[HIGH COURT OF AUSTRALIA.]

HEPPINGSTONE . . . . . APPELLANT,
PLAINTIFF,

AND

STEWART . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *October* 25, 26, 31.

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

Contract—Sale of land—Offer—Statute of Frauds—Specific performance—Partnership—Agreement—New trial.

The plaintiff and his brother agreed on 24th November 1905 to sell to the defendant all their interest in certain lands known as "Mount Celia Station," and all the improvements and live stock thereon. The plaintiff alleged that he had on 16th November 1905 entered into an independent collateral agreement in writing with the defendant whereby the defendant agreed to allow the plaintiff to re-purchase his half interest on certain terms and conditions set out in the agreement, and that the agreement of 24th November was made subject to it. This document was not produced by the plaintiff, but the learned Judge who presided at the trial and also the learned Judges who constituted the Full Court were of opinion that the defendant had signed it. The agreement of 24th November was carried out, and subsequently the plaintiff brought an action for specific performance or damages for non-performance of the alleged agreement of 16th November.

Held, that the agreement of 16th November was an offer which could have been turned into a contract sufficient to satisfy the *Statute of Frauds* between the parties by verbal acceptance before withdrawal, and that, in the absence of necessary findings of fact by the presiding Judge, a new trial should be granted.

Decision of the Full Court of Western Australia: *Heppingstone* v. *Stewart*, 12 W.A.L.R., 135, reversed.

APPEAL from the Supreme Court of Western Australia.

The facts are fully stated in the judgment of *Griffith* C.J.

Keenan K.C. (*M. Cantor* with him), for the appellant. *Rooth* J. and all the Judges who sat in the Full Court were of opinion that the document of 16th November was signed by the defendant. The plaintiff would never have entered into the agreement of 24th November unless there had been the prior agreement of 16th November, and the carrying out of the agreement of 24th November was evidence of part performance of the agreement of 16th November. At any rate the arrangement of 16th November was an offer by the defendant to allow the plaintiff to re-purchase the half interest in the property on the terms named, and the plaintiff has given ample evidence of acceptance of that offer. [He referred to *Reuss* v. *Picksley* (1); *Noble* v. *Ward* (2); *Gibson* v. *Holland* (3).]

Pilkington K.C. (*Hearder* with him), for the respondent. The agreement upon which the action was brought offended against the *Statute of Frauds*, and the plaintiff must fail. The argument now put forward by the appellant that it was an offer which he subsequently accepted was never put before the Court below. The Court would not grant specific performance of what would be a partnership at will: *Fry on Specific Performance*, 4th ed., sec. 1540. The plaintiff's only claim must be for damages for non-performance of the agreement. The plaintiff did not prove any damage; nominal damages at the most were recoverable, and that was met by the payment into Court of £5. As to appeals from findings of fact by a Judge sitting without a jury, see *Coghlan* v. *Cumberland* (4). [He also referred to *Nichol* v. *Bestwick* (5); and *Dearman* v. *Dearman* (6).]

Keenan K.C., in reply.

Cur. adv. vult.

The following judgments were read:—

GRIFFITH C.J. This was an action for specific performance of an agreement to sell a half share in a pastoral property, or in the

October 31.

(1) L.R. 1 Ex., 342.
(2) L.R. 2 Ex., 135.
(3) L.R. 1 C.P., 1.
(4) (1898) 1 Ch., 704.
(5) 28 L J. Ex., 4.
(6) 7 C.L.R., 549.

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alternative for damages. The principal difficulty that I have found in dealing with the case arises from the turn which the proceedings took in the Supreme Court, which makes it necessary to refer in some detail to the pleadings and evidence and to the points to which the attention of the Supreme Court was directed. The amended statement of claim alleged that by agreement dated 24th November 1905 the plaintiff and his brother agreed to sell to the defendant all their interest in certain pastoral leases known as Mount Celia Station and the cattle on it, and that in pursuance of the agreement the leases were transferred to the defendant and possession was given. Paragraph 3 was as follows:—"Prior to the said agreement being executed on the 16th day of November 1905 the plaintiff and defendant entered into an agreement in writing whereby the defendant agreed to allow the plaintiff to re-purchase the half interest in the Mount Celia Station for the sum of £1,000 together with half share of all improvements made while the defendant had charge thereof; the plaintiff having to pay half of the said improvements and to pay interest at the rate of £8 per centum on the money laid out by the defendant, and that the defendant should give an account of any sales during the term of one year while that agreement was in existence should the plaintiff desire to purchase." I stop there for a moment. The agreement alleged is to allow the plaintiff to re-purchase if he desired to do so. That is technically only an offer, which would not be binding upon the defendant until it was accepted, and it would have been more accurate to have said that the defendant made an offer in writing instead of saying that he entered into an agreement in writing. Paragraph 3 went on, "and on that condition the plaintiff entered into the agreement in writing of the 24th day of November 1905 and transferred to the defendant his interest in the said leases and stock." That is apparently intended as an averment that the agreement in paragraph 1—the agreement of 24th November—was subject to a condition subsequent, and defeasible on non-performance of that condition. Paragraph 5 alleged an acceptance by the plaintiff of the offer of 16th November and a refusal by the defendant to perform the agreement. Then the statement of claim asked, first, for an order setting aside the

