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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.

APPEAL from the decision of the Full Court of Queensland setting aside the judgment of *Real* J., and entering a verdict for the plaintiff for £2,500, being the amount of damages found by the Judge as having been suffered by the plaintiff.

The plaintiff, a timber merchant, sued the defendant upon a written contract for the supply of a large quantity of log timber of specified dimensions. He alleged that the timber had never been supplied, and claimed damages for breach of contract. The defendant in the first place denied the contract. He next pleaded that if he executed the agreement (which he did not admit) the plaintiff knew, and it was a term of the agreement, that the timber was to be obtained from certain Crown lands, and was conditional on the defendant's obtaining a licence to take timber from those lands; and further said he could not, within the period mentioned, obtain the quantity of timber of the average girth which the plaintiff said he had to supply because there was not sufficient timber of that class on the lands. This defence was shown to be untenable. The defendant also pleaded that if he executed the agreement he did so in the faith and belief (as the plaintiff well knew) that he was not bound by the agreement to deliver logs of an average girth of eight feet but that logs of five feet girth would be accepted, and that by the agreement there was no fixed time of delivery. It was on these pleadings that the defendant came into Court, and he failed upon these defences. The plaintiff proved a written agreement by which he undertook to purchase and the defendant to sell 500,000 superficial feet of dark red cedar in the log at 25s. per 100 superficial feet loaded on trucks at Allora railway station, provided the logs were supplied in lengths of from 10 to 15 feet (averaging 12 ft. 6 in.) and an average girth of not less than 10 ft. 6 in., and at the rate of not less than 60,000 feet every three months. The defendant did not deliver any timber under the contract. At the close of the plaintiff's case the defendant swore that no special time had been fixed for the commencement of deliveries under the contract, that the term of three months was not mentioned, and that he did not bind himself to any time. The plaintiff in giving evidence had said in a somewhat ambiguous way that it was arranged that it would be three months before the defendant would start delivery. The

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defendant, however, contradicted this statement and swore that no time for starting delivery was ever mentioned or understood.

After the defendant's case had been closed, his counsel applied for leave to amend his pleadings in order to raise the *Statute of Frauds* as a defence on the ground that the contract in writing was not the agreement made between the parties inasmuch as it did not contain two essential terms of the agreement, and that the real contract had not been reduced into writing. One of these terms was that delivery was to commence three months after the date of the contract, and the other was that a minimum girth of 6 feet had been agreed upon. *Real* J. allowed the amendment, found that these were terms of the contract and were not contained in the written agreement, and gave judgment for the defendant The Full Court on appeal reversed the judgment of *Real* J.

Stumm, for the appellant. One of the main grounds upon which the Full Court upheld the appeal was that *Real* J. should not have allowed the amendment of the pleadings by means of which the defendant set up the *Statute of Frauds*. The power to allow an amendment is purely a discretionary one.

The plaintiff in his evidence said:—"It was mutually arranged before signing that it would be three months before he (the defendant) could start delivery." This proves that the written agreement did not contain all the terms. Also, there was an exhibit in the case—a letter from the plaintiff to the locomotive engineer at Ipswich *re* a contract for the supply of timber to the Railway Department—which showed that the plaintiff knew that some of the logs would only be 6 feet in girth; this shows that the written agreement did not contain all the conditions as to minimum girth.

Lukin and *Hobbs*, for the respondent. The amendment allowed by the Judge made the statement of defence ridiculous, because, in the first place, it was pleaded that "there was no fixed time for delivery," and then by the amended plea it was stated that the written agreement did not contain all the conditions, one being that three months were to elapse before delivery was to

begin. All that was meant by the plaintiff in his evidence was that a *reasonable time* was to elapse before delivery. There was no evidence as to minimum girth outside the written agreement, and the parties having put their contract into writing in fixed terms, viz., "I undertake to purchase from you," &c. (signed, A. B. Macgregor) . . . "I undertake to supply and agree under the above conditions" (signed, A. Gordon), they were bound by it. See *Harnor* v. *Groves* (1). [Counsel also referred to *Buxton* v. *Rust* (2), *Ellis* v. *Thompson & Kebbel* (3).]

The following judgments were read:—

May 11.

GRIFFITH C.J. This was an action brought by the respondent against the appellant to recover damages for breach of contract. The statement of claim alleged an agreement in writing dated 4th November 1907, by which the defendant was to sell, and the plaintiff was to buy, 500,000 superficial feet of dark red cedar in log on certain terms, two of which were that the logs should be from 10 feet to 15 feet, averaging 12 feet 6 inches, in length, and should have an average girth of 10 feet 6 inches, and that the timber should be delivered at the rate of not less than 60,000 superficial feet every three months at a place stated. The defendant first alleged the existence of another term of the agreement, meaning, apparently, of the written agreement. There was no such term, verbal or in writing, and nothing turns upon that defence. He also pleaded another defence, which substantially consisted of an allegation that he refused to agree to bind himself to any time with respect to the delivery of the timber, and that he executed the agreement in the faith and belief that no time was fixed for delivery. The case came on for trial on those issues. It appeared in the course of the plaintiff's evidence that there had been verbal negotiations between the parties, and that on 4th November the agreement sued upon was signed by both parties. The general rule, well known—I quote the words of *Maule* J. in *Harnor* v. *Groves* (4)—is that "Where a contract, though completely entered into by parol, is afterwards reduced into writing, we must look at that, and at that alone . . .

