Cons
Riches v *Hogben* [1986] 1 QdR 315

Appr
Gray v *Dalgety & Co Ltd* (1916) 21 CLR 509

Rev
Dalgety & Co Ltd v *Gray* (1919) 26 CLR 249

[HIGH COURT OF AUSTRALIA.]

GRAY . . . . . APPELLANT;
PLAINTIFF,

AND

DALGETY & CO. LTD. . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 21, 22, 23, 24.

SYDNEY, *Dec.* 18.

Griffith C.J., Isaacs and Powers JJ.

Contract—Agency—Agreement to procure loan on mortgage—Evidence—Contract concerning interest in land—Instruments Act 1890 (*Vict.*) (*No.* 1103), *sec.* 208 (*Statute of Frauds* (29 *Car. II. c.* 3), *sec.* 4).

In an action in which the plaintiff alleged an oral contract by which the defendants agreed to raise for the plaintiff the sum of £84,000 upon the security of the plaintiff's station, of which £72,000 or thereabouts was to be secured upon first mortgage of the station at 4 per cent., and £12,000 upon second mortgage of the station at 5 per cent., and that the defendants had not raised that sum or any part thereof,

Held, by *Isaacs* and *Powers* JJ. (*Griffith* C.J. dissenting), (1) that upon the evidence reasonable men might have come to the conclusion that the defendants for valuable consideration had undertaken to find some person or persons able and willing to lend the plaintiff £72,000 at 4 per cent. on first mortgage, and £12,000 at 5 per cent. on second mortgage, of the plaintiff's station, other terms being reasonable; (2) that such an agreement was an enforceable contract; (3) that under such a contract the defendants were not entitled to lend their own money; and (4) that such a contract was not a contract concerning an interest in land, and was therefore not within the *Statute of Frauds*, sec. 4 (*Instruments Act* 1890 (Vict.), sec. 208).

Decision of the Supreme Court of Victoria reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by John Guthrie

Gray against Dalgety & Co. Ltd., in which the plaintiff by his statement of claim alleged that in August 1907 he was in possession of a station called "Kentucky," in New South Wales, under a lease from the City of Melbourne Bank Ltd. to him with an option of purchase at a certain price which he then contemplated exercising and that the defendants at all material times had knowledge of those facts. The statement of claim then proceeded:—

"8. The defendant for reward to it and in consideration of the plaintiff entrusting it exclusively with the raising of money for the purchase of Kentucky Station aforesaid and refusing an offer of one Griffiths to lend to or procure for the plaintiff the sum of £84,000 at 4½ per centum per annum on the security of the said Kentucky Station agreed with the plaintiff on or about 26th August 1907 to raise for the plaintiff and promised that it would raise for the plaintiff the sum of £84,000 upon the security of Kentucky Station aforesaid of which the sum of £72,000 or thereabouts was to be secured upon first mortgage of the said station at 4 per centum per annum and the balance of £12,000 or thereabouts on second mortgage of the said station at 5 per centum per annum.

"9. The defendant did not raise the said sum of £84,000 or any part thereof for the plaintiff or at all and wholly refused and neglected so to do.

"10. By reason of the premises the plaintiff lost in particular the benefit of his option to purchase the said station and was otherwise damnified."

The plaintiff claimed £14,280.

The defendants in addition to other defences pleaded sec. 208 of the *Instruments Act* 1890 (*Statute of Frauds*, sec. 4).

At the trial before *Hood* J. and a jury the learned Judge at the close of the plaintiff's evidence directed the jury to find a verdict for the defendants, which they accordingly did, and judgment was entered for the defendants with costs. The plaintiff appealed to the Full Court and the appeal was dismissed.

From that decision the plaintiff now appealed to the High Court.

The material facts are stated in the judgments hereunder.

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Starke, for the appellant.

Mitchell K.C. and *McArthur* K.C. (with them *Mann*), for the respondents.

During argument reference was made to *Horsey* v. *Graham* (1); *Brown* v. *Robertson* (2); *Dale* v. *Hamilton* (3); *In re De Nicols*; *De Nicols* v. *Curlier* (4); *Halsbury's Laws of England*, vol. XXV., p. 291 (*n*); *Boston* v. *Boston* (5); *Chitty on Contracts*, 14th ed., p. 297; *Ex parte Hall*; *In re Whitting* (6); *Mounsey* v. *Rankin* (7); *Bank of Ireland* v. *Trustees of Evans' Charities in Ireland* (8); *May* v. *Thompson* (9); *Rimmer* v. *Knowles* (10); *Harris* v. *Petherick* (11).

Cur. adv. vult.

The following judgments were read:—

Dec. 18.

GRIFFITH C.J. This is an appeal from an order of the Supreme Court of Victoria dismissing a motion by way of appeal from a judgment in the nature of a nonsuit entered by *Hood* J. at the trial of an action with a jury. The action was brought to recover damages for breach by the defendants of an alleged contract said to have been made on 26th August 1907, by which they promised to raise for the plaintiff the sum of £84,000 upon the security of property called "Kentucky" Station, of which £72,000 or thereabouts was to be secured upon first mortgage of the station at 4 per cent. per annum, and the balance of £12,000 or thereabouts on second mortgage of the station at 5 per cent. per annum.

The defendants are a company carrying on in all the States of the Commonwealth the business of stock and station and financial agents, which includes, amongst other things, the advance of money to their clients on the security of land and stock, and acting as agents for them in the disposition of their stock and produce.

