[PRIVY COUNCIL.]

BACON . . . . . APPELLANT;

AND

PURCELL . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL.* 1916.

June 30.

Contract—Sale of cattle—Delivery—Time for delivery—Principal and agent—Authority of agent to vary contract—Severability of contract—Sale of Goods Act 1896 (*Qd.*) (60 *Vict. No.* 6), *sec.* 14 (3).

By an agreement in writing the plaintiff agreed to sell, and O. as agent for the defendant agreed to purchase, "the following stock, viz.:—About 1,500 mixed cattle (more or less) now depasturing on Lake Dunn with 100 branded cattle and all unbranded cattle given in price £2 per head delivery on or before 26th April 1912 on terms £500 deposit to credit" of plaintiff "balance cash on delivery of stock also about 700 mixed cattle (more or less) now depasturing on Ballyneety being the whole of the herd with all unbranded cattle given in price £2 15s. per head. Delivery and conditions of sale same as above." Lake Dunn and Ballyneety were adjoining pastoral properties, one being enclosed and the other unenclosed. It was afterwards mutually agreed in writing that 26th April should be the date of delivery of both lots of cattle and the same place was agreed to for delivery of both. Before 26th April it was arranged between the plaintiff and O., who was the defendant's agent to take delivery, that the collection of the Lake Dunn cattle for delivery should stand over until completion of delivery of the Ballyneety cattle. The Ballyneety cattle were delivered to O. as agent for the defendant on 26th April. The defendant refused to take delivery of the Lake Dunn cattle. In an action by the plaintiff against the defendant to recover damages for refusal to take delivery of the Lake Dunn cattle, the jury found a verdict for the plaintiff.

Held, on the evidence, that O. had authority to vary the written contract by substituting a later date for delivery of the cattle than that specified by the contract, and therefore that the plaintiff was entitled to retain his verdict.

Decision of the High Court: *Purcell* v. *Bacon*, 19 C.L.R., 241, reversed.

* Present—Lord Buckmaster L.C., Earl Loreburn, Lord Shaw and Sir Arthur Channell.

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APPEAL to the Privy Council from the High Court.

This was an appeal by Edwin Charles Bacon from the decision of the High Court: *Purcell* v. *Bacon* (1).

The judgment of their Lordships was delivered by

LORD BUCKMASTER L.C. There are two main questions upon which this case depends. First, what is the true meaning of the contract made between the parties? and, secondly, was that contract varied? These questions obviously admit of many subdivisions, and, as the result of the minute and painstaking analysis to which the evidence was subjected by the learned Judge who tried the case, twenty-six questions were left to and determined by the jury, while counsel for the respondent contends that even these findings do not elucidate the crucial issue.

The contract is in writing, and its date is agreed to be 22nd March 1912, although by an error the date it bears is 22nd March 1902. It is made between the appellant, as vendor, and a Mr. G. H. Oliffe, on behalf of the respondent, as purchaser, and by it the appellant agreed to sell 1,500 mixed cattle that were then depasturing on Lake Dunn, an area of about 100 square miles, and also 700 mixed cattle then depasturing on Ballyneety, an area of about 20,000 acres, delivery to be made on or before 26th April 1912.

The date as to delivery was altered by an indorsement on the contract made again by Mr. Oliffe on behalf of the purchaser, which recorded that the parties had mutually agreed that the delivery of both lots of cattle should be 26th April 1912. There is some dispute as to the reason for this alteration; it is alleged by the purchaser that it was made for his convenience, and that a telegram to Oliffe, dated 22nd March 1912, requesting the alteration was shown to the vendor, but the separate determination of this question is not material. Much discussion has taken place upon the question as to whether this contract was severable and was in reality two contracts relating to the two different herds of cattle, or whether it was one and indivisible; for reasons that will appear, their Lordships do not think this point material to the real issue of the

(1) 19 C.L.R., 241.

case. The meaning of the contract, however, with regard to the date of delivery, is a relevant and an important consideration, and for its determination it is essential to know all the usual circumstances attending the delivery of two herds of cattle which at the date of a contract for sale are depasturing in large and different areas. To effect such delivery three separate operations have to be undertaken and carried out. The cattle must be mustered together; they must be held while mustering proceeds and until transfer of possession is effected; and they must be counted out and delivered to the purchaser. These operations are distinct, and under the terms of such a contract as that before their Lordships, all of them must be discharged by the vendor.

It is asserted by the respondent that the learned Judge in summing up to the jury has confused two of these steps and has assumed that mustering is part of delivery. It certainly appears that counsel for the appellant in the Court of appeal assented to this view, but if the summing up alone be regarded their Lordships would not draw this conclusion. Mustering and holding are essential acts in the course of delivery, but according to the true meaning of the contract in this case they are not, in their Lordships' opinion, part of the delivery that is contemplated as that which was to take place on 26th April.

