halsbury's Laws of England*, 2nd ed., vol. 15, pp. 223, 282. The common features present in these cases are (a) that the parties met on unequal terms and (b) that advantage was taken of this by the stronger and (c) that a bargain resulted highly beneficial to the stronger. In the present case there was inequality of which advantage was taken by the appellant and a bargain highly beneficial to the appellant resulted. The appellant does not come to court with clean hands and it cannot be said that the lack of clean hands is only

(1) (1889) 43 Ch. D. 187, at p. 190.
(2) (1934) A.C. 491, at pp. 496, 497, 503; (1934) 51 C.L.R. 58, at pp. 61, 67.
(3) (1751) 2 Ves. Sen. 125 [28 E.R. 82].
(4) (1862) 31 Beav. 80 [54 E.R. 1067].
(5) (1860) 2 Giff. 157 [66 E.R. 67].
(6) (1864) 33 Beav. 419 [55 E.R. 430].
(7) (1889) 40 Ch. D. 312.
(8) (1787) 1 Cox. 333 [29 E.R. 1191].
(9) (1855) 6 De. G. M. & G. 424 [43 E.R. 1298]; (1860) 8 H.L.C. 481 [11 E.R. 517].
(10) (1948) 76 C.L.R. 646.
(11) (1877) L.R. 2 App. Cas. 814.
(12) (1818) 3 Modd. 417.
(13) (1818) 1 Swans. 137 [36 E.R. 329].
(14) (1936) 36 S.R. (N.S.W.) 643; 53 W.N. 250.
(15) (1930) N.Z.L.R. 890, at pp. 918, 920, 921.

a collateral matter and does not affect his right to specific performance. [He referred to *Meyers* v. *Casey* (1).] Alternatively, there was here a relationship of influence which arose upon the appellant choosing to negotiate the contract through a person in a relationship of confidence to the respondent. This applies both so far as Stemm and Rogers are concerned. If a principal to an intended contract negotiates by the agency of a person standing in a relationship of influence or confidence to the other contracting party the transaction is subject to the same principles as determine the validity of dealings between persons who stand to one another in such a relation. [He referred to *Hesse* v. *Briant* (2); *Crampton* v. *Walker* (3); *Imesion* v. *Lister* (4); *Haywood* v. *Roadknight* (5); *Watt* v. *Grove* (6); *Peninsular & Oriental Steam Navigation Co.* v. *Johnson* (7); *Johnson* v. *McInerney* (8); *Spencer Bower* on *Actionable Non-disclosure* (1915) pp. 357, 358.] When the relationship of confidence exists it is incumbent upon the person in whom the confidence is reposed, if he wishes to uphold the transaction, to show that there has been the utmost good faith and openness of dealing, that there has been a complete disclosure of all material facts known to him and that the transaction is a fair one having regard to all the circumstances. [He referred to *Demerara Bauxite Co. Ltd.* v. *Hubbard* (9); *Tate* v. *Williamson* (10); *McPherson* v. *Watt* (11).] If the confidant does not discharge this onus then the court at the suit of the confidor will set aside the transaction: see *Haywood* v. *Roadknight* (12). An agent engaged for the purpose of finding a purchaser for his principal stands in a relationship of confidence to the principal: see *Haywood* v. *Roadknight* (12); *Dunne* v. *English* (13). Weight should be given to the fact that the agent who negotiated the sale acted for both parties. Stemm acted as agent for both parties and Rogers acted as solicitor for both and the respondent was deprived of the independent advice which he needed and to which he was entitled. The evidence will not support the view that the respondent affirmed the contract; see *Kerr* on *Fraud and Mistake* 7th ed. (1952) p. 591 et seq. The trial judge rejected the view that the respondent had affirmed the contract. The Court ought not to interfere with the trial judge's

(1) (1913) 17 C.L.R. 90, at p. 123.
(2) (1856) 6 De G. M. & G. 623 [43 E.R. 1375].
(3) (1893) 31 Ir. R. 437.
(4) (1920) 149 L.T. Jo. 446.
(5) (1927) V.L.R. 512, at pp. 516, 521, 522.
(6) (1805) 2 Sch. & Lef. 492, at p. 502.
(7) (1938) 60 C.L.R. 189, at p. 235.
(8) (1953) V.L.R. 343, at p. 347.
(9) (1923) A.C. 673.
(10) (1866) L.R. 1 Eq. 528.
(11) (1877) L.R. 3 App. Cas. 254.
(12) (1927) V.L.R. 512.
(13) (1874) L.R. 18 Eq. 524.

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findings on the facts. [He referred to *Paterson* v. *Paterson* (1); *Wilton* v. *Farnworth* (2).] On the question of mere drunkeness, see *Cooke* v. *Clayworth* (3).

[McTIERNAN J. The Court does not desire to hear you on the question of the amendment.]

On the question of the Minister's consent, see the *Crown Land Consolidation Act* 1913 (N.S.W.), ss. 236, 272 (1) (2) and reg. 325 made thereunder and *Lang* v. *Castles* (4). The Minister's consent having been obtained by a misrepresentation and on a document which was not in fact a statutory declaration is void and ineffective. There was no consent in any relevant sense. [He referred to *Butts* v. *O'Dwyer* (5).] Alternatively the consent is voidable by the Minister and in the circumstances is not a proper consent and no consent was thus obtained within the stipulated time. The appeal should be dismissed.

B. P. Macfarlan Q.C., in reply. The critical date at which the question of influence must be determined is the date of execution of the contract. [He referred to *Ralston* v. *Turpin* (6).] From the trial judge's findings both in his acceptance of Rogers and his failure to make any adverse finding against the appellant in relation to his knowledge of the respondent's condition on such date the very basis for intervention by a court of equity is lacking. On the question of drunkeness in cases of this kind, see *Cooke* v. *Clayworth* (7); *Nagle* v. *Baylor* (8); *Molton* v. *Camroux* (9); *Matthews* v. *Baxter* (10); *Bawlf Grain Co.* v. *Ross* (11); *Gibbons* v. *Wright* (12). Upon the hypothesis that there was here unfair dealing equity in the case of a drunkard not lacking in capacity will grant him no more favourable treatment as regards time for initiating proceedings than would both equity and law in the case of a contract which the drunkard is entitled to avoid because at the time of its making he was wholly incapacitated. Prompt disaffirmation after recovery of sobriety is essential. [He referred to *Williston* on *Contracts* (1921) vol. 1, par. 253 p. 492; par. 260 p. 504.] So long as the Minister's consent in its present form remains

(1) (1953) 89 C.L.R. 212, at pp. 219-224.
(2) (1948) 76 C.L.R. 646, at p. 654.
(3) (1811) 18 Ves. Jun. 12 [34 E.R. 222].
(4) (1924) S.A.S.R. 255, at p. 267.
(5) (1952) 87 C.L.R. 267.
(6) (1888) 129 U.S. 663, at p. 667 [32 Law Ed. 747, at p. 752].
(7) (1811) 18 Ves. Jun. 12, at p. 13 [34 E.R. 222, at p. 223].
(8) (1842) 3 Dr. & W. 60, at p. 64.
(9) (1849) 4 Ex. 17 [154 E.R. 1107].
(10) (1873) L.R. 8 Ex. 132.
(11) (1917) 55 Can. S.C.R. 232.
(12) (1954) 91 C.L.R. 423, at pp. 440-444.

the respondent cannot complain of it. *Lang* v. *Castle* (1) is distinguishable in that there was in that case no real consent to the relevant transaction.

Cur. adv. vult.

Mar. 28, 1956.

The following written judgments were delivered :—

McTIERNAN J. The action from which this appeal arises was within the original jurisdiction of this Court because the parties were residents of different States, namely Queensland and New South Wales. The action was tried by *Taylor* J. at Sydney. There was no controversy whether the law of one State rather than that of the other was applicable, because each State has the same law on the questions in the case in respect of which there might be room for such a controversy. The appellant was the plaintiff in the action. He brought it to enforce a contract made on 21st April 1953 by which the respondent, who was the defendant, sold a grazing property to the appellant for the price of £25,000. This property is a settlement lease of 3,696 acres at Boggabilla, a town in New South Wales. The respondent was in possession of the property. A settlement lease is a tenure created by the *Crown Lands Acts* of New South Wales. An incident of the tenure is that it is not transferable without the consent of the Minister for Lands. His approval was given to a transfer to be made pursuant to the contract. The respondent in the action counterclaimed for relief against the contract on the ground of constructive fraud. He alleged that it was unfair to him—a hard bargain. Matters upon which he relied to support this allegation were the price, the deposit, the rate of interest and the terms of payment. As already stated, the price was £25,000. This included £550, the value of some chattels sold with the land. The learned trial judge found that the market value of the property as grazing land on 21st April 1953 was £33,444 or " slightly over " £9 per acre. The value of the chattels is not included in this estimate. The deposit payable by the appellant as purchaser was £5. Having regard to the size of the transaction this was an abnormally low deposit. The rate of interest was four per cent upon outstanding purchase-money. This was one point less than the current rate. The contract stipulated that completion was to be made " not later " than 1st August 1953 : that the appellant, that is the purchaser, would pay £9,995 on completion and the balance of the price in four equal annual instalments of not less than £3,500, the last of which would become payable on 1st August 1957. The vendor,

(1) (1924) S.A.S.R. 255.

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that is the respondent, alleged that these terms of payment were upon the whole extremely one-sided and unfair to him.

An agent, whose name is C. J. Stemm, and E. F. Blomley, father of the appellant, procured the purchase of the property from the respondent. An issue in the case is whether they met the respondent upon equal terms. He was about seventy-eight years of age. On 20th April 1953 they made a bargain with him for the purchase of the property by the appellant for £25,000, upon terms, and delivery of possession to be given in August. The respondent was sodden with rum and sick. Stemm and Blomley acted in concert: the respondent was single-handed. The memorandum of the contract was signed by E. F. Blomley, as agent for the appellant: and by the respondent. This was done on 21st April 1953 in the office at Goondiwindi of Mr. Rogers, a solicitor. The respondent has never denied that he signed this document. It was put in evidence at the trial. Mr. Rogers acted for vendor and purchaser at the execution of the contract. Besides being incapacitated by old age the respondent was then ailing in consequence of excesses in drinking rum. The respondent alleged that in the negotiations for the purchase of the property he did not meet Stemm or E. F. Blomley on equal terms and they procured the purchase by taking advantage of his relative weakness and that Rogers failed to give him proper advice and protection. The respondent did not obtain a copy of the contract until July 1953. The learned trial judge was not satisfied that the respondent had any precise knowledge of the price or other terms of the sale until he obtained the copy of the contract. Subsequently the respondent consulted Mr. Cole, his solicitor in these proceedings. He advised the respondent not to complete the contract. Mr. Rogers is, in this case, the solicitor for the appellant: he was called by the appellant to give evidence at the trial.

The Minister for Lands having given his consent to the transfer intended by the contract, it was ready for completion. The appellant was ready and willing to pay £9,995 when that event should happen. The respondent acted upon the advice given by Mr. Cole and accordingly refused to complete the contract. The appellant claimed in the action a decree of specific performance compelling the respondent to do so; alternatively, he claimed damages for breach of contract.

The respondent raised in the defence grounds for resisting both claims. It is not necessary now to refer to all these grounds. Those with which this appeal is more directly concerned are in pars. 10, 11, 12, 13, 14 and 15 of the amended defence. It is convenient to

refer first to pars. 12 and 13. The respondent charged in them irregularities in connexion with the appellant's part in the statutory application for the consent of the Minister for Lands to his being the transferee of the settlement lease. Nothing in pars. 11 or 12 entered into the reasons upon which the learned trial judge determined the action. It will not be necessary to deal with any point raised by pars. 11 or 12 unless the conclusion to which those reasons led him cannot be supported. The respondent charged in pars. 10 and 11 that " the agreement (the contract sued upon) was and is unfair to (him) " and claimed therein that specific performance, being a discretionary remedy, the Court would for that reason withhold it. Paragraph 10 contains allegations with respect to the conditions and circumstances of the respondent, the price and the terms of the bargain. Two of the former set of allegations were that at the time the respondent signed the contract he was intoxicated and incapable of contracting. The learned trial judge did not find that at the time alleged the respondent was so drunk that he did not know that he was signing a contract for the sale of the property. Nor did he hold that he was then incapable of contracting by reason of mental infirmity. Paragraph 11 contained the allegations that at the time the contract was made the respondent " was incapable of knowing or understanding the nature or effect of it ". It will be necessary to ascertain what the condition and circumstances of the respondent were on 20th and 21st April.

The respondent gave evidence. It appears by the reasons for judgment that the learned trial judge could place no reliance upon it because the decline of the respondent's memory was very evident. Upon a perusal of the transcript of his evidence it is difficult to resist the conclusion that only little of his intellect remained.

Paragraph 15 was a counterclaim for relief by way of setting aside the contract. It was founded upon pars. 11 and 14. The counterclaim and par. 14 were added to the defence very late in the trial. Beforehand, the learned trial judge decided on the evidence relating to the issues raised by the allegations in pars. 10 and 11 that he would refuse specific performance. Almost the whole of the evidence has a bearing upon those issues. When announcing this decision, the learned judge stated that in the view he took of the evidence it was adequate to support a counterclaim for the rescission of the contract; and that he was concerned with the possibility of being called upon to assess damages for breach of a contract which appeared to him, upon the evidence, to be an unconscionable bargain. Thereupon the respondent applied to add pars. 14 and 15 to the defence and the application was granted, but not without opposition

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by the appellant, who contended that to amend in that way so late in the trial would cause him prejudice. The learned trial judge, however, had made it a condition of the leave to amend that the appellant was at liberty to call further evidence. He did this: the respondent did not call further evidence: he rested upon the evidence already given and the further evidence called by the appellant. In the end the Court granted the counterclaim and dismissed the action. A declaration and order were made upon the counterclaim, which operate to undo the contract and while this relief stands the appellant can get neither specific performance nor damages.