In 1907 the plaintiff, who was then lessee of a pastoral property in New South Wales called "Kentucky," comprising about 24,000

(1) L.R. 5 C.P., 9.
(2) 16 V.L.R., 786; 12 A.L.T., 147.
(3) 5 Ha., 369.
(4) (1900) 2 Ch., 410, at p. 416.
(5) (1904) 1 K.B., 124.
(6) 10 Ch. D., 615.
(7) 1 Cab. & El., 496.
(8) 5 H.L.C., 389.
(9) 20 Ch. D., 705.
(10) 30 L.T. (N.S.), 496.
(11) 39 L.T. (N.S.), 543.

acres, with an option of purchase at £3 10s. per acre, was a client of the defendants, and was indebted to them to the extent of about £12,000, secured by mortgage of his stock.

He desired to exercise his option of purchase of Kentucky, for which purpose he would have had to raise by way of loan the whole of the purchase money, £84,000. He hoped to be able to obtain £72,000 on first mortgage of the property itself at 4 per cent. In July 1907 he applied to the defendants to advance the balance of £12,000 at a higher rate of interest upon the security of a second mortgage of Kentucky, with collateral security over some other lands which he had in the neighbourhood. The plaintiff was very anxious that the proposed first mortgage should reserve to him the right to repay the £72,000 by instalments at his option, and so informed the defendants, but was warned by them that they did not think that the money could be secured at 4 per cent. subject to such a condition. The plaintiff was also negotiating with other persons for the desired loan.

On 26th August, while these negotiations were going on, plaintiff called at defendants' office in Melbourne, where he saw two of their principal officers, Messrs. MacRae and Aitken, with whom he had a conversation which is relied upon to establish the alleged contract, and which he narrates as follows:—

"I first saw Mr. MacRae, and I said to Mr. MacRae: 'I have come down to see you on the matter of financing the purchase of the Kentucky property.' Mr. MacRae at once said: 'I had better call Mr. Aitken in.' He then left the room, and walked into Mr. Aitken's room, which adjoins his. He was acting manager then in Mr. Campbell's place, who was at Home. On their return, Mr. MacRae took his seat and Mr Aitken stood by the table. I said I wanted the money for the purpose of exercising my option in two sums of £72,000 on first mortgage at 4 per cent. and £12,000 at 5 per cent. on second mortgage. One of them—I forget which—said: 'There will be no difficulty in getting the sum of £72,000 at 4 per cent., but I doubt whether we will get any money at 5 per cent. on second mortgage.' I then said: 'I may as well tell you that since my arrival in town I met a man who, after an interview with his principal, has promised to lend me £84,000'—without mentioning the rate of interest or mentioning

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his name—'but if you are not inclined to take up the business I intend at once to settle with him.' Mr. MacRae then looked up at Mr. Aitken, and Mr. Aitken, after a moment's hesitation, said: 'Well, we will do it, but you must give us a week or ten days to look around for the money.' I said: 'This is an important matter with me and very urgent. I want something settled.' Mr. Aitken then said: 'Don't worry any more about it. Go home and attend to your shearing, and look upon this matter as done.'"

The defendants deny the alleged contract, and say that what they did was to promise to endeavour to obtain for the plaintiff a sum of £72,000 at 4 per cent., and, in the event of their obtaining it, themselves to advance a further sum of £12,000 on second mortgage. The alleged contract rests entirely upon the plaintiff's version of the conversation, and the matter for determination is whether there was any evidence fit to be left to the jury, that is, any evidence upon which reasonable men could find in his favour.

The *Statute of Frauds* was pleaded.

The first question that arises is whether, upon the most favourable construction of the plaintiff's version of the conversation, there was any complete contract at all. The subject matter of the conversation was two contemplated mortgages. According to that version the amounts of the proposed loans and the rates of interest were specified, but the duration of the loans and the terms of redemption were left open. If the defendants made the alleged promise it is plain that before effect could be given to it it would have been necessary for the proposed mortgagees to come to an agreement with the plaintiff on both points. I quote from the third edition of *Fry on Specific Performance* (1892) (the last published with the direct authority of the learned author, who was then a Lord Justice of Appeal):—

(370) "Contracts are often incomplete from their reserving some matter for future agreement: unless perhaps in cases where in the absence of such agreement the law determines the matter, such contracts are necessarily incomplete until the further agreement has been come to. A contract to contract is nothing."

In a note the case of *May* v. *Thompson* (1) is referred to. That

(1) 20 Ch. D., 705.

was a case of alleged contract for the purchase of a lease and medical practice. Some of the terms of purchase had not been settled, and it was held that there was no contract at all.

The principle is common to all contracts. If a material term on which an alleged contract is silent is one which the law will imply the rule may not apply, but in my opinion that is the only exception. Accordingly, a promise made by A to B for valuable consideration to execute a formal written document embodying terms all of which have been agreed to is a good contract. So a like promise that C, a third person, shall execute a contract all the material terms of which have been agreed to, or are implied by law, is a good contract. But, in my opinion, a promise made for valuable consideration by A to B that he will procure either a named third person, or a person then unknown, to enter into a contract with B as to a specific subject matter, some of the material terms of the proposed contract being neither expressed nor implied by law, is not according to English law a contract at all. (*Cf. Montreal Gas Co.* v. *Vasey* (1).) No authority is needed in support of so plain a position.

The contract set up in the present case cannot be put higher than this. The plaintiff's case, therefore, fails *in limine.*

The only answer attempted to be made was that the law will imply that the contemplated loans were to be for a reasonable period and that the terms of redemption were to be reasonable. If the subject matter of a contract in similar words were finding a purchaser for goods this might well be so, but it is impossible to say that any implication as to such matters can be made in the case of a mortgage in the absence of express agreement of the parties, any more than as to the rent or commencement or duration of the term in the case of a lease.

In the present case there was express evidence in writing that special terms of redemption were regarded by the plaintiff as of great importance, and known by the defendants to be so regarded. I have already mentioned one reference to the subject in the course of the negotiations before 26th August. Later, on 27th October, the plaintiff, writing to the defendants, and complaining that they had not raised the loan for him, said: "You apparently

(1) (1900) A.C., 595, at p. 599.