It does not follow from this view that the delivery contemplated by the contract was the handing over of both herds of cattle simultaneously upon one day. There was evidence to show that this was not reasonably possible. The contract must be construed in relation to the subject matter with which it deals and in the light of the circumstances by which it is surrounded, and in their Lordships' view delivery on 26th April means no more than that the vendor should be ready to begin delivery on that date and to complete it with all reasonable despatch, having regard to the numbers of the cattle involved, the place where, and the conditions under which, the delivery was to take place.

So far their Lordships have dealt only with the obligation of the vendor under the contract, but the obligations of the purchaser call equally for consideration. The purchaser is bound to be in a position to take over the cattle as and when they are delivered,

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and for this purpose he must have a staff of men ready to hold and deal with the cattle as they are handed over. In these circumstances there is evidence to show that it is often a matter of convenience both to vendor and to purchaser that the drover appointed by the purchaser to receive and hold the cattle after receipt should also perform for the vendor, at the vendor's expense, the duty of holding the cattle while mustering is made complete.

There are many advantages in pursuing this course. In the first place, it may relieve the vendor of some of the expenses connected with the drover and his men, and, in the next, it ensures that the person most interested in seeing the cattle be well cared for should, at an early stage of an operation in which the cattle may be exhausted or injured, have their security and well-being placed in the hands of his own men. There is certainly no trade custom or usage in such a matter. It is no implied term of any bargain for the sale and delivery of cattle that such a step should be taken, but it is a practice not infrequently pursued, and recognized as a possible and a reasonable course for the vendor to take in connection with his duties.

Mustering of cattle takes some time, and so far as the Lake Dunn cattle are concerned the evidence shows that it would have required from ten to eleven days. The vendor was in this difficulty in regard to the matter: He only held the Ballyneety district until 12th April, but the Lake Dunn country he held indefinitely. He had explained this to Mr. Oliffe, the respondent's agent, and it was probably due to this fact that the time originally considered as suitable for the delivery of the Ballyneety cattle was 12th April. The Ballyneety cattle had been bought by the vendor from a Mr. MacAuliffe, and the mustering of these cattle was done by MacAuliffe, and the delivery, that should have been made by him to the vendor, was made direct to Oliffe on behalf of the purchaser. The actual delivery of these cattle was begun on 26th April, and completed on 28th April, and was accepted by Oliffe without complaint, though at that time he knew that the Lake Dunn cattle had not been mustered.

On 29th April, Oliffe refused to await delivery of the Lake Dunn cattle, and took away the Ballyneety cattle which he had

received. The purchaser then definitely declined to accept delivery of the Lake Dunn cattle, and this action was brought by the vendor to claim damages against the purchaser for his alleged breach of contract.

If nothing had transpired between the making of the contract and 26th April, their Lordships are of opinion that this action would fail. In such circumstances the vendor would not have duly performed his part of the bargain, since he had not mustered the cattle ready for delivery, by this omission he would have committed a clear breach of the contract, and but for the question which would have arisen as to whether the purchaser could avail himself of that breach when he had accepted part of the cattle with knowledge that the breach had occurred, there would have been no ground for supporting the vendor's claim.

A very material circumstance did, however, happen before 26th April. On 11th April the vendor telegraphed to Oliffe asking where his drovers were, and saying that he could not muster until they arrived, to which an answer was sent from Oliffe saying that he was arriving that night, but only to see the cattle counted out of Ballyneety, and that he was not taking delivery until the 26th.

At this time the vendor had made arrangements with a Mr. Tamblyn for mustering the cattle on the Lake Dunn area, and he had anticipated that Tamblyn would also be able to hold the cattle, but in this respect Tamblyn had failed him.

On 13th April the vendor saw Oliffe at Barcaldine, and a conversation took place of great importance. Oliffe was informed that Tamblyn was unable to hold the cattle, and he was asked if he could hold them. This, as has already been pointed out, was a perfectly usual and reasonable arrangement to make in the circumstances, and Oliffe assented, stating that he had plenty of men and horses for the work. They then travelled together to Aramac, and there they stayed from 13th to 19th April. During the whole of this time they were waiting for Oliffe's plant to arrive, and Oliffe was apparently continually wiring and asking that it should be sent to him. However, it did not come, and the vendor asserts that, realizing the date of delivery was getting near, he mentioned

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the fact to Oliffe in connection with the difficulty that Oliffe had experienced in getting forward the necessary plant to provide for the operation of the holding, and to this objection Oliffe replied: "What does it matter about the date? I suppose you have got the cattle there, and I will take them anyhow." With this statement the vendor was satisfied, and made no further immediate efforts to obtain the holding of the cattle by other means.

