H. C. OF A. 1916.

SMITH v. GRAHAM.

*Appeal allowed. Order appealed from discharged and order of Court of Insolvency varied as above mentioned.*

Solicitor for the appellant, *J. W. McComas.*

Solicitors for the respondents, *Blake & Riggall.*

B. L.



---

[HIGH COURT OF AUSTRALIA.]

GRAY . . . . . APPELLANT;
PLAINTIFF,

AND

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

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1916.

MELBOURNE, *March* 15, 16, 17, 20, 21, 22; *June* 2.

Griffith C.J., Barton, Isaacs Higgins, Gavan Duffy, Powers and Rich JJ.

*Contract—Agency—Agreement to procure loan on mortgage—Validity—Contract concerning interest in land—Evidence—Exoneration—Judgment ordering new trial—Determination of questions of law—Res judicata—Estoppel—Instruments Act* 1890 (*Vict.*) (*No.* 1103), *sec.* 208 (*Statute of Frauds* (29 *Car. II., c.* 3), *sec.* 4).

In an action tried with a jury 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 land, of which £72,000 or thereabouts was to be secured upon first mortgage of the land at 4 per cent., and £12,000 upon second mortgage of the land at 5 per cent., and that the defendants had not raised that sum or any part thereof,

*Held*, by *Isaacs, Higgins, Gavan Duffy, Powers* and *Rich* JJ. (*Griffith* C.J. and *Barton* J. dissenting on all points), (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 to the plaintiff £72,000 at 4 per cent. on first mortgage, and £12,000 at

H. C. OF A. 1916. GRAY v. DALGETY & CO. LTD.

5 per cent. on second mortgage, of the plaintiff's land, 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).

*Gray* v. *Dalgety & Co. Ltd.*, 19 C.L.R., 356, approved.

*Held* also, by *Isaacs*, *Higgins*, *Gavan Duffy*, *Powers* and *Rich* JJ. (*Griffith* C.J. dissenting, *Barton* J. doubting), that upon the evidence a jury might properly find that the plaintiff had not exonerated the defendants from performance of the contract.

*Per Higgins* J.—"Exoneration" means rescission; and the rescission must be mutual.

On the first trial of the action the jury, by direction of the Judge, found a verdict for the defendants, and judgment was entered for them. The Full Court dismissed an appeal by the plaintiff, and the High Court on appeal from the decision of the Full Court ordered a new trial on the grounds (1), (2), (3) and (4) above mentioned. On the new trial, when evidence was given which had not been given on the first trial, the jury found a verdict for the plaintiff, but on appeal the Full Court directed judgment to be entered for the defendants. On appeal by the plaintiff to the High Court,

*Held*, by *Griffith* C.J. and *Barton*, *Higgins* and *Powers* JJ. (*Isaacs* J. dissenting), that as to the question whether the agreement was an enforceable contract the prior decision of the High Court ordering a new trial did not operate as an estoppel to prevent the defendants from again contesting that question.

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. claiming damages for breach of contract.

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. On appeal by the plaintiff to the High Court a new trial was directed: *Gray* v. *Dalgety & Co. Ltd.* (1). A new trial was then had before *Madden*, C.J. and

(1) 19 C.L.R., 356.

a jury, and the jury found a verdict for the plaintiff for £1,800, and judgment was entered for him accordingly, but on appeal to the Full Court judgment was ordered to be entered for the defendants.

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

The material facts are stated in the judgments hereunder.

The appeal was first argued on 23rd, 24th and 25th February before *Griffith* C.J. and *Barton*, *Isaacs*, *Gavan Duffy* and *Rich* JJ., and was directed to be re-argued before a Full Bench.

*Starke*, for the appellant.

*Mann*, for the respondents.

[During argument reference was made to *King* v. *Gillett* (1); *Johnstone* v. *Milling* (2); *Hamer* v. *Sharp* (3); *Rosenbaum* v. *Belson* (4); *Fisher* v. *Drewett* (5); *Re Sovereign Life Assurance Co.*; *Salters' Claim* (6); *Fry on Specific Performance*, 4th ed., p. 150; *Reid* v. *Hoskins* (7); *Anson on Contracts*, 13th ed., p. 321; *Brown* v. *Robertson* (8); *Horsey* v. *Graham* (9); *Hutton* v. *Lippert* (10); *Bentwich's Privy Council Practice*, p. 324; *Maharajah Moheshur Sing* v. *Bengal Government* (11); *Forbes* v. *Ameeroonissa Begum* (12); *Sheonath* v. *Ramnath* (13); *Cameron* v. *Fraser* (14); *Williams* v. *Bishop of Salisbury* (15); *Halsbury's Laws of England*, vol. VII., p. 512; vol. XIII., pp. 330, 356; *Duchess of Kingston's Case* (16); *Butler* v. *Butler* (17); *Humphries* v. *Humphries* (18); *In re Graydon*; *Ex parte Official Receiver* (19); *Flitters* v. *Allfrey* (20); *In re Bank of Hindustan, China, and Japan* (21); *Jewsbury* v. *Mummery* (22); *Badar Bee* v. *Habib Merican Noordin* (23); *Cooke* v. *Rickman* (24); *May*

(1) 7 M. & W., 55.
(2) 16 Q.B.D., 460.
(3) L.R. 19 Eq., 108.
(4) (1900) 2 Ch., 267.
(5) 48 L.J. Q.B., 32.
(6) 7 T.L.R., 602.
(7) 6 El. & Bl., 961.
(8) 16 V.L.R., 786, at p. 790; 12 A.L.T., 147.
(9) L.R. 5 C.P., 9.
(10) 8 App Cas., 309.
(11) 7 Moo. Ind. App., 283, at p. 302.
(12) 10 Moo. Ind. App., 340, at p. 359.
(13) 10 Moo. Ind. App., 413, at p. 423.
(14) 4 Moo. P.C.C., 1.
(15) 2 Moo. P.C.C. (N.S.), 375, at pp. 377, 394.
(16) 2 Sm. L.C., 12th ed., 754, at p. 789.
(17) (1894) P., 25.
(18) (1910) 2 K.B., 531, at pp. 534, 536.
(19) (1896) 1 Q.B., 417, at p. 419.
(20) L.R. 10 C.P., 29.
(21) L.R. 9 Ch., 1.
(22) L.R. 8 C.P., 56.
(23) (1909) A.C., 615, at p. 622.
(24) (1911) 2 K.B., 1125.

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

v. *Martin* (1); *Federated Engine Drivers &c. Association of Australasia* v. *Broken Hill Proprietary Co. Ltd.* (2); *Re Arbib and Class' Contract* (3); *Room* v. *Baird* (4); *Kali Krishna Tagore* v. *Secretary of State for India* (5); *Sri Raja Rao Lakshmi Kantaiyammi* v. *Sri Raja Inuganti Rajagopa Rao* (6); *Aspinall* v. *Marks* (7); *Krishna Behari Roy* v. *Brojeswari Chowdranee* (8); *Gregory* v. *Molesworth* (9); *Houston* v. *Marquis of Sligo* (10); *Taylor on Evidence*, 10th ed., vol. II., p. 1223; *Furness, Withy & Co. Ltd.* v. *J. & E. Hall Ltd.* (11); *Metropolitan Railway Co.* v. *Wright* (12); *Prentice* v. *Victorian Railways Commissioners* (13); *Middleton* v. *Melbourne Tramway and Omnibus Co.* (14); *Byrd* v. *Nunn* (15); *May* v. *Thomson* (16); *Bayley* v. *Fitzmaurice* (17); *Gordon* v. *Trevelyan* (18).]

*Cur. adv. vult.*

The following judgments were read :—

June 2.

GRIFFITH C.J. The plaintiff in this action sues for damages for breach of a verbal contract alleged to have been made between him and the defendants on 26th August 1907, by which they promised for valuable consideration to procure and introduce to the plaintiff some person or persons able and willing to lend him £84,000 upon specified real security in two sums, £72,000 on first mortgage at 4 per cent. and £12,000 on second mortgage at 5 per cent., the conditions of redemption being unspecified. The defendants denied the making of the alleged promise. The plaintiff himself said in evidence that such an absolute promise would have been unusual, and that he never knew of a similar transaction, the ordinary transaction being to endeavour to obtain the desired loan. The only evidence in support of the promise was the plaintiff's verbal testimony, first given in 1914, as to his recollection of a conversation in which the promise was said to have been made seven years

(1) 12 V.L.R., 115.
(2) 16 C.L.R., 245.
(3) 64 L.T., 217.
(4) 19 C.L.R., 283.
(5) 15 Ind. App., 186, at p. 192.
(6) 25 Ind. App., 102, at p. 107.
(7) 8 V.L.R. (L.), 217, at p. 220.
(8) 2 Ind. App., 283, at p. 286.
(9) 3 Atk., 626.
(10) 29 Ch. D., 448, at p. 457.
(11) 25 T.L.R., 233.
(12) 11 App. Cas., 152.
(13) 18 C.L.R., 526, at p. 528.
(14) 16 C.L.R., 572.
(15) 7 Ch. D., 284, at p. 287.
(16) 20 Ch. D., 705.
(17) 8 El. & Bl., 664.
(18) 1 Price, 64.

before. There was, however, a mass of contemporaneous correspondence on the subject, mostly consisting of the plaintiff's own statements in writing, which, as the defendants contend, negatived the making of the promise alleged and showed that the real transaction was of quite a different kind.

The plaintiff's case rests upon the position that the jury were entitled to disregard everything except his sworn statement as to the verbal contract, and to deal with the case upon the basis of it alone. His counsel carefully refrained from formally putting forward such a doctrine, but it will be found on examination that it is the sole basis of the plaintiff's case. It is not necessary to cite authorities to show that such a position is wholly untenable. It is sufficient to refer to those cited in the case of *Prentice* v. *Victorian Railways Commissioners* (1). A jury is not entitled to reject from consideration the undisputed facts and circumstances and the contemporaneous written statements of a party in favour of a verbal statement made by him many years afterwards inconsistent with such facts and statements. Such evidence is in different planes.

If this difficulty were out of the way, the plaintiff would still be confronted with many others equally serious.

The defendants are a joint stock 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 acres, with an option of purchase at £3 10s. per acre, was a client of the defendants, and was indebted to them to a considerable extent for advances on current account, 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, of which he hoped

(1) 18 C.L.R., 526.

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

Griffith C.J.

to be able to obtain £72,000 on first mortgage of the property itself at 4 per cent.

It appeared from a letter written by the defendants' office in Melbourne on 24th July 1907 to their head office in London, and put in by the plaintiff as containing a correct narrative of the facts stated in it, that the plaintiff had before that date informed the defendants of his desire, stating that in consequence of the rise in value of property in the neighbourhood he anticipated being able to borrow £72,000 on the security of "Kentucky," "which would necessitate his then finding—say—£12,000 to complete the purchase, which sum he asks us to advance." The letter further stated that the plaintiff proposed to offer some farm lands of his in the neighbourhood by public auction with a view to establishing the value of the land in the district. The letter added that if the defendants agreed to the plaintiff's proposals he did not intend to hold more than 9,500 acres of "Kentucky," and would at once try to realize the greater portion of the balance of the estate, 14,500 acres. Before 22nd July plaintiff had formally applied to defendants for a loan of £12,000 "to enable him to purchase the Kentucky Estate, conditional upon his selling the farm lands during the next month." An extract from the minutes of a meeting of defendants' Melbourne local board on 22nd July, put in by the plaintiff, recorded that on that day the proposal was discussed and its further consideration postponed pending the result of the intended sale.