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get away from the fact that your understanding with me was to find a first mortgage—on conditions necessitated by my intention to sell part of the estate—at 4 per cent." Even, therefore, if such an implication could be made under any circumstances, it is excluded in this case.

Since the conclusion of the argument we have been referred to the case of *Green* v. *Lucas* (1), in which the plaintiff recovered commission for procuring for the defendant a lender of money upon mortgage of leaseholds. In that case no such question as that now in discussion was or could have been raised. The promise upon which the plaintiff sued was held by the Court to be a promise that if he should find a lender willing to advance the desired sum on a specific security the defendant would pay an agreed commission. The plaintiff found a person who promised to make the advance on terms agreed to by both parties, but afterwards refused to perform his promise on the alleged ground that the defendant could not give the agreed security. The Court held that the plaintiff had fulfilled the conditions on which the defendant's promise depended, whether the expected lender was or was not justified in refusing to perform his promise. It is obvious that there is not even a superficial resemblance between a promise to pay remuneration in the event of a contract between the promisor and a third person being brought about by the exertion of the promisee and a promise to bring about a contract between the promisee and a third person, known or unknown, on terms to be afterwards agreed between them. The only promise cognizable by law in the latter case would be a promise to endeavour to bring about a contract.

If this difficulty could be got over, the defendants contend that the only possible contract that can be spelled out from the alleged conversation is a contract relating to an interest in land. It is not disputed that a contract to give a mortgage of land is such a contract, but the plaintiff contends that the alleged contract is neither a contract by him to give a mortgage nor a contract by the defendants to accept one. He says that it is open to a jury to find that upon a proper interpretation of the language to which he deposes it was a term of the contract that

(1) 33 L.T. (N.S.), 584.

the two proposed loans should be advanced by some third persons to the exclusion of the defendants themselves. There is no suggestion of any such exclusion in the conversation as deposed to. The words are: "If you are not inclined to take up the business I intend at once to settle with him" (another possible lender). "Well, we will do it, but you must give us a week or ten days to look round for the money." "Don't worry any more about it. Go home . . . . and look upon this matter as done."

Treating the conversation as embodying a contract, it was, in my opinion, in the first place a contract by way of guarantee that some person or persons then unknown would advance the two sums of £72,000 and £12,000 to the plaintiff, with the additional promise, always implied in guarantees with respect to the payment of money, that if the person who is or is to become primarily liable to make the payment should make default the guarantor will make it himself. I will assume that such implied promise may be excluded by express stipulation, but, as I have pointed out, there is no suggestion of any such express stipulation in the language deposed to. It is conceivable, indeed, that an intending borrower may object to put himself in the position of mortgagor to a particular mortgagee, but the terms of the alleged conversation do not suggest any such objection. On the contrary, the plaintiff was on 26th August indebted to the defendants in the sum of about £12,000 secured by stock mortgage, and his negotiations with them for a loan of £12,000 on second mortgage of Kentucky had not been broken off. On 5th October, writing to them with respect to an unsuccessful attempt which they had made to obtain the £72,000 for the plaintiff from the A.M.P. Society, the plaintiff complained that "it appears that you had to go outside to obtain the loan on first mortgage." There is here no suggestion of any objection to the defendants as mortgagees in respect of either loan. Further, in a letter written by plaintiff on 24th June 1913, containing a careful and detailed statement of his case against the defendants, and compiled with the assistance of his solicitor, he complained that in November 1907, when he was contemplating making other financial arrangements for securing the £72,000, "on applying to you to confirm your engagement

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to find the second money, £12,000, to complete, you refused to do so. I therefore hold that you broke your contract with me of 26th August by your failure to find the money on first mortgage at 4 per cent., and finally by your refusal to find the second £12,000 at 5 per cent." In the face of these facts and letters, I think that a finding by a jury that it was an implied term of the alleged verbal contract that the defendants should not themselves advance either the £72,000 or the £12,000 would be so perverse that it could not stand. (See *Skeate* v. *Slater's Ltd.* (1).)

In my judgment, a contract by which the defendants promised to find a lender or lenders of the two stipulated sums on mortgage would involve a correlative promise by the plaintiff to execute a mortgage to the lenders when found, or to the defendants if no others were found. (See *Hutton* v. *Lippert* (2).) This seems to have been the opinion of all the four learned Judges before whom the case came in the Supreme Court, and there is no doubt that such a contract is obnoxious to the *Statute of Frauds.*

I should add that I think that the alleged contract would be equally obnoxious to the Statute if the defendants were not themselves to be allowed to be mortgagees in respect of either sum. In *Horsey* v. *Graham* (3) the plaintiff relied upon a verbal promise by the defendant that he would procure one Carlton to assign leasehold premises to the plaintiff. The plaintiff might, of course, have directed the assignment to be made to himself or anyone else. It was held that such a promise was within the *Statute of Frauds.* It was attempted to distinguish that case from the present on the ground that in that case the obligation which the defendant undertook was, in effect, the same as if he had himself agreed to sell the lease to the plaintiff when he had no title. That is no doubt true, and was indeed the *ratio decidendi.* The Court did not hold that the contract was a contract of sale, which it clearly was not, but that it was a contract concerning an interest in land. (*Cf. McManus* v. *Cooke* (4).) The present is the converse case. The promise alleged is not, as in *Horsey* v. *Graham* (3), that the defendants will procure the present owner of land to sell it to anyone they may name,

(1) (1914) 2 K.B., 429.
(2) 8 App. Cas., 309.
(3) L.R. 5 C.P., 9.
(4) 35 Ch. D., 681, at p. 687.

but that they will procure that some person to be named by them shall lend money on mortgage of the plaintiff's land, he agreeing to execute the mortgage to the person so named. *Hutton* v. *Lippert* (1) is a very similar case.