agreement of 24th November. That was apparently based on the ground of defeasance, but no foundation was shown for such a claim, and in any event no such order could be made in the absence of the other vendor. Nothing, however, now turns upon that claim. The plaintiff next claimed a declaration that he is entitled to a half share or interest in the leases, stock and partnership business; an order directing the defendant to execute all necessary transfers and assurances to vest that share or interest in the plaintiff; and accounts. Now, it is settled that the Court will not grant specific performance of an agreement for a partnership at will, which would have been constituted had this agreement been carried out. In substance, therefore, the action was an action for damages for non-performance of the agreement. It would have been more accurate, as I have already pointed out, if the statement of claim had alleged an offer, and stated that the offer was accepted while still a continuing offer and before it was withdrawn. But the defendant was not misled by the error, if any, in the statement of claim, for by his defence he first denied the making of the agreement, and secondly denied receiving notice of the plaintiff's intention to accept the offer. On these pleadings the case came on for trial.

It appeared from the evidence that the plaintiff and his brother had been partners in the property, that the defendant had first agreed to buy the plaintiff's brother's share for £1,500, that then negotiations took place between the plaintiff and defendant for the sale of the plaintiff's share for the sum of £1,000 subject to a right of re-purchase. While these negotiations were going on, the agreement sued upon was said to have been made on 16th November. I will refer to the terms of it directly. On 24th November the agreement in the form of a sale by both parties was executed—that was a sale for £2,500 by the two partners—the land being described as worth £500 and the cattle and stock as worth £2,000. The document was executed by the plaintiff's brother as attorney for the plaintiff, the plaintiff being then away from Perth. Now it is evident upon those facts that some fresh agreement had been come to between the parties, by which those two previous agreements of sale by the partners separately had been put together to form a fresh agreement, or a consolidated

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agreement. The plaintiff's story as to the agreement sued upon is this: That he had only agreed to sell his share for £1,000 on the condition that he was to have the option to re-purchase for the same price within a year; that it was agreed by defendant there should be a collateral agreement to that effect, that is, one agreement, for sale by the two partners and a collateral agreement enabling the plaintiff to re-purchase his share; that an agreement was accordingly drawn up to that effect; that he took it to the defendant, who signed it and kept the original; that a copy taken by him, which was to have been a duplicate apparently, was smudged, and the defendant promised to make it out afresh. The plaintiff says that both parties signed it, and the defendant kept the original. The plaintiff kept the draft, which had no date on it, but he said he was able to fix the actual date because he had had a transaction with his bank to the extent of £75 on that date, the 16th November. In the following January he found that the draft had got frayed owing to his having carried it about in his pocket, and he made out a fresh copy, and he put in the date on which he made the copy—of course the wrong one. The defendant denied signing any such document. The document which the plaintiff swore was a copy of the draft of the agreement signed by the defendant is in these terms:—

"Memorandum of agreement made this 16th day of November 1905 between C. R. Heppingstone of the one part and R. J. Stewart of the other. Whereas the said R. J. Stewart agrees to allow C. R. Heppingstone to re-purchase the half interest in Mount Celia Station for the sum of one thousand pounds together with half share of all improvements made while the said R. J. Stewart has charge, the said C. R. Heppingstone having to pay half of the said improvements. It is also agreed that C. R. Heppingstone is to pay interest at the rate of 8 per cent. on the money laid out by R. J. Stewart, and that the said R. J. Stewart shall give an account of any sales during the term of one year while this agreement is in existence, should the said C. R. Heppingstone desire to purchase."