In the meantime the plaintiff was making inquiries in other quarters as to the possibility of raising the £84,000. Amongst other persons he put himself in communication with a Mr. Hobbs of Sydney, and in a letter to him of 24th July stated fully what he desired, suggesting interest at the rate of $3\frac{7}{8}$ per cent. Amongst other things he stated that his intention was to sell 14,000 acres of the land, and that he would desire to repay the mortgage in part on terms which he specified. This negotiation fell through, but the correspondence with Hobbs was sent to the defendants' Sydney office and by them to the Melbourne office. On 19th August they wrote to the plaintiff, referring to his proposal to Hobbs, and saying, amongst other things, "We cannot understand what object Mr. Hobbs had in troubling our Sydney people with the business. As

we advised you when you spoke to us in Melbourne we do not think money is procurable under 4 per cent. if you are to have the power of repayment."

On 20th August the auction sale took place, and the land offered realized, the plaintiff says, about £6 an acre, which fact he reported to the defendants on the same day. He then went to Melbourne to see the defendants, and saw two of their principal officers on the 26th, when, he says, a conversation took place which is relied upon to establish the contract alleged. For various reasons, which will appear later, the proposed loans were not obtained, and on 30th September 1913 this action was commenced.

The defendants denied the alleged contract and pleaded the *Statute of Frauds* and the *Statute of Limitations*. They also pleaded that before breach the plaintiff exonerated and discharged them from further performance.

The action has been twice tried with juries.

It first came on for trial before *Hood* J., who directed the jury to find a verdict for the defendants on the ground that the contract alleged and deposed to was invalid under the *Statute of Frauds* as involving a promise by the defendants to advance £12,000 on mortgage of land. An appeal to the Full Court from this decision was dismissed, but on appeal to this Court (1) the Court ordered a new trial, the majority of the Court (*Isaacs* and *Powers* JJ.) being of opinion that upon the evidence given at the trial it was open to the jury to find an agreement which was not open to the objection (taken by the defendants) of incompleteness or uncertainty and was not obnoxious to the *Statute of Frauds*.

The case came on again for trial in April 1915 before *Madden* C.J., when the jury found in answer to questions submitted to them as follows :—

"(1) Was there any binding contract between the parties, *i.e.*, were their minds ever at one ? "—Answer : "Yes."

"(2) Was the contract between Gray and Dalgety & Co. that Dalgety & Co. absolutely promised for valuable consideration that they Dalgety & Co. would procure and introduce to Gray some person or persons corporation or corporations able and willing to

(1) 19 C.L.R., 356.

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

Griffith C.J.

lend Gray £84,000 upon the security of Kentucky Station in two sums namely £72,000 on first mortgage at 4 per cent. and £12,000 on second mortgage at 5 per cent. within a reasonable time ? "—Answer : " Yes."

" (3) Was the contract that for valuable consideration Dalgety & Co. agreed with Gray that they would endeavour to obtain for him a loan of £72,000 at 4 per cent. on the security of a first mortgage on Kentucky Station and that in the event of Dalgety & Co. succeeding in obtaining that loan Dalgety & Co. would themselves lend Gray a further sum of £12,000 at 5 per cent. on the security of a second mortgage of the said station ? "—Answer : " No."

" (4) In your opinion was it a term of the contract between the parties understood by both Gray and Dalgety & Co. that whatever else the contract provided Dalgety & Co. themselves were to be at liberty to lend to Gray £12,000 on the security of a second mortgage of Kentucky Station at 5 per cent. interest ? "—Answer : " No."

" (5) Did Gray exonerate Dalgety & Co. from their obligation of procuring a lender or lenders under the contract mentioned in Question 2 if you find that such contract was made ? "—Answer : " No."

" (7) Did Dalgety & Co. perform the contract mentioned in Question 2 within a reasonable time or at all ? "—Answer : " No."

" (8) If the contract mentioned in Question 2 was made at what date was it broken ? "—Answer : " After 10th October 1907."

And assessed the damages at £1,800.

This last answer is ambiguous. It may mean that at any time after 10th October it could be predicated of the defendants that they had then broken their contract, or it may mean that the breach of contract was not earlier than 10th October, which would be material on the defence of the *Statute of Limitations*. The construction most favourable for the plaintiff that can be put upon it is that a reasonable time for performance had then expired.

It was conceded by appellant's counsel that, as indeed is manifest, the answer to the second question must be construed as affirming a promise to find a lender ready and willing to lend the money on reasonable terms. *Madden* C.J. directed judgment for the plaintiff

for £1,800, but on appeal to the Full Court judgment was entered for the defendants on the defence of exoneration. The learned Judges considered themselves precluded from dealing with the other questions of law raised by reason of opinions expressed by the majority of this Court when granting a new trial.

I leave for the present the answer to the first question.

The plaintiff's version of the conversation of 26th August is as follows :—

"I then called on Dalgety & Co., Bourke Street, at about 2.20 p.m. I first saw Mr. Macrae. He appeared to me to be acting as manager of Dalgety & Co.

"I.—'I came to see about financing purchase of "Kentucky."'

"Macrae.—'I had better call Aitken in.'

"He went to Aitken's room, and after a little they returned together. Macrae resumed his seat at the table, and Aitken stood throughout the interview.

"I.—'I now want the money to exercise my option of purchasing "Kentucky" in two mortgages, one of £72,000 at 4 per cent. on first mortgage and the other of £12,000 at 5 per cent. on second mortgage.'

"One of them said 'There is no difficulty in our getting the first money £72,000 at 4 per cent., but I doubt much if we can get you any money on second mortgage at 5 per cent.'

"I.—'I may as well tell you that since coming to town I have met an agent who, after consulting his principal, has offered me the whole £84,000 and if you don't see your way to take up the business I intend to at once settle with him.' (I did not mention the offerer's name nor rate of interest he was willing to take.)

"Mr. Macrae looked at Aitken. Aitken hesitated and said, 'We will do it, but you must give us a week or 10 days to look round for the money.'

"I.—'This is an important matter and very urgent. I want something settled.'

"Aitken.—'Don't worry any more about it, go home and attend to your shearing, and look on the matter as done.'"

There is no suggestion in the alleged conversation that any terms were mentioned as to the conditions of redemption to be

H C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

Griffith C.J.

expressed in the proposed mortgages, or that that subject was present to the minds of either party to it as a matter for present discussion.

Upon these facts the first question that arises is whether a promise made in such terms is a contractual promise at all. If the defendants made the alleged promise it is plain that before any effect could be given to it it would have been necessary for the plaintiff and the hypothetical willing lenders to come to an agreement as to the duration of the loans and the terms of redemption of the mortgages. A mortgage is a conveyance on condition. A promise to lend money on mortgage or procure a lender on mortgage on unspecified conditions is not, in my opinion, a contract at all. It is, at best, a promise to negotiate or to find a person willing to negotiate for a future contract. I quote from the 3rd ed. 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:—(Sec. 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."

*May* v. *Thomson* (1) is an express decision of the Court of Appeal to the same effect. But in truth no authority is needed in support of so plain a position. In answer to this argument it is suggested that the conditions were to be "reasonable." With great respect, the word has no meaning in such a context. The doctrine that in a contract for the sale of goods which is silent as to price the law will infer that the price was to be reasonable, or that on a contract for the sale or lease of land usual conditions may be implied, has no application to the case of a contract for a mortgage which is silent as to the conditions of redemption—*à fortiori*, when the proposed mortgages are for a sum of £84,000 on the security of pastoral land of which the intending mortgagor proposes to sell a great part forthwith, or when one of the proposed mortgages is a second mortgage following on a first mortgage for £72,000. The plaintiff's own statement that he never heard of such a contract before is

(1) 20 Ch. D., 705.

sufficient to show that there can be no usual conditions in such a case.

If I promise A.B. that I will within a reasonable time lend him a specified sum of money on mortgage of real estate upon terms of redemption to be agreed upon, that is not a contract: Nor if I promise him that C.D. will do the like. A promise that I will procure some other person then unknown to do the like is no better. On the other hand, if A.B. promises me that if I make or procure such a loan he will reward me for my services there is a complete conditional contract on his part, while my obligation, if any, does not extend beyond endeavouring to procure the loan.

All this is elementary.

For these reasons I am of opinion that the alleged contract as found is void for incompleteness, or, as it is sometimes called, uncertainty.

It is, indeed, at least doubtful whether the finding of the jury in answer to the second question means that the defendants promised to do more than find a willing lender who would enter into negotiations with the plaintiff as to the terms of redemption. In the course of his summing-up the learned Chief Justice thus put the plaintiff's contention :—

"The plaintiff's story is in effect: 'My arrangement, my bargain, with you, was, that in consideration of my paying you a commission on obtaining the loans you were to obtain the loans from two people who should not be yourselves (I will explain that to you later), what you were to do was not to make a bargain for a mortgage but that you would get people who had £72,000 and £12,000 who were able to lend it and would be willing to lend it, and willing and anxious to enter into a fair bargain to take the security and to lend the money.' In other words—'You bring me the people who have got that money and are agreeable to lend it and they and I will finish the business ourselves. I will bargain with them as to the terms of the mortgage and the length of time and other of the conditions, if any, outside the ordinary which should be in the mortgages, and then I will execute the mortgages and they will hand over the money and you will earn your commission.'"

"The plaintiff says that was my bargain. On the other hand,

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

Griffith C.J.

the defendant says the contract was not that; the contract was that we were to endeavour to procure for you, we did not undertake it at all, but we were to endeavour to find a lender of £72,000 and he was to be promised the security of first mortgage at 4 per cent., and then as to the balance of £12,000 we, as it is put on the pleadings, were ourselves to find £12,000 and take the second mortgage at 5 per cent. If that was the bargain, that would be a definite contract that if they did the work which the plaintiff employed them to do they then would get an interest in his land, a second mortgage over it in consideration of the loan they were getting."

It is true that the learned Chief Justice was then particularly addressing himself to the question whether it was a term of the alleged contract understood by both parties that the defendants were not themselves to find the £12,000, but I cannot find that he at any other part of the summing-up put the plaintiff's version of the alleged promise on any other basis. He had prefaced the language I have quoted by a statement that he would submit to them copies of the plaintiff's version of the conversation with the defendants' version, adding that a good deal turned on the verbiage of the statements made, and that this was the reason for following this matter closely.

If the finding of the jury is to be read with this direction, the jury have in substance found that the real promise was to find willing lenders who would enter into negotiations with the plaintiff, which, for the reasons I have given, is an incomplete and uncertain contract, and, moreover, is not the contract alleged.