A contract between A and B by which B promises to find a purchaser for A's land at the price of £1,000 (if it is a complete contract at all) involves, in my opinion, a corresponding promise by A to execute a conveyance of the land to any person named by B as the purchaser. In such a case it is clear that B may direct the conveyance to be made to himself unless otherwise expressly stipulated. By parity of reasoning a contract between A and B, by which B promises to find a lender of £1,000 on mortgage of A's land, involves a corresponding promise by A that he will execute a mortgage of the land to the person named by B as the lender. Under such a contract B may name himself as the lender, unless it is otherwise expressly stipulated. It seems to me to be immaterial whether in such cases the promisor or some other person is to be vendor or purchaser, or mortgagor or mortgagee, and the express exclusion of the promisor does not affect the substantial character of the contract.

In order to escape from the *Statute of Frauds* it was further attempted, but not very strenuously, to support the alleged contract as a contract of agency with a contract of guarantee superadded. It cannot be suggested on the language alleged to have been used that the defendants had plenary power to bind the plaintiff to execute mortgages on any terms to which they might agree with the proposed lenders. Even if the language were open to such a construction, the plaintiff's subsequent correspondence shows that he never so construed it, for all negotiations were, in fact, made with his full and express concurrence obtained in advance.

It was also faintly suggested that the idea of the defendants themselves becoming mortgagees was excluded by their fiduciary position as agents for the plaintiff. As they were already his mortgagees, and the plaintiff complained that they did not allow him to increase his liability to them, this argument, apart from other obvious answers to it, does not deserve serious consideration.

(1) 8 App. Cas., 309.

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Irrespective, altogether, of the matters of law with which I have dealt, I think it right to say that, in my opinion, the whole of the evidence points to the inevitable conclusion that the language of the defendants' officers in the conversation of 26th August was in fact, as it was in law, the language of confident assurance of their ability to do what the plaintiff desired, that is to say, to procure a loan for him, and not the language of contract.

For all these reasons I think that the appeal should be dismissed.

ISAACS J. The question I have to answer in this appeal is one of fact, and as a question it is short and simple. It is this: Was there evidence upon which reasonable men could come to the conclusion that the respondents for valuable consideration had undertaken to find some person or persons able and willing to lend to the appellant £72,000 at 4 per cent. on first mortgage, and £12,000 at 5 per cent. on second mortgage, of Kentucky Station, other terms being reasonable?

In one sense it is a matter of law, because the Court is entrusted with the duty of seeing for itself whether there is such evidence; but the performance of that duty consists in the ascertainment of a matter of fact. And before the Court can withdraw the case from a jury it must see clearly that there is nothing in respect of which that tribunal has any judicial duty to perform. See *Middleton* v. *Melbourne Tramway and Omnibus Co. Ltd.* (1), where the principal prior authorities are collected. But it cannot be too carefully borne in mind that where there are competing probabilities, and where the result depends not merely on accepted or uncontroverted facts but also on inferences from them, on the doubtful significance of those facts themselves in relation to other circumstances, on the credibility of witnesses, and the comparative weight to be attached to words or conduct, the Court has then no warrant for assuming a function which is that left by the law to a jury. And part of the line of respondents' argument impels me to observe that where the contract is to be deduced from parol evidence, conduct, and writings, the

(1) 16 C.L.R., 572, at pp. 582-583.

general conclusion to be drawn from all, including the documentary evidence, is for the jury. See *Moore* v. *Garwood* (1).

That the answer to the question I have stated is not so simple or clear as to require the Court to summarily terminate the case by a direction to the jury, is very strongly evinced by the remarkable divergence of views, in some respects amounting to contrariety, among the learned Judges of the Supreme Court as to the effect of the evidence, though they agree in the result that the case should be withdrawn.

Hood J. at the trial construed the evidence as showing an absolute obligation on the defendants to provide the money. That was his conclusion as to the fact. His Honor went on to hold as a matter of law that the defendants had the option of introducing a stranger to lend the money or of offering their own money, which the plaintiff could not refuse. The legal aspect comes later, but the direction was that there was an absolute undertaking to provide the money.

In the Full Court *àBeckett* J. declined to accept that view of the facts, stated the construction he would he prepared to place on the contract—namely, an agreement to try to find a lender for £72,000, and if successful an absolute obligation to lend the £12,000. His Honor, however, would have sent the case for a new trial if he had not as a matter of law thought that the agreement itself created an obligation on the plaintiff to give someone an interest in his land.

Hodges J. assumed for the purpose of his judgment, but without deciding, that an undertaking to procure lenders was not within the *Statute of Frauds*, but thought—contrary to the opinion of *Hood* J.—that there was no evidence of any absolute obligation fit to be submitted to the jury. His Honor also thought the plaintiff's subsequent conduct discharged the defendants from any obligation to procure the money.

Cussen J. substantially agreed with *Hood* J., resting particularly on the absence of words excluding the defendants from advancing the money themselves if they chose. His Honor also thought with *Hodges* J. that the plaintiff had exonerated the defendants from performance.

(1) 4 Exch., 681.

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It is difficult, in view of that judicial diversity, to say that the evidence is demonstrably unambiguous against the plaintiff. We have also a difference in this Court as to the meaning or possible meaning of the words. Difference of judicial opinion as to the meaning of words was regarded by Lord *Atkinson* in *Charrington & Co. Ltd.* v. *Wooder* (1) as material in making their signification a question for the jury.

So many and such varied contentions were presented as to make it unfortunately necessary to examine the matter with some minuteness.

The appellant is a grazier and farmer; the respondents are a well-known mercantile firm, operating in various parts of Australia, and including in their business the functions of financial and stock and station agents.