The defendant denies signing any such document, but he admitted in his evidence that a document to that effect was brought to him by the plaintiff for signature. The first question

tried before *Rooth* J., who heard the case without a jury, was whether that document was signed or not, and the evidence was partly in writing and partly oral. There was a flat contradiction between the witnesses, and much depended on their credibility. The learned Judge was of opinion that the document was signed by the defendant, and the Full Court were of the same opinion. We were invited by Mr. *Pilkington* to review that finding of fact, and if we found the fact in favour of the defendant it would, of course, dispose of the whole case. I was at first impressed by the wrong date of the instrument. The plaintiff said that he first filled in the date in January when he made the copy, but afterwards when it was seen that that was obviously the wrong date, he filled in another date, the 24th of November, and afterwards he discovered that the real date was the 16th. The weight of that evidence, which at first seemed considerable, is very much diminished when we remember that really the document, *i.e.*, the draft, was undated.

The insertion of the erroneous dates afterwards does not therefore much weaken his testimony in that respect. *Rooth* J., however, seems to have been under a misapprehension with respect to the weight to be attributed to two letters written by the defendant's brother to him, in December 1905, which suggested that both he and defendant were perfectly aware of the existence of the controverted option. On further consideration it appears that no weight ought to be attached to those letters, because it is admitted that in the course of previous negotiations such an option had been agreed to be given. But, apart from that evidence to which the learned Judge attached undue weight, I cannot say that I think the conclusion to which he and the Full Court came was wrong. We must therefore consider the case on the footing that there was a written agreement or offer as alleged by the plaintiff. Then the next question to be determined upon the pleadings and in law was: whether that offer was accepted by the defendant before it was withdrawn. If it was, there was a complete contract between the parties sufficiently signed to satisfy the *Statute of Frauds*. Since the case of *Reuss* v. *Picksley* (1), decided in 1866, it cannot be disputed that a written

(1) L.R. 1 Ex., 342.

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offer, containing all the terms of a proposed contract, may be accepted verbally, and if it is accepted verbally then there is a complete contract satisfying the *Statute of Frauds*. Both parties addressed themselves to the question. Evidence was given on both sides, some written and some oral, and there was ample evidence—I say no more—to support an affirmative finding in the plaintiff's favour that the offer was accepted before it was withdrawn. The defendant admitted that on 17th March 1906 the plaintiff came to see him to pay the £1,000 under an alleged agreement, but he says that he denied the existence of the agreement. The earliest suggestion of a withdrawal—I do not say that it was a withdrawal—was on 26th March. If that fact had been found by the learned Judge at the trial in favour of the plaintiff, there would have been nothing left but to assess the damages. But at this stage, in some inexplicable manner, all the parties seem to have lost their way. Instead of directing their attention to the acceptance or non-acceptance of the offer, the question was raised whether the agreement was in writing; but, as I have pointed out, according to the case of *Reuss* v. *Picksley* (1), that question did not arise on the facts. If the evidence had shown that the offer was withdrawn before acceptance, there would be no agreement at all; and if the cause of action had been for breach of an agreement for valuable consideration to keep the offer open for a fixed term, an agreement in writing to that effect was not proved. How the mistake came to arise I do not know; possibly from the use of the word "agreement" in paragraph 3 of the statement of claim instead of the word "offer." With all respect to the learned Judges, and without dissenting from anything they said as to the law regarding the point to which their attention was directed, I think the point did not arise on the facts. In opposition to the argument set up by the defendant, an attempt was made to supply a consideration by reference to earlier correspondence, but that, as the learned Judges properly held, failed because there was nothing to connect the earlier correspondence with the agreement sued upon. Then it was suggested that there was evidence of part performance by the delivery of the property under the agreement of 24th

(1) L.R., 1 Ex., 342.

November. But there is nothing to connect the two documents together; and if there were, the agreement of 24th November could not be a consideration for that of 16th November, although the agreement of 16th November might have been part of the consideration for, or part of the inducement to enter into, the agreement of the 24th. But the notion of the doctrine of part performance being applicable is excluded, because the delivery of possession is clearly referable to the agreement of 24th November, and not to the earlier agreement of the 16th.

If, then, this fact of acceptance of the offer had been found in favour of the plaintiff the only matter remaining would have been to assess the damages. What damages? The defendant paid £5 into Court and said it was sufficient. Mr. *Pilkington* contended that on the evidence nothing more than nominal damages was shown. I do not think it desirable to go into the evidence on the point. It is sufficint to say that in my opinion there is evidence of substantial damages. Under these circumstances, what is to be done? The learned Judge of first instance dismissed the action. He did not find any facts, although he expressed a strong opinion about the agreement. If he had given any formal finding of fact which stood on the records of the Court, this Court might accept it and start on that basis; but there is none. It is in my opinion extremely undesirable that a Court of Appeal should act as a Court of first instance in deciding questions of fact. I think I have seen instances where a final Court of Appeal have gone wrong in attempting to exercise that function.