The appellant, however, further contends that the respondents are estopped from setting up this view of the law, because, they say, that question was definitely settled as between the parties by the language used by the learned Justices who formed the majority of this Court when giving reasons for granting a new trial, and who expressed the opinion that upon the evidence given at the first trial the jury would have been warranted in finding a contract which was neither void for uncertainty nor obnoxious to the *Statute of Frauds*. I am unable to find any support either in principle or authority for the contention. A decision of the Court upon some matter directly in controversy between the parties upon some definite point

of fact or determination of right, no doubt, operates as an estoppel. And this may be so even as to an incidental matter arising in the course of the proceedings which requires immediate settlement. For, as pointed out by the Judicial Committee in the Indian case cited, such a decision is either appealable or not. If it is not appealable, it is final. If it is appealable and is not appealed from, it becomes final. But I never before heard it suggested that a grant of a new trial was a final decision upon any point except that the matter should be further investigated. No authority was cited, nor even a suggestion in a text-writer, that it has any such operation. The reasons of the Judges for granting a new trial may operate as a decision binding the Court in the conventional sense that a Court ought to follow its own decisions. In the present case a special Court has been constituted for the purpose of deciding, first, whether it is bound to follow the opinions of my brothers *Isaacs* and *Powers*, and, secondly, if it is not so bound, of reviewing them. It is not disputed that the Judicial Committee on appeal from this Court is not so bound, so that a refusal of this Court to reconsider the matter would merely leave it open.

In the case of *Cameron* v. *Fraser* (1) it was contended that the appellant was "pre-empted" from appealing in consequence of his not having appealed from an interlocutory order of the same Court in the same suit. The Board, whose opinion was delivered by Dr. *Lushington*, said :—"This order of the Court did not purport to be a definitive sentence ; and then the next question would arise, that if not a definitive sentence, whether it was an interlocutory order, having the force or effect of a definitive sentence, and supposing it to have such force and effect, whether the consequence would be, that not having appealed from it, the appellant would now be pre-empted from asserting this appeal. Their Lordships are of opinion in the first place, that there is nothing to induce them to come to the conclusion that it can be called an interlocutory order, having the force or effect of a definitive sentence. The meaning of those words perhaps it is unnecessary to enter into, particularly upon the present occasion ; but the real purport and effect of them must be to all intents and purposes as conclusive of the whole rights

(1) 4 Moo. P.C.C., 1.

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

Griffith C.J.

of the parties as a definitive sentence itself, to the extent it goes, and their Lordships see no reason to think that upon the present occasion any such interpretation can be put upon it."

So, in the present case, I can see no reason to think that an order for a new trial, on whatever ground or for whatever reason granted, can have the force and effect of a definitive adjudication upon a matter directly in controversy between the parties.

In truth, however, the question does not really arise, for the evidence given on the second trial was by no means identical with that given on the first.

For all these reasons I think that the plaintiff's case fails *in limine.*

The defendants contend further that the finding of the jury in answer to Question 2 is demonstrably wrong, since it is, they say, manifest upon uncontradicted evidence, to which I will refer, that it was a term of the promise, if any, understood by both parties at the time of the conversation of 26th August, that the loans, if procured, were to be made upon special terms of redemption to be afterwards agreed to by the plaintiff and the hypothetical lender.

It is abundantly clear that that conversation was not the initiation of a new proposal, but a continuation of proposals already made. The plaintiff's application to the defendants for a loan of £12,000 was still pending. His opening of the conversation, as deposed to by him, "I came to see about financing purchase of 'Kentucky,'" sufficiently proves that the conversation was such a continuation. If, however, there were any room for doubt, it is removed by a letter written by the plaintiff to the defendants' manager on 24th June 1913 with the assistance of a gentleman who is now his solicitor in the action, in which he set out his case against the defendants. In this letter, referring to the interview of 28th August, he said: "On calling at your office I first saw Mr. Macrae, and on stating my business, for which of course from our previous correspondence he was quite prepared, you were called in in consultation." I have already mentioned the defendants' letter of 19th August 1907 to the plaintiff which referred to the question of repayment.

The subsequent action of the parties also shows that it was clearly understood by them that the loans were to be made upon special

terms allowing the plaintiff to redeem the loan of £72,000 in part at an early date. The first application which the defendants made for a loan of £72,000 to the plaintiff on the security of "Kentucky" was made to the Australian Mutual Provident Society. By a letter dated 13th September 1907 from defendants to plaintiff they informed him that they had interviewed the Society on the subject and added :—"We have explained to the Society that it is your desire though borrowing this money to realize the greater portion of the property at an early date, and we might ask them when making this application if they could suggest any way that would allow you to get certain lands released in the event of your paying the whole of the purchase money. Under the application you are now lodging the concession is given of repaying up to one-fifth of the amount in any one year without fine." Replying to this letter on 16th September, plaintiff gave particulars of the 14,600 acres which he proposed to offer for sale. On the 18th the defendants, in answer to his letter of 16th, suggested that the plaintiff, if he had any proposal for borrowing the £72,000 in two loans, should lay them before the Society's valuer, "who might probably make some recommendation that would prove more suitable to you in connection with the discharging of the lands you propose to sell." On 22nd September the plaintiff wrote to the defendants acknowledging their letter of 18th, and saying that he would consult with the Society's valuer as regards future arrangements in connection with paying off part of the principal.

The application to the A.M.P. Society was not acceded to, and on 3rd October the defendants informed the plaintiff of the fact, and proposed to him that, subject to his approval, they should make an application to the National Mutual Life Association of Victoria for the loan of £72,000. The plaintiff, by letter of 5th October, approved of their doing so, and enclosed an application to be lodged by them. They accordingly lodged it. On 14th October the defendants wrote to the plaintiff, quoting the following passage from the reply of the National Mutual Life Association :—"'It would not suit us to make the advance at less than $4\frac{1}{2}$ per cent. per annum with the option to the borrower of reducing principal after the first year at 3 months' notice.'"

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

Griffith C.J.

In a letter from plaintiff to defendants of 27th October 1907 he said: "You apparently get away from the fact that your undertaking with me was to find a first mortgage on conditions necessitated by my intention to resell part of the estate."

In the face of these statements by the plaintiff, it is impossible to maintain that the promise (if any) made by the defendants was not a promise to procure a lender of £72,000 on first mortgage on special conditions for redemption of part of the estate. This negatives the contract as found by the jury, and is of itself sufficient to dispose of the case.

I pass now to the jury's answer to Question 4, that it was not a term of the contract that the defendants might themselves lend the £12,000. The alleged promise was to find lenders of two sums of £72,000 and £12,000. It was not anticipated that there would be any difficulty in procuring a lender of the £72,000, but it was not so certain that a lender of £12,000 on second mortgage could be found. Yet it was necessary for the plaintiff to obtain the whole amount of £84,000 to enable him to exercise his option of purchase. At the date of the alleged conversation of 26th August the plaintiff's application to the defendants for a loan of £12,000 on second mortgage was still pending.

The plaintiff called as a witness Mr. Skinner, now his solicitor, who deposed as follows :—"From July 1907 to the end of the year there was no difficulty in getting £72,000 on first mortgage at from 4 per cent. to 4½ per cent. Money was very plentiful then, and all large lending companies were willing to lend at about that rate. The difficulty was getting the £12,000 on second mortgage. The £72,000 was easy. I do not think that the £12,000 on second mortgage could be got; individual lenders are very unwilling to lend on second mortgage when large first mortgage already existing. The only chance was a wool company. I approached all of them, and they all declined it." The term "wool company" means a company carrying on a business similar to that of the defendants. Skinner further deposed in cross-examination :—"No wool company would advance on second mortgage unless it obtained the advantage of the account and commission on sales of the land when cut up. I do not think that any private lender would entertain the

second mortgage proposal—I am sure he would not." Plaintiff, in his examination, referring to the proposal made by him in July, said:—"It was a proposal in effect that defendants should be second mortgagees as to £12,000. My proposal was to obtain £72,000 at 4 per cent. from some other lender and £12,000 on second mortgage and other securities from defendants at 5 per cent." And again, referring to the conversation of 26th August, he said:—"On the 26th of August 1907 I said 'I have come down to see you on a matter of financing the Kentucky property, that phrase is similar to that I used in a letter to Skinner on the 20th August 1907. They (Aitken and Macrae) could not understand anything else but that up to that point of the conversation they were being asked to finance the £12,000 only, at 5 per cent.'" And further:—"The £72,000 would have been no good to me unless I got the £12,000 also. I signed the application. If the A.M.P. had granted the £72,000 at 4 per cent. it was the defendants' business to see where the £12,000 could be got on second mortgage. My letters show that if the A.M.P. had valued the property and then agreed to lend £72,000, and that if defendants had then come to me and said they would lend me the £12,000, I would have taken it. I would have taken any terms in that event, I would not have refused them, I would have taken the £12,000 from them. It became immaterial then, after three weeks from the 26th of August, but once the £72,000 was lent to me and if again offered the £12,000 on second mortgage at 5 per cent., the price of money having risen, I would have taken it."

On the first trial he had said:—"It was immaterial to me where the money came from. Mr. Justice *Hood* asked me on that trial: 'Why do you make a distinction between August 26th arrangement and what occurred before that date?' The distinction was in my mind. I do not know what was in theirs. His Honor asked me: 'If they had let you have £12,000 would you have made any objection to their being mortgagees?' I replied: 'Not the slightest.' I said if they had offered their own money I would have accepted it, and if I did could not object to their being mortgagees."

At the conversation of 26th August the question whether the

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

Griffith C.J.

defendants were or were not to be at liberty themselves to lend the £12,000 was not raised or mentioned, and in the letter of June 1913, already quoted, plaintiff alleged as a breach of the contract of 26th August that the defendants had refused to lend him the £12,000. The jury, therefore, had no evidence before them which would warrant the finding.

Further, I am of opinion that if the contract was absolute and unconditional as found by the jury, it was an implied term of it that if the defendants could not find any other person to advance the two sums of £72,000 and £12,000 they would themselves do so and a further implied term that the plaintiff was to execute mortgages to them accordingly (See *Hutton* v. *Lippert* (1) ).

It follows that the alleged contract, if made, was a contract to lend money on mortgage of land, which, it is admitted, was obnoxious to the *Statute of Frauds*. In this connection I should refer to an argument founded on a supposed fiduciary relation existing between the plaintiff and the defendants and created by the alleged contract. It is clear that no such relation existed when he called at their office on 26th August. It is equally clear that it did not exist with respect to the £12,000 then asked for by him from them. If it was created, it must have arisen from a distinct understanding between the parties that under no circumstances were the defendants to become the mortgagees. There is, as I have already pointed out, no word in the alleged conversation of anything to support such an understanding. An implied term of a contract is one which the parties must, not might, have intended (*The Moorcock* (2) ). The plaintiff's explanation is that he had in his mind his conversation with the unnamed " agent " who, he said, had offered him the whole £84,000. (The name of the agent was Griffith, who was called as a witness and denied all knowledge of the matter.) Whatever the plaintiff had in his mind, he did not communicate it to the defendants. There is, therefore, no foundation in fact for the argument founded upon the supposed fiduciary relation, at any rate so far as regards the £12,000. The learned Chief Justice, however, directed the jury that if they accepted the plaintiff's version of the conversation the defendants would not by

(1) 8 App. Cas., 309. (2) 14 P.D., 64.

law have been at liberty to lend the money themselves without the plaintiff's express permission. *à Beckett* J. thought, and I agree with him, that this was a misdirection, which might, I think, have affected, and probably did materially affect, the minds of the jury in considering Question 4.

For these reasons I am of opinion that the finding of the jury in answer to Question 4 was demonstrably wrong and that the alleged contract was obnoxious to the *Statute of Frauds*.

It follows from what I have said that the answer to Question 1 cannot stand. For, if the plaintiff really thought that the contract was as found by the jury (which in the face of his letters it is hard to believe), there is no evidence upon which they could find that the defendants thought so. The finding is therefore, at best, founded upon conjecture.

