[HIGH COURT OF AUSTRALIA.]

LEIPNER . . . . . APPELLANT;
PLAINTIFF,

AND

McLEAN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1909.

SYDNEY, *April* 8, 21, 22.

Griffith C.J., O'Connor and Isaacs JJ.

Principal and agent—Evidence of authority—Contract—Interest in land—Agreement to advance money in consideration of mortgage of land—Collateral agreement—Verbal agreement as to application of money advanced—Statute of Frauds (29 *Car. II.* c. 3), *sec.* 4.

Adoption by a person of engagements purporting to be entered into on his behalf with a third party is evidence of authority in the agent to bind him with respect to those transactions, and also with respect to subsequent transactions arising out of them.

A mortgagee of real property agreed verbally with the mortgagor to make a further advance, in consideration of the mortgagor executing a further charge on the property, and before the execution of the charge, promised at the request of the mortgagor to pay the amount to be advanced to a particular person. The charge, which was under seal, made no reference to the application of the money advanced, describing the transaction merely as an agreement for a further advance in consideration of the execution of a further charge, and acknowledging receipt of the amount by the mortgagor.

In an action by the mortgagor against the mortgagee for breach of the alleged agreement to pay the sum in question to the person indicated, sec. 4 of the *Statute of Frauds* having been pleaded :

Held, that it was a question for the jury whether the verbal promise to pay the money to a particular person was intended by the parties to be a term of the main agreement which was subsequently reduced to writing, in

which case the Statute would apply, or was part of a collateral agreement relating solely to the application of the money when advanced, and, therefore, not within the Statute.

The High Court, on appeal, will not give effect to objections based on defects in the proceedings which could have been cured by amendment, but will deal with the case before them as if all necessary and proper amendments had been made.

Decision of the Supreme Court reversed.

APPEAL from a decision of the Supreme Court of New South Wales on a motion for a new trial.

The appellant Mary S. Leipner sued the respondent, Norman McLean, for damages for breach of contract. The declaration alleged that the plaintiff had entered into a contract to purchase a certain property and paid a deposit thereon, and that it was agreed between the plaintiff and defendant that in consideration of the plaintiff executing "a mortgage in favour of the defendant the defendant should advance certain moneys to the plaintiff and thereupon the plaintiff did execute the said mortgage and subsequently it became necessary for the plaintiff to pay to the Master in Equity on account of the purchase of the aforesaid property a certain sum of money by a certain date in order to escape incurring a forfeiture of the said deposit and a cancellation of the contract to purchase and heavy legal . . . expenses and thereupon it was agreed between the plaintiff and the defendant that in consideration of the plaintiff having executed the aforesaid mortgage and then giving a further security to the defendant the defendant should pay on behalf of the plaintiff to the Master in Equity the sum of £1,057 15s." on a certain date to enable the plaintiff to complete the purchase and to prevent cancellation and the consequent loss, and that the further charge was given by the plaintiff, but the defendant failed to pay the whole amount agreed upon to the Master in Equity whereby the plaintiff suffered damage. The defendant in his pleas traversed the material allegations in the declaration, and also pleaded that the agreement was a contract and sale of lands, &c., and an interest in lands within sec. 4 of the *Statute of Frauds* and there was no memorandum in writing.