(1) 15 C.B., 667, at pp. 673-4.
(2) L.R. 7 Ex., 1, at p. 4, per *Martin B.*
(3) 3 M. & W., 445.
(4) 15 C. B., 667, at p. 674.

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It is by the written contract alone . . . that the parties are bound. And more especially is that so in a case where, as here, the contract is one which by the *Statute of Frauds* is required to be in writing." This is, I think, sufficient to dispose of the case. The defendant could only controvert this position by showing that the written document was not intended to embody the whole contract.

After the close of all the evidence (except some which was given by permission upon a subsidiary point, which failed), the defendant's counsel asked leave to amend his pleadings by alleging that the writing alleged in the statement of claim did not contain the whole terms of the agreement between the parties, and to set up the *Statute of Frauds*. The application was founded upon a suggestion that in respect of two matters the written agreement did not embody all the terms agreed upon between the parties. One of them was as to the time when the deliveries under the contract were to commence. On that point the agreement was silent, and I construe it as meaning that they were to commence within a reasonable time. In the course of the plaintiff's evidence, he said that it was mutually arranged before the signing of the agreement that it would be three months before the defendant would start to deliver. I have already pointed out that the defendant had specially pleaded that he refused to agree to bind himself to any time with respect to the delivery, and that he had executed the written agreement in the faith that it contained no such term. In his oral evidence he swore:—"Before signing I said I would sign no agreement with the starting point in it;" and again:—"I asked him if there was a time for starting mentioned in the agreement. I said that if so I would not sign it."

The learned Judge allowed the amendment, and found in favour of the defendant on both points. He found as a fact that it was a term of the agreement between the parties that the delivery should not commence for a period of three months. It is objected by the plaintiff that there was no evidence to support that finding. Two of the learned Judges in the Supreme Court thought that there was some evidence from which the Judge might have found that it was a term of the agreement, but that

under the circumstances it was not fair to allow the defendant to raise the point, when he had denied the fact in his pleadings and had denied it on oath.

Here I would remark that it is a very dangerous thing after the close of the evidence to allow an amendment to raise a point founded on some oral statement by a witness, which may be perfectly complete so far as it is relevant to the issues which are being tried, but which if it were given with reference to entirely different issues would be incomplete. It is like allowing a party to raise a new case on appeal when the Court has not all the materials before it. I, for my part, dissent from the opinion of the two learned Judges, and I agree with the Chief Justice that there was no evidence on which it could be found that the term was a term of the agreement entered into between the parties. The defendant denied it. The conversation, as deposed to by the plaintiff, was at best ambiguous. In my opinion it amounts, *primâ facie*, to a mere statement of what the parties thought would be reasonable when the time came for determining when the delivery should begin, as in the case of *Ellis* v. *Thompson & Kebbel* (1), cited by Mr. *Lukin*.

The second point on which the learned Judge of first instance found that the written agreement did not contain all the terms of the actual agreement was that a minimum girth of the logs that would be accepted under the contract had been verbally agreed upon. Upon that point the learned Judges of the Supreme Court were unanimous that there was no evidence to support the finding of *Real* J. I content myself with saying that I entirely agree with them. I think, therefore, that, whether the amendment was properly allowed or not in the exercise of the learned Judge's discretion, there was nothing in the evidence to warrant the finding that the written agreement did not contain the whole of the terms of the agreement deliberately entered into between the parties. The learned Judge assessed the damages that the plaintiff would be entitled to recover, if he was entitled to succeed, at £2,500, but entered judgment for the defendant. The Supreme Court set that judgment aside, and entered judgment for the plaintiff. In my opinion that judgment was correct, and should be affirmed.

(1) 3 M. & W., 445.

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O'CONNOR J. I am of the same opinion.

ISAACS J. I agree with what has been said by the learned Chief Justice, and I desire to add a few words. The learned Judges of the Supreme Court attached a good deal of importance to whether there was evidence as to the time, and as to the girth. There is one view of defendant's case which impressed itself very strongly upon me, which makes that perfectly immaterial. The evidence of the plaintiff, which is not contradicted on this point, shows that the written document was brought by him, shown to the defendant, read over, and plaintiff said :—"Are you prepared to sign the agreement and get on with the work ? He said, 'Yes.' I said, 'Where can we sign it?' and he said, 'In the station-master's room.' We then went to the station-master's room, where the defendant read over the agreement, filled in the date, and signed it. It was witnessed by the station-master. It was mutually arranged before signing that it would be three months before he would start delivery." That passage in the evidence is strongly relied upon by Mr. *Stumm*, but it should be observed that although that passage, whatever its weight may be, occurs before the signing of the agreement, the parties had agreed to sign the document, and this statement, whatever its force, was either a preliminary negotiation or, what is more probable, a contemporaneous agreement.