I pass to the answer to Question 5, on which the learned Judges of the Supreme Court founded their judgment, thinking themselves precluded by the language of *Isaacs* and *Powers* JJ. on the previous appeal to this Court from dealing with the other questions.

I have already mentioned that after the A.M.P. Society refused to entertain the plaintiff's application for a loan of £72,000 the defendants at his request lodged a similar proposal with the National Mutual Life Association of Victoria.

In the plaintiff's letter of 5th October enclosing this proposal he said :—" I now enclose fresh proposal as requested but I think should this not be accepted it would be better considering the present conditions of the market and the season to let the matter rest for a time."

The National Mutual Life Association of Victoria on 14th October declined the proposal, as already stated, and the defendants contend, and the Supreme Court thought, that the defendants were thereupon, when the condition happened—as it did—absolved from the necessity of taking any further immediate action for procuring the loan of £72,000 at 4 per cent. and £12,000 at 5 per cent. The plaintiff relies on a passage in the judgment of *Alderson* B. in *King* v. *Gillett* (1), to the effect that a defendant cannot succeed upon a plea of exoneration unless he proves a proposition to exonerate on

(1) 7 M. & W., 55, at p. 59.

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

Griffith C.J.

the part of the plaintiff acceded to by himself which would in effect be a rescinding of the contract. I confess my inability to see the application of this doctrine to the case of a contract to render services in which the promisee requests the promisor to hold his hand for the present. In such a case the promisor, if not discharged altogether from his promise, is at any rate discharged until he is requested to resume his duty under the contract.

On 19th October plaintiff wrote to the defendants referring to their letter of the 14th, and saying, "It seems to me as I said before useless to proceed further." In a letter replying, dated 25th October, the defendants advise the plaintiff not to abandon the attempt to get a loan so as to enable him to purchase "Kentucky," for which purpose they proposed to him that he should come to Melbourne and confer with them. He came, a fresh proposal was made, and further negotiations took place which resulted in the plaintiff arranging the purchase, the vendors allowing a large part of the price to remain on mortgage.

The jury found that the alleged contract was broken "after 10th October." The exoneration relied upon must, therefore, be found before that date. The defendants contend that it is proved by plaintiff's letter of 5th October. In my opinion it was not open to the jury to say that that letter did not operate as an exoneration. I do not see, indeed, what they had to do with the construction of its plain language. I think, therefore, that this defence was proved.

The plaintiff, in fact, continued to act on friendly terms with the defendants as his agents in connection with "Kentucky" until action brought just within the six years.

For all these reasons I am of opinion that the findings of the jury are unsupported by the evidence, and that the defendants are entitled to judgment in the action.

The appeal should therefore be dismissed.

BARTON J. I am in general agreement with the judgment of the learned Chief Justice except upon one point, that of exoneration. On that question the main evidence is documentary, and I doubt whether it establishes this defence. But the question is in my view

not material, since it arises with respect to an alleged contract which I think was never made. As the finding of the jury as to the contract itself is, I think, against the evidence, the question of exoneration does not arise. If, however, the contract was as found, then the appellant's letter of 5th October is strong on the question of reasonable time. The jury seem to have found that a breach occurred on 10th October, which is only five days later than the appellant's letter of the 5th. The last mentioned letter was either evidence of exoneration or it was a concession of further time. It told the respondents that if the proposal to the National Mutual Life Association were not accepted it would be better to let the matter rest for a time. If the jury meant, as I think they did, that a reasonable time had elapsed five days after this concession of further time, it is most difficult if not impossible to justify that finding (No. 8). Moreover, that finding is as to the alleged breach of a contract which, as I have said above, was in my opinion not the contract between the parties, if indeed there was any contract.

It is not my intention to traverse the whole of the evidence, as it has been so fully dealt with by the learned Chief Justice, whose judgment I have had the advantage of reading. His examination of it is complete for all the purposes of the case, and demonstrates to my mind that the verdict, and the judgment in the first instance, were erroneous.

On the question of estoppel, perhaps some further light may be obtained from the judgments of the Judicial Committee in the case of *Williams* v. *Bishop of Salisbury* (1) and in *Forbes* v. *Ameeroonissa Begum* (2). I do not consider that the judgment of this Court upon the new trial motion in this case (3) can be regarded as *res judicata* between the parties so as to estop the defendants on any of the points in the present appeal. I do not think that the grant of a new trial on that occasion amounted to anything more than a remitter of the case to the examination of a second jury. It is further argued, however, that this Court is bound by the opinion of the majority on that occasion, on the ground that the Court ought to follow its own decisions. But the previous

(1) 2 Moo. P.C.C. (N.S.), 375, at 395. (2) 10 Moo. Ind. App., at pp. 359, 360.
(3) 19 C.L.R., 356.

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

Barton J.

appeal was dealt with by a Bench of three Judges and by majority, and the very object of having the present appeal heard by a Bench consisting of the entire Court was, as I understand the matter, to obtain, in view of the great importance of the questions, the most authoritative pronouncement possible as to the whole case. I believe that it was intended that the opinions of all of us should now be obtained, untrammelled, but of course formed with the respect which we all pay to the views of our learned brethren. Indeed, the evidence given on the second trial cannot successfully be contended to be identical with that previously given. I think, however, that if it be taken as identical in its main features, it is still open to us to form and declare our respective opinions on the whole case, and mine is, as I have indicated, that the appeal ought to be dismissed.

ISAACS J. The Supreme Court held that the defendants were entitled to judgment notwithstanding the findings of the jury in favour of the plaintiff, on the ground that before breach the plaintiff had exonerated the defendants from performing the contract found to have been made. This conclusion was arrived at assuming, but without deciding, that the other findings could stand. It was also plainly contrary to the views expressed at the trial by *Madden* C.J., before whom the case was heard. On this appeal the whole position has been debated at great length, and will have to be considered, and therefore I think it will conduce to simplicity if each question is taken in order. With the exception of one point, the question, lengthy as it is, is practically a disputed question of fact.

1. *The Contract.*—The plaintiff's statement of claim (par. 8) alleges a contract whereby the defendants promised *absolutely* to raise for him £84,000 on the security of Kentucky Station, of which £72,000 was to be secured on first mortgage at 4 per cent., and the balance £12,000 on second mortgage at 5 per cent. The defence alleged that the real agreement between the parties was (1) to endeavour to obtain a loan of £72,000 at 4 per cent. on first mortgage, and, conditionally on that being obtained, then (2) themselves to *lend* to the plaintiff £12,000 at 5 per cent. on second mortgage. It adds "save as aforesaid it denies every allegation in par. 8."

The defendants also plead the *Statute of Frauds*. It is plain the only issues of fact raised as to the creation of the contract are whether (*a*) the defendants promised absolutely to raise £84,000; or (*b*) promised to endeavour to raise £72,000, and then conditionally undertook to lend £12,000. The other allegations as to interest, priority of mortgage and subject matter of mortgage are by the rules of pleading admitted because not denied. In view of the argument, it is very material to observe that no condition precedent is denied (Order XIX., r. 14, of the *Rules of the Supreme Court* 1906), and that no allegation of any specific stipulation is made, as for instance release of portions of land from mortgage (Order XIX., r. 13); and see *Byrd* v. *Nunn* (1). The parties have set out the issues of fact in contest.

The previous appeal to this Court is reported in the *Commonwealth Law Reports* (2). On the case as then presented, I thought the issue of fact as to the contract was whether the plaintiff's allegation was correct or not, namely, whether "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?" Those last words I considered it was desirable to state by reason of the point suggested during the argument on that occasion—that no subsidiary terms were averred or agreed to and, therefore, the whole arrangement amounted to nothing. But those words I regarded merely as something that would necessarily be implied or inferred, in the absence of any contest that some specific term was intended. And up to the time of that appeal, no specific term was relied on by the defendants.

The learned Chief Justice suggested that so general an implication could not be made because in a letter of 27th October the plaintiff had made reference to "conditions necessitated by my intention to sell part of the estate"—though what those conditions were could only be conjectured. It was possible that on the second trial the defendants might, by amendment of their pleading or by tacit consent, set up as a fact that some

(1) 7 Ch. D., 284. (2) 19 C.L.R., 356.

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

Isaacs J.

special condition was agreed to, so as to alter the implication or inference otherwise arising. My learned brother *Powers* recognized that, had the case gone to the jury, they might have been invited to find, and might have found, that the subsidiary terms were to be either reasonable terms or some terms then agreed to by the parties. Notwithstanding this plain intimation, the defendants neither amended their defence nor raised at the second trial any contention of fact that the parties had agreed to that or any other specific subsidiary term. No question was suggested on this point to the jury, and it appears to me too late to raise it now, and quite impossible to ask the Court to assume there was such a term. The vague statement referred to in the plaintiff's letter was never assented to by the defendants; no one relied upon it as a term actually agreed to; it is not borne out by anything the defendant did; and to dig up that line as a fatal answer to the plaintiff's case, after the jury had been allowed to decide the only points fought and considered material, would, in my opinion, offend against both the recognized rules of practice (*Byrd* v. *Nunn* (1)) and the essence of justice and fair play.

I assume that the only questions in dispute relevant to the formation of the contract in fact were those pleaded, and put before the jury and answered by their replies to Questions Nos. 2, 3 and 4.

The first point here contested as to the contract so found is whether there was evidence upon which the jury could, as reasonable men, come to their conclusions. I do not stop to inquire whether this question has been already determined in the prior appeal. To some extent it has, because it was there held that on the verbal evidence of the plaintiff then uncontradicted, there was material which would sustain a finding in his favour. But I am disposed to agree with defendants' contention that, technically, it cannot be properly regarded as already decided. There are now contradictions of the plaintiff's evidence and there are other documents, and however helpful the prior decision may be, it does not, I think, go further on this branch. I therefore consider the point as *res nova*.

(1) 7 Ch. D., 284.

So regarding it, I am clearly of opinion that there was abundant evidence to support the findings. Prior to 22nd July 1907 Gray had applied to the defendant for a loan of £12,000 to purchase "Kentucky" conditional on his selling certain farm lands. No rate of interest was mentioned. This proposal was discussed on 22nd July by the defendants' board, and postponed pending the result of the sale of farm lands. That sale took place on 20th August. But in the meantime Gray, who needed £84,000 in all, not having had any promise from Dalgety & Co., and while looking round for the £72,000 that he was to find for himself, entered into negotiations with Hobbs, a commission agent, for the total loan at $3\frac{7}{8}$ per cent. This agent's principal died and he came to Dalgety & Co. unknown to Gray, and sent in all the papers. It is of the first importance to notice that in the correspondence that Hobbs placed before Dalgety & Co. it appears that the business on foot was a proposed loan of £85,000. In their Melbourne letter to their Sydney house they say that Gray informed them he was going to get money at $3\frac{7}{8}$ per cent. and that they told him they thought it unlikely he would succeed. They add: "At the ordinary market rate we of course could help Mr. Gray as well as anybody else, if he would entrust the business to us as he is in fact half inclined to do." "The business" there referred to is at the least open to the meaning of the business of finding a lender or lenders of the whole £85,000. On the same day the Melbourne house writes to Gray and after referring to the Hobbs negotiation, says:—"We have no doubt that we could get the money just as well as anyone else if you care to entrust us with the business; but it will first of all be necessary for you to write to Mr. Hobbs formally withdrawing the business from him." "The business" is obviously the whole loan of £85,000. The letter concludes with a reference to the original application for £12,000. But it is clear that two distinct lines of possible negotiation were going on at the same time: (1) a proposal for a combined loan of £85,000, for which Hobbs and then Dalgety & Co. were the intended intermediaries, and (2) a proposal for a contingent advance by Dalgety & Co. of £12,000, which had not progressed even far enough to state the rate of interest. Until the sale of the farm lands it was apparently not thought worth while to mention the rate. And in

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

Isaacs J.

view of the argument it is most important to observe, independently of any difficulty arising under the *Statute of Frauds*, that this proposal never advanced to the position where it could be said to be a contract of loan for any fixed period or that any settled rate of interest was included.