The action was brought to recover damages for breach of contract and the nature and effect of that contract have been the chief subject of controversy. A new feature was upon this appeal introduced into the discussion, which is of very great importance, namely, as to whether the terms of the agreement between the parties as disclosed by the evidence constitute in law any contract whatever. That is, of course, a radical question, and goes much deeper than the difficulty of the *Statute of Frauds*, as the relevant enactment is still usually called. If sustainable, it is an incurable defect, and proper to be considered even at this stage, because it at once ends the case. In any event, its examination is most helpful; and, in the view I take, the result of that examination clears the whole case of difficulties, and enables us to answer almost every phase of the question presented, without much further reference to other considerations.

In 1902 the appellant became lessee of Kentucky Station in New South Wales, consisting of about 23,900 acres, of which about 15,000 acres were freehold, and the balance Crown leasehold or conditional purchase. Portion, therefore, was under the *Real Property Act* 1900, and the rest under the general law.

The lease gave him the option of purchase at £3 10s. per acre —in all about £83,650—on giving certain six monthly notices.

(1) (1914) A.C., 71, at p. 93.

In July 1907 the appellant, with a view to such purchase negotiated with the respondents for a loan of £12,000 from themselves. While that was pending and undecided, he met another financial agent, namely Hobbs, who entertained a proposal to obtain a loan for the whole £84,000 or £85,000 at $3\frac{7}{8}$ per cent., but just as the business was maturing, his lending client died, and Hobbs then placed this new proposal before the respondents' Sydney branch, which communicated the circumstances to their Melbourne branch on August 16.

A few days later—on the 26th—Gray was in Melbourne, and, independently, met a Mr. Griffiths of Albury, a member of a firm of stock and station agents, and had a conversation with him, the nature of which appears in the appellant's account of the interview he had on the same day with the respondents. That account, either alone or, if ambiguous, taken in conjunction with the subsequent conduct of the parties (*Fenn* v. *Harrison* (1), *Forbes* v. *Watt* (2), and *International Paper Co.* v. *Spicer* (3); and particularly see *per* Lord *Atkinson* in *Charrington & Co. Ltd.* v. *Wooder* (4)), leaves abundant material for a jury to say, having regard to the surrounding circumstances, whether the parties agreed that lenders should be procured as to both of the sums named, or whether the £12,000 itself was to be directly advanced by the Company, and if the former, then whether the defendants' obligation as to the £72,000 and the £12,000 was absolute or merely one of endeavour. I would observe that the respondents here rely upon inferences drawn from appellant's statements in subsequent letters to govern the construction of the verbal arrangement of August 26; if that is a sound position, the actual unequivocal conduct of the parties in endeavouring to carry out the arrangement must be equally admissible, and much more potent. The appellant gives his sworn statement of what took place between him and the respondents. I need not read it, but merely observe that no distinction is made in that conversation between the £72,000 and the £12,000 except as to interest and priority of mortgage, and the £72,000 portion was admittedly agency. The appellant terminated his relations with Hobbs, and

(1) 4 T.R., 177.
(2) L.R. 2 H.L. (Sc.), 214.
(3) 4 C.L.R., 739, at p. 762.
(4) (1914) A.C., 93.

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proceeded no further with Griffiths. Not only is his version of the conversation—up to the present—undenied, but it is supported by another statement—also up to the present undenied—that a little before 14th November the appellant, in pursuance of his intimation in the letter of 27th October (Ex. B. 1) that he would call on the respondents, did call, and told Mr. Campbell (since dead) that he had come down to see about the Company's proposal to lend £12,000. The plaintiff swears he told Campbell that if the promises which had been made to him by Campbell's representatives while he was at Home had been carried out "the present application would have been unnecessary." That, if true, shows not only a clear distinction made between the August arrangement as to the £12,000 and the November proposal as to £12,000—really a revival of the July proposal,—but is also at least susceptible of the conclusion that the appellant openly expressed his view that the August promise had been broken, and that he was forced to try and mend matters by a separate proposition.

The appellant goes on to say that Aitken was called in, and in effect corroborated him as to his version respecting the August arrangement. Then the discussion went on, and need not be here pursued, except to say the matter was left undecided. On 19th November (Ex. D 1) the appellant wrote asking for a definite answer as to the "previous application," which may be the original July application revived in November. And on 22nd November he receives a definite refusal. But, reverting to the November interview merely to consider the corroboration and assistance it gives with respect to the original interview, it seems to me to form with that original account a sufficient basis to permit a jury to conclude, if, in its discretion, it thought just, that the view of the arrangement put forward on behalf of the appellant is the correct one.

It is material at this point to see what the respondents did in endeavouring to carry out that arrangement. It appears from Ex. L (13th September 1907) that the Company interviewed the Australian Mutual Provident Society in reference to lending £72,000 for five years, interest at 4 per cent. per annum payable half-yearly, on the security of the Kentucky estate, and generally,

as the letter shows, *as his agent.* Certain favourable terms by way of concession were also suggested. The appellant's reply (Ex. N) on 16th September indicates his approval of that course. A formal application to the A.M.P. Society was put in, deferred on 24th September for a week, and on 2nd October declined. Then on 3rd October the Company proposed applying to the National Mutual Life Association. On 5th October (Ex. U) the appellant wrote a much debated letter, stating that the arrangement had been as to the whole £84,000 that it would be "advanced through your own office"—not "by" the respondents' office, but "through" it.