The questions which are of the first importance in the appeal are whether it was right to give such leave to amend so late in the trial: and whether there is enough in the evidence upon which to set aside the contract on the allegations in pars. 11 and 14 of the defence. It is not easy to deal separately with these two questions for, if the evidence already given was sufficient for setting aside the contract, that lends strong support to the justice of allowing the respondent to counterclaim that relief. The first question logically is preliminary to the second. In my opinion, the order giving the leave has not been shown to be a wrong exercise of discretion. Later I shall state my reasons for so deciding.

It has been said that par. 11 contained an allegation that at the time the respondent made the contract he was incapable of knowing or understanding the transaction, and by the same paragraph knowledge of this fact was attributed to the appellant. The main ground of the counterclaim, however, is constituted by the allegations in par. 14. The respondent alleged that at the time he signed the contract and of the negotiations his condition and circumstances were: " (he was) an old man, lacking in education, suffering from the effects of intoxication, mentally and physically weak, without proper advice, unable properly to protect himself and on unequal terms with the plaintiff ". The respondent attributed by this paragraph knowledge of these facts to the plaintiff, who, as has been said, is now the appellant. The respondent charged in this paragraph that the appellant " took advantage of the said circumstances of the defendant (respondent) ". There follow these additional allegations: " The plaintiff employed as his solicitor in certain of the negotiations and in the drawing up of the said contract the same solicitor as acted for the defendant, who did not give to the defendant full and proper advice, and the plaintiff acted with undue haste." The last allegation in par. 14 is that the

appellant " procured the said agreement of the defendant (respondent) to the sale of the property, the subject of the contract, at a great undervalue and upon terms highly favourable to the plaintiff (appellant) and unfavourable to the defendant (respondent) ".

The question arises whether all or any of these allegations would if proved provide the respondent with an equity to be relieved against the contract. This is a question of law. In my opinion the facts alleged constitute fraud, according to the criteria of equity. The essence of the fraud thereby charged is that advantage was taken of weakness, ignorance and other disabilities on the side of the respondent and the contract was derived from such behaviour and it is an unfair bargain. Lord *Hardwicke* said in *Earl of Chesterfield* v. *Janssen* (1): " This Court has an undoubted jurisdiction to relieve against every species of fraud " (2). It appears by his judgment in that case that one species is getting bargains by taking surreptitious advantage of persons unable to judge for themselves by reason of weakness, necessity or ignorance. The word surreptitious would imply that the bargain was snatched. A fraud of this kind, Lord *Hardwicke* said, may be presumed from " the circumstances and conditions of the parties contracting " (2). It seems from what is said by Lord *Hardwicke* that equity departs in this case from law, where deceit must be proved, not presumed, to make its jurisdiction of relief effective. The charge that a bargain was procured by this class of constructive fraud, spoken of by him, could be answered by showing that the bargain is not unfair to the weaker side. Lord *Hardwicke* returned to the principle of proof when he mentioned the cases described as " catching bargains " (3) with expectants. He said: " These have been generally mixed cases, compounded of all or several species of fraud; there being sometimes proof of actual fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting: weakness on one side, usury on the other, or extortion or other advantage taken of that weakness. There has been always an appearance of fraud from the nature of the bargain " (3).

In the present case what is alleged in the defence in support of the counterclaim is, in effect,—" weakness on one side " and " advantage taken of that weakness " on the other side. Such is the class of fraud charged here. Inadequacy of price and other inequalities in the bargain are alleged. These elements are not made an

(1) (1751) 2 Ves. Sen. 125 [28 E.R. 82.]
(2) (1751) 2 Ves. Sen., at p. 155 [28 E.R. at p. 100].
(3) (1751) 2 Ves. Sen., at p. 157 [28 E.R. at p. 101].

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independent ground of relief. They are charged as ingredients of the equity upon which relief is counterclaimed.

Lord *Selborne* said in *Earl of Aylesford* v. *Morris* (1) that the "fraud" which Lord *Hardwicke* said may be presumed or inferred means "an unconscientious use of the power arising out of these circumstances and conditions" of the contracting parties. "When" (said Lord *Selborne*) "the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable" (2). This principle of relief is not limited to transactions with expectants. "It has been extended *to all cases in which the parties to a contract have not met upon equal terms*": *White and Tudor's Equity Cases* 7th ed. (1897) vol. 1, p. 313. The principle extends to a case in which the victimised party is entitled in possession to the interest which is the subject of the impeached transaction.

The issues of fact and law raised by the amended defence make it important to ascertain what were the circumstances and condition of the respondent on 13th April 1953 when E. F. Blomley and Stemm first solicited him to sell his property, on 20th April when they concluded the transaction and on 21st April when he signed the contract. The facts established by the weight of evidence are these. The respondent was about seventy-eight years of age and his mental and physical powers were much impaired by old age and addiction to rum. He left school at the age of fourteen years; he was uneducated and of humble social station. His mental weakness did not amount to continuous contractual incapacity. He owned and managed this valuable grazing property named "Worrah" at Boggabilla. He had held it since 1926. The area of the property is 3,696 acres: it was carrying, in April 1953, about 3,000 sheep and 50 head of cattle owned by the respondent. He lived in an unpretentious house on the property. The only other residents were "Scotty" Turner, an old age pensioner, whom, as appears by the evidence, he befriended by taking him into the house, and John Cooney, a nephew of the respondent. The former is not presented by the evidence as a man of any parts, or as capable of advising the respondent on any matter of business. His only trait, noticed in the evidence, is a strong appetite for rum. He was referred to in evidence as the respondent's "drinking partner". Cooney did all the substantial work about the property and was paid wages by the respondent. It is evident that without

(1) (1873) L.R. 8 Ch. App., 484. (2) (1873) L.R. 8 Ch. App., at p. 491.

Cooney the respondent could not carry on the property. However he was secretive about his plans in his relations with Cooney. At shearing time, the shearers lived in the house ; then the pressure on the accommodation made it necessary for the respondent and Turner to share one bedroom.

Rather late in life, Ryan contracted a habit of indulging in extended bouts of drinking. He usually went on one of these sprees at shearing time. He was so intoxicated at times that he could not manage himself or his affairs. When he was drunk at shearing time he took no interest in what was going on and moped about the place. Drinking was then his preoccupation.

The shearers arrived on 19th April and began shearing on the next day. A few days before they arrived the respondent obtained a supply of rum from stock and station agents at Goondiwindi. When the shearers came he was drunk and dirty and his house was in a filthy condition. Turner had moved into the respondent's room and they kept up an almost incredible spree in this room morning, day and night, for some days.

As for the appellant, no relationship of confidence existed between him and the respondent: no reason can be suggested why the respondent would favour him in this transaction. He is a young grazier, and as far as the evidence goes, was a stranger to the respondent. The intemperate habits and way of life of the respondent were notorious and the appellant was not entirely ignorant of them.

The purchase of the property from the respondent for the appellant was negotiated by his father, E. F. Blomley and C. J. Stemm. The former was an experienced grazier and he had a good knowledge of this property. His age was about fifty-six years. He was anxious to purchase it either for himself or his son, the appellant. Stemm was the assistant manager of the branch at Goondiwindi of the stock and station agents from whose store the respondent bought the supply of rum before shearing time. This town is forty miles from Boggabilla. Both E. F. Blomley and Stemm were acquainted with the respondent and knew about his intemperate habits and peculiar manner of life. The appellant's direct participation in the purchase of the property of the respondent was small, but he would, in the circumstances, be affected, if his father and Stemm or either of them brought about the transaction by fraud. The contract could, in that event, be avoided against the appellant.

The initiative in the transaction was never taken by the respondent. In February 1952 he was asked whether the property was for sale. He said it would be, but not until the end of the year, and

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that the price would be £9 per acre. The total price on this basis would be £33,264. Stemm wrote a letter in September 1952 making a further inquiry. This was prompted by E. F. Blomley whom he described as " our buyer ". The respondent replied that it would not be for sale until after shearing in May 1953. The respondent's letters show that his small measure of literacy was declining. Stemm asked the respondent to allow E. F. Blomley to inspect the property and he consented.

The next issue is how the contract of sale was negotiated and concluded. On 13th April 1953, E. F. Blomley, his son (the appellant) and Stemm drove to the respondent's house on the property. Stemm brought a bottle of rum. Before bargaining began, and when it ended for the day, Stemm poured drinks for the respondent, his companion, " Scotty " Turner, E. F. Blomley and himself and all had several drinks. The bottle was left behind with a small residue in it.

The bargaining took place between E. F. Blomley and Stemm on one side and the respondent, Ryan, on the other. According to their evidence, E. F. Blomley offered £25,000, the respondent firmly refused to take less than £30,000, saying he would sell at that price on terms, and Blomley told the respondent that as he would give terms, his son, the appellant, would be the buyer. The respondent said in evidence he mentioned no other price than £9 per acre. According to the evidence, the only progress made was that the respondent would consider the question of price. The learned judge was not satisfied that Blomley, his son or Stemm had given evidence of all that passed between them and the respondent. He thought that the sum of £30,000 might have been mentioned. As for the evidence of the respondent, he felt that he could not act upon it because his faculties were declining, a fact shown by his demeanour and appearance in the witness-box.

Before going to the events of 20th April, when E. F. Blomley and Stemm resumed bargaining, it is convenient to notice the evidence given by W. J. Doran, a grazier, a neighbour of the respondent. This witness, whose son is married to a daughter of E. F. Blomley, said that on 15th April 1953 he told the respondent that he heard that his property was for sale. According to Doran's evidence, the respondent offered, without any ado, to sell it to this witness for £25,000 on terms, and gave him plenty of time to make up his mind about this offer; the respondent did not tell him that anybody had inquired about the property and never again mentioned the offer to the witness. If this evidence be true, the respondent gave this option to Doran to buy the property at a price very much

less than that which he specified two days before to E. F. Blomley and Stemm. There was no decline of the value of this class of property since the respondent wrote in September 1952 that the price at which he would sell after next shearing would be £9 per acre.

It is important, in this connexion, to refer to the evidence of C. B. Barden, a grazier, another neighbour of the respondent. He and the respondent had been in partnership and were on friendly terms. This witness said that in February 1952 he offered the respondent £8 per acre for the property. Precisely what Barden said in evidence was this: "I said" (to Ryan): "'Would £8 shift him?' and he replied 'No', he wanted £9". It appears by the evidence that the respondent gave his "Land Rover" to Barden's son, upon his return from the Korean war.

The appellant relies upon the evidence of Doran to prove that the respondent had made a decision, since he refused Blomley's offer on 13th April, that it was worth while selling for £25,000. But, if that be the case, his reason for refusing to complete this contract, by which the appellant is bound to pay that price, is obscure. A reason urged by the appellant was that the respondent's pride was hurt by scoffing that went on at the small deposit of £5. This is a strange reason for repudiating the contract, if as the appellant urged, the respondent was a shrewd old man. The summary manner in which, upon Doran's evidence, the respondent gave the verbal option to him, lends no support to this appreciation of the respondent.

With respect to the evidence of W. J. Doran, the learned trial judge made these observations: "I have grave doubts whether the defendant really made a firm offer to sell to Doran at this figure but if he did it was a personal favour to Doran and it was almost immediately forgotten by him. Perhaps, if such an offer was made, the defendant's condition was at the time the same as it was on the occasion towards the end of the shearing operations when he offered a number of rams to Binney as a present. The present was refused, Binney feeling that the defendant 'was too stupid' to make it and that he would forget having made it. But whatever the explanation it is clear, I should think, that on 20th and 21st April the defendant had no recollection whatever of having made any offer to Doran".

The incident deposed to by Doran is a very curious one and gives rise to speculations. There is nothing in the evidence upon which it can be said with any force that the way in which the learned judge dealt with it is wrong. It is, I think, too subtle a speculation

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that the respondent, before E. F. Blomley and Stemm met him again on 20th April, had judged that it would be prudent to take £25,000 for the property because he could immediately relieve himself of the burden of it at that price. The learned judge's observations provide an insight into the weakness of the respondent's mind and character.

On 20th April 1953, E. F. Blomley and Stemm drove again to the respondent's house. This time the appellant did not come but his brother-in-law, B. Doran, a son of the witness W. J. Doran, came with them. Again Stemm brought a bottle of rum. He knew that the respondent had a few days previously obtained a supply of rum from his principal's store at Goondiwindi in the ordinary course of business. Stemm said he brought a bottle of rum with him as " a friendly gesture ". Disclaiming that it was an artifice, Stemm said that he would have brought more if he were minded to use it to get a bargain. The respondent's idea was that the rum was brought for the purpose of " softening his heart ".

It is certain, upon the weight of the evidence, that the respondent was very drunk when these three persons arrived, and that nobody who saw him could have any doubt that he was. However, according to the evidence of Blomley and Stemm, the respondent was sober and sensible. The learned trial judge did not believe this evidence about the respondent's condition. The facts, found by the learned judge, establish that the respondent was so drunk that he was incapable of managing himself and was in a degraded state.

As already stated, shearing began on 20th April. The respondent was following his practice of going on the spree on such occasions. He and Turner in their common room were indulging in gross excesses of drinking. The learned judge found that on the night of 19th April the respondent " had drunk himself practically, if not entirely, into a state of insensibility ": since 18th April when the spree began he had not changed his clothes day or night : he resumed drinking on the morning of 20th April : when Stemm arrived he went up to the bedroom and found the respondent lying on his bed : his posture was described as " sprawled on the bed ": Stemm and the respondent came down to the kitchen where E. F. Blomley was waiting : Stemm produced the bottle of rum and invited the respondent to drink. Blomley and Stemm not only asserted that the respondent was not drunk, but they maintained also that he did not drink when invited, although everybody else did. They also said that the respondent appeared to be in his normal state of health : he showed no signs of having been on a spree : nor did

he appear to be sick. The learned trial judge explicitly rejected this account of the respondent's condition and appearance and made findings opposite to it.

