Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Lyttelton Times Company, Limited, v. Warners, Limited, from the Court of Appeal of New Zealand; delivered the 31st July 1907.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD ROBERTSON.
LORD COLLINS.
SIR FORD NORTH.
SIR ARTHUR WILSON.

[*Delivered by The Lord Chancellor.*]

In this case there has been a marked difference of opinion among the learned Judges in the Supreme Court of New Zealand, arising out of a state of facts which may be summarised as follows:—

In 1902 Warners, Limited, owned a hotel in Christchurch adjoining premises in which the Lyttelton Times Company, Limited, carried on business as printers and newspaper publishers. It occurred to Mr. Luttrell, an architect, that the hotel could be provided with additional bedrooms (which were needed) and that the printing house could be accommodated with better premises (which was desired) if the printing house were rebuilt so that its business could be carried on in the lower floor, and part of the upper floors should consist of bedrooms, and be let as such to the hotel. Negotiations ensued, in which Luttrell, though an intermediary, was the agent of neither side, and in the end an agreement was reached under which

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the building was to be erected, and Warners, Limited, were to rent a portion of the upper floors for 10 years at a rent of 300*l*. a year. What occurred in the negotiations preceding this agreement has been stated by Mr. Justice Denniston, whose findings in fact are accepted on all hands.

"Each party entertained, very naturally, doubts as to the wisdom of combining in the same building an engine-house and printing machinery with hotel bedrooms. Each party spoke of the risk of noise and vibration. In each case such doubts were so far removed by the representation of Mr. Luttrell as to his ability to neutralise such risk that I am satisfied each party signed the agreement in the belief that the noise and vibration, if not absolutely unfelt in the bedrooms, would be so slight as not to be an inconvenience. Only on such a supposition can I conceive two bodies of intelligent and experienced men of business entering into the agreement they did—an agreement containing no stipulation or provision, no guarantee and no indemnity in respect of a risk which was apparent, and admittedly had been considered."

The building proceeded, and Luttrell's anticipations have not been realised. There is noise and vibration which causes substantial inconvenience in the new bedrooms and in some of the old bedrooms close to the openings made in the old wall of the hotel to communicate with the new building. Thereupon Warners, Limited, brought this action for an injunction and damages.

At the root of the difficulties in the case as presented to their Lordships in argument lies this question:—Ought the fact that one of the parties was the grantor and the other the grantee of a lease to dominate the decision of the case? The maxim that a grantor cannot derogate from his grant expresses the duty ordinarily laid on a man who sells or leases land. But it does not touch a similar and equally binding duty that may in certain cases be laid on a man who buys or hires land. If A lets a plot to B, he may not act so as to frustrate the purpose

for which in the contemplation of both parties the land was hired. So also if B takes a plot from A, he may not act so as to frustrate the purpose for which in the contemplation of both parties the adjoining plot remaining in A's hands was destined. The fact that one lets and the other hires does not create any presumption in favour of either in construing an expressed contract. Nor ought it to create a presumption in construing the implied obligations arising out of a contract. When it is a question of what shall be implied from the contract, it is proper to ascertain what in fact was the purpose or what were the purposes to which both intended the land to be put, and, having found that, both should be held to all that was implied in this common intention.

In this case their Lordships think that both parties agreed upon a building scheme with the intention that the building should be used for bedrooms and also for a printing house according to a design agreed upon. Both parties believed these two uses could co-exist without clashing, and that was why both of them accepted the scheme. Neither would have embarked upon it if he had not thought his intended enjoyment of the building would be permitted, and both intended that the other should enjoy the building in the way contemplated. They were mistaken in their anticipation. But if it be true that neither has done or asks to do anything which was not contemplated by both, neither can have any right against the other.

Mr. Levett and Mr. Pollock argued the case on behalf of the Respondents (Plaintiffs) as though the common intention was that the Plaintiffs should have reasonably quiet bedrooms. It was so, but that was only one half of the common intention.

The other half was that the Defendants should keep on printing. One cannot bisect the intention and enforce one half of it when the effect of so doing would be to frustrate the other half. Accordingly their Lordships agree with the conclusions of Mr. Justice Edwards and Mr. Justice Chapman.

If it could be shown that the Defendant Company or its servants had erected the building or established or worked their machinery and plant improperly, no doubt there would have been a cause of action. But that is not found by Mr. Justice Denniston, nor by the majority of the Court of Appeal, nor was it in reality the case made by the Plaintiffs. It is rather put on the ground that a duty lay on the Defendant Company to prove affirmatively that the building could not have been so constructed as to avert a nuisance, and that they had failed in that duty. Their Lordships do not think that in this case the burden of proof is on the Defendants, and share what appears to have been the opinion of most of the Judges in New Zealand, that negligent or improper construction and working have not been established.

Under these circumstances their Lordships will humbly advise His Majesty that this Appeal ought to be allowed, that the judgments of the Court of Appeal and the Supreme Court ought to be discharged, and that the action ought to be dismissed with costs in the Courts of New Zealand on such scale as may be directed by the Court of Appeal in New Zealand.

The Respondents will pay the costs of this Appeal.