For obvious reasons I will not say more as to that phrase than this: that it is at the least as susceptible of meaning "agency" or procuring a lender as lending, and is also susceptible of meaning agency in procuring a lender as distinguished from lending, and, further, is open to the view, if the jury think fit to adopt it, that it is used to indicate that even third party lenders were not to be sought outside the *clientèle* of the Company's own office, if the strict terms of the bargain were adhered to, whatever acquiescence in departing from it might be yielded to save loss and inconvenience. He, however, enclosed a proposal as requested to the National Mutual Association. On 10th October (Ex. V) the respondents made an application on behalf of Gray for £72,000 for five years at 4 per cent. payable half-yearly on security of Kentucky Station. They enclosed Gray's proposal, and stated their own view of the August arrangement. Next day it was declined as made. The Association wanted 4½ per cent. and was willing to give a certain option of reduction of principal, and was willing, if its own terms were acceded to, to go on. This counter proposal was refused by Gray on account of the rate of interest. Dalgety & Co. then (25th October, Ex. A1) suggested to Gray to come to Melbourne if he desired to reopen matters with the National Mutual or to treat with the Melbourne Trust Co., the respondents having had a conversation with the manager of the latter. This led to Gray's visit, and his November interview already mentioned.

The conduct of the parties in relation to the August arrangement does, in my opinion, afford material upon which the jury

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could have arrived at a conclusion whether the parties understood that the arrangement, though fixing amounts, rates of interest, and nature of security, left to the respondents a reasonable limit of range, with respect to the period of loan, and other conditions. As stated in *Halsbury's Laws of England*, under heading "Specific Performance," vol. XXVII., p. 28, par. 43: "In cases where a contract is *primâ facie* incomplete, the Court may be more ready to infer a term so as to make the contract complete and enforceable if there has been part performance on the faith of the contract." This I cite only by way of *à fortiori* example, as the present case does not really need the rule. As a business transaction, given the three fixed factors mentioned, it would have manifestly limited the respondents' chances of procuring the money if a specified unalterable term—say four years—were named. If a possible range of (say) three to seven years were mentioned, the same objection as is now advanced as to indefiniteness could be urged. But, supposing a rigid limit of four years named, some lenders might be quite willing to lend at three or five or seven years, but not at four. And it must not be forgotten that the term of the loan was not the only stipulation to be filled up. Conditions as to when interest was to be payable (every three or six or twelve months), what the penal rate, if any, was to be, whether partial repayments could be made and when, what length of notice was required, various provisions as to power of sale—especially as to the land under the general law—and so on, are as vital as the period of the loan. But it is, as I conceive, open to the jury to say there were matters which were left to implication within the limits of reasonableness, having regard to all the circumstances. I shall explain more definitely presently what I mean by this, emphasizing for the moment the one fact that the respondents acted as if they fully understood they were doing what was within the scope of their mandate in naming five years, and in asking for certain provisions as to repayment.

Both sides place reliance on Ex. 4, a letter written in June 1913 by the appellant in response to a request by the respondents to state his case. I only say of that letter that it is certainly as open to the jury to take the view that it supports

the appellant as that it militates against him. I will not say more.

Now comes first in order of importance the question alluded to, whether—apart from the *Statute of Frauds*—any contract has been established at all, even on the most favourable view possible of the appellant's case. Something was said about the terms of par. 8 of the statement of claim; but, at this stage of the case, pleadings are not all important, even if defective. I do not think the pleading defective; I only say that, even if it were, the matter must now be determined on the evidence as well as the pleadings. See *McLean* v. *McKay* (1).

Is it, then, a fatal objection that no period of loan is stipulated for? In my opinion, clearly not. It is admitted (par. 7 of the defence and Ex. W) that as to the £72,000 the Company was not to lend the money, but to procure a lender. The evidence draws no distinction in this respect between the £72,000 and the £12,000, and the plaintiff says there was none. *Hood* J., *Hodges* J., and *Cussen* J., as we have seen, drew no distinction in this respect. Whatever is to be predicated of one branch may, as it seems to me, if the jury think fit, be predicated of the other. The jury may think differently as to these two sums, but they may not.

But it is clear that if they think Dalgety & Co. were primarily, or at all, to find lenders for both sums, and get commission for so doing, the law presumes that *primâ facie* they, being his agents, would not be at liberty to lend their own money. That follows for this reason, which, being a definite presumption of law, must be applied. If the Company were entrusted with the mandate of finding lenders, which, being expanded, means the mandate of procuring on Gray's behalf the offer or assent of others to lend to him on terms partly fixed by him and partly to be fixed by their negotiation, they undertook a duty to Gray, a duty of doing the best for him they reasonably could, so far as they were not specifically instructed. They were not only bound to adhere to the limits of the three factors—amount, rate of interest, and security—which he specified, but as to the other necessary factors they were bound to try to get for him from

(1) L.R. 5 P.C., 327, at p. 337.

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others the best terms they reasonably could. And they were not at liberty, without some provision in the contract—which the jury may or may not find to be included—or with the plaintiff's subsequent consent, to lend their own money on their own terms, to suit themselves, which would not be the thing they had undertaken to do, and which, if done, would bring their interest and their duty into conflict. This is a vital principle, and is settled by high authority—as, for instance, *Rothschild* v. *Brookman* (1).

The assumption that the defendants could have insisted on being lenders if they liked, is based on the view that it made no difference to Gray where the money came from, and that as long as he got it he sustained no loss. But, with the greatest deference to the contrary opinion, that is not a sound position. First of all, it loses sight of the fact that it might have made a difference. Another lender might have given more favourable terms. But more than that: once concede that Dalgety & Co. were employed to get the money for Gray from an outsider, and on terms variable and dependent upon their negotiation, it is clear that the rule referred to and repeatedly insisted on as an absolute rule applies, and the Court will not listen to any suggestion that the principal has sustained no injury. *James* L.J., in *Parker* v. *McKenna*, said (2):—"That rule is an inflexible rule, and must be applied inexorably by this Court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that."