The respondent had by power of attorney appointed as one of

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his agents a member of the firm of Stephen, Jaques & Stephen, solicitors practising in Sydney. At the hearing of the action before *Sly* J. the appellant gave evidence that she was entitled to a half share in certain real property which was being sold by order of the Equity Court, and which she had entered into a contract to purchase, and that she arranged with Mr. Colin Stephen, another member of the same firm of solicitors, for certain advances to be made to her by the respondent, as security for which she was to execute a mortgage of the property in favour of the respondent. Various interviews took place in reference to the matter, as a result of which the amount of the deposit was advanced by the respondent and paid into Court by Messrs. Stephen, Jaques & Stephen, and a mortgage was executed as arranged. Subsequently the sale was delayed and was in danger of going off owing to the inability of the appellant to find the purchase money. Finally the appellant arranged with Mr. Colin Stephen for a further advance by the respondent of the balance of the purchase money, the mortgage being extended to cover that amount, and later in another interview she informed him, as she alleged, that it would be necessary for her to find a further amount of £30 for certain costs that had been incurred in the interval, and that this should be added to the amount to be paid into Court. He agreed to add the amount to the cheque for the balance of purchase money and to pay the whole into Court to her credit on condition that she executed a further charge on the property as security for the advance. At his request she then signed a further charge which recited that £1,507 was then owing to the respondent on the original mortgage, and that the mortgagee had agreed to advance to her a further sum of £50 upon the security of the further charge, and witnessed that in consideration of the £50, of which the receipt was acknowledged, the mortgagor covenanted to reduce the sum of £1,557 secured by the original mortgage and the further charge to £900, &c. The balance of the purchase money was then paid into Court by the firm, but for some reason the £30 was not included in the cheque paid in. The sale to the appellant having gone off in consequence, the deposit was forfeited and the property re-sold. The respondent subsequently took proceedings in equity for payment of the

amount of the advances out of the appellant's share of the proceeds of the sale in Court, and in support of the application filed affidavits setting out the whole of the negotiations, and describing the various transactions as having been conducted by the firm of Stephen, Jaques & Stephen on behalf of the respondent, but made no reference to the arrangement for the payment of the additional £30. The appellant was nonsuited at the hearing of the action, on the ground that the contract was within sec. 4 of the Statute of Frauds, and there was no note or memorandum in writing. On appeal to the Full Court a new trial was refused on the ground that there was no evidence of authority in the particular member of the firm who had conducted the negotiations to bind the respondent in regard to the agreement to advance £30.

From this decision the present appeal was brought.

Bignold, (*Nicholas* with him), for the appellant. The Full Court's decision proceeded on the assumption that no person but the attorney could bind the respondent. But the evidence showed that the firm to which the attorney belonged also acted as agents for the respondent. A member of the firm, representing the firm, carried on all the negotiations with the appellant, arranged for the advances, and paid them by the firm's cheque. The respondent adopted the acts of the firm as having been done on his behalf, and thereby held out the firm as having authority to bind him in similar transactions with respect to the same subject matter. The affidavits filed by the respondent in the proceedings to charge the appellant's interest with the amount of the advances afford ample evidence that not only the attorney, but the other members of the firm acting for the firm, had authority to make the arrangements of which the respondent subsequently took advantage. The respondent cannot repudiate one part of the transaction while adopting the other part. At any rate, an admission that the firm had authority to make the earlier arrangements is some evidence that they had authority to make the latter.

The agreement as to the £30, even if taken strictly as alleged in the declaration, was not within the Statute of Frauds. An agreement to lend money in consideration that the other party

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does something in relation to land after the land has been conveyed does not require a writing. All that had to be done with reference to an interest in lands had been done. [He referred to *Price* v. *Leyburn* (1).] The appellant does not sue on an agreement to lend money, but on an agreement to pay money into the hands of the Master in Equity. The agreement to lend the money and the consideration for it were contained in the instrument, but the charge makes no reference to the payment into Court. The Statute therefore is satisfied so far as it applies. [He referred to *Wilkinson* v. *Scott* (2); *Lyman* v. *Lyman* (3).] The agreement to pay into Court was entirely collateral to the main transaction. It is not a case of leaving a term out of the written agreement.

[GRIFFITH C.J.—Could it not be put thus, that the arrangement as to payment to the Master in Equity was something subsequent to and independent of the making of the advance, relating to money notionally advanced, but remaining in the hands of the lender?]

That is the agreement on which the appellant is suing.