There are three questions which arise in the case: first, was the alleged agreement or option signed by the defendant; second, if so, was it accepted before being withdrawn; third, what damages? On none of these questions has there been any formal finding of fact by the Supreme Court, although we know their opinion on the first of those questions. Under these circumstances it seems to me there is nothing for it but to grant a new trial, with leave to either party to amend his pleadings and particulars as he may be advised.

BARTON J. The claim to set aside the agreement of 24th

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November 1905 for the sale of the station does not seem to be insisted on. The alternative claimed to the setting aside of that agreement is the enforcement of a contract for a half interest in the leases, stock and partnership business. The Court will not compel performance of a contract to enter into a partnership not for a definite term (*Fry, Specific Performance*, sec. 1540), and indeed as a general rule it will not enforce specific performance of a contract to form and carry on a partnership (*Ib.* and sec. 843). Hence the claim for specific performance may be left out of consideration, and the matter resolves itself into an endeavour to establish the document alleged to have been executed on 16th November 1905, and in respect of it to show (1) that the option of re-purchase which it allows to the appellant was exercised while the option remained unrevoked, so as to convert the offer of 16th November into a binding agreement; (2) that the respondent refused to perform the agreement thus constituted; and (3) that the appellant sustained damage from the breach exceeding the £5 paid into Court.

The defence denies the execution of the document of 16th November 1905, and sets up the *Statute of Frauds* with regard to it. It also denies the exercise of the right to re-purchase and the respondent's refusal to re-sell in compliance with it. As to damages, if that point is reached, he says £5 is a sum large enough to compensate the appellant. There was a counterclaim, which is not before us. It may be mentioned here that the statement of claim asserts that the option to re-purchase his half share was a condition of the plaintiff's entering together with his brother David into the agreement for the absolute sale of the entire property on 24th November 1905. He does not establish that it was such a condition either by documentary or by oral proof. But his claim founded on the option itself must still be considered.

Evidence was taken before *Rooth* J. during three days, and he reserved judgment, which when delivered was for the respondent in respect of the alleged option to purchase. The learned Judge admitted at the trial secondary evidence (a copy of a draft) of the alleged document of 16th November after failure of the defendant to produce the original, which he found to have been traced to

the defendant's possession. In his judgment he found that the evidence for the plaintiff (now appellant) as to the execution of a document containing the option on 16th November in terms identical except as to date with Exhibits "C" and "5" ought to be accepted against the denial of the defendant (now respondent). This document therefore must have been executed before the agreement for sale of 24th November, but obviously after the terms of sale had been arrived at between the appellant, his brother David, and the respondent. But his Honor decided that the document of the 16th was not enforceable as an agreement, because it did not show consideration, and therefore did not comply with the fourth section of the *Statute of Frauds*, and because—as he was clearly right in holding—the part performance relied on, namely, the giving and taking of possession, was referable wholly to the agreement of 24th November. He therefore gave judgment for the respondent upon the claim; and we are not now concerned with the counterclaim with which his Honor proceeded to deal. On appeal to the Full Court the finding of *Rooth* J. as to the execution of the document giving the option of re-purchase was sustained, *McMillan* J. expressing a strong doubt whether the secondary evidence of it could be admitted with safety as between two parties giving absolutely conflicting testimony, the one affirming and the other denying its existence. All their Honors agreed that the document—assuming it to be admissible—was not such as to satisfy the *Statute of Frauds*.

These questions, the one of fact and the other of law, were, in effect, the only matters decided with regard to the claim, and there was no appeal as to the counterclaim.

As to the sole question of fact specifically decided we have thus the concurrent findings of two Courts. It would take a strong case to cause us to set aside the finding upon that question at this stage, and I cannot affirm that the respondent has demonstrated the finding to be erroneous. In view of possible further proceedings, in which the credibility of the parties would be in question, it is not advisable to say more on that head.

I proceed to consider the conclusion of their Honors upon the question of law.

It is plain that the document in question was not until accept-

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ance a binding agreement. It was only an offer to make one. But the acceptance of the offer, even if merely verbal, converted it into a binding contract of which every term was in writing. That an option for which no consideration is given is not a binding contract is perfectly correct, but to say so is not to decide the question which arises when a proposal of this kind is accepted within the time allowed for the purpose. The written proposal, if signed by the party to be charged, and accepted in due course even by parol by the party to whom it is made, is a sufficient memorandum of an agreement to satisfy the fourth section of the Statute: *Reuss* v. *Picksley* (1). Accepting the finding of *Rooth* J. that the document of which secondary evidence was admitted was in fact signed by the respondent on 16th November, any acceptance of it by the appellant within the twelve months constituted it a binding contract of sale. On that point therefore I am unable to agree with the learned Judges below. But inasmuch as before acceptance there is no binding contract on the part of the party who signs, he is quite at liberty to revoke or withdraw his offer before the other party accepts it.