After the drinks, according to the evidence of Stemm, E. F. Blomley and Doran, they and the respondent walked towards the shearing shed. Stemm deposed that, prompted then by Blomley, he said to the respondent: "What is your price to-day, Tim?", and the latter immediately replied, "£25,000". Stemm admits having been surprised at the reply. It should be remembered that E. F. Blomley said in his evidence that Stemm had an opinion that the value of the property was £50,000. Stemm's principals were to get a commission from the respondent on the sale, but he did nothing to protect the respondent by telling him that £25,000 was an extremely low price for the property. Both Stemm and Blomley knew that it was. Blomley knew too that Stemm was not concerned to protect the respondent. Stemm was entirely on Blomley's side. His anxiety to effect the purchase of the property for the Blomleys was shown by his action in asking the respondent immediately to sign a form of contract produced by Stemm. The respondent did not sign it. He preferred, so the evidence of Stemm and others proves, that Mr. Rogers, a solicitor at Goondiwindi, would act for him in the transaction. Considering the state of the respondent it is probable that this resistance to Stemm's pressure was an intuitive rather than a conscious action. In any case it was a clear demonstration to E. F. Blomley and Stemm of the respondent's trust and confidence in Rogers. It will be seen that Rogers failed to caution the respondent about the price at which he was selling the property. Another arrangement said to have been made was that the respondent would give possession in August 1953. Stemm forthwith arranged with the respondent to drive him to Rogers's office on the next day.

The evidence, on the appellant's side, of how Stemm made the deal with the respondent on the walk to the shearing shed does not read like a straightforward story. It is evident that the learned trial judge mistrusted it: the respondent's memory was too bad to be depended upon to add any reliable details. Taking against Stemm and Blomley the evidence given on their side; it was not fair and honest to ask the respondent, having regard to his condition, the question, "What is your price to-day, Tim?" It was plain that he was in no condition to consider the question, to judge for himself, or to resist the pressure of Stemm and Blomley to sell his property or to sell it at Blomley's price; or to decide whether to enter into a contract with Blomley's son, the appellant.

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The respondent was clearly the weaker side. His weakness was of the kind spoken of by Lord *Hardwicke* in defining the fraud characterised as taking surreptitious advantage of the weakness, ignorance or necessity of another. The essence of such weakness is that the party is unable to judge for himself. The condition and circumstances of the respondent have been mentioned. His mental and physical powers were impaired by the cumulative effects of old age, intemperance and his manner of life: the burden of holding this property was increasing with the years and the deterioration of his powers: and at the time this bargain was concluded he was in worse than his normal poor state of mental and bodily health by reason of drinking excesses and irregular living of the past few days. The respondent, being in possession of this valuable grazing property, was by reason of his circumstances and condition, exposed to imposition and overreaching; and E. F. Blomley and Stemm had, relatively to him, great bargaining strength and could dominate his will and they were anxious to effect a sale of the property upon terms advantageous to the Blomleys. There is a strong presumption upon these facts that they took advantage of their relatively superior strength and made undue use of it, and by such unconscientious behaviour procured the purchase of the property at a great undervalue. The price, £25,000, is £8,444 less than the estimate of the market price accepted by the learned trial judge. The price is strikingly disproportionate to the estimate. There is nothing in the evidence, upon which the learned trial judge was prepared to act, by which it could be found that £25,000 is a reasonable measure of the value of the property. His Honour was satisfied that E. F. Blomley and Stemm were aware at every stage of the transaction that £25,000 was a substantial undervalue. E. F. Blomley said in evidence that his estimate of the value of the property in April 1953 was £5 per acre. The learned judge made this comment: "... I do not believe that his estimate could have been so erroneous. Nor would such a view be consistent with his reasonably obvious eagerness to obtain it for his son at £25,000" (1). His Honour then made this finding: "I am satisfied, having regard to the experience of both Stemm and Blomley, that they believed that the purchase of 'Worrah' at £25,000 and upon the terms of the contract subsequently executed, represented not only a good bargain but a purchase at a very substantial undervalue" (1). I have no doubt, upon the evidence, that the learned judge did no injustice to Stemm by finding that his motive in asking the respondent to sign a contract

(1) (1955) 99 C.L.R., at p. 371.

when " he assented or appeared to assent " to sell for £25,000 was to conclude a bargain before the respondent would have any opportunity to consider it ; and that his Honour was also right when he said that it was " most decidedly " not the practice for formal agreements for the sale of substantial properties to be concluded in the fashion in which Stemm wanted to conclude this one. It was urged for Stemm that such was the practice. The learned judge added : " There was no urgency about the matter ; completion was not to take place for more than three months, the defendant at his best was an old man of failing intellect, he was in the condition which I have attempted briefly to describe and he had no independent advice of any kind."

Stemm did not press the respondent to sign his form of agreement. An agreement drawn up by a solicitor and executed before him could eliminate the possibility of there being any loophole by which the respondent might escape from the contract. But as he and Blomley were eager, as the learned trial judge found, to bind the respondent before he should have an opportunity of considering what deal he had made, there was no time to be lost. Unrestrained by any scruple arising from the respondent's pathetic state, Stemm arranged to call for him on the next day and bring him into Rogers's office, which was forty miles away. It appears by the evidence that when Stemm returned to Goondiwindi, he saw J. R. Folk, his principal's manager in the town and, although it was evening, they called on Mr. Rogers and instructed him to prepare a contract which the respondent was expected to sign next day. The respondent and Turner resumed drinking when Stemm, E. F. Blomley and Doran left the house after concluding this deal.

In order to arrive at a conclusion as to what was the condition and appearance of the respondent when Stemm called on the morning of 21st April at his house for the purpose of bringing him to Rogers's office, it is necessary to go by the evidence of Mrs. Binney, the wife of the shearing contractor, who, with her husband, was occupying the room adjacent to that which was the scene of the drinking bout carried on by the respondent and Turner. The learned trial judge said that she was a truthful witness and attached much importance to her evidence. In order to appreciate fully what a spectacle the respondent was when Stemm and Blomley say that he assented to sell the property for £25,000, it is necessary to consider all of her evidence. There is space to quote only a passage in which she describes the folly of the respondent and Turner on the night of 20th, the morning of 21st ; and the spectacle presented by the respondent when Stemm took him away to sign the contract in

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Rogers's office. The passage is as follows: "Do you remember anything?—I slept better on Monday night (20th April). You would always hear them (the respondent and Turner) talking particularly in the morning and 'Scotty' would get up and I would hear the mugs and something poured into mugs and drinking. (The evidence was that they used mugs for drinking rum.)

In the morning?—In the morning.

What time in the morning?—I suppose round about five or six.

Did you hear that on the Tuesday (21st April)?—On the Tuesday morning.

Did you see Mr. Ryan on the Tuesday morning?—Yes.

Where was he when you saw him?—I was standing near the stairs. I could see about half a dozen steps. Mr. Ryan came down clutching the rail. There is only one rail and the other is a wall. When he got out he sort of faltered, and then he went to the car.

Was anyone behind him?—Mr. Stemm walked down behind him.

Coming down the steps from his room?—Yes.

And then did you see Mr. Ryan walk out to the car?—Yes.

How did he get out to the car?—It was more of a shuffle, and when he got to the gate to open it he sort of lurched to the gate.

Did you see him get into the car?—Yes, he practically fell into the car.

How did he look?—He looked to me as though he would be sick any time, very white in the face, that he might vomit any time, that is just how he looked to me.

What about his clothes?—Oh, they were always in a dirty condition, the same suit on.

What sort of suit?—A brown suit with a white stripe."

In cross-examination the witness said: "He (the respondent) did not lift his feet up properly but just shuffled along".

J. R. Folk, who, as stated above, was the manager for Stemm's principals at Goondiwindi, gave evidence as to the respondent's appearance on the morning of 21st April after he arrived there. This witness said that he saw the respondent passing their office and he heard him "mumbling" something which the witness could not catch. The witness further said that "he looked very frail, rather a sick man I thought": "he looked to be an older and a sicker man than I have ever remembered, definitely": "I do not think that I have ever seen him looking as sick": "he did not seem to be walking as sprightly as he used to do. He sort of shuffled along really". This witness had been manager of the business at Goondiwindi for about seven years. He was in Rogers's office when the respondent was there on the morning of 21st April. Regarding

the condition of the respondent, when Stemm called for him, and during the journey to Goondiwindi, the learned trial judge made this finding: "I am satisfied that during the preceding night the defendant was again grossly intoxicated and that in the morning when Stemm called for him his condition was far from normal. At an early hour he was, I think, barely sensible of what was going on around though his condition may have improved a little during the drive to Goondiwindi. Nevertheless he was that morning in Goondiwindi older and sicker than Folk had ever seen him yet Stemm says he was quite sober and normal. Accepting Folk's statement and Mrs. Binney's evidence as I do, I find it impossible to accept Stemm's evidence on this point. No evidence was given by Stemm of any conversation between him and the defendant during the drive to Goondiwindi and I doubt if at least for some part of this drive the defendant was reasonably capable of intelligent conversation".

The appellant relies upon the evidence given by Rogers to prove that during the proceedings in his office on that very day the appellant was able to understand the terms of the contract and judge about them for himself. Rogers gave an account of the respondent's condition and what passed between the people present in his office. They were Rogers, the respondent, E. F. Blomley, Stemm and Folk. Rogers said in evidence that when the respondent came into the office "his state of health appeared to me the same as it had been since I had known him. He is not a robust man by any means but he had no difficulty in walking or talking on general subjects." Rogers was asked these questions: "Was there any suggestion of him being in any degree under the influence of liquor?—No there was not the slightest suggestion of that.

Could you smell any liquor on him?—No.

Was he respectably dressed?—Yes, so far as I recall he was wearing a suit and tie. He had no difficulty in speaking to me or in conversation on general matters—the weather and the like.

Did you discuss his plans with him at all?—Yes. I told him that I understood he was selling 'Worrah' and asked him what his plans were for the future.

Did he speak of any plans?—I asked him what he intended to do when he sold 'Worrah' and he said in reply that he intended to buy a small place near Parramatta and retire there; that he was getting on in years and he would retire.

Did he show any sign of having repented of his 'Worrah' bargain?—No, he seemed quite enthusiastic about the whole sale.

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Was any mention made of what his activities would be at Parramatta ?—No, none that I can recall. He was buying a small place there."

Consistently with the explicit rejection of Stemm's evidence and the acceptance of Folk's evidence, it is hard to regard this evidence of Rogers as a correct account of the condition or appearance of the respondent. This evidence is significant by reason of the omission of important matters. Presumably no other matters were mentioned. There was no opening statement that the respondent wanted Rogers to act for him in the transaction : no spontaneous statement by the respondent to him that he had agreed to sell the property : no reference to the price : more reference to future plans than to the immediate substantial and important transaction. Indeed it is not possible to find in the evidence any substantial support for the conclusion that the respondent made a firm decision to live at Parramatta when he retired. I find difficulty in regarding the evidence of this conversation as affording proof that the pathetic individual who came by Stemm's car, appeared in Rogers's office as a normal type of vendor who fully understood what he was about to do, and could judge for himself.

The conversation was preliminary to the arrival in the office of E. F. Blomley, who came with Stemm ; Folk followed them. Rogers gives an account of the negotiations which he managed between the respondent on the one hand and E. F. Blomley and Stemm on the other. Rogers read the draft contract which he had prepared the previous night upon the instructions of Stemm and Folk. The purpose of the negotiations was to settle outstanding points—the amount of deposit, the terms of payment and the rate of interest. Rogers said he inquired of the parties : " What is the deposit to be ?" and Blomley answered " That is up to Tim." To this, Rogers said that " Tim ", the respondent, replied : " I do not care what it is." Then, according to Rogers, he said that the deposit in the district was usually ten per cent of the purchase money. In this case it should therefore have been £2,500. Then, according to Rogers, he gave to all present an exposition of the reason why a vendor prefers a high deposit and the purchaser a low one. The interest of the agent in the amount of the deposit was also mentioned by Rogers. According to his evidence, Blomley then said : " What is it to be, Tim ?" He replied, " What about a fiver ? " Then Blomley observed, " All right that will suit us." It is strange that the respondent said, " What about a fiver ?" if he understood what Rogers said as to the purpose of a deposit, and the respondent had realised that they were fixing the amount

of the deposit appropriate to the price, £25,000 mentioned in the draft contract. But Blomley, in giving evidence, said that it was probably he, Blomley, who suggested £5 as the amount of the deposit. If this is correct, then it is apparent that the respondent was too apathetic to answer Rogers's question or to follow what was taking place.

The evidence of Rogers further shows that the respondent accepted at once the terms of payment of the purchase money proposed by E. F. Blomley, and that the respondent suggested four per cent as the rate of interest, although Rogers told him that the current rate was five per cent.

It was strongly contended for the appellant that the respondent was a shrewd old man. This contention should be rejected even upon the evidence of Rogers. The question is whether he was just a foolish old man or a weak old man, without either the will or the power to judge for himself. Upon the weight of the evidence he was the latter. On analysis, I think that Rogers's evidence of the really passive part that the respondent took in the parleying about the outstanding points of the bargain is probative of this. Before the contract could be engrossed a point had to be settled with the respondent's accountant. Rogers told him that the accountant wanted to see him. It was expected by Rogers that the respondent would do so before the parties re-assembled after lunch to execute the contract. Efforts were made, by circumstantial evidence, to prove that the respondent visited the accountant. But the accountant himself, who was called as a witness, could not remember that he did.

When the parties re-assembled in Rogers's office for the execution of the contract, Rogers said that he detected the smell of alcohol coming from the respondent's breath. Rogers said that he " read through the contract in detail ", and " ensured that both parties fully understood it ". In all this evidence it is not stated that anybody ever raised the question of the amount of the price or called particular attention to this subject. It is not likely that Rogers could have been more successful in ensuring that the respondent understood the terms of the contract than he was in instructing him about the purpose served by a deposit. It was only an empty ceremony to read out the contract to a person so stupefied as the respondent. Cross-examined about the reading of the contract, Stemm gave this evidence :

" What was Mr. Ryan doing while it was being read out ?—He was there listening.