On 20th August the sale took place, and, as appears by Gray's letter to Skinner of that date, the plaintiff wired to Hobbs that unless a definite and satisfactory assurance were given without delay "this matter" will be taken out of his hands. That letter was written before the Dalgety letter of 19th August could be received by him. After referring to Hobbs and "the business" he was engaged in—that is, the whole sum of £84,000 or £85,000—that letter of 19th August says: "We have no doubt that we could get the money for you just as well as anyone else if you care to entrust us with the business," and then the writer says it will be first necessary to withdraw "the business" from Hobbs. The letter concludes with a reference to the original application of 22nd July for the advance of £12,000. That may well be read as quite independent of and alternative to the possible entrustment of "the business" previously referred to. If I had to decide the matter, I should think it was.

Dalgety & Co. got a wire from Gray as to the satisfactory prices obtained at the sale of his farm lands; and they sent a representative, named Boothby, to discuss matters with him. Boothby reported on 26th August that Gray had by wire taken "the business" out of Hobbs's hands, and adds: "I strongly urged Mr. Gray to come to Melbourne and consult you in the matter, and he said he would try and be down to-day." Gray acceded to that, and came to Melbourne. There he met a Mr. Griffith of Albury, a member of a firm of stock and station agents, and according to the plaintiff's evidence this gentleman was willing to take up the business of getting the whole £84,000 in two sums of £72,000 and £12,000. Then Gray went on to Dalgety & Co. and had a conversation which, as he relates it, is relied on as creating the contract sued on, and which the jury believed. There are subsequent conversations, at one of which Gray says Aitken was present, and which, if true as stated by Gray, corroborates him. Aitken says only that he has no recollection

of the confirmatory conversation, but does not deny it. His memory may have been considered weak. True, Gray's verbal account is verbally contradicted as to absoluteness with regard to the £72,000, and as to procuring a lender at all for the £12,000. He is also contradicted by Griffith. But the jury had the various witnesses before them, they had letters, words and conduct to judge of (*Moore* v. *Garwood* (1) ). They had in the account given by Macrae and Aitken some extraordinary views put forward. As to the £72,000, admittedly it was to be "procured," not "lent," by Dalgety & Co.; and it is now admitted by learned counsel in argument—as, indeed, it could not be disputed without violence to the most elementary rule of equity with regard to agency transactions, based as it is on fundamental principles of justice—that Dalgety & Co. had no right to lend the £72,000 out of their own moneys without express permission. As to this £72,000 the defendants' evidence is only as to an "endeavour" to procure it. Then, as to the £12,000, Aitken's strange story is that they were to be under no obligation at all with respect even to the £12,000; they were to be "at liberty" to lend it. He says: "That had been so, from 26th August. If circumstances arose which rendered it undesirable to do so, we were at liberty to exercise our judgment against the advance." Also: "We were absolutely bound to find £12,000 until we withdrew, and we were at liberty to withdraw it at any time." For a statement of business obligations, the jury might well think that a most extraordinary one and indicative at the best of obscured memory. It may have been also an attempt to reconcile an absolute undertaking to lend £12,000 conditionally upon securing the £72,000—an undertaking which would defeat the plaintiff's version of the contract—with the previous statement of Macrae that defendants "deliberately broke their promise." But however it may be, there was in my opinion superabundant material upon which the jury could find the contract as they have done, and any Court, in setting that verdict aside and entering one for the defendants, would usurp the jury's function, very much as was attempted to be done in *Pearse* v. *Schweder* (2). In *Middleton* v. *Melbourne Tramway and*

(1) 4 Ex., 681.

(2) (1897) A.C., 520.

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

Isaacs J.

*Omnibus Co.* (1) I stated my view of the law as to setting aside the verdict of a jury. The passage begins: "Where there is a jury," and ends with the words: "that is for the jury." I adhere to that statement, which I desire to be taken as now repeated, and which, as appears from my judgment in that case, is the result of the cases of *Metropolitan Railway Co.* v. *Wright* (2), *per* Lord *Halsbury*; *Riekmann* v. *Thierry* (3); *Cox* v. *English, Scottish and Australian Bank Ltd.* (4), and *Jones* v. *Spencer* (5). That principle, applied to the facts of this case, is in my opinion fatal to the defendants' contention as to all the findings of fact complained of.

(2) *The Breach.*—The jury have found that after 10th October had passed the reasonable time for performing the contract, as deduced from all the circumstances including the plaintiff's acquiescence in proceeding as far as he did, had expired. Lord *Atkinson*, for the Privy Council, said in *De Soysa* v. *De Pless Pol* (6):—"One party to a contract is not bound to give to the other unlimited time after a day named to do that which the other has contracted to do. There must be some point of time at which delay or neglect amounts to a refusal."

Now, I do not say that if the plaintiff had insisted earlier he could not have complained of an earlier breach. But, by mutual conduct, the limits of reasonable time were apparently—and, as the jury thought actually—extended until 10th October, when the defendants took up the position of denying the contract, and therefore of refusing to perform it. Their letter is not only a denial of the absolute contract, which the plaintiff alleged and the jury have found, but is even a deviation from the bargain set up by the defendants themselves in their pleading. They maintain their bargain was to endeavour to obtain £72,000, and then to "entertain the lending" of £12,000, and they have ever since maintained it. This is Aitken's evidence already referred to, and Macrae's evidence as to the meaning of "entertain" shows the recognized difference between an absolute promise and a promise to "entertain." If the plaintiff's view of the bargain was right, it was hopeless for him to persevere in pressing them to continue; they had denied the foundations, and

(1) 16 C.L.R., 572, at p. 583.
(2) 11 App. Cas., 152, at p. 156.
(3) 14 R.P.C., 105, at p. 116.
(4) (1905) A.C., 168.
(5) 77 L.T., 536.
(6) (1912) A.C., 194, at pp. 202-203.

this was equivalent to a total refusal to perform (see *Rhymney Railway Co.* v. *Brecon and Merthyr Tydfil Junction Railway Co.* (1) ).

(3) *Exoneration.*—It is important to see what the defendants say in their pleading constituted exoneration. In par. 12 of the defence it is said to rest on two circumstances: (1) a direction by the plaintiff to do nothing further, and (2) defendants' compliance with that direction. Pars. 13, 14 and 15 carry it no further. The Supreme Court agree with that, and consider that the letters of 5th and 19th October and the conduct of the defendants are of such a nature as to take the matter out of the hands of the jury and to constitute in law an exoneration. That is the real meaning of holding that the jury could not, as reasonable men, find as a fact that there was no exoneration before breach. In other words, the Supreme Court holds that before a reasonable time for performance had arrived the parties voluntarily and mutually agreed as a binding contract (*King* v. *Gillett* (2) ), and without further consideration to the plaintiff, that the contract here sued on should be put an end to and the defendants released from their undertaking. I should observe that the Supreme Court accepted as correct for this purpose the finding of the jury that on the expiry of 10th October the breach had occurred—supposing, of course, there was no prior exoneration. And in holding there was exoneration prior to the 11th or prior to the 19th, their Honors must necessarily have excluded from the letter of 19th October any force whatever except as interpretative of the letter of 5th October. Assuming a breach on 11th October, then, if the letter of 5th October were ambiguous and were sworn by the defendants to have been interpreted and acted upon by them in one of the ambiguous ways, and if that interpretation were supported by the letter of 19th October, the latter document would be important—otherwise not. But the letter of 5th October is not, in my opinion, ambiguous, and, if it were, the defendants do not say they understood or acted on it as meaning that they were to be discharged from proceeding further. If they had said so, their actions would contradict them, or at least the jury could think so.

That letter has assumed a prominence beyond its real importance.

(1) 69 L.J. Ch., 813. (2) 7 M. & W., 55.

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

ISAACS J.

On the first appeal I pointed out one possible aspect in which it might be regarded by the jury as consistent with the plaintiff's case. One possibly consistent view was enough for the purposes of that appeal, and I certainly did not pretend to exhaust all possible views or to lay down as a legal proposition that the jury were not to be at liberty to read that letter in more than one of two possible aspects. They have, in the present instance, apparently read the letter as one of a number of circumstances, and appraised it at its proper value as they understood the position as a whole. Now that letter says (1) that the plaintiff is annoyed at having his loan carried outside Dalgety & Co.'s office and into the offices of other financial firms. The attempt was unsuccessful and might militate against his eventual success, because, as he then says, "Once the fact of having been refused is known at one office may render the business difficult, if not impossible, at another." Then he says: "That I should have had personally two offers" (he means those of Hobbs and Griffiths) "to entertain the business" (that is, the whole £84,000) "at $3\frac{7}{8}$ in Melbourne and that your first proposal at 4 per cent. should be declined are facts hard to understand." Before reading the next sentence, we have to recollect that Gray was still anxious to purchase "Kentucky," and was still in need of borrowed money to do it, and no reason is shown why he should let Dalgety & Co. off an absolute promise to get it for him. But it is quite feasible, and indeed in the highest degree probable, that for his own benefit he should suggest to them the best means of carrying it out so long, of course, as the obligation was adhered to. So he says: "I now enclose fresh proposal as requested, but I think should this not be accepted, it would be better considering the present condition of the market and the season to let the matter rest for a time." A jury, taking all the probabilities into consideration, might fairly say, if Gray really meant to withdraw he would have said so distinctly, and they might, as it seems to me, reasonably have considered that Gray meant, and would be understood by Dalgety & Co. to mean, by letting the matter rest "for a time," that he thought the time for performance should be extended to a more favourable opportunity—the bargain still holding. He made a suggestion, and how did they meet it? In their letter of 10th

October they deny the very existence of the contract as he states it. They state further how they do understand his final sentence. They also say: "We note in view of the season you think we should not endeavour to carry through the business *at present*" &c. (The italics are mine.) But the words "at present" are decisive that they did not understand a definite withdrawal when they wrote their letter of 10th October, and by firmly denying the contract and clearly refusing to acknowledge such a contract or any obligation to adhere to it, they fundamentally break it. They go on to suggest another. I should read Gray's letter of 19th October—when taken as part of the whole series of events—as an intimation that he would not entertain the substituted attempts suggested by Dalgety & Co., and considered it useless in view of all they had said and done to extend the time further. This was at all events clearly, I should say, open to the jury, and it leaves the matter as found by them with a breach of absolute contract not replaced or repaired by any substituted method of getting the money contracted for. At the worst for the plaintiff, this letter of the 19th definitely closed the reasonable time, but did not discharge the defendants from their breach of the absolute contract they had made. In this aspect the date of the breach should be placed as after the 19th instead of after the 10th, which would make no difference in the result. Alternatively, it was a decision not to substitute another attempt for the contract already broken by the failure to get the money and by the repudiation contained in their letter of the 10th. That appears to me to be the real legal position as the jury have found the fact. It is true there was further correspondence. The defendants on 25th October, unwilling to abandon the business, urge the plaintiff to proceed still further with what are seen to be outside attempts to get money—and they introduce the Melbourne Trust Ltd. as well as suggest reopening the National Mutual application. The communication elicits a complaint on 27th October of breach of undertaking—and incidentally there is the passage, "conditions necessitated by my intention to resell part of the estate," which was thought by the learned Chief Justice to destroy the plaintiff's case. But the letter ends with a promise to call, and on 29th October they approve of an interview.