Now in the present case the parties were in a conflict of evidence as to whether (1) the proposal called the option was accepted by the appellant, the proposal remaining unrevoked; (2) whether the proposal was not definitely withdrawn or revoked by the respondent before the intimation by the appellant of any acceptance. No doubt if there was an acceptance before the occurrence of any matter relied on as a revocation, the respondent has refused to perform the contract which would thus be established. But if there was by acceptance a valid contract and that contract was broken, there remains the controversy as to damages, in which the parties give widely different estimates—one of them furnishing evidence that his loss is from £250 to £500, the other that the damage is nominal. The measure of damages is clear, the conflict is as to the quantum.

Thus there are three questions, all essential to the proper determination of the case, on which there has not been any finding of the facts up to the time of this appeal. I do not think this Court can properly assume the functions of a tribunal of first instance

(1) L.R. 1 Ex., 342.

by now deciding these questions of fact, or the questions of law which may arise upon facts not yet ascertained. That being so, the parties will be left without any due determination of the issues unless the case is sent to a new trial, which I agree in thinking to be the only course open for this Court to adopt.

I agree in the order proposed by the Chief Justice.

O'CONNOR J. As I agree that there should be an order for a new trial in this case I do not wish to express my view upon the facts any further than is necessary for explaining my reasons for that conclusion.

The cause of action in the statement of claim, though somewhat inartificially stated, is in substance clear enough. The plaintiff bases his claim on the agreement of 16th November 1905, alleges that he has been denied the right of re-purchase of his interest thereby given, and claims a decree for the specific performance of the agreement, and such declarations and orders as will be necessary to constitute him a partner. In the alternative he claims damages. The learned Judge had before him evidence on both sides touching the issues whether the agreement relied on had been made, whether it was witnessed by writing, whether the plaintiff had notified his intention of exercising the option of re-purchase, and whether his right to exercise the option had been denied by the defendant. The learned Judge found that the agreement had been made, that an original of the document of 16th November 1905 put in evidence as containing the terms of the agreement had been duly signed by the defendant. In that finding I entirely concur. Looking at the evidence broadly I think that the inconsistencies as to dates of copies and other matters of detail are satisfactorily explained by the circumstances. But although the learned Judge found that the agreement put forward had been made in writing, he found himself unable to give effect to it, because in his view the writing did not contain one of the terms, namely, the consideration, and therefore did not comply with the *Statute of Frauds*. In that the learned Judge in my opinion fell into an error. Regarded as an agreement for the re-purchase of the plaintiff's interest the writing contains all the necessary terms, the consideration amongst others. It is true that nothing is therein expressed as consideration for keeping

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the option open. The effect of that omission was that the defendant could have withdrawn the option at any time before notice of acceptance. But once notice was communicated by the plaintiff to the defendant of an intention to avail himself of the option, the contract became perfected by acceptance, whether the acceptance was in writing or not: *Reuss* v. *Picksley* (1). It then became a completed contract to re-purchase at the price and for the other considerations set forth in the writing. Whether there had or had not been an acceptance in terms of the option, and whether it had been withdrawn before that acceptance, were issues of fact which the learned Judge ought to have determined, but which he erroneously, as I have pointed out, thought himself relieved from considering by reason of his view that the agreement was bad under the *Statute of Frauds*. That issue was therefore never really tried.

Another material issue was also left undecided. Defendant's counsel contended unanswerably that equity will not decree specific performance of a partnership determinable at will. When once that objection is given effect to the issue of damages becomes all important, but that issue was never inquired into. In my opinion, therefore, the real matters in controversy between the parties have never been tried. The obvious remedy is to send the case back for another trial. There is nothing in the view taken by the Supreme Court which affords any reason why the plaintiff should not now have his claim investigated as submitted in his statement of claim.

On the whole case, therefore, I am of opinion that the appeal must be allowed and a new trial ordered.

Appeal allowed, orders of Full Court and of Rooth J. discharged and a new trial ordered. Costs of former trial to be costs in the action. No order as to costs of appeal either before High Court or Full Court of Western Australia.

Solicitors, for appellant, *Keenan & Randall.*

Solicitors, for respondent, *James & Darbyshire.*

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(1) L.R. 1 Ex., 342.