Did he interject at all ?—No.

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Did he have nothing to say about it at all ?—No.

He was perfectly silent ?—Yes.

And when the draft contract was being read did he have anything to say ?—No, only when he was asked questions.

And he answered everything he was asked ?—Yes.

And that was the substance of his participation in the deal: when he was asked questions he answered them ?—Yes."

Rogers admitted in cross-examination that he did not discuss the price stipulated in the contract with the respondent or give him any advice about it: that there was need here to give the respondent special protection because he was of advanced years and the parties had a common solicitor: that he had no valuation of the property. He further admitted that the deposit was in his experience " unprecedently low ": that the rate of interest was one per cent below current rate; and that these factors including the provisions to pay off the property in four years all operated for the benefit of the purchaser. His Honour found that the " failing mental equipment " of the respondent " left him at a distinct disadvantage in negotiating with Stemm and E. F. Blomley ". The evidence of Rogers shows that he treated the parties as if they were meeting on equal terms. But it is correct, as his Honour found, that Rogers had no knowledge of the events of the 20th or of the value of the property. His Honour added: " If he had possessed this knowledge I think that it is probable that the agreement would not have been signed that day or at all ".

The evidence which the learned trial judge accepted as to the respondent's condition on the morning of 21st April at home, and when he arrived in Goondiwindi, leads to a strong inference that his visit to Rogers's office was due not to any act of his own will but to his inability to resist Stemm's pressure and eagerness to get the contract concluded. The respondent was in fact " taken " as his Honour said " from his room by Stemm " on that morning. There is a hesitant finding about the respondent's contractual capacity. It is that the respondent did not entirely lack such capacity, and had recovered sufficiently from his excesses on the previous night " to have something more than a hazy understanding of what was going on ". The learned judge could not find that the competence of the respondent to attend to the business which Stemm brought him to Rogers's office to transact was any more than this: he could appreciate that the transaction which was under discussion was a sale of his property, but his participation in it was not accompanied by any reasonably intelligent consent to it.

The learned judge found that his action in executing a contract to sell the property for £8,000 or £9,000 less than its real value may be explained by the disadvantage under which the decline of his mental equipment placed him in dealing with two such persons as Stemm and E. F. Blomley, and the further incapacitating effects of the drinking bout in the course of which the contract was negotiated and executed. Indeed that bout was continued until 30th April. The incapacitating effects of this drinking bout were really the cause of the change in his, the respondent's, constitution observed by Folk. He was on the morning of 21st sicker and older than Folk ever remembered. Rogers's perception must have been much at fault because it gave him an impression of the respondent more like the untruthful one conveyed by Stemm's evidence than the truthful account given by Folk. The learned trial judge doubted that on the morning of 21st April the respondent had any real recollection of having agreed on the previous day to sell the property for £25,000. Stemm's object was to get a contract signed by the respondent before he emerged from his stupor. That he was emerging from it on the road from Boggabilla to Goondiwindi and the process had continued so far that while in Rogers's office he attained to a hazy understanding of the fact that he was discussing a contract for the sale of his property, need not be doubted. The learned judge so found. But it is another thing to say that the respondent had recovered his senses sufficiently to realise that the price was £25,000 and to judge for himself whether to sell at that price : assuming, of course, that when he was not freshly sodden with rum, the impairing effects of old age and chronic alcoholism had not disabled him from protecting his own interests single-handed in a business transaction. It is a proper inference from the evidence, and I apprehend it was made by the learned judge, that the respondent was not sufficiently in possession of what threads of intellect he retained to protect his interests during the negotiations or while the contract was being concluded. E. F. Blomley and Stemm were well aware of this disability and weakness on the respondent's side. Rogers failed to protect the respondent by giving him any appropriate advice. The relative position of the contracting parties, the haste with which E. F. Blomley and Stemm proceeded to bind the respondent by a contract, the enormous discrepancy between the price and the market value of the property and the other inequalities in the contract raise a strong presumption that they procured this bargain by behaviour which is within the category of constructive fraud. The bargain is unfair to the point of being a hard bargain. The parties were not on equal terms.

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Stemm and E. F. Blomley took an extremely unfair advantage of the condition and circumstances of the respondent. The facts of the case make it analagous to the cases cited by the learned judge in which relief was given under the same category of fraud.

It was urged for the appellant that if the circumstances would raise an equity to set aside the contract the respondent affirmed it and thereby deprived himself of this equity. This point was raised at the trial. The learned trial judge made findings of fact which make the point untenable. It is sufficient to say that there is ample evidence to support those findings.

The learned trial judge gave in his reasons for judgment an account of the situation which he thought could be properly resolved by the amendment of the defence now complained of. For the appellant it is again contended that he was prejudiced by the amendment. I did not gather that the allegation of prejudice had any more particularity than that to add the counterclaim at so late a stage necessarily resulted in prejudice to the appellant because until then he counted upon being remitted to his legal claim for damages if his claim for specific performance were refused upon equitable grounds. The contention is not meant to involve the assertion that either because of the substance of the amendment or the stage at which it was made, the trial judge exceeded his powers in giving leave to make the amendment. It involves only whether the leave was an erroneous exercise of discretion. If the respondent, as he contends, was seriously prejudiced that would no doubt infect the leave. The contention is met by these facts. All the matters alleged in par. 14 had been dealt with by the evidence: most of them were involved in par. 10: there was a strenuous contest at the trial upon the issues raised in pars. 10 and 11: the appellant was given leave to call further evidence and availed himself of it: the respondent rested upon the evidence already given to prove his equity to have the contract set aside. The appellant could not have been surprised by any allegation in par. 14. Nor could he have been really embarrased in opposing the counterclaim by any contention advanced at the trial in order to enhance damages: because the respondent had alleged in par. 10 (b) that the sale was at a great undervalue. In my opinion there is no substance in the contention that it was unfair to the appellant to make the amendment of which he complains: or that it was productive of any real prejudice to him. I do not agree with the contention that the giving of the leave to make the amendment was an erroneous exercise of discretion.

I find it unnecessary to consider any other question raised in the appeal because I think that *Taylor* J. was right in deciding that there was enough in the evidence upon which to set aside the contract and that upon the evidence of events after 21st April the respondent did not affirm the contract.

I would dismiss the appeal with costs.

FULLAGAR J. I have felt some difficulty over this appeal from *Taylor* J., but I have come to the conclusion that it should fail. I think that his Honour's findings, read in the light of the whole of the evidence, justify the decree which he made.

Taylor J. set aside a contract in writing for the sale of land made between the plaintiff and the defendant on 21st April 1953. The plaintiff sued for specific performance, or alternatively for damages for breach, and the defendant, by an amendment allowed at a late stage, counterclaimed for the decree in fact made. I will refer later in more detail to his Honour's findings of fact. At the moment it is sufficient to say that he found that, at the time of the making of the contract, the faculties of the defendant, who was a man of about seventy-eight years of age, were gravely impaired by prolonged and excessive consumption of alcohol, that it must have been apparent to those who negotiated the contract that he was in no fit state to transact business, and that it would be inequitable to allow the other party to enforce the contract.

The case is not one of that comparatively rare class where a man's faculties, whether from age or natural infirmity or drink or any other cause, are so defective that he does not really know what he is doing—that his mind does not go with his deed. In such a case his instrument is void even at law—*non est factum*. Nor is it a case like *Gore* v. *Gibson* (1), as to which see *Gibbons* v. *Wright* (2). It is a case, I think, in which relief could be obtained by the defendant, if at all, only in equity. And, when we look for the principle on which equity did grant relief in such cases, we find as so often in equity, only very wide general expressions to guide us. There was, I think, a typical difference in approach between equity and the common law. To the common law the transaction in question might be void or voidable, but the primary question was as to the reality of the assent of the person resisting enforcement of the contract. Equity traditionally looked at the matter rather from the point of view of the party seeking to enforce the contract

(1) (1845) 13 M. & W. 623 [153 E.R. 260].

(2) (1954) 91 C.L.R. 423, at pp. 441-443.

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and was minded to inquire whether, having regard to all the circumstances, it was consistent with equity and good conscience that he should be allowed to enforce it.

The cases on which *Taylor* J. expressly relied as justifying the decree which he made are: *Clark* v. *Malpas* (1); *Longmate* v. *Ledger* (2); *Baker* v. *Monk* (3) and *Fry* v. *Lane* (4). More or less similar cases have been considered by this Court in *Johnson* v. *Buttress* (5); *Yerkey* v. *Jones* (6) and *Wilton* v. *Farnworth* (7). These cases may at first sight appear to be somewhat remote from the present case. For example, the headnote to *Clarke* v. *Malpas* (8) reads: "A purchase from an illiterate poor man, who was ill" —he was apparently nigh to death—"at the time, set aside, the price being inadequate, the vendor having no professional advice, and the transaction being completed in great haste and on terms unduly disadvantageous to him." In none of them did any question arise as to the effect of intoxication on the question whether equity would enforce, or refuse to enforce, or set aside, the contract of a man who said that he was drunk at the time when he entered into it. There is, however, some specific authority with regard to the attitude of equity to such cases.

There are passages in the reports which, if read alone, would suggest that equity adopted a somewhat lofty and aloof attitude to such cases. For example, in *Shaw* v. *Thackray* (9), *Stuart* V.C. said: "The material question was with regard to the state of incapacity by intoxication of Thackray at the time of sale to Shaw. Now, upon the evidence on both sides, it was quite plain that Thackray was a man the reverse of sober. The doctrine of that Court was, that, if a man, by habits of drunkenness, had entirely destroyed his capacity as a man of understanding, so far as to be incapable of executing a deed, any instrument executed by him was entirely invalid; but, on the other hand, a man in the habit of drinking to excess, but who had not wholly destroyed his faculties, if he entered into a contract with another individual, was not to derive to himself any advantages from those habits which had lowered him in the scale of humanity" (10). The Vice-Chancellor added: "The Court was disinclined to interfere in such cases" (10). There are a number of cases of alleged drunkenness in which specific

(1) (1862) 31 Beav. 80 [54 E.R. 1067]; 4 De G. F. & J. 401 [45 E.R. 1238].
(2) (1860) 2 Giff. 157 [66 E.R. 67].
(3) (1864) 33 Beav. 419 [55 E.R. 430].
(4) (1888) 40 Ch. D. 312.
(5) (1936) 56 C.L.R. 113.
(6) (1939) 63 C.L.R. 649.
(7) (1948) 76 C.L.R. 646.
(8) (1862) 4 De G. F. & J. 401 [45 E.R. 1238].
(9) (1853) 17 Jur. 1045.
(10) (1853) 17 Jur., at p. 1046.

performance has been refused, but I have found only one (to which I shall refer later) where the contract has been set aside. In *Vivers* v. *Tuck* (1), *Knight Bruce* L.J., speaking for the Privy Council, said: "It is not the habit of a Court of Equity to decree the specific performance of an agreement more favourable to the Plaintiff than to the Defendant, involving hardship upon the Defendant and damage to his property, if he entered into it without advice or assistance, and there be reasonable ground for doubting whether he entered into it with a knowledge and understanding of its nature and its consequences" (2). That was a case of a suit for specific performance which was resisted upon various grounds, including the ground that at the time of making it the defendant was in a state of intoxication—in the language of the report "considerably in liquor". It was pointed out that the refusal of specific performance left the plaintiff to his remedy at law, and that it by no means followed that the contract should be set aside. In *Scates* v. *King* (3), a bill for specific performance was dismissed without prejudice to any action at law, and no costs were given. *Molesworth* J., while conceding that "the degree of drunkenness which should make an agreement bad in equity is less than that which should avoid it at law" (4), thought that, generally speaking, "courts of equity should not interfere for either party either enforcing or resisting such questionable agreements" (4).

In a note to the case of *Osmond* v. *Fitzroy* (5) we find it said: "The having been in drink is not any reason to relieve a man against any deed or agreement gained from him when in those circumstances; for this were to encourage drunkenness" (6). The only exception apparently allowed is stated in the following terms: ". . . *secus* if through the management or contrivance of him who gained the deed, &c., the party from whom such deed had been gained, was drawn in to drink. By Sir *Joseph Jekyll*, at the Rolls, *Johnson* v. *Medlicott* May 29, 1734" (6). It is clear, however, that the exception is stated too narrowly in the note. For example, in *Cory* v. *Cory* (7) the report begins: "On a question whether it was sufficient to set aside an agreement, that one of the parties was drunk at the time, *Lord Chancellor*" (*Hardwicke*) "thought it was not; unless some unfair advantage was taken, which did not appear in this case" (7).

(1) (1863) 1 Moo. N.S. 516 [15 E.R. 794].
(2) (1863) 1 Moo. N.S., at pp. 526, 527 [15 E.R., at p. 798].
(3) (1870) 1 V.R. (Eq.) 100.
(4) (1870) 1 V.R. (Eq.), at p. 101.
(5) (1731) 3 P. Wms. 129 [24 E.R. 997].
(6) (1731) 3 P. Wms., at p. 131 [24 E.R., at p. 998].
(7) (1747) 1 Ves. Sen. 19 [27 E.R. 864].