[ISAACS J.—Where is the evidence of authority to pay the money into Court?]

Two payments into Court had already been made by the firm, of which the respondent took the benefit. [He referred also to *Lindley* v. *Lacey* (4); *Evans* v. *Hoare* (5); *Hucklesby* v. *Hook* (6); *Ex parte Hall*; *In re Whitting*; *Ex parte Hall* (7); *Driver* v. *Broad* (8); *Mounsey* v. *Rankin* (9); *Morgan* v. *Griffith* (10); *Angell* v. *Duke* (11); *Mann* v. *Nunn* (12); *De Lassalle* v. *Guildford* (13); *Erskine* v. *Adeane* (14).]

E. Milner Stephen, (*Broomfield* with him), for the respondent. The contract on which the appellant now relies is not the contract sued upon. The declaration alleges a failure to carry out an agreement of which one term relates to an interest in land. The

(1) Gow., 109, at p. 112.
(2) 17 Mass., 249.
(3) 133 Mass., 414.
(4) 11 L.T.N.S., 273.
(5) (1892) 1 Q.B., 593.
(6) 82 L.T., 117.
(7) 10 Ch. D., 615.
(8) (1893) 1 Q.B., 744.
(9) Cab. & El., 496.
(10) L.R. 6 Ex., 70,
(11) L.R. 10 Q.B., 174.
(12) 30 L.T.N.S., 526.
(13) (1901) 2 K.B., 215.
(14) L.R. 8 Ch., 756.

whole transaction is an agreement to give a further charge in consideration of a further advance, and it cannot be divided into two parts; neither the verbal arrangement nor the written document can stand alone. The charge in itself conveys no estate. A mere conveyance does not create a debt. [He referred to *South African Territories Ltd.* v. *Wallington* (1).] Without a bargain and sale it creates only a resulting trust. If the bargain does not appear in some writing the *Statute of Frauds* applies. Generally it appears in the conveyance itself. But here, according to the appellant's contention, the agreement as stated in the document is not the agreement sued upon.

[O'CONNOR J.—The appellant's contention is that the contract to pay the money is an independent contract.]

According to the deed no money was due from the mortgagee to the mortgagor, because the receipt was acknowledged. The appellant is suing on an agreement which is inconsistent with that, and which should have been in writing.

[GRIFFITH C.J.—The appellant says that the contract in the instrument was executed, and that she is now suing on a contract to apply in a particular way moneys already lent.]

But the promise to advance was in consideration of the execution of the charge. The consideration is not divisible in the way the appellant contends. There is therefore no consideration for the other promise.

[GRIFFITH C.J.—There is the confidence reposed in the lender.]

The lender would be a gratuitous bailee. The evidence shows only one contract. The application of the money was an integral part of the consideration for the execution of the charge. It was not in any sense collateral. [He referred to *Sanderson* v. *Graves* (2); *Cocking* v. *Ward* (3); *Pulbrook* v. *Lawes* (4); *Bagnall* v. *White* (5); *Harris* v. *Sydney Glass and Tile Co.* (6).] The promise, if there was one, was anterior to the execution, and the agreement having been reduced to writing, nothing not contained in the writing can be proved.

[ISAACS J. referred to *Mann* v. *Nunn* (7).]

(1) (1898) A.C., 309.
(2) L.R. 10 Ex., 234.
(3) 1 C.B., 858; 15 L.J.C P., 245.
(4) 1 Q.B.D., 284.
(5) 4 C.L.R., 89.
(6) 2 C.L.R., 227.
(7) 30 L.T.N.S., 526.

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The bargain that is sued upon necessarily involved a dealing with an interest in land.

[GRIFFITH C.J.—There is perhaps a variance between the evidence and the declaration. This Court never pays much attention to such matters as can be cured by amendment.]