Now that document, when it is looked at, uses words that are appropriate only to a definite absolute contract :—"I undertake to purchase" on the one hand with all the particulars, and "I undertake to supply and agree under the above conditions" on the other, and it is witnessed by the station-master. It is an almost irresistible presumption that the parties agreed that that should be the record of their bargain, and I can find no scrap of evidence to displace that presumption, and, therefore, I say it matters under the circumstances of this case not at all whether there was evidence as to the girth and as to the time. The rule in many cases has been affirmed over and over again. *Harnor* v. *Groves* (1) is a well known case, but another view of it is given in *Knight* v. *Barber* (2), by *Pollock* C.B., in these words :—"But I think it is a conclusion of law, that where parties are making an agreement

(1) 15 C.B., 667.

(2) 16 M. & W., 66, at p. 69.

by parol, and subsequently reduce it into writing, the writing constitutes the contract." That requires just a word of qualification, and it is given by Baron *Bramwell* in the well known case of *Wake* v. *Harrop* (1)—a case which afterwards went to the Court of Exchequer Chamber (2). Baron *Bramwell* says:—"It should be borne in mind that a written contract, not under seal, is not the contract itself, but only evidence—the record of the contract. When the parties have recorded their contract, the rule is that they cannot alter or vary it by parol evidence. They put on paper what is to bind them, and so make the written document conclusive evidence between them. But it is always open to the parties to show whether or not the written document is the binding record of the contract."

Now, as I say, we start here with the legal presumption—the *primâ facie* presumption—that this is a binding record of the contract, and there is nothing to displace it. Once you arrive at that position, the rule that you cannot introduce parol evidence to vary it is distinct, and perhaps the most authoritative place where you find the principle enumerated is in *Inglis* v. *John Buttery & Co.* (3). Lord *Blackburn* in his speech there quotes with approval the observations of Lord *Giffard*. He says:—"Now, I think it is quite fixed—and no more wholesome or salutary rule relative to written contracts can be devised—that where parties agree to embody, and do actually embody, their contract in a formal written deed, then in determining what the contract really was and really meant, a Court must look to the formal deed and to that deed alone. That is only carrying out the will of the parties. The only meaning of adjusting a formal contract is, that the formal contract shall supersede all loose and preliminary negotiations—that there shall be no room for misunderstandings which may often arise, and which do constantly arise, in the course of long, and it may be desultory conversations, or in the course of correspondence or negotiations during which the parties are often widely at issue as to what they will insist on and what they will concede. The very purpose of a formal contract is to put an end to the disputes which would inevitably

(1) 1 H. & C., 202; 6 H. & N., 768. (2) 6 H. & N., 768, at p. 774.
(3) 3 App. Cas., 552, at p. 577.

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arise if the matter were left upon verbal negotiations or upon mixed communings partly consisting of letters and partly of conversations. The written contract is that which is to be appealed to by both parties, however different it may be from their previous demands or stipulations, whether contained in letters or in verbal conversation. There can be no doubt that this is the general rule, and I think the general rule, strictly and with peculiar appropriateness, applies to the present case." Once that position is established the defendant, in order to escape from the effect of the document, would have to show that it was not intended to be the record of the contract—he would have to show some reason for defeating the plaintiff, either by showing fraud, or by showing that by mistake the contract was not properly recorded, but neither of those things has been attempted to be shown here. Therefore, looking at the matter as part of the preliminary negotiations, no case whatever has been made, in my opinion, even if there were evidence as to what the negotiations were, to vary the effect of the written document.

I will only make one more reference, and that is to the case of the *New London Credit Syndicate Ltd.* v. *Neale* (1), where the Court of Appeal in England re-affirmed the doctrine that you cannot give evidence of a contemporaneous oral agreement to vary a written contract. *Rigby* L.J. said :—" It is a wholesome rule of law that, when parties have put an agreement into writing, parol evidence is not admissible to contradict, or vary the terms of the written agreement," and, therefore, they held that an oral agreement to vary the terms of contract of a bill of exchange was not admissible because it contradicted the written terms. In this case I say the ordinary legal rule should apply, and there being no circumstances such as we recognize at law or in equity for varying the *primâ facie* effect of a written document, I agree with the judgment delivered by the Chief Justice that the appeal should be dismissed.

Appeal dismissed.

Solicitors, for the appellant, *McGrath & Hunter.*
Solicitors, for the respondent, *Roberts & Roberts.*

H. V. J.

(1) (1898) 2 Q.B., 487, at p. 491.