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The real effect of the cases on the subject was, I think, stated by Sir *William Grant* M.R. in *Cooke* v. *Clayworth* (1), in a passage which has been quoted in several later cases. The Master of the Rolls said : " I think, a Court of Equity ought not to give its assistance to a person, who has obtained an agreement, or deed, from another in a state of intoxication ; and on the other hand ought not to assist a person to get rid of any agreement, or deed, merely upon the ground of his having been intoxicated at the time (*Dunnage* v. *White* (2)) : I say merely upon that ground ; as, if there was, as Lord *Hardwicke* expresses it in *Cory* v. *Cory* (3), any unfair advantage made of his situation, or as Sir *Joseph Jekyll* says in *Johnson* v. *Medlicott* (4), any contrivance or management to draw him in to drink, he might be a proper object of relief in a Court of Equity. As to that extreme state of intoxication, that deprives a man of his reason, I apprehend, that even at Law it would invalidate a deed, obtained from him while in that condition " (5). This statement of equitable principle was referred to and acted upon in *Nagle* v. *Baylor* (6) (where gross inadequacy of consideration was alleged but not proved), in the case already referred to, of *Shaw* v *Thackray* (7), and in *Wiltshire* v. *Marshall* (8). In the first of these cases specific performance was decreed. In the second a bill to set aside was dismissed. The third is the only reported case I have succeeded in finding in which a transaction has actually been set aside by a court of equity on the ground that one party was intoxicated but not so far intoxicated as to make his deed void even at law. Sir *William Page Wood* V.C. put the principle on which he acted in this way. He said : " And now, having shortly considered what is the state of the law upon this subject, the first thing I have to do is . . . to determine . . . whether it was so entered into as to display absence of judgment in the person making it, and a degree of unfairness in the person accepting it. . . . " (9).

The authorities which I have cited show, I think, that, when a court of equity is asked to refuse specific performance of, or to set aside, a contract at the instance of a party who says that he was drunk at the time of making it, the principles applied do not differ in substance from those applied in such cases as *Clark* v. *Malpas* (10),

(1) (1811) 18 Ves. Jun. 12 [34 E.R. 222].
(2) (1818) 1 Swans. 137 [36 E.R. 329].
(3) (1747) 1 Ves. Sen. 19 [27 E.R. 864].
(4) (1731) 3 P. Wms., at p. 131 [24 E.R., at p. 998].
(5) (1811) 18 Ves. Jun., at pp. 15, 16 [34 E.R., at p. 223].
(6) (1842) 3 Dr. & W. 60.
(7) (1853) 17 Jur. 1045.
(8) (1866) 14 L.T. (N.S.) 396.
(9) (1866) 14 L.T. (N.S.), at p. 397.
(10) (1862) 31 Beav. 80 [54 E.R. 1067] ; 4 De G. F. & J. 401 [45 E.R. 1238].

Fry v. *Lane* (1), and the other cases cited by *Taylor* J. But they show also that cases in which an allegation of intoxication is a main feature are approached with great caution by courts of equity. This is, I think, not so much because intoxication is a self-induced state and a reprehensible thing, but rather because it would be dangerous to lend any countenance to the view that a man could escape the obligation of a contract by simply proving that he was " in liquor " when it was made. So we find it said again and again that *mere* drunkenness affords no ground for resisting a suit to enforce a contract. Where, however, there is real ground for thinking that the judgment of one party was, to the knowledge of the other, seriously affected by drink, equity will generally refuse specific performance at the suit of that other, leaving him to pursue a remedy at law if he so desires. And, where the court is satisfied that a contract disadvantageous to the party affected has been obtained by " drawing him in to drink ", or that there has been real unfairness in taking advantage of his condition, the contract may be set aside.

One other general observation may be made before proceeding to the facts of the present case. The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage *vis-à-vis* the other. It does not appear to be essential in all cases that the party at a disadvantage should suffer loss or detriment by the bargain. In *Cooke* v. *Clayworth* (2), in which specific performance was refused, it does not appear that there was anything actually unfair in the terms of the transaction itself. But inadequacy of consideration, while never of itself a ground for resisting enforcement, will often be a specially important element in cases of this type. It may be important in either or both of two ways—firstly as supporting the inference that a position of disadvantage existed, and secondly as tending to show that an unfair use was made of the occasion. Where, as here, intoxication is the main element relied upon as creating the position of disadvantage, the question of adequacy or inadequacy of consideration is, I think, likely to be a matter of major, and perhaps decisive, importance. It will almost always,

(1) (1888) 40 Ch. D. 312.

(2) (1811) Ves. Jun. 12 [34 E.R. 222].

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I think, be " . . . an important ingredient in considering whether a person did exercise any degree of judgment in making a contract, or whether there is a degree of unfairness in accepting the contract. . . . " (per *Page Wood* V.C. in *Wiltshire* v. *Marshall* (1)).

In the present case it is impossible to doubt that the defendant sold his station property, " Worrah ", at a gross undervalue. The contract price was £25,000, but of this amount the sum of £550 was apportioned to certain chattels which were included in the sale, so that the price for the land (3,696 acres) and buildings was really £24,450 (about £6 12s. 0d. per acre). Two valuers were called at the trial, one for the plaintiff and one for the defendant. The plaintiff's valuer, Mr. McGregor, said that the value of the property at the date of the contract (21st April 1953) was £30,907—say £31,000. If we accept this figure, the defendant was getting some £6,500—more than twenty per cent—less than the true value of what he was selling. But the learned trial judge did not accept the evidence of Mr. McGregor, who valued the property four months later (August 1953) at £34,602—say £34,600. He accepted the evidence of the defendant's valuer, Mr. Boland, who said that no such rise in values had taken place in the four months, and valued the property at the date of sale at £33,444—say £33,450. On this figure the defendant was getting £9,000—or something approaching thirty per cent—less than the true value of what he was selling. There is no suggestion of any such element as kinship, friendship, or gratitude, which might incline Mr. Ryan to make a present of £9,000 to the plaintiff, so as to give an appearance of rationality to the transaction from the defendant's point of view. In this connexion, it is very significant that the defendant had, some time previously, when clearly in a normal state of mind, stated in writing that his price for the property was £9 0s. 0d. per acre, which is almost exactly the value put upon it by Mr. Boland. He had, moreover, not long before, been offered £8 0s. 0d. per acre, which he had refused, saying that £9 0s. 0d. was his price.

But the wide discrepancy between price and value is not the only interesting feature of this transaction. There are two others. In the first place, the deposit on a contract of sale for £25,000 was £5. In the second place, the sale was on terms, which provided for payment of the price over a period of more than four years, and the rate of interest on unpaid purchase money was four per cent. The bank rate of interest current at the time was five per cent. It may be said that the deposit was a matter of small practical importance, but the only thing that can save it from being justly

(1) (1866) 14 L.T. 396, at p. 397

described as ridiculous is the fact that a purchaser at so very low a price would be likely to move heaven and earth rather than default. It is obviously an additional abnormal element in the transaction itself, as is also, of course, the low rate of interest payable under the contract. The rate of interest was an important matter, because the defendant was proposing to " retire ", and presumably to live on the interest of his capital.

The learned trial judge found the explanation of this remarkable transaction in the facts that the defendant was an old man, whose health and faculties had been impaired by habitual drinking to excess over a long period, who was at the material time in the middle of a prolonged bout of heavy drinking of rum, and who was utterly incapable of forming a rational judgment about the terms of any business transaction. Having carefully read and considered the evidence, I agree with this view. His Honour also held that the defendant's condition must have been patent to the plaintiff's father, who acted as the plaintiff's agent, and to Stemm, who acted (ostensibly) as the defendant's agent, and that these persons took such an unfair advantage of that condition that a court of equity could not allow the contract to stand. I agree with this view also.

I do not propose to traverse the evidence in detail, but only to refer generally to certain features of it, and to refer specially to the evidence of the solicitor, Mr. Rogers.

The plaintiff himself, who is a young man, took little or no part in the proceedings at any stage : the negotiations were conducted by his father. Stemm, an employee of Dalgety & Co. Ltd., acted as " agent " for the sale of the property. Obstensibly he was acting in that capacity for the defendant, to whom his firm would look for their commission. But it is obvious that he was, so to speak, " in the plaintiff's camp " throughout : his concern was simply to procure a sale, and nothing seems to have been further from his mind than the idea that it was his duty to obtain the best price he could for the defendant, and generally to look after the defendant's interests. The instructions to prepare the contract were given by Stemm to Rogers, who was supposed to be playing the ambiguous, and not seldom difficult, role of " solicitor for both parties ".

The material events took place on three days—on Monday 13th April at " Worrah ", on Monday 20th April at " Worrah ", and on Tuesday 21st April in Rogers's office at Goondiwindi. With regard to 13th April, the evidence is highly unsatisfactory. It is unsatisfactory because the defendant, although there is no suggestion that he was seriously affected by alcohol on that day, had no clear recollection of what had taken place, and because the evidence of

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Blomley senior and Stemm is open to grave suspicion. His Honour —very naturally, I think—did not believe that he had heard a full and true account of the discussions of that day. According to Blomley senior and Stemm, the plaintiff offered to pay £25,000 for the property, and the defendant wanted £30,000 for it. According to the defendant, the price on which he insisted was £9 0s. 0d. per acre, which was the price he had previously quoted in a letter to Dalgety & Co. Ltd., and which must be taken to have been approximately the true value of the property: at £9 0s. 0d. per acre the property would be worth £33,264. Probability seems rather on the side of the defendant. At any rate, no deal was concluded and the visitors departed with the understanding that the defendant was to think over the matter for a week or so.

Stemm and Blomley senior returned accordingly on the afternoon on Monday the 20th. It was on this day that shearing commenced on "Worrah", and the shearers had arrived on the preceding Sunday. The intemperate habits of the defendant appear to have been well known in the district, a country district near the border of New South Wales and Queensland, and it appears also to have been well known that at shearing time the defendant was specially prone to gratify his taste for rum. It *may*, nevertheless, have been a mere coincidence that the visit took place during shearing time, and that the visitors took with them a bottle of rum—a step which seems, by the way, to have been a carrying of coals to Newcastle. The question of price seems to have been settled in the simplest way. Stemm asked the defendant: "Well, what is your price today, Tim?" The defendant replied: "£25,000". Stemm asked him if he would like to sign a form of contract which he had taken out with him, but the defendant said that he "would sooner his solicitor prepare the contract". His solicitor was Mr. Rogers, and Blomley said that his solicitor also was Mr. Rogers. It was then arranged that Stemm should drive the defendant in to Goondiwindi on the following morning, and that the parties should meet at Rogers's office there. Stemm drove the defendant in on the following morning, Tuesday, the 21st, and the contract was signed in Rogers's office.

It is again, I think, very doubtful whether we have a full and true account of what took place on the 20th. It cannot be doubted, however, that the defendant on the afternoon of that day did agree, or purported to agree, to the price of £25,000. It is very remarkable that, although the sale was a sale "on terms", there appears to have been no discussion on this day as to what the terms were to be. It is also very remarkable that he should thus drop his price

from £30,000 or £9 0s. 0d. per acre (whichever it was). There is much to suggest that he had a very good idea indeed of the real value of his property, and nothing to suggest that there was the slightest urgency or occasion for haste in the matter of selling it. He could in fact, a short time previously, have obtained £8 0s. 0d. per acre from a neighbour and friend named Barden, who gave evidence at the trial. *Taylor* J. found the explanation in the effects of a prolonged and continuing bout of heavy drinking on an old man who had habitually drunk to excess for a long time.

His Honour expressed his general finding by saying that the defendant's condition was such that " . . . he was incapable of considering the question of the sale of his property with any real degree of intelligent appreciation of the matters involved . . ." (1). More specifically he said that he had " . . . no doubt that the defendant's drinking bout on this occasion extended from some little time before Saturday, 18th April, until, at least, towards the end of the following week and that there were many occasions during this period when he was quite incapable . . . of transacting the simplest forms of business " . . . (2). I take his Honour to have thought that on these " occasions " any instrument signed by the defendant must have been held to be void even at law, and that throughout the period he was incapable of making an intelligent decision or forming a rationally considered judgment on a matter of business. During the night of the 20th to 21st he became again, as his Honour found, " grossly intoxicated " (3), and early on the 21st he was " barely sensible of what was going on around him " (4), though his condition " may have improved a little " (4) during the drive (about forty miles) to Goondiwindi.

It seems to me probable that, apart from the direct effects of excessive drinking during the period in question, the defendant's general condition had deteriorated seriously during the preceding year or so. The witness Folk said that on the morning of the 21st he looked " very frail ", and " an older and sicker man " than he had ever seen him look, and there is a very striking difference between two letters written by him on 29th February 1952 and 11th September 1952. But, be this as it may, there is an abundance of evidence to support the findings actually made by his Honour. They are fully supported by the evidence of Mr. and Mrs. Binney, Folk, Cunningham, Cooney and Pfoor. His Honour's view of the credibility of witnesses seen and heard by him in such a case as this could hardly be challenged, and in any case it is impossible to read the evidence of these six witnesses without feeling convinced that

(1) (1955) 99 C.L.R., at p. 370.
(2) (1955) 99 C.L.R., at p. 368.
(3) (1955) 99 C.L.R., at p. 372.
(4) (1955) 99 C.L.R., at p. 373.

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they were painting a substantially true picture, and that the evidence to the contrary effect of Mr. and Mrs. McEwan is altogether unreliable. I think that his Honour approached the issues with all the caution which such cases require. I think that his findings as to the defendant's condition were amply justified. I think that, when once the evidence of the defendant's witnesses with regard to his condition was accepted as true in substance, it was inevitable that it should be found that it must have been apparent to Blomley senior and to Stemm that the defendant was in no fit state to transact business involving a large sum of money. I think that his Honour might well be satisfied, as he was, that both Blomley senior and Stemm knew or believed that the purchase of "Worrah" at £25,000 was "a purchase at a very substantial undervalue". And I think finally that his Honour was right in holding that in such circumstances equity not merely could not enforce, but ought to set aside, a contract so highly disadvantageous to the defendant.

It is necessary to refer to two other matters. The first is the evidence of Mr. Rogers, the solicitor. The plaintiff very naturally relied strongly on this evidence. It is unnecessary to set it out. Rogers gave an account of a quite rational conversation with the defendant alone in his office during the morning of 21st April, and he narrated in some detail what took place in the afternoon when the contract was signed. He said: "I would say that Ryan was definitely sober, had full possession of his faculties . . . I had no idea whatever in my own mind that he was in any way influenced by alcohol." *Taylor* J., having made the findings mentioned above as to the condition of the defendant, observed that it followed that the evidence of Blomley senior and Stemm was generally unreliable and in some respects not to be believed. But he did not disbelieve the evidence of Rogers. Indeed, I think that he accepted it as substantially true.