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

ISAACS J.

Gray did call shortly before 14th November, when the corroborative conversation already referred to took place. The defendants then undertook to try and help the plaintiff in view of their already broken promise, by entertaining the question of resuscitating the old proposal of lending him £12,000. On 22nd November they inform him definitely and finally they cannot do even that. This is what Macrae referred to when he says " we deliberately broke our promise."

Now, when in June 1913 the plaintiff was asked by Aitken to sit down and write out his grievances, if allowance be made for his being a layman as the jury were entitled to do, his letter is a fair confirmation of his story in the witness-box. The contract and the breach are substantially stated in the letter from Gray to Aitken dated 24th June 1913. He insisted that the breach as to the £72,000 was earlier, and that would be enough for the plaintiff's case. No reply to the letter was given denying any of the statements there made, and no trace of any suggestion as to exoneration appears in the correspondence. There is certainly to be noticed a scarcely veiled threat that he is in their hands, and that his interests demand an amicable attitude on his part, but no suggestion of mutual rescission such as the law requires (*King* v. *Gillett* (1) ), or even an understanding on their part that they were to desist entirely from carrying out their bargain. Accordingly, it is not to be wondered at that Gray went on " amicably," paying well for all consideration received, until he was free from them and could bring his action without imperilling his property. So the jury thought at all events, and in so complicated an affair, I repeat, I do not see how their right to decide it can be validly questioned. I ought to notice an argument of the defendants resting on a paragraph of the letter of 24th June 1913, and based on the word " find " as applied to the £12,000. But, as mere inspection discloses, the same word is applied to the £72,000, which was admittedly not to be a loan by Dalgety & Co. themselves under any circumstances.

(4) *Enforceability of the Contract.*—It was denied by the defendants at every stage of this protracted litigation that the bargain, even if made, was enforceable. Reliance was placed on the *Statute of*

(1) 7 M. & W., 55.

*Frauds*. This was originally successful, but was overruled by this Court on the first appeal. On that occasion, a further ground of vitiation was suggested from the Bench, namely, that as all the possible terms of a lending contract were not stipulated for in the bargain to find a lender, the bargain was necessarily incomplete. That also was a clear-cut and distinct issue of law, and was, of course, vital to the plaintiff's case. If the suggestion were sound, the appeal would necessarily have failed, and no order for a new trial could have been made. It would have been absurd to send for trial on the facts a case that had no validity in law, even if every fact alleged were found to exist.

As to the *Statute of Frauds*, that, as the Supreme Court have rightly said in the present instance, may be disregarded in view of the contract as found by the jury.

As to the point of "no contract"—which would be equally fatal even though the bargain as alleged by the defendants themselves were put into writing and sealed with their separate seal—that meets, in my opinion, with two answers. The first is that it is a question which has already been determined by this Court in this very case between these parties. Apart even from a very potent provision to which I shall presently refer, this circumstance would, as I view the law, make it legally impossible for *this Court* to again consider that selfsame point and decide it, perhaps, in the same way—perhaps, differently. It was not a hypothetical contract the Court then dealt with—it was the very contract sued on; and the Court distinctly held that, if the jury found, as the plaintiff alleged was the bargain, that the contract was to procure a lender or lenders for the sums mentioned on the specific terms mentioned, the law did not require any subsidiary terms to be expressly specified as between the parties, and that the bargain made by Dalgety & Co. would have been satisfied by bringing a willing and competent lender or lenders of those sums on the specified terms, other terms being such as no reasonable person in the known circumstances of the plaintiff would have rejected (see *Clack* v. *Wood* (1)). The jury have found the contract as the plaintiff alleged.

In my opinion the principle enunciated by Lord *Macnaghten* for

(1) 9 Q.B.D., 276.

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

Isaacs J.

the Privy Council in *Badar Bee* v. *Habib Merican Noordin* (1) applies. There his Lordship said :—" It is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal." This, as was laid down by the same tribunal in *Ram Kirpal Shukul* v. *Mussumat Rup Kuari* (2), is not rested on any special statutory provision, but is a general principle of law. It is a settled doctrine of public policy based on the maxim *Interest reipublicæ ut sit finis litium.* It applies not merely to final judgments and orders in the sense which contrasts them with interlocutory judgments and others, but applies also to interlocutory decisions. This was definitely settled by the same august tribunal in *Ram Kirpal's Case* (3), where it was said, speaking of the matter decided :—" It was as binding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution." Their Lordships said :—" The judgment or order of Mr. Probyn was an interlocutory judgment, he merely held that according to the proper construction of the decree of the Sudder Court mesne profits were awarded by it. He did not assess the amount." Later on, their Lordships say that if no appeal lay it was final ; and if an appeal lay, and none was preferred, it was equally final and binding. But there the word final is used in antithesis, not to interlocutory, but to the power to dispute its correctness. They meant it was final in effect as distinguished from final in nature. The distinction is clearly shown by *Kay* L.J. in *McNair & Co.* v. *Audenshaw Paint and Colour Co.* (4), and *Cozens-Hardy* L.J. in *Marchioness of Huntly* v. *Gaskell* (5). Being final in effect, the Privy Council in the case mentioned said it would not be correct for their Lordships to put their own construction on the decree interpreted by the order under consideration. The fact of the decision not being " final," as opposed to " interlocutory," might be important if the question arose not in the same case but in another case. As it is, the matter is

(1) (1909) A.C., 615, at p. 623.
(2) 11 Ind. App., 37.
(3) 11 Ind. App., at p. 41.
(4) (1891) 2 Q.B., 502, at p. 508.
(5) (1905) 2 Ch., 656, at p. 667.

unimportant. Consequently, in my opinion, it is not competent to this Court to review its own previous decision in this very case on this very point.

It was at one time suggested further that the formal order for new trial as drawn up could alone be looked at to determine this question, and that as no such grounds appeared in that document, this question, which went to the very root of the whole case, could not be considered as having been determined. But that suggestion cannot hold in face of the distinct decision of the Judicial Committee in *Kali Krishna Tagore* v. *Secretary of State for India* (1), followed in *Sri Raja Rao Lakshmi Kantaiyammi* v. *Sri Raja Inuganti Rajagopa Rao* (2). The judgment, as it is there called, that is the reasoned judgment, expressing what points were decided, and for what reasons, must, it was held, be in such a case looked at in order that it may be ascertained what was really determined by the Court between the parties. The reasons for so determining, of course, are not binding but the points—that is, the issues both of fact and of law—once decided, are finally decided unless under some power of rehearing the matter is reheard or unless on appeal they are differently decided. I should, therefore, be prepared to hold that the point as to whether a concluded bargain had been made was not now open to contest in this case. Nevertheless, in view of the differing opinion on that point, the matter was allowed to be re-argued, and I state anew my conclusions. I retain the opinion I formerly expressed, and make the following additional observations.

In favour of Dalgety & Co. I assumed on the last occasion, and assume now, that their mandate was to find for Gray a person or persons able and willing to lend on the prescribed terms, and such other terms as in the circumstances Gray, as a reasonable man, could not object to. The last observation as to other terms is a necessary implication to give the bargain the business efficacy which the parties must have intended it should have (*The Moorcock* (3), *per Bowen* J.).

If they had found such a person or persons—not merely persons

(1) 15 Ind. App., 192; I.L.R. 16 Calc., 173.
(2) 25 Ind. App., 102, at p. 108.
(3) 14 P.D., 64.

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

ISAACS J.

willing to negotiate at large, but able and willing to lend on those terms, so that all Gray would have to do was to accept the offer they eventually held out to him, whether negotiation as to subsidiary terms within the range of reasonableness did or did not take place—then Dalgety & Co. would have performed their contract and earned their commission. I may mention some instances additional to those I cited on the last occasion.

The case of *Denyssen* v. *Botha* (1) was one in which a principal authorized an agent to borrow £500 or £600, which was for the purpose, *inter alia*, of enabling the principal to purchase some land. No duration of the loan was mentioned, and no rate of interest was mentioned. The agent borrowed £600. About £200 was applied to the purchase, and the Supreme Court of the Cape of Good Hope gave judgment for the lender for that sum, but held the principal not liable for the balance, apparently on the ground that the authority was an inseparable authority to borrow and mortgage, but not to borrow without mortgage, and that the mandate was ineffectual as to mortgage. The Privy Council gave judgment for the whole £600. The pertinence of the case here is in this: that independently of a later document which might have been regarded as an adoption of the actual application for a loan, and independently of any possible ratification of the acceptance of the loan, their Lordships considered that a document of 28th January 1852, which mentioned neither duration of loan nor rate of interest, was "according to the law prevailing in the Colony effectual as a mandate to borrow money."

The case is cited for general principle in *Halsbury's Laws of England*, vol. I., at p. 163. From the judgment I apprehend that there was nothing special in the law there as to the necessity for consensus of minds in contract; but that their Lordships were intimating that the local ordinances, while requiring special forms as to powers of attorney to mortgage, left an ordinary mandate to borrow untouched. *Re The Sovereign Life Assurance Co. (Salters's Claim)* (2) is another case. There *Chitty* J. says (3):—"The readiness and willingness required must be a continued readiness and willingness to go on with the loan according to the usual course of business

(1) 8 W.R., 710. (2) 7 T.L.R., 602. (3) 7 T.L.R., at p. 603.

in such a transaction." In *Mason* v. *Clifton* (1) *Cockburn* C.J., in summing up the case to the jury said :—" It appears that the defendant employed Kingdon to raise money upon the usual terms," &c. And see *Harris* v. *Petherick* (2), the last few lines on p. 544 and the middle of the next column. It is all a question as to what the respondents contracted to do, and in my opinion, and having special regard to the fact that the defendant Company was or was known to be a negotiator of loans and had a clientele of possible lenders, it is impossible to say the parties contracted to do nothing that business men in the relative situation of the parties would definitely understand. A jury of business men might well so consider, and they are the proper judges of that. (See *Halsbury's Laws of England*, vol. I., p. 164, par. 355, to which I draw attention.) Perhaps the best proof of that is that during the whole course of the action, through the pleadings, the first trial, and the motion to the Supreme Court after the first trial, the point never occurred to the respondents or their advisers. Having the sanction, however, of the learned Chief Justice of this Court, it demands great attention, but even on careful consideration I am compelled, with respect, to say I am unable to agree with it. I would add that, if it be sound, then a vast number of mandates in this respect are dependent merely on goodwill, and could never be enforced if either party objected. It is utterly impracticable to tie financial agents down, so as to leave no room for choosing, among those who are willing to lend on stipulated terms, the persons offering the most advantageous subsidiary provisions, well known and quite common in transactions of the kind, so long as they do not exceed the bounds of reasonableness when applied to the circumstances.