But as no amendment was asked for, the nonsuit was right. The agreement now suggested is subsequent to the execution of the charge, whereas the actual promise was prior to and in consideration of the execution. The charge was tendered in evidence by the plaintiff only in order to prove the agreement, otherwise it had no significance. [He referred to *Boston* v. *Boston* (1).]

[ISAACS J.—The transaction between the parties may have consisted of two contracts, the first a contract for a loan, the second for the application of the money lent. It is a question for the jury whether there was one contract or two.

O'CONNOR J.—All that the plaintiff need show is that the facts are capable of the construction that there was a collateral agreement.]

As to the question of authority. There is no evidence of holding out by the defendant in regard to this particular contract. Adoption of this alleged agent's acts cannot operate as a holding out except in regard to things done after the adoption. Here the adoption was subsequent to the contract in question. [He referred to *International Paper Co.* v. *Spicer* (2).]

April 22.

GRIFFITH C.J. We have had an opportunity of considering this case in the interval which has elapsed since the argument, and do not see any necessity for deferring judgment.

The action was brought upon an alleged agreement by which the defendant agreed to pay into the Equity Court for the benefit of the plaintiff, by a certain time, a sum of money which it was necessary for her to pay in order that she might get the benefit of a purchase which she had made at a sale held under the authority of the Court of a property in which she was entitled to an interest. The money advanced was to be secured by a mortgage of the plaintiff's interest in the land which she

(1) (1904) 1 K.B., 124.

(2) 4 C.L.R., 739, at p. 745.

was to acquire. At the trial evidence was given that the defendant's agents had agreed to lend her on the security of a mortgage a sufficient sum of money to enable her to complete the purchase, but that owing to some accident the amount payable by the plaintiff had been increased by some £25 or £30, and that she thereupon applied to the same agents for the defendant and asked them to advance the extra amount and to pay the whole sum into Court for her at once, and they agreed to do so. An application was made for a nonsuit on the ground that the contract should have been in writing under the Statute of Frauds, and the learned Judge granted the nonsuit on that ground. On an application by the plaintiff to the Full Court for a new trial, that Court did not deal with the question raised upon the Statute of Frauds, but refused a new trial on the ground that the authority of the alleged agent had not been established. In the view that this Court takes of the matter the case must go back for a new trial. On the question of authority the learned Judges of the Supreme Court referred exclusively to a power of attorney given by the defendant to his Australian agents, one of whom is a member of a firm of solicitors in Sydney. But it appears that the transactions in question were entered into on behalf of the defendant by another member of the same firm of solicitors. They were all carried on by him with the plaintiff, and it appeared from affidavits, which the defendant himself had put in in another proceeding in the Court, that the facts were such as to raise the inference that that gentleman had authority to make the contract sued upon. I say nothing as to whether that evidence was conclusive, or as to the weight that should be attached to it, but it is clear that upon that evidence the jury might have come to the conclusion that the gentleman who actually made the bargain with the plaintiff had authority to make it.

With regard to the question under the Statute of Frauds, I will read what was said by *Sir G. Mellish* L.J. in *Erskine* v. *Adeane* (1):—"No doubt, as a rule of law, if parties enter into negotiations affecting the terms of a bargain, and afterwards reduce it into writing, verbal evidence will not be admitted to

(1) L.R. 8 Ch., 756, at p. 766.

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Griffith C.J.