That basis of construction disappearing, I mean the basis that necessarily the agreement gave Dalgety & Co. the power, as a due fulfilment of their contract, to lend their own money on any subsidiary terms they chose, the least that can be said for the appellant is that the way is obviously open for the jury, on consideration of all the circumstances, to find they were confined to securing lenders, that is, to procuring the money from outsiders.

That brings us face to face with the import of such a contract

(1) 2 Dow & Cl., 188. (2) 10 Ch. App., 96, at p. 124.

and with the question whether the absence of all the precise terms of the projected borrowing is a fatal objection to any contract with the agents at all.

In my opinion it is not. An agent may be employed to find a purchaser, or a lessee, of property on terms which constitute a complete contract of agency, but which would be quite too vague and uncertain to make a concluded sale or lease. The present undertaking of an agent to his principal is not identical with the future undertaking of the prospective contractor to the principal. A lease or an agreement for a lease is incomplete unless the date of commencement is expressly stated, or ascertainable by reasonable inference. But a mandate to an agent to find a lessee need not specify the commencing date. He may be commissioned to find one who will be willing to take a lease for a term of (say) two years, commencing in January or in the second half of a stated year. If in that case such a person is found the agent's contract is fulfilled, and he may sue upon it for his commission even though the principal still has to reduce the matter to definiteness as between himself and his prospective tenant, in order to have a binding contract of letting. And if the agent has authority to make the bargain, he himself, on behalf of the principal, may so reduce it to the necessary definiteness.

And the principle of the matter is plain. Every mandate, whether general or special, carries with it incidental authority to exercise all powers necessary, or proper, or usual, as means to effectuate the purposes of the mandate. See *Story on Agency*, sec. 97.

In *Foliamb's Case* (1) the maxim is stated, "*Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.*" Authorities, says *Eyre* L.C.J. in *Howard* v. *Baillie* (2), though to be strictly pursued, "are to be so construed as to include all the necessary means of executing them with effect."

It follows that where a mandate is given to procure a loan, certain factors being specified, and other factors, indeterminate in extent but known to both as necessary to the effectuation of the mandate, are left unreferred to, those other factors are inferentially included. If the mandate be to definitely bind the

(1) 5 Coke, fol. 116.

(2) 2 H. Bl., 618, at p. 620.

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principal, then the agent would have to exercise his discretion in selecting among those possible factors the best available for his principal; if the mandate be to do everything short of the final act of binding the principal, so as to give his principal an opportunity of binding himself or declining to do so, then it is fulfilled when factors within the inferred range are obtained by the agent.

The question was raised in *Green* v. *Lucas* (1), a case I have found since the argument. Lucas in writing authorized Green to procure him "on loan the sum of £20,000" on leasehold security at 6 per cent. interest, for a commission of 2 per cent. on procuring the loan. It will be observed the contract did not expressly mention lender, but money. *No period of loan was mentioned.* A proposed lender was found, but on his discovering unusual covenants in the lease, which the agent did not know, he refused to go on.

The agent sued for the commission. The Court of Appeal (Lord *Cairns* L.C., *Kelly* C.B., *Bramwell* B. and *Blackburn* J.) affirmed the judgment of the Court of Common Pleas (Lord *Coleridge* C.J. and *Keating* J. and *Grove* J.) and held that the agents were entitled to their commission. The Lord Chancellor said it was hard on defendant to have to pay for a loan he did not receive, and it was hard on plaintiff to lose a commission if he had earned it; the matter rested on the letter of the contract. He held that "the plaintiffs had done everything which agents in this kind of work are bound to do."

On the assumption that the jury find the contract in the present case to be what the appellant asserts it to be, namely, an undertaking to procure a lender or lenders, the observations of *Bramwell B.* are in point. He said:—"I am of opinion that the word 'procure,' in this contract, means to procure the lender and not the money, and that the contract was completed, as far as the plaintiffs were concerned, when they had procured a person who was ready and willing to advance the money."

And those observations, as already stated, were made on written instructions to procure "on loan the sum of £20,000." *Blackburn* J. first refers to the plaintiff thus:—"The agent

(1) 33 L.T. (N.S.), 584.

stipulates for a certain commission," &c. Further on he said:— "In the present case 'procure' means procure a person who is ready and willing to lend the money on the leaseholds."

No one can imagine such an elementary defect as is contended for here, escaping the notice of such eminent lawyers. See also *Fisher* v. *Drewett* (1), and *Fuller* v. *Eames* (2)—*A. L. Smith* J.

Before leaving the case of *Green* v. *Lucas* (3) I would observe that, as the *Statute of Frauds* requires every term of the agreement to be in writing, the decision is of some importance on that point also. No one raised the question, it is true, but why?

If the true obligation of the agent is completed when he has brought the proposed lender to the principal, the agency contract does not and cannot come within the *Statute of Frauds*. Up to that point, no one is bound to part with or to acquire any interest in land. Two persons are introduced to each other, one wanting money, and the other willing to supply it on terms involving an interest in land. But by this time the agent's contract is over, theoretically he is paid and done with, and the result of his work may or may not end in a binding obligation between the parties he has brought together. His contract was one for work and labour, and what he has undertaken to do is antecedent and collateral to any contract dealing with any interest in land. This is a necessary consequence of the cases of *Green* v. *Lucas* (3) and *Angell* v. *Duke* (4), and, but for the views from which, with the most unfeigned respect, I am differing, I should have thought needed no authority to establish it. If, however, the defendants had the option of providing the money, the consequential contract would be so linked with the first, that the first, if it is, as alleged, an absolute undertaking, would, in my opinion, be obnoxious to the Statute. A decision on this point is not strictly necessary, and formally the point would be open to reconsideration. But I state my opinion as the matter has been argued on both sides. If the defendants were bound by the contract sued upon to lend the money themselves without any option, the case would of course be struck by the Statute. If two alternatives were provided, one within and the other without

(1) 48 L.J.Q.B., 32 (C.A.).
(2) 8 T.L.R., 278.
(3) 33 L.T. (N.S.), 584.
(4) L.R. 10 Q.B., 174.