I do not think that there is any reason for saying that the evidence of Rogers is otherwise than substantially true, and I am not prepared to say that any blame should be imputed to him for his part in the transaction. But there are several comments to be made. I think he was almost certainly unobservant, and it is very unfortunate, as things turned out, that he was acting as solicitor "for both parties". If he had been acting for Ryan alone, it is not to be supposed that he would have passed either the £5 deposit or the four per cent rate of interest. As it was, the facts that Ryan himself (as Rogers says) suggested the absurd deposit and the low rate of interest might well have put him on his guard. But he knew nothing of the value of "Worrah". There was nothing to lead him to suspect the gross discrepancy between price and value,

which is so important a feature of this case. Nor had he any knowledge of the events of the previous day. He knew nothing of Ryan's sudden and suprising " shift " from £30,000 (or £9 per acre) to £25,000. He concerned himself simply with putting into legal shape a transaction of the substance of which he had been informed on the previous night by Stemm, and to the terms of which the parties present before him appeared to agree. While I think that an observant and experienced solicitor might indeed well have had his suspicions aroused, it seems to me understandable that Rogers should have failed to realise that the defendant was in no fit state to discuss and determine the terms on which a valuable property was to be sold. In this connexion, it is important to bear in mind exactly what was the view of *Taylor* J. with regard to the state of the defendant's mind when he was in Rogers's office. It is not to be supposed that he was in that condition of helplessness and semi-imbecility into which he appears to have drunk himself at times during the period of his " bout ". The general nature of the transaction was not beyond his comprehension on 21st April. " But ", said his Honour, " whilst I feel that this is the proper conclusion upon the evidence I am satisfied that at no time was his participation in the transaction accompanied by any reasonably intelligent consent to it (1) ".

The view which I have taken of the evidence of Mr. Rogers is, I think, in substance the view taken of it by the learned trial judge. I would only add that, if his Honour had not taken that view, he might, I think, have felt himself compelled—convinced, as he was, as to the real condition of the defendant, to take a more unfavourable view of that evidence.

It was argued that the defendant had by conduct affirmed the contract after regaining a normal state of mind. It has been said that, in cases of this type, equity will not relieve unless there has been a prompt repudiation after a cessation of any vitiating circumstances. The defendant did not repudiate the contract until 22nd July. In the meantime he had bought another property, in which he proposed to reside, and he had allowed certain stock to be placed on " Worrah " by the plaintiff or his father. But Rogers had not supplied him with a copy of the contract, and I do not think, on the evidence, that he had any real understanding of the position until early in July, when he obtained a copy of the document, and, after a conversation with the witness Barden, consulted a firm of solicitors at Moree. After obtaining their advice he acted promptly enough. His drinking bout continued for some days after 21st April, and *Taylor* J. thought that at its conclusion he had, at the

(1) (1955) 99 C.L.R., at p. 374.

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best, only a hazy recollection of what had actually happened. When—to use his own expressive phrase—the "booze got out of his system", he seems to have begun to think seriously about the position, but there is nothing to suggest that he was aware that the transaction might be successfully challenged, or even alive to what he had really done in April. In all the circumstances it would be wrong, in my opinion, to hold that there was any affirmation of the contract or any failure to repudiate in due time a transaction which, even when he became sober, he did not fully understand and appreciate until the document was in his hands.

I felt pressed at first by the argument based on the evidence of Rogers. But, after full consideration of the whole case, I am satisfied that we have here an example of a thoroughly unconscionable transaction, which no court of equity could possibly enforce itself, or allow to be enforced at law. I would regard specific performance as out of the question, and to let the contract be enforced at law would, in this particular case, be, in effect, to allow the overreaching party to reap the full reward of his inequitable conduct. The appeal should, in my opinion, be dismissed.

KITTO J. This is an appeal against a judgment given in an action in the original jurisdiction of this Court. The action was within the jurisdiction of the Court because the plaintiff was a resident of Queensland and the respondent a resident of New South Wales. The relief sought was specific performance of a contract made between the parties on 21st April 1953, or alternatively damages.

The contract was for the sale by the defendant to the plaintiff of a grazing property known as "Worrah", near Boggabilla in New South Wales, (including £550 worth of chattels) for the price of £25,000, payable by a cash deposit of £5, a payment of £9,995 on completion, and a payment of the remaining £15,000 by four annual instalments with interest at four per cent. It was agreed that completion should take place at Goondiwindi not later than 1st August 1953. The contract was made subject to the consent of the Minister for Lands, and it provided that in the event of the consent being refused or not being granted within three months from the date of sale either party might cancel the sale by notice in writing.

The making of the contract and a purported cancellation of it by the defendant were admitted on the pleadings. Originally the following defences only were raised: (i) that the Minister's consent had not been obtained before the expiration of the stipulated three months, and that the defendant had thereupon cancelled the sale;

(ii) that the plaintiff was not always ready and willing to perform the contract on his part; and (iii) that discretionary grounds for refusing specific performance existed, for the reason that the agreement was unfair and oppressive to the defendant in that (a) at the time of signing the agreement he was intoxicated, mentally and physically weak, incapable of contracting and lacking legal advice as the plaintiff and/or his agent or agents knew or should have known, (b) the consideration for the sale was inadequate and far below the real value of the property, and (c) the terms and conditions of the agreement were unfair to the defendant and would cause him great hardship.

On the eighth day of the hearing the defendant obtained leave to amend his defence. It had by then become apparent that the Minister had in fact given his consent to the sale within the three months limited by the contract, but that the application for the consent, which the relevant regulations required to be supported by a statutory declaration of the purchaser containing specified information, had been supported by a document which, though it purported to be a statutory declaration of the plaintiff, had never been declared by him, and which contained untrue statements. The amendments made raised two new defences. One was that the application for consent was not a proper application, as the document which has been mentioned was not a statutory declaration and contained statements which were false to the plaintiff's knowledge. The other was that at the time of the making of the contract the defendant was incapable of knowing or understanding the nature and effect of the transaction, and that this was known to the plaintiff, or alternatively that the contract was unfair and oppressive to the defendant.

The trial proceeded for another two days, and judgment was reserved. At a later date, however, the learned judge restored the case to the list and informed the parties, in effect, that he was disposed to take a view of the evidence which would entitle the defendant, if the pleadings were appropriately amended, not only to have the claim for specific performance refused but to escape an award of damages by having the contract set aside by the Court in the exercise of its equitable jurisdiction. The defendant thereupon applied for leave to amend his defence a second time. He sought in the first place to allege that at the time of signing the contract and of the negotiations between the parties he was old, lacking in education, suffering from the effects of intoxication, mentally and physically weak, without proper advice, unable properly to protect himself and on unequal terms with the plaintiff, all of which the

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plaintiff then well knew, and that the plaintiff took advantage of the defendant's circumstances, that the same solicitor acted for both parties and did not give the defendant full and proper advice, that the plaintiff acted with undue haste and procured the defendant's agreement to the sale at a great undervalue and upon terms highly favourable to himself and unfavourable to the defendant. Secondly the defendant sought to add a counterclaim repeating some of the allegations in the defence, including those which he was desirous of adding by the new amendment, and claiming a declaration that the contract ought to be set aside and an order that it be delivered up to be cancelled. The application for these amendments was opposed on the ground that to allow them would be to place the plaintiff at an unfair disadvantage by raising new issues with which he could not adequately deal at so late a stage in the case. The learned judge, however, allowed the amendments. His decision to do so is challenged in this appeal, and it is said that the event proved that the allowance of the amendments resulted in so real a measure of prejudice to the plaintiff that the judgment ultimately given should not be allowed to stand. It is a sufficient answer to this, however, to say that the amendments were allowed in the exercise of a judicial discretion, and that no ground has been shown for regarding this case as one in which, conformably with established principle, a court of appeal can properly interfere.

The new amendments having been made, further evidence was allowed to be called on behalf of the plaintiff, and judgment was again reserved. On 17th December 1954 judgment was delivered in favour of the defendant. The suit was dismissed and an order was made on the defendant's counterclaim declaring that the agreement for sale ought to be rescinded and ordering that, subject to repayment of the £5 deposit, the agreement should be delivered up to the defendant for cancellation. The defendant was awarded two-thirds of his costs of the suit and counterclaim.

Before approaching the matters which have been argued on the appeal, the ground may be cleared of two issues raised by the pleadings. One is the issue as to the defendant's contractual capacity at the time of his entering into the contract; and all that need be said as to this is that the learned trial judge expressed himself as not prepared to find that the defendant lacked capacity, and no attempt has been made on the appeal to maintain that a finding to that effect should have been made. The other issue was whether the Minister's consent to the sale, because of defects of both substance and form in the declaration upon which it was applied for,

was not a consent which satisfied the requirement of the contract, and whether for that reason what has been referred to as the purported cancellation of the contract by the defendant was effective. This issue has been revived before us, but all that need now be said about it is that even though it may be that the Minister might have withdrawn the consent on discovering what had occurred he has not seen fit to do so, and the consent therefore stands as a consent given in fact within the stipulated period.

The remaining grounds of defence and counterclaim were substantially successful. The view which his Honour took of the evidence appeared to him to bring the case within the principle of equity explained and applied in such cases as *Longmate* v. *Ledger* (1); *Clark* v. *Malpas* (2); *Baker* v. *Monk* (3) and *Fry* v. *Lane* (4). This is a well-known head of equity. It applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.

The defendant's case, so far as now material, was that at the time of his entering into the contract his mind was so affected by a bout of drinking in which he had been engaged for several days that he was prone to accept a lower price and less advantageous terms on a sale of his property than were reasonably prudent, and that those who acted for the plaintiff in the matter took unfair advantage of his impaired state of mind to induce him to sell at a considerable undervalue and upon terms which, as regards the amount of the deposit and the rate of interest on unpaid purchase money, were unfair to him. That the sale was in fact at an undervalue was established by evidence which the trial judge accepted, and the finding made in this connexion is not challenged. That finding was that at the date of the sale the property, excluding the chattels, was worth £33,444, or slightly more than £9 per acre. The sale price, as has been mentioned, was only £25,000, which is approximately £6 15s. 0d. per acre. The deposit (£5) was merely nominal, and the rate of interest (4%) was proved to be one per cent below the current bank rate.

At the outset it may be observed that the defendant did not suggest that drink had anything to do with his decision to sell. He had been contemplating sale for more than a year. In February

(1) (1860) 2 Giff. 157 [66 E.R. 67].
(2) (1862) 31 Beav. 80 [54 E.R. 1067]; 4 De G. F. & J. 401 [45 E.R. 1238].
(3) (1864) 33 Beav. 419 [55 E.R. 430]; 4 De G. J. & S. 388 [46 E.R. 968].
(4) (1889) 40 Ch. D. 312.

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1952, a Mr. Gore, a stock and station agent at Goondiwindi, a nearby town across the Queensland border, had written to the defendant asking whether he would consider offering "Worrah" for sale; and he had replied that the property would be for sale, but not until the end of the year. He added that the price would be £9 per acre. In September 1952 Dalgety & Co. Ltd. who by then had taken over Mr. Gore's business, wrote to the defendant stating that they had a client who would be very interested if the property were offered for sale. The defendant replied, in effect, that the place would not be for sale until after shearing in the following May, and that he would let Dalgety's know when he was ready to sell. In acknowledging receipt of this reply, Dalgety's revealed that their client was the plaintiff's father, E. F. Blomley. The latter had known the defendant for thirty years and was not altogether unaquainted with "Worrah". His son-in-law, Brian Doran, owned a property called "Toenda", only four miles away.

Dalgety's office at Goondiwindi was managed by a man named Folk, and the assistant manager was named Stemm. On 8th or 9th April 1953 the defendant told Folk in his office in Goondiwindi that Blomley (the plaintiff's father will be thus referred to in this judgment) could come out and have a look at "Worrah" at any time. It was four or five days later, on Monday 13th April 1953, that the invitation was accepted. Stemm brought out Blomley, together with the plaintiff who at the time was twenty-five years of age. Apparently Blomley was considering buying the property in his own name. A discussion took place with the defendant, about (as the plaintiff put it) "running capacities, sales of different other properties, and that line of talk in general". It lasted for two or three hours, and before it finished the party inspected a bore drain, which apparently was the only feature of the property which Blomley particularly wanted to see at that stage. According to the evidence called for the plaintiff, Blomley offered £25,000 and the defendant asked £30,000, both remaining adamant to the end of the conversation. According to the defendant, he never mentioned £30,000 or any total figure, but insisted upon £9 per acre. No one suggests that agreement was reached, but, according to evidence which seems to have been accepted, the defendant said that he did not need cash and would sell on terms; whereupon Blomley said that in that case his son, the plaintiff, would be the purchaser if a sale were agreed upon. Stemm and the two Blomleys left, asking the defendant to think the matter over for a week. There are some important points to notice about this conversation, notwithstanding that the trial judge was not satisfied that Stemm

and the Blomleys had given a complete account of it and felt unable to place any real reliance upon the defendant's evidence. The defendant was not at that time suffering from any bout of drinking. The bout which is said to be material to this case did not begin until the following Thursday, 16th April. In full possession of his senses, the defendant wanted to sell, and was prepared to give terms for payment of the purchase money. Only the question of price stood in the way of agreement. And it should be added that, although the trial judge thought the defendant had little or no recollection of the events of that day, a perusal of his evidence in regard to it shows that a number of details remained in his mind, such as the inspection of the bore drain and particularly his own firmness as to price, and yet in his evidence he did not question the statements which the other witnesses had made either about his willingness to give terms or about a week having been named as a period within which he might think over the outstanding difference as to price. And it is perhaps even more important to mention that in giving his evidence he made no complaint whatever that any of the persons with whom he was dealing had made the slightest attempt on that occasion to bustle him into agreement or to overbear him in any way.