introduce additional terms into the agreement, but, nevertheless, what is called a collateral agreement, where the parties have entered into an agreement for a lease or for any other deed under seal, may be made in consideration of one of the parties executing that deed, unless, of course, the stipulation contradicts the terms of the deed itself." In *De Lassalle* v. *Guildford* (1), the same principle was laid down in a considered judgment of the Court of Appeal—that is to say, that there may be a collateral agreement to which the Statute of Frauds does not apply. In this case the plaintiff wanted £25 extra to be paid into Court, and she asked the defendant's agent to pay it for her. He said that he would do so on security being given. Accordingly security was given and a deed was executed, and it was agreed that the money should be paid into Court. Was that a collateral agreement—collateral to the arrangement to give the security, and to take effect when the money should be advanced? I think it may reasonably be contended that the particular stipulation to pay the money into Court was collateral. The two contracts may be independent of one another. I suggested during the argument, as an analogous case, that of a man who wishes to pay a debt, and sells a piece of land in order to be able to pay it, and at the time of the sale agrees with the purchaser that he will pay the purchase money to the creditor for him, and after the conveyance is executed the purchaser does not pay the creditor. Surely in such a case as that the agreement to pay the money to the creditor of the vendor instead of to the vendor himself is entirely collateral to the main transaction. The question is one of fact. In the present case I think that the jury might have come to the conclusion that the agreement was collateral, and I think, therefore, that the plaintiff is entitled to have the case sent down for a new trial.

O'CONNOR J. I am of the same opinion and have nothing to add.

ISAACS J. I think that the nonsuit was wrong. I think that the evidence was consistent with the contract to pay the money

(1) (1901) 2 K.B., 215.

into Court being collateral to the other part of the transaction—namely, the agreement to advance money upon the security of a further charge—and there are circumstances which have been adverted to in argument which make that conclusion possible. I say no more about that, because I wish to be careful not to say anything that might influence the ultimate finding of the jury on that point.

Then as to the question of evidence of agency. That is also a question that will have to be determined again by the jury. But there was, in my opinion, ample evidence, as matters now stand, upon which the jury might find that, apart altogether from the power of attorney, Mr. Colin Stephen was authorized to make the bargain that he is said to have made, that he would pay this money into Court. It has been said that, although the authority to make the previous contract has been admitted by the defendant, that does not carry the plaintiff any distance with regard to the authority to make the other bargain. I will refer to a case which seems to me quite in point, namely, *Hazard* v. *Treadwell* (1), the circumstances of which are set out as follows: The defendant who was a considerable dealer in iron, and known to the plaintiffs as such, though they had never dealt together before, sent a waterman to the plaintiff to purchase iron on trust, and paid for it afterwards. He sent the same waterman a second time with ready money, who received the goods but did not pay for them, and the Chief Justice held that the sending him upon trust the first time and paying afterwards for the goods was an invitation to give him credit, so as to charge the defendant upon the second contract. That is exactly the case here. There is evidence that may be displaced or may be outweighed, but it is impossible to say that there was no evidence to go to the jury as to the agency.

Appeal allowed. Order appealed from discharged. Rule made absolute for a new trial with costs of the rule. Costs of the first trial to be plaintiff's costs in the cause. Respondent to pay the

(1) 1 Stra., 506.

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plaintiff such costs of appeal as are allowed in appeals in formâ pauperis.

Solicitor, for the appellant, *H. E. McIntosh.*

Solicitors, for the respondent, *Stephen, Jaques and Stephen.*

C. A. W.

Foll *Stevens v Standard Chartered Bank Aust Ltd* 53 SASR 323

[HIGH COURT OF AUSTRALIA.]

ANDREW GORDON . . . . . APPELLANT;
DEFENDANT,

AND

ALEXANDER MACGREGOR . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *May* 10, 11.

Griffith C.J., O'Connor and Isaacs JJ.

Written contract—Variation of, by parol agreement—Pleadings—Amendment of, after close of evidence.

When a contract has been entered into by parol and afterwards reduced into writing, the parties to it are bound by the writing unless it is shown by evidence that the written document was not intended to embody the whole of the terms of the contract.

Semble, it is not a proper exercise of his discretionary power for the presiding Judge, after the close of the evidence, to allow an amendment of the pleadings to raise a point founded on some oral statement by a witness, which may have been perfectly complete so far as it was relevant to the issues which were being tried, but which, if it had been given with reference to entirely different issues, might have been supplemented or qualified by other material evidence.

Decision of the Supreme Court affirmed.