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the Statute, my opinion is that the Statute requires the whole to be in writing. The contract is entire and indivisible. Enforcement of the one alternative, ignoring the other, alters the actual contract, and converts it from an alternative promise, the defendants having a choice, to a single promise without choice. The principle of *Chater* v. *Beckett* (1), followed in *Thomas* v. *Williams* (2), applies to such a case as is for this purpose supposed.

I refer also on this point to *Browne* on the *Statute of Frauds*, sec. 152, which states the American view.

The argument of the great improbability of an absolute undertaking, as opposed to a mere undertaking to try to obtain a lender, should perhaps be specially referred to. As already mentioned, *Hood* and *Cussen* JJ. accept the view of absolute undertaking, and *àBeckett* J. does not dispute that it is matter for the jury. *Hodges* J. alone rejects it entirely on the ground of improbability. For myself I abstain on this as on every other disputable point in the case, except as to whether there is any evidence fit to be submitted to the jury, from expressing or even forming any opinion. But it is clear that the circumstances leave it open to the jury to arrive at their own conclusion, as men of the world, how the words of the defendants' representatives in the August interview, whatever their unexpressed intention may have been, would be reasonably understood, and were understood, by the plaintiff. See *per Blackburn* J. in *Smith* v. *Hughes* (3).

The objection as to exoneration was not pressed with the same force as the other part of the case. *Hood* J. and *àBeckett* J. do not rely upon it, and the contention rests upon the assumption that the plaintiff's letter of 5th October (Ex. U), in the concluding paragraph, relieved the Company of any obligation to proceed. In my opinion, that is not a necessary inference. It is consistent with all the other circumstances that the plaintiff in writing that letter meant, and that the defendants in receiving it understood, that he complained that the bargain—one of some urgency, and with an apparent time limit not reaching so far as 5th October—had been broken, first by delay, and next by going

(1) 7 T.R., 201.
(2) 10 B. & C., 664, at p. 671.
(3) L.R. 6 Q.B., 597, at p. 607.

outside the defendants' own clients; and that, although there was already a breach of contract, the plaintiff was willing to make the best of the situation by accepting, if procurable, a loan outside the limits of the August contract, but would not consent to go in that respect beyond the proposal referred to in that letter. Whether there was a discharge or exoneration depends on whether the jury accept or reject that view, and therefore is itself a matter for the jury, and should be left to them with the other issues of fact.

For the reasons stated this appeal should, in my opinion, be allowed and a new trial ordered.

POWERS J. In this case the agreement on which the plaintiff relied was a verbal agreement; but correspondence between the parties, after the agreement was made, was produced to support the plaintiff's account of what was said when the agreement was entered into.

The learned Judges of the Supreme Court disagreed as to what agreement the jury might, on the evidence, reasonably find most favourable to the plaintiff; but agreed that on any of their findings the plaintiff could not recover. We, in this Court, also disagree as to what agreement the jury might, on the evidence, reasonably find most favourable to the plaintiff; and do not agree, as to that, with the learned Judges of the Supreme Court. What the agreement between the parties really was is evidently very doubtful.

In my opinion what the verbal agreement between the parties was is a question for the jury, and, when the jury decide that, the Court can then decide whether on that agreement the plaintiff can recover if he proves a breach of it.

I agree with my brother *Isaacs* that the appeal should be allowed, but as the matter has to be reconsidered I do not feel justified in expressing any opinion beyond saying—that if the case had been submitted to the jury on the uncontradicted evidence of the plaintiff, and they had come to the conclusion that the defendants had undertaken for a commission to find persons, other than themselves, willing and ready to advance to him £84,000 on the Kentucky property at 4 per cent. on £72,000, and at 5 per cent. on £12,000 for five years, on reasonable terms,

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or on terms then agreed to by the parties, I would hold that the finding was not perverse, and that a jury might reasonably have arrived at such a conclusion on the evidence.

I think the jury might reasonably have found that the terms on which the advance had to be obtained were agreed to, because the defendants, after the agreement was entered into, without further reference to the plaintiff submitted the proposal for the advance to the Australian Mutual Provident Society.

Such a contract would not fail because of indefiniteness, and would not be a contract for an interest in land, but only to get a lender. See *Green* v. *Lucas* (1), referred to by my brother *Isaacs*, in which case Lord *Bramwell* said (2):—"I am of opinion that the word 'procure,' in this contract, means to procure the lender and not the money, and that the contract was completed, as far as the plaintiffs were concerned, when they had procured a person who was ready and willing to advance the money." In that case the written agreement was to procure "£20,000 upon the security of certain leasehold property at Southwark at £6 per cent. interest." The agreement in that case was more indefinite than in this case, and it was to procure a lender who would advance money on mortgage. In that case the plaintiff had a right to recover if he found a lender ready and willing to lend the money on reasonable terms. In this case if the undertaking to do the same thing is proved, and there was a breach of the agreement and undertaking, I hold there is a right of action.

It is for the jury to say what the agreement was.

I therefore hold that the appeal should be allowed.

Appeal allowed. Order appealed from discharged. New trial granted. Respondents to pay costs of motion to the Supreme Court and of this appeal. Costs of first trial to be costs in the action.

Solicitor, for the appellant, *Alan Skinner.*

Solicitors, for the respondents, *Blake & Riggall.*

B. L.

(1) 33 L.T. (N.S.), 584.

(2) 33 L.T. (N.S.), 584, at p. 587.