(5) *Damages.*—We were informed at the Bar that the respondents announced to the Supreme Court that they did not propose to question the quantum if they did not succeed on any point other than damages. Before us, they did not really dispute the quantum if the nature of the contract was one supporting substantial damages, and—at the end, they added—unless some possible offer consonant with their contract would have led to rejection of the loan by Gray.

It seems to me plain that the question depends entirely upon

(1) 3 F. & F., 899, at p. 901. (2) 39 L.T., 543.

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

Isaacs J.

the mandate and upon the *primâ facie* presumption, which there is nothing to displace, that Gray would have accepted any offer coming within the mandate he had himself created. Whether that mandate, other than specified terms, was confined wholly to terms not unreasonable, or included some term relating to release of portions of the land, the facts that he created the mandate, that he desired its fulfilment, that all conditions precedent are admitted (Order XIX., r. 14), and his readiness and willingness to accept among them, relieve this branch of the case from serious difficulty.

(6) *Misdirection.*—This is hardly a serious question. *Madden* C.J. was perfectly right in informing the jury that an agent employed to find a lender cannot, without distinct permission, lend his own money, even within the range of subsidiary terms that are common enough in such cases. His Honor left the matter entirely to the jury as a fact whether such permission was given or not. In so doing, he took occasion to answer the conflicting arguments raised by the two parties, and, in my opinion, the charge was unexceptionable, besides being unexcepted to.

He also instructed the jury that the mandate was to bring some person or persons who would make a fair bargain—plainly as to the subsidiary terms. This meant no more than that Gray was not bound to accept the loan at all, and before accepting it could try to make the subsidiary terms as between him and the proposed lender or lenders as favourable as possible. But so long as the proposed lender or lenders was or were willing before or after discussion to lend his or their money on the specified terms, plus subordinate terms within reasonable limits, Dalgety & Co. had performed their mandate, and though Gray might reject the loan he must pay the agents who had fulfilled his mandate by bringing the loan within his power. On the other hand, if the proposed lender as to subordinate terms would not come within the limits of reasonableness, Dalgety & Co. had broken their contract. The amount of damages recoverable might vary according to the extra stipulation demanded, and the attitude of the parties on the trial and in the Supreme Court on this question shuts the defendants out from any contest as to this. But, in any case, if no one could be found by Dalgety & Co. to advance at the promised rate, it may

in their favour be assumed that persons could be found to advance at a higher rate, all other conditions expressed and implied being assumed. The difference between the rate contracted for, and the rate that would have to be paid, would then be at least a possible measure of damages. This is what the defendants themselves contended in effect.

In my opinion, on the whole case the appeal should be allowed, and the judgment of *Madden* C.J. restored.

HIGGINS J. The ground—the only ground—on which the Full Supreme Court of Victoria has set aside the verdict and judgment for the plaintiff, and entered judgment for the defendant Company, is that the plaintiff exonerated the defendant Company from its obligation to procure a lender or lenders under the contract. The Supreme Court has taken the view that the finding of the jury that there was no exoneration was "against evidence"—that on the facts proved no jury could reasonably find anything short of exoneration. The learned Judges rely on a letter from the plaintiff dated 5th October 1907, supplemented by a letter of 19th October. These letters have to be examined closely in connection with the circumstances.

The contract to find a lender or lenders was made verbally on 26th August; no application was made for a loan until 18th September, and then the defendant Company approached—not one of its own customers—but the Australian Mutual Provident Society; and on 2nd October the Society wrote declining the application. The defendant Company reported the refusal to the plaintiff, and asked him to fill in and sign another application to the National Mutual Life Association. In reply the plaintiff wrote the letter of 5th October which has been set out in the judgment of the Chief Justice. The letter shows surprise and irritation on the part of the plaintiff. He complains that the money was to have been advanced through the defendant Company's own office (by some of the defendant's clients), and within a week or two after the contract; that practically nothing had been done for three weeks; that the season would now render lenders very cautious once the fact of the refusal should be known to other offices. The plaintiff signed and

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

Higgins J.

enclosed the fresh application—that to the National Mutual—as requested, but added: "but I think should this not be accepted, it would be better considering the present condition of the market and season to let the matter rest for a time." In its reply of 10th October the defendant Company disputes the plaintiff's version of the contract; promises to advise him in a few days as to the result of the application to the National Mutual; states that it has also approached one McCaughey as to lending, and adds: "We note in view of the season you think we should not endeavour to carry through the business at present but we think you had better leave it with us for a few weeks."

Up to this point it is, to my mind, perfectly clear that the defendant had not acceded to the opinion of the plaintiff—for it was literally only an opinion ("I think")—that the matter should rest "for a time." The defendant had strong reasons of business commissions on the sub-sales, commissions on the loans, profits as stock and station agents, &c., for carrying through the plaintiff's enterprise; and, besides, the managers, as honourable men, were not indifferent to the plaintiff's complaint that they had failed to carry out their contract. Then, on 11th October, the National Mutual wrote refusing to make the advance at less than 4½ per cent. (with the option to the borrower of reducing principal after the first year at three months' notice). The defendant on 14th October wrote to the plaintiff announcing this refusal; asked him would he accept the loan at the 4½ per cent.; said it understood that the National Mutual would make very favourable concessions as to repayment; and announced that McCaughey had refused to lend.

The plaintiff was away from his home when this letter came; but on 19th October he wrote, expressing surprise that the defendant Company should ask him to go on at 4½ per cent. after the arrangement for 4 per cent., and he added: "As the insurance company and Sir S. McCaughey both decline to take the matter up it seems to me, as I said before, useless to proceed further as these matters are always talked about and will certainly damage my prospects in the future."

On 25th October the defendant replies to the plaintiff, noting that he now proposes that the defendant should do nothing further

in the matter for the present; it states its opinion that he should purchase the property without further delay; and it describes a conversation with McKay, the manager of the Melbourne Trust Company, from which it appeared that that Company would probably be prepared to find £72,000 at 5 per cent., excising from its mortgage any portion of the land sold if the sale did not interfere with the value of the rest. The letter winds up by saying that if he favourably considered "reopening" the matter with the National Mutual, or "treating with" the Melbourne Trust Company, he might come to Melbourne and discuss the matter with the defendant. The plaintiff on 27th October reminds the defendant that it was getting away from the fact that it had undertaken to find a first mortgage at 4 per cent. (as well as a second mortgage at 5 per cent), and that even half per cent. difference on the first mortgage would be £360 per annum, or £1,800 in 5 years; but that he would call upon them after 1st November in connection with this business. On 14th November the plaintiff called. Mr. Macrae, the manager, told him that if he could get the Melbourne Trust Company to lend him £72,000 the defendant would discuss the lending of £12,000—in fact would pay it. What followed may be disregarded on this question of exoneration. It relates to what Mr. Macrae calls a "new proposal"; and when the plaintiff asked definitely whether the defendant would find him the £12,000, the defendant said (22nd November) that the head office in London, by cable, had refused to authorize the advance.

I have now examined at some length what took place from 5th October onwards, and I cannot find from first to last any indication of the plaintiff offering to relieve the defendant Company of its obligation under the contract, or of the defendant Company consenting to be so released, or to forego the commission and the other substantial advantages which it would derive from putting the loan through. So far as the plaintiff is concerned, I should gather that he thought that the defendant Company had already before 5th October broken its promise. This is the opinion of *Cussen* J. also; but the jury has found that the contract was not broken till "after 10th October 1907"; and there is no sound reason for asserting that this finding is clearly wrong. It was a finding that cannot be

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

Higgins J.

called impossible, or even unreasonable. The jury may have thought that a delay from 26th August to 10th October in carrying out the promise to find the lenders was not an unreasonable delay on the part of the defendant under all the circumstances. I cannot, however, accept the view that there was any repudiation of the contract by the defendant such as would be a breach within the rule in *Hochster* v. *de la Tour* (1); for, though the defendant denied the terms of the contract as alleged by the plaintiff, it still endeavoured to get for the plaintiff the money which he wanted, and in a manner which was consistent with the view of the contract taken by the plaintiff as well as with the view of the contract taken by the defendant. There was no final and absolute refusal on the part of the defendant to perform its (alleged) obligations under the contract. There was not, as there was in *Hochster* v. *de la Tour*, any absolute declaration by the defendant that it would never act under the contract. But if it is true that the plaintiff wrote the letter of 5th October in the belief that the time had expired within which the lenders should be found, it follows that he did not, in that or in the subsequent letter, apply his mind to any rescission of his contract with the defendant Company. "Exoneration" means rescission, or it means nothing—in law. The exoneration must be mutual (*King* v. *Gillett* (2) ). Did the plaintiff and the defendant agree to rescind before breach their mutual relations as fixed by the contract of 26th August? There can be no exoneration except by mutual consent, and there is not one tittle of evidence that the defendant Company gave any consent. It differed from the plaintiff as to what the contract was; but it went on with its endeavours to get the money for the plaintiff. In my opinion, therefore, the jury's finding of "no exoneration" should not be set aside as being against evidence. This finding represents a view of the facts which —to say the least—a jury might reasonably take. There is no difficulty as to the interpretation of the letters, such as would justify the Court in interfering; it was for the jury, looking at all the conversations as well as the letters, to say whether there was exoneration by mutual consent, whether there was rescission of the contract or not (*Moore* v. *Garwood* (3) ).

(1) 2 El. & Bl., 678. (2) 7 M. & W., 55. (3) 4 Ex., 681.

But the defendant has also challenged the verdict and judgment on numerous grounds stated in the notice of appeal to the Supreme Court, and not referred to by the learned Judges. I apprehend that their Honors accepted as binding on them the opinions expressed by the majority of the High Court in granting a new trial. The decision in the High Court of three is not binding as law when challenged before the Full Bench of seven; but it is urged that it is binding by way of estoppel between the parties, as *res judicata*. For my part I am not convinced that there is any such estoppel—either as to facts or as to law. All that the High Court did was to order a new trial—deciding that the case ought not to have been withdrawn from the jury. There are four points discussed before the Bench of three Judges as to which, it is argued, the defendant is estopped. The first is that there was evidence fit for a jury of the agreement alleged by the plaintiff. But the evidence on the second trial cannot be said to be the same precisely as the evidence on the first trial; and it is technically open to the defendant to show that there was no evidence on the second trial fit for a jury. The second point is that the evidence did not conclusively show that there was exoneration. The answer to this argument is similar. Indeed, Mr. *Mann* admits that he does not argue that there was no evidence to go to a jury of the agreement alleged by the plaintiff. The other two points are points in which evidence had not to be considered—points of pure law: (1) that the agreement alleged was enforceable by the Courts; (2) that it was not obnoxious to the Statute. There seems to me to be more excuse for applying the doctrine of estoppel *inter partes* to these points. But what is the true effect of ordering a new trial, where the primary Judge has withdrawn the case from the jury? Is it not merely that the Court decides that the case ought not to have been withdrawn from the jury? All that is necessary for the decision is, on these points, that the claim of the plaintiff is not so clearly wrong in law that it ought not to be fully tried. However certain the learned Judges who formed the majority may have been as to the law on these matters, I think that the remarks in their judgments should be regarded rather as reasons for ordering a new trial, as statements relevant to the issues of law, but not as findings of issues of law. (See *Langmead*

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

Higgins J.

v. *Maple* (1)—*Willes* J.) Otherwise the defendant would, practically, be precluded from curing a mistake on these vital points even by getting special leave to appeal to the Privy Council. If it asked for leave to appeal after the order for a new trial, it would almost certainly be told to wait for the result of the new trial (*Rocke, Tompsitt & Co.* v. *Wilson* (2) ); whereas if it asked for leave to appeal after the new trial, it would, according to the doctrine now propounded, be estopped as to these points. As at present advised, I propose to deal with the grounds of appeal on their merits on the assumption that the defendant Company is not estopped.