Neither Blomley nor Stemm approached the defendant until the week had expired. But before two days had elapsed, viz. on 15th April, the defendant, still unaffected by any bout of drinking, had sufficiently revised his ideas about price to offer to sell "Worrah" to the owner of an adjoining property, Walter Joseph Doran, for "about £25,000" on terms. The trial judge doubted whether this was a firm offer, and he thought that, if it was an offer to Doran as a personal favour and was almost immediately forgotten by the defendant; but he did not reject Doran's evidence as to the making of the offer, and that evidence shows that, even if Doran's impression that the defendant was anxious to sell was ill-founded, at least the defendant was by no means as intent on getting either £30,000 or £9 per acre as he had been, or had affected to be, in his discussion with Blomley and Stemm. There is nothing surprising about this. One needs to be careful not to introduce an artificial element into the consideration of the case by looking at what people did and said through glasses coloured by the knowledge we now have that on conflicting evidence a finding has been made that the real value of "Worrah" was £33,444. It must be remembered that this finding was made with the assistance of information as to subsequent sales and after hearing the evidence of experts. The defendant would naturally have some acquaintance with values, for he

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was a practical man, capable (as Doran thought) of making a shrewd bargain, and familiar with the district and with local happenings over many years; but his opinion that the place was worth £9 per acre, correct though the trial judge considered it, was not shown to have been reached by reasoning from any concrete facts. It was apparently a general impression or belief of a kind which might alter from time to time under the influence of new information, persuasive argument, or possibly the mood of the moment. All that need be taken from Doran's evidence of what occurred on 15th April is that a sale price of £25,000 was not completely foreign to the defendant's thinking, even while he was still completely sober.

Steady drinking began at "Worrah" on the next day, Thurday 16th April. A party of four was formed for the purpose, its members being the defendant, an old retainer of his named Turner and familiarly called "Scotty", the defendant's nephew John Cooney, and a man named Cunningham who was employed by a neighbouring grazier called Barden. A good deal of rum was consumed over a period of three days, and the defendant was very drunk for most of that time. On the Saturday, shearers commenced to arrive at "Worrah", the shearing of the defendant's sheep being due to commence on the following Monday. On the Sunday, 19th April the shearing contractor, Binney, arrived together with his wife, and there was also a cook, a Mrs. McEwan, whose husband was one of the shearers. They stayed until Monday 4th May, the shearing cutting out on the previous Thursday, 30th April. The defendant had a good deal to drink in this period, and was often intoxicated. His weakness was for rum, and there was plenty of it available.

On Monday, 20th April, Blomley and Stemm came to "Worrah" to renew their negotiations with the defendant. This time the plaintiff was not present, but his place was taken by a young man called Brian Doran, a son of Walter Joseph Doran and a son-in-law of Blomley, who lived, as has been mentioned, on a property called "Toenda", four miles from "Worrah". All three swore at the trial that they found the defendant quite sober, though they all thought he did not look well and Brian Doran said he thought he was recovering from a drinking bout. The defendant, on the other hand, said he was "sick with drinking" and he professed to have no recollection of what he said except that he himself had said he wanted £9 an acre. He described Blomley as "a sort of stand-over cove" who tried to "bounce" him; but he was unable to specify any conduct on Blomley's part which justified this description, except that Blomley had spoken to him "very abrupt". The plaintiff's three witnesses told quite a different story. According

to them, after having a drink at the homestead, they walked to the shearing shed, Blomley and Doran falling back to allow Stemm an opportunity of talking to the defendant. Stemm said he asked the defendant: "What is your price today, Tim?", and the defendant replied at once: "£25,000". Stemm reported this to Blomley, and then asked the defendant whether he would give in the fifty head of cattle which were on the property. The defendant refused, stating that he had already promised the cattle to some one else. The date for delivery of possession was discussed, and the defendant stipulated that it should be left until 1st August, giving as his reasons the very sensible one (having regard to income tax) that, as his wool would be sold before the end of June he wanted to defer the sale of his stock until the next financial year. After the party returned to the house, Stemm produced a form of contract and asked the defendant whether he would like to sign it. He said he would sooner his solicitor prepared the contract, and this was at once acquiesced in. Blomley asked who his solicitor was, and he named Mr. Rogers, a solicitor practising in Goondiwindi. Blomley replied that Mr. Rogers was his solicitor too, and, the defendant agreeing that Rogers might act for them both, it was arranged that they should go to him the next day and sign a contract. Stemm promised to call for the defendant and convey him to Goondiwindi, but he made the offer to do so only after asking the defendant whether he had any means of transport and receiving the reply that he had not, as his nephew Cooney was needed at "Worrah" in connexion with the shearing.

The only other witnesses who touched on this occasion were Mr. and Mrs. Binney and Mr. and Mrs. McEwan, but, although a perusal of their evidence suggests strongly that the defendant must have been suffering to some extent from the effects of the excessive drinking in which he had indulged over the preceding three or four days, none of them gave any definite description of him as he appeared during the actual period of the visit by Blomley, Stemm and Brian Doran. The trial judge, however, formed an opinion which he expressed in these words: "Upon a consideration of the evidence I have no doubt that during the afternoon of the 20th the defendant's condition was such that he was incapable of considering the question of the sale of his property with any real degree of intelligent appreciation of the matters involved, and that this was so must have been reasonably apparent to both Stemm and Blomley." His Honour apparently did not reject the evidence of Blomley, Stemm and Brian Doran in so far as it described things said and done, and indeed the sequel fits that evidence satisfactorily.

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Even the evidence of the cardinal fact that £25,000 was agreed upon cannot well be disbelieved in all the circumstances; and his Honour does not seem to have disbelieved it, for he commented that, as Stemm and Blomley may have seen the defendant on other occasions in a not dissimilar condition, and as he wished to dispose of his property, they may have induced themselves to think that they were not doing him a grave injustice by undertaking to relieve him of it for the sum of £25,000. The view which his Honour took seems to have been that although the defendant did give to the transaction the measure of agreement which the others present described in their evidence, it must have been apparent to them that his mind was so muddled, in consequence of his recent excesses, that his words did not reflect reasoned or sensible decisions. There are two difficulties in the way of adopting this view: it takes a very considerable step by way of inference from general evidence, and it is not easy to reconcile with subsequent events.

One other inference was drawn by his Honour concerning the 20th April. Having regard to the experience of both Stemm and Blomley, he felt satisfied that they believed that the sale agreed upon represented not only a good bargain but a purchase at a very substantial undervalue, and that Stemm's suggestion that a contract should be signed at once indicated a desire to conclude the matter before the defendant should have an opportunity of considering the deal to which he had assented or appeared to assent. His Honour amplified this by referring to the next event in the history of the matter, which was that on returning to Goondiwindi Stemm telephoned Mr. Rogers at 6.30 p.m., made an appointment for 7.30 p.m., and at the latter hour gave instructions to enable the contract to be ready by the following morning. Stemm, his Honour said, did not propose to let the grass grow under his feet; and his Honour thought that the expedition which was used suggested as the reason for haste a desire to conclude the matter before the defendant had time for sober reflection. The validity of this view depends upon whether the defendant was, to the knowledge of Stemm and Blomley, agreeing to the sale in a state of drink-induced folly; for otherwise Stemm's suggestion that a contract be signed at once, and his prompt giving of instructions to Rogers, could not safely be attributed to anything more than that desire to get a contract signed which is a perfectly natural characteristic of the race of real estate agents.

The night of 20th April saw more drinking by the defendant. Next morning Stemm called for him as had been arranged. The trial judge concluded from the evidence that his condition was then

far from normal. He did not need to be reminded, however, that he had an appointment to go with Stemm to Mr. Rogers's office for the purpose of entering into a contract for the sale of " Worrah ". In fact, when Stemm arrived, the defendant was waiting for him, sitting on a stool inside his gate. Mrs. Binney said that he shuffled, lurched to the gate, practically fell into the car, and was very white in the face. It may be, as his Honour thought, that he improved during the drive to Goondiwindi, but Folk gave evidence which was accepted, to the effect that on arrival he looked older and sicker than he (Folk) had ever seen him. This weighed heavily with his Honour, who thought that, if the execution of the contract had, been left until the defendant's drinking bout had run its course and he had recovered from its effects, the defendant would have refused to sell his property for £25,000, or to sell it on terms comparable with those contained in the agreement sued upon. This reaches the crux of the case, for if it is right, and if Blomley and Stemm knowingly took advantage of the situation to get the contract signed, clearly a court of equity would not allow the contract to stand. Whether it is in fact right and advantage was in fact taken of the situation, are questions to which the evidence so far related gives no conclusive answer. It is necessary to consider carefully what happened in Rogers's office.

Rogers went into the witness-box, and he was subjected to a vigorous cross-examination. His evidence was expressly accepted by the trial judge to this extent, that in the face of it his Honour was not prepared to find that the defendant on arrival at the office entirely lacked contractual capacity, and thought it probable that the defendant had temporarily recovered from his over-night excesses sufficiently to have something more than a hazy understanding of what was going on—in fact sufficiently to be able to appreciate the purpose of his visit, the nature of the transaction under discussion and the general purport of the instrument he executed. But his Honour expressed himself as satisfied that at no time was the defendant's participation in the transaction accompanied by any reasonably intelligent consent to it. Rogers, however, gave evidence which, if believed, showed a completely intelligent consent to the transaction, and the question at once arises whether it is possible for the defendant's condition to have been as his Honour thought it was, and to have appeared as such to Stemm and Blomley, without Rogers being aware of it; for, if not, the defendant's case must fail unless the extremely serious conclusion is reached, the impossible conclusion on the evidence as it seems to me, that Rogers was guilty of a scandalous breach of professional duty,

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of participation in a wicked and deliberate trick upon a sick and helpless old man, and of a deliberate attempt to mislead the Court by giving false evidence.

The learned judge was, of course, quite alive to this situation; and it is evident that he did not think that Rogers saw in the defendant a man disabled by the drink-induced state of his health to give businesslike consideration to so large a matter as the sale of a grazing property and being helplessly drawn into a transaction upon which he could form no reasonably intelligent judgment. Yet his Honour thought that the defendant was such a man and that Blomley and Stemm perceived that he was. The question therefore arises squarely: how can that be so, without Rogers having known it too? The answer which seemed to his Honour sufficient was that Rogers had no knowledge of the value of "Worrah", was quite ignorant of the fact that the sale was at a considerable undervalue, and knew nothing of the circumstances in which the arrangements of the previous day had been made. If he had known these things, no doubt he would have been much more alert than he in fact had occasion to be to attach significance to any signs the defendant may have given of inability to grasp the situation or to look after his own interests in negotiating. But if the defendant was so lacking as a result of days of prolonged and extreme intoxication, it seems to me incredible that his condition should not have been obvious to Rogers, however unobservant he may have been at the beginning and however prone to make favourable assumptions about a transaction in which an important and respectable firm of local agents was acting.

Let us see what actually occurred, according to Rogers's evidence. Stemm brought the defendant into Rogers's office about 11.30 a.m., but he was obviously not shepherding him, for he left him alone with Rogers for ten or fifteen minutes while he himself went up the street to look for Blomley. Now, the defendant was no stranger to Rogers; they knew each other "reasonably well", as Rogers put it; and they spent the waiting time in general conversation. The defendant had no difficulty in walking, or in talking on general subjects; he did not smell of liquor; and he spoke intelligently of his plans for the future. Asked what he intended to do when he had sold "Worrah", he replied that he intended to buy a small place near Parramatta and to retire there. He seemed to Rogers "quite enthusiastic about the whole sale". Then Stemm and Blomley came in, and Folk also. Rogers went through the draft contract he had prepared, filling in blanks in accordance with the joint instructions of Blomley and the defendant, and forming an

impression which he stated in cross-examination by saying that he had no doubt the defendant understood the price and the terms as much as any layman would. Rogers asked what the deposit was to be, and Blomley said " That is up to Tim " (the defendant). The defendant said he did not care what it was. Rogers said ten per cent was the usual deposit, and that a vendor usually preferred a high deposit and a purchaser a low one. He also said that an agent generally liked to see a deposit sufficient to cover his commission, an aspect about which Folk said he was not worried. It was the defendant who named a figure. He said " What about a fiver ?" And Blomley, naturally enough, said that that would suit him. Stopping there, it could be, of course, that the defendant was sitting in a state of mental torpor, and following the discussion just enough to give an answer that fitted the question but naming the first amount that came into his fuddled head. But, if so, Rogers would surely have had to be blind not to see it. He inserted the £5 in the contract, however, and went on to the next question which was the method of payment of the purchase money. On this, the defendant's general attitude had been defined days before. Blomley suggested that £10,000 be paid on delivery of possession, and the balance by instalments over a period of four years. To this the defendant replied, " That will suit me. I do not want all the money now, as I am going to retire." Rogers asked about the rate of interest, and it was the defendant who nominated four per cent.

So far, unless Rogers was simply inventing all this, the defendant's attitude was intelligent enough to all appearance. True the four per cent was low ; the current bank rate at the time was five per cent. But the statement that he was going to retire and did not want full payment at once was sensible and accorded with what he had said previously ; and he repeated to Rogers the thoughtful income-tax reason that he had stated at " Worrah " on the previous day for wanting the date for delivery of possession put forward to 1st August, namely that that would give him time to sell his sheep after the end of the financial year. There was not the slightest attempt to bustle him, or cajole, or persuade him. He had raised no question or demur when the price had been read out as £25,000. But there next occurred an incident, relating to the very matter of the sale price, which makes it exceedingly difficult to suppose that the defendant was labouring under any handicap in the settling of the terms of the contract. After Rogers had gone through various provisions which excited no comment from any of those present, he came to the question of apportioning the sale price as between the various items comprised in the property sold. This,

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as he said at the time, could help to protect the defendant in relation to income tax, that is in relation to recoupment of depreciation on capital assets which had been allowed in his assessments for past years. Rogers, with the defendant's assent, spoke on the telephone to a local accountant named White, who had kept the defendant's books and attended to his income-tax affairs for the preceding six years, and made an appointment for the defendant to see him that day. To prepare a draft clause on this topic Rogers asked what movables were to be included, and the defendant replied: "There is no stock. Everything goes in except the Land Rover, my clothing and ports to take the clothes away in." Rogers asked about tools and furniture, and the defendant said: "Yes, I will not want any of that stuff where I am going to." After Blomley had said not to worry about an inventory, as he had known the defendant for over thirty years and could accept his word, the parties dispersed, agreeing to assemble again after lunch when Rogers should have received the suggested apportionment from Mr. White the accountant, and have had time to engross the contract. The defendant went straight to White's office, and he went alone. That he discussed with White the details of the apportionment, and therefore the fact that the total price was £25,000, is certain, for Rogers produced a draft containing figures which he swore and White acknowledged had been written by White, and these figures included the £25,000 itself. White, however, had no independent recollection of the interview by the time he went into the witness-box—a fact which tells against the defendant, for if he had been so drink-sodden as to be incapable of intelligent consideration of the sale he was making it is difficult to imagine that White would not have observed the fact and been scandalised to find himself asked to assist a man to part with his property while in such a condition. And moreover, if to men like Blomley and Stemm £25,000 was as obviously an undervalue as is now suggested, one might have expected it to cause some little surprise to White also. But evidently there was nothing about the defendant's visit which interested White sufficiently to leave any lasting impression.

The party re-assembled at 2.30 p.m. or thereabouts in Rogers's office. While the contract was being typed, Rogers took down from the defendant his instructions for the application for the Minister's consent to the sale. The information the defendant had to supply for this purpose was sufficiently extensive to make it quite certain, one would think, that if his capacity for thought and his grasp of considerations relevant to the sale had been diminished to any substantial extent by the effects of alcohol Rogers

must have seen signs of it then, even if he had not seen any before. But although he then detected liquor in the defendant's breath, he found no difficulty in getting the instructions, and he swore at the trial that he had " no idea whatever " in his mind that the defendant was " in any way influenced by alcohol ". He read through the contract in detail and assured himself that both the defendant and Blomley understood it, and they then executed it, Blomley signing for his son the plaintiff. The gathering then broke up, and only one other event of any relevance occurred that day. Blomley met the defendant at the Royal Hotel, and asked whether the plaintiff could put some cattle on the property. According to him, the defendant agreed as he had already disposed of his cattle, but said that the plaintiff could not put sheep on the property until he sold his own. This rings true, for shortly afterwards the plaintiff did put cattle on " Worrah ", and this fact assumes some significance when it is realised that weeks went by with these cattle on the property, and no word of complaint came from the defend- and that he had been unfairly dealt with on 21st April.

In those weeks several events occurred, some before the period of heavy drinking ended and some after, which tell heavily against the notion that on 21st April the defendant assented to a sale from which a period of sober reflection would have saved him. They must be considered in the light of the fact, which it is quite impossible to doubt, that the defendant at least knew he had sold his property for £25,000. At the trial he would have had the judge believe that he did not know the price until his nephew Cooney got a copy of the contract for him from Rogers's office. But that was about 15th July 1953, and a month earlier he was grumbling to a stock and station agent named D. C. Piddington that " I sold this place too cheap. I was not drunk at the time but I was in a bad mood." That he knew all along that he had signed a contract of sale is beyond dispute ; and it is unbelievable that he went along either not troubling what the price was or confident that despite an absence of recollection on the point he could depend on its having been £9 per acre and had no need to make sure.

Blomley was at " Worrah " the next day with his wife and daughter, inspecting the house and " the general set-up " and talking with the defendant. The day after, 23rd April, an agent called H. R. Piddington, the father of D. C. Piddington, called on the defendant to seek the sale of his sheep. His evidence was that the defendant told him he had sold the property to Blomley for £25,000, promised to offer the sheep to Piddington later on, and discussed quite intelligently the shearing and his plans to go and live at

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Parramatta. In relation to this occasion the learned judge said he was not satisfied that the defendant had any clear picture of what had occurred; but he did not express any doubt of H. R. Piddintgon's veracity, and unless the latter was lying his evidence shows that the defendant was fully alive to the only thing that really mattered, namely that he had agreed to a sale for £25,000. Blomley was out there on several other occasions before 1st August, and on one occasion, in June, the plaintiff himself and his fiancee went out to inspect the house, while D. C. Piddington measured the house for insurance purposes. Still there was no word of complaint.

But an even more significant event occurred two months after the date of the contract, on 26th June 1953. The drinking bout was a thing of the past by then, and there is no suggestion that another had begun. The defendant called on Rogers; not indeed to complain that he had made an improvident sale at a time when he was not himself, and certainly not to remonstrate with Rogers for the part he had played in the matter, but to avail himself once more of Rogers's professional services. And this time it was to act for him in the purchase of a cottage in Goondiwindi. Rogers asked him had he changed his mind about going to Parramatta, and he replied: "Yes, I think I will stay here in Goondiwindi now." He wanted completion of the purchase of the cottage to be fixed for a week or so after the settlement date for "Worrah", saying that he could use money from the sale of that property to settle the house purchase. He was here speaking to the solicitor who he knew had drawn up the contract of sale of "Worrah"—it was to his office that he was later to send Cooney to get a copy of the contract—and the reference to Parramatta reached back to their conversation on the day of that contract. But there was no complaint, no suggestion of ignorance of any material matter, no request for information, only instructions for the purchase of a house in which he could live when he left "Worrah". This was surely not the conduct of a man who had made, under the effects of drink, a sale to which in cold sobriety he saw reason to take exception.

The defendant even went so far as to sell his sheep. But apparently people began to suggest that he had sold "Worrah" too cheaply, and some comment seems to have been made to him about the unusually small deposit he had agreed to. Apparently this preyed on the defendant's mind, for he said in evidence that "the whole public" had told him about the deposit: "in fact the dogs are barking it". And he said that people were laughing at him about it, and named some of them. At some stage, perhaps because he

was stung by what people said to him, he decided not to go on with the contract. In his evidence he first fixed this time as a couple of months after signing the contract. Later he said that he would have liked to tell Blomley a week after having signed it, "when the boooze got out of my system", that he would get out of the contract if he could. But in fact he told him nothing of the kind, and instead, as has been mentioned, he went on to sell his sheep and buy a house to live in.

When finally the defendant made up his mind to cancel the contract it was on the ground that (as he and his newly-engaged solicitors supposed) the Minister's consent had not been obtained within the time allowed in the contract. It was only when that ground failed that he set up that he was not in a fit condition at the time of the contract. In the box his suggestions were extravagant: "I had sold it for half-price"; "I was blithered—drunk". Asked whether he thought, when he bought the Goondiwindi cottage, of leaving "Worrah" and settling down, he said, "Well, I did when I was a bit intoxicated"; and then he added "and I was sick and sorry for leaving it"—a statement which may well point to the truth of the matter, at least if added to his statements that he had sold to Blomley when he was in a bad mood and that people were laughing at him.

When the date for completion arrived, Blomley was in Rogers's office, ready with the amount of money then payable. The defendant came in, but said he had not come about "Worrah" but about the house he was buying, that he would not go on with the sale of "Worrah", and that he would not discuss the matter without his new solicitor, a Mr. Cole. Blomley went to see him at "Worrah" at some time within the next three days, and offered to discuss the matter, but the defendant became angry and refused to talk about it. Still there was no specific ground put forward as entitling the defendant to get out of the contract. On 3rd September Rogers wrote to Mr. Cole on the subject, and the reply said vaguely that "one ground . . . concerns the circumstances of the night of the 20th April and the following morning, the 21st April at your office and involves yourself, the agent and your client's father." Not until the defence was delivered on 3rd December was a clear line adopted, and even then it was to be modified as the case went on, by the successive amendments which have been described.

On a full review of the evidence, the main features of which have now been surveyed, the conclusion to which I have come, with great respect to the learned trial judge and with much hesitation,

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is that the evidence in the case does not provide a sufficient foundation for the findings which entitled the defendant to the relief granted him. The hypothesis in applying the relevant head of equity is that the person claiming relief possessed at the material time such a degree of understanding that the contract or dealing which he impugns is not voidable at law for want of mental capacity, on the principles to which reference has recently been made in *Gibbons* v. *Wright* (1). Where that capacity exists, no imperfection of reasoning power, no difficulty of comprehension, can suffice by itself to give a title to, or a defence to a claim for, equitable relief. But such deficiencies may combine with other circumstances to form a total situation of such a character that the Equity Court will see in it a ground for active interference or for refusal of equitable remedies to the opposite party. Even though the bargain made may be onerous, there still may not be enough in the case for either purpose. So, as *Isaacs* and *Rich* JJ. mentioned in *Fullers' Theatres Ltd.* v. *Musgrove* (2); "*In Stewart* v. *Kennedy* (3) Lord *Watson* says: 'Specific performance is not a matter of legal right, but a purely equitable remedy, *which the Court can withhold when there are sufficient reasons of conscience or expediency against it.*' In *Davis* v. *Maung Shwe Go* (4) the Privy Council were urged on the ground of discretion not to affirm a decree for specific performance having regard to the onerous nature of the bargain. But their Lordships held that in the absence of fraud or misrepresentation or any unconscionable feature, or proof of improper advantage having been taken, they could not accede to the argument" (5). Cf. *Boyd* v. *Alexander* (6); *Yerkey* v. *Jones* (7); *Wilton* v. *Farnworth* (8). The essence of the ground we have to consider is unconscientiousness on the part of the party seeking to enforce the contract; and unconscientiousness is not made out in this case unless it appears, first, that at the time of entering into the contract the defendant was in such a debilitated condition that there was not what Sir *John Stuart* called "... a reasonable degree of equality between the contracting parties"; *Longmate* v. *Ledger* (9), and secondly, that the defendant's condition was sufficiently evident to those who were acting for the plaintiff at the time to make it prima facie unfair for them to take his assent to the sale. If these two propositions of fact were established the burden of proving

(1) (1953) 91 C.L.R. 423.
(2) (1923) 31 C.L.R. 524.
(3) (1890) 15 A.C. 75, at p. 102.
(4) (1911) L.R. 38 Ind. App. 155.
(5) (1923) 31 C.L.R., at p. 549.
(6) (1931) 31 S.R. (N.S.W.) 645, at p. 648; 48 W.N. 202.
(7) (1939) 63 C.L.R. 649, at pp. 678-680.
(8) (1948) 76 C.L.R. 646, at p. 653.
(9) (1860) 2 Giff. 157, at p. 163 [66 E.R. 67, at p. 69].

that the transaction was nevertheless fair would lie upon the plaintiff: *Earl of Aylesford* v. *Morris* (1); *Permanent Trustee Co. Ltd.* v. *Bridgewater* (2). If the burden were not discharged the defendant would be entitled to hold the judgment appealed from, since in that event it would be right to draw the conclusion that, as was said in *Evans* v. *Llewellin* (3), " . . . though there was no actual fraud, it is something like fraud, for an undue advantage was taken of his situation " (4). The fact that the defendant's condition was the result of his own self-indulgence could make no difference, for, as is shown by *Cooke* v. *Clayworth* (5), the principle applied is not one which extends sympathetic benevolence to a victim of undeserved misfortune; it is one which denies to those who act unconscientiously the fruits of their wrongdoing.

The learned trial judge was under no misapprehension as to the relevant principles of law. The difficulty in the case is to decide whether the findings should stand which were made as to the condition in which the defendant was at the time when he signed the contract of sale and as to the knowledge and conduct of Blomley and Stemm. The features of the case which call for a close and indeed a suspicious scrutiny of the evidence are obvious, and one cannot fail to be conscious of the advantage which his Honour possessed in seeing the witnesses and having an opportunity to assess the character of each of the persons who took part in the material transaction. But even so, I find myself unable to avoid the conclusion that the defendant all along acted deliberately, even if not as hard-headedly as he might have; that he was quite capable of judging of his interests and of dealing with Blomley and Stemm on equal terms; and that there was nothing in the conduct of Blomley, Stemm or Rogers which amounted to over-reaching, sharp practice, or in any other way taking an unfair advantage of the defendant. The defendant was not the " poor and ignorant man " who figures in the cases as a ready victim for the unscrupulous. He was not poor, he was not ignorant as regards matters relevant to the value of his property; and he was not under any sort of pressure, of circumstances any more than of persons. He stood in no need of independent advice. His decision to accept a price so much below that which he had been demanding does not need any more probable explanation than that being, as he said, in a bad mood, tired of managing the property, feeling his age and the depressing effects of indifferent health, desiring the convenience of

(1) (1873) L.R. 8 Ch. 484, at p. 490.
(2) (1936) 36 S.R. (N.S.W.) 643, at pp. 651, 652; 53 W.N. 250.
(3) (1787) 1 Cox. 333 [29 E.R. 1191].
(4) (1787) 1 Cox. 333, at p. 340 [29 E.R. 1191, at p. 1194].
(5) (1811) 18 Ves. Jun. 12 [34 E.R. 222].

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town life and the company it would afford, and realising that £25,000 was ample for his needs in such years as might remain to him, he came to the conclusion that the best thing to do was to take Blomley's offer and be done with it.

In this situation I see no reason why a court of equity should not hold the defendant to his contract and require him to perform it. In my opinion the appeal should be allowed, the judgment appealed from should be set aside, and in lieu thereof there should be judgment for specific performance.

Appeal dismissed with costs.

Solicitors for the appellant, *Rogers & Stein*, Goondiwindi, by *Anthony B. Bradfield & Johnson.*

Solicitors for the respondent, *Moodie Cole & Sons*, Moree, by *Purves, Moodie & Storey.*

R. A. H.