I am of opinion that there was ample evidence to support the contract as found by the jury ; that this contract is not void for uncertainty ; and that it is not obnoxious to the provisions of the *Statute of Frauds*. I need not repeat the reasons given by my brother *Isaacs* in his judgment as reported in the *Commonwealth Law Reports* (3), but I desire to emphasize the fact that we are not dealing with an agreement between vendor and purchaser, but an agreement (as found) between principal and financial agent—an agent to procure a loan—or rather two loans. I conceive that if the defendant had procured a person or persons ready to lend the money at the rates stipulated, for any term and on any conditions within the usual course of business (*Collen* v. *Gardner* (4) ), the defendant would thereby have carried out its contract and earned its commission. The *Statute of Frauds*, sec. 4 (*Instruments Act* 1915, sec. 228), does not apply to contracts between financial agents and their principals, even if a security has to be given over land. But for the express legislation of the Victorian Parliament (*ib.*, sec. 229), a land agent's authority to sell need not be in writing ; the land agent's contract is merely collateral, does not relate to land. I am also of opinion that there is sufficient evidence to support the finding that it was not a term of contract that the defendant Company was at liberty itself to lend the £12,000. It was not necessary for the plaintiff to prove that he made any stipulation against Dalgety & Co. itself lending the

(1) 18 C.B. (N.S.), 255.
(2) 13 V.L.R., 833.
(3) 19 C.L.R., 356.
(4) 21 Beav., 540.

money; it was enough that the defendant Company was the plaintiff's agent to procure the loans; and, in the absence of clear stipulation to the contrary, an agent has no right to take on himself the role of party to the contract with his principal (*per Thesiger* L.J. in *de Bussche* v. *Alt* (1)). It is not enough for the defendant to point out the improbability of the plaintiff refusing to accept the money from Dalgety & Co. There are considerations in favour of, and considerations against, the improbability. The position of the plaintiff is simple—*Non haec in foedera veni.*

It has been urged, finally, that the plaintiff is entitled at most merely to nominal damages, inasmuch as the defendant was not under an obligation to do more than procure lenders at the rates mentioned, and if the defendant fulfilled this obligation it does not at all follow that the plaintiff would have accepted the loans, because (it is said) he required a clause in any mortgage enabling him to excise from the mortgage any parcel of land which he should sell to a sub-purchaser. But the inclusion of such a clause in the mortgage was not part of the contract alleged or proved. The damages seem to be based on the difference between the rates of interest fixed by the contract, and the rates which the plaintiff had to pay when interest rose. It seems to me to have been open to the jury to find that if the defendant procured lenders as agreed, the plaintiff would have accepted the loans, either stipulating in the mortgage for power to excise lands sold, or trusting to subsequent arrangements with the mortgagee for release of lands as required, or selling parcels of land on conditions allowing postponement of conveyance until the mortgage should become due. Moreover, objection as to misdirection as to the amount of damages (if other than nominal) does not appear to have been taken at the trial.

I am of opinion that the appeal should be allowed, and the verdict and the judgment thereon restored.

I should like to say, in fairness to the defendant, that our decision in favour of the plaintiff is not a decision against the veracity or honour of the defendant's witnesses. The jury saw and heard the witnesses, and we have not. Our function is confined to saying

(1) 8 Ch. D., 286, at p. 311.

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

Gavan Duffy J.

whether the verdict of the jury is such that obviously no reasonable men might honestly find.

GAVAN DUFFY J. In this case the facts and the points of law raised on them have been so fully discussed in the judgments already delivered that I shall content myself with saying that I am not satisfied that the verdict of the jury should be disturbed, though I should not myself have arrived at the same conclusion as they did. I say nothing as to the effect of the order for a new trial already made by this Court. On the facts and the findings of the jury I should have been disposed to think that the plaintiff was not entitled to more than nominal damages, but we have been assured by Mr. *Starke* that at the hearing it was agreed between Mr. *Mitchell* and himself that if the jury found the contract set up by the plaintiff he would be entitled to substantial damages, and I think we should accept his assurance. It must not be forgotten that the issues left to the jury were not precisely those raised by the pleadings, and in the circumstances I think the point is not open to the defendant Company. In my opinion the appeal should be allowed.

POWERS J. The judgments delivered by my brothers set out fully the cause of action and the questions to be decided by this Court, specially convened to decide all questions raised by the parties to the appeal. The appellant, Gray, contended that the respondent, Dalgety & Co. Ltd., is estopped from setting up the question whether the contract found by the jury was a binding contract or not, because, it is alleged, that question was definitely decided and settled as between the parties by the majority of the Justices of this Court when they granted a new trial and gave reasons for granting a new trial. I concur in the views expressed by the learned Chief Justice and my brother *Higgins* in their judgments that the only final decision arrived at was that there should be a new trial. As one of the majority of the Court who granted the new trial I certainly only intended to decide that there should be a new trial. In delivering judgment I said (1) :—" We, in this Court, also disagree as to what agreement the jury might, on the

(1) 19 C.L.R., at p. 379.

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."

The jury on the new trial, on different evidence, did not expressly find either that Dalgety & Co. agreed to find a lender who would advance the money on reasonable terms, or on terms agreed to by the parties; but found that "the contract between Gray and Dalgety & Co. Ltd. was that Dalgety & Co. Ltd. absolutely promised for valuable consideration that they (Dalgety & Co. Ltd.) would procure and introduce to Gray some person or persons corporation or corporations able and willing to lend Gray £84,000 upon the security of Kentucky Station in two sums, namely £72,000 on first mortgage at 4 per cent. and £12,000 on second mortgage at 5 per cent. within a reasonable time." The respondent is not, in my opinion, estopped from setting up the question whether the contract found by the jury on the second trial on different evidence was a binding contract or not by any views expressed by the majority of the Court when granting the new trial, and in any case the only final decision arrived at was to grant a new trial.

Counsel for the Company admitted that the Company would have been entitled to its commission if it had carried out its part of the agreement which the jury found had been entered into. I agree with that view. The jury has also found that the Company absolutely promised to carry out its part of the agreement, namely, to procure a willing lender, and that it committed a breach of that agreement. Under such a contract as the jury found, there would generally be a difficulty in assessing the damages for a breach, but in this case no objection was taken at the new trial as to misdirection as to damages, and the Company's counsel stated at the hearing that he did not ask this Court for a new trial on the question of damages.

Dealing with other objections raised in the case:—As the jury found that the undertaking was only to find a lender willing to lend money and not an agreement to give a mortgage, the *Statute of*

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

Powers J.

*Frauds* does not apply. As to exoneration, I did not consider the question or refer to it on the application for a new trial. The question to be decided on that application was whether the Supreme Court should, or should not, have allowed the jury to decide what the agreement between the parties really was. The question whether the plaintiff could recover on that agreement, or whether the Company was exonerated by Gray from the performance of the agreement found by the jury to have been entered into could then, and only then, in my opinion, be decided. I have not to decide whether I should have arrived at the same conclusion as the jury did, but I cannot say that a jury could not, on the evidence, reasonably find that Gray had not exonerated the Company from its undertaking to procure a lender or lenders.

As to the question whether the Company had not itself the right to advance the £12,000 on second mortgage—when I joined in granting a new trial I said (1) 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, 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." The jury had that evidence before them on the new trial and evidence to the contrary given by the respondent. The jury evidently believed the plaintiff's evidence.

The following is a copy of Question 4 and the reply thereto :— "In your opinion was it a term of the contract between the parties understood by both Gray and Dalgety & Co. that whatever else the contract provided Dalgety & Co. themselves were to be at liberty to lend to Gray £12,000 on the security of a second mortgage of Kentucky Station at 5 per cent. interest ? "—Answer : "No."

The learned Chief Justice has referred at length to the evidence showing that this finding of the jury is one that reasonable men could not find, and my brother *Isaacs* has referred at length to

(1) 19 C.L.R., at p. 379.

evidence showing why, in his opinion, the jury as reasonable men could find as they did.

I expressed my views of the law as to setting aside the verdict of a jury in *Prentice* v. *Victorian Railways Commissioners* (1). I still hold the view then expressed, and as there was evidence in this case on which reasonable men might have found, as the jury did, the answer to Question 4, I cannot see my way to set aside the verdict as perverse, because I personally would have come to another conclusion. That would be assuming the functions of the jury without the advantage of hearing the evidence and seeing the demeanour of the witnesses.

For the reasons mentioned, I agree that the appeal should be allowed.

RICH J. The fundamental consideration in this case is whether this Court can disturb the jury's finding as to what were the terms of the bargain between the appellant, Gray, and the respondent, Dalgety & Co. Ltd. In *Prentice* v. *Victorian Railways Commissioners* (2) I said :—" There being evidence both ways, I must not usurp the functions of the jury and decide the case according to my view of the facts. It is not for me to say whether I concur in the verdict." The jury's finding in this case is neither unreasonable nor perverse. It is such as reasonable men might have found.

The jury have found as a fact, that Dalgety & Co. Ltd. undertook for valuable consideration to find Gray some one who would be able and willing to lend him a specified sum at a specified rate of interest. It has been urged that this bargain is unenforceable for two reasons, namely, (1) it is too uncertain and incomplete in its terms to amount to a contract, because nothing was said about the terms of redemption ; (2) even if the bargain is a contract, the *Statute of Frauds* is an obstacle to its enforceability.

With regard to the first objection. There is a wide difference between a contract to mortgage, and a contract by a prospective mortgagor with an agent to procure a prospective mortgagee. In the latter case, it cannot be said that the contract is incomplete in a legal sense, though it may be unwise from a business point of

(1) 18 C.L.R., 526, at p. 535. (2) 18 C.L.R., at p. 539.

H. C. OF A. 1916.

GRAY v. DALGETY & CO. LTD.

Rich J.

view, because all reference to the terms of redemption is omitted. The bargain here sued upon is a perfectly valid contract, and Dalgety & Co. Ltd. would have performed their part of it by introducing to Gray a lender, able and willing to negotiate with him in a reasonable way, on the terms which he had stipulated as to amount and interest.

The second objection as to the enforceability of the contract is also untenable. It arises, like the first, by confusing a contract to mortgage with a contract to find a mortgagee. The first agreement is within the *Statute of Frauds*. But the second is merely one of employment. It does not affect an interest in land. It is only a preliminary or preparatory step for negotiating about a loan which may or may not be effected.

I agree that the judgment of the Supreme Court on the question of exoneration cannot stand. The essentials of a valid exoneration are as definite as those of a contract. I do not think that these essentials are so clearly established by the evidence that the jury acted unreasonably in finding as a fact that the appellant had not relieved the respondent of its contractual obligations.

I agree that the appeal should be allowed.

*Appeal allowed. Judgment appealed from discharged. Judgment entered for plaintiff restored. Motion to Supreme Court dismissed with costs. Respondents to pay costs of appeal.*

Solicitor for the appellant, *Alan Skinner.*

Solicitors for the respondents, *Blake & Riggall.*

B. L.