These are the circumstances and this is the conversation upon which the appellant relies for the purpose of showing that the date of delivery of the goods was waived by the purchaser. There can be no doubt that if the conversation had taken place with the purchaser instead of with Oliffe this defence would have been complete, and the real question, therefore, is whether Oliffe had or was held out as having any such authority as would bind the purchaser by the arrangement which he made.

Now the necessity for varying the date of delivery arose out of Oliffe's inability to hold the cattle as he had promised. It was in reliance on this promise that the vendor abandoned the arrangement he was making to get them held by an independent person and postponed the mustering.

It was strongly urged by the respondent that this arrangement of Oliffe's was personal to himself, and he requested a special question to be left to the jury upon this point. This the learned Judge refused to do, thinking, and in their Lordships' opinion quite rightly, that the real question was involved in the other points that he left for the jury's consideration.

Assuming that the respondent is right in the view he urged that Oliffe's agreement as to holding was not one binding upon his principal, that is to say, that no action for damages for its breach could have been brought against the purchaser, this only indirectly affects the question as to whether Oliffe had authority, real or ostensible, to vary the date of delivery.

To answer that question, it is necessary to go back and see what was the position which Oliffe held, by the purchaser's direction, in relation to the vendor and to the contract.

In the first place, it is clear that Oliffe had full power, as agent of the purchaser, to discuss all the terms of the original contract

and to enter into the bargain on the purchaser's behalf. Further, after the contract was complete, the terms as to the date of delivery were, in fact, altered, and again altered, by Oliffe without any communication between the vendor and the purchaser; indeed, between these two parties no personal communication took place throughout the whole transaction.

In addition to this, Oliffe, on his own initiative, purchased further cattle on behalf of the purchaser, a fact which was also known to the vendor. Finally, Oliffe was appointed as the person to take delivery on the purchaser's behalf, and, having regard to the subject matter of the contract, and the absolute necessity for the person accepting delivery of such property to be able to act without the necessity of communicating every detail to his principal, their Lordships think that this position is of considerable importance in determining the nature of his authority.

The respondent has urged that this question of authority has never been properly left to the jury. Their Lordships cannot accept this view. The matter was explained in careful language by the learned Judge at the trial, and explained in relation to the real point, that is, the authority to vary the time, and upon this question the jury found that the defendant did waive the condition to have the cattle delivered on 26th April, assuming that the contract required such delivery. In their Lordships' opinion there was abundant evidence to support this finding, and there was no need to have left the further question as to the authority of Oliffe to bind his principal by the arrangement as to holding. It was undoubtedly the failure of this arrangement that led to the time for delivery being changed, but it was not this arrangement itself upon which the vendor need rely.

Their Lordships have not dealt with the denials made by the defendant's witnesses of the passages in the plaintiff's evidence to which they have referred. It is not necessary to do so, for to determine between these two conflicting stories is the true province of the jury, who were properly instructed by the learned Judge in charge of the case, and their verdict is plain. The view thus expressed by their Lordships is in accordance with the judgments of *Pope Cooper* C.J., of *Griffith* C.J. and of *Barton* J., but it is at variance

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with the opinion of *Real* J., as a member of the Full Court of Queensland, and of the three Judges who constituted the majority in the High Court of Australia.

In their Lordships' opinion these latter judgments erred in considering the question of Oliffe's authority by separating each act done by Oliffe in the course of his agency, and considering whether that alone would have sufficed, but these acts are not independent, they are cumulative, and the position of Oliffe as drover sent to receive the cattle cannot be dissociated from his position as the agent authorized to make and vary the original bargain. The point on which their Lordships feel compelled to differ from the High Court is made plain in the following extract from the judgment of the majority of that Court (1) :—" Yet another argument was advanced as to actual authority. It was that as Oliffe was the same person who was originally empowered to deal in making the contract, the identity of personality continued the original full power of bargaining. But that is impossible. Oliffe had exhausted his original authority when the contract was finally closed. From that moment Oliffe ceased to be Purcell's agent, and became an entire stranger to him, *quoad* making a contract as to these cattle."

Their Lordships cannot accept this view. The whole of the communications as to the method of carrying out the contract took place continuously between Oliffe and the vendor, and there is no suggestion that it was so conducted in error. For example, on 9th April the vendor telegraphs to Oliffe, as representing the purchaser, in these terms : " Expect commence muster 12th ; can you advise whereabouts your drover ? " And received as answer : " Will go out from Jericho Saturday's coach ; do not take cattle off Ballyneety until I arrive as arranged." There is further evidence of the same character, all capable of supporting the view that Oliffe's authority was continuous, and it is in their Lordships' view erroneous to consider separately each act to see if it will support an authority which all combine to create. In any case, these things taken together legitimately might have led the seller to believe that Oliffe had authority.

If the authority was in fact restricted it was incumbent on the

(1) 19 C.L.R., at p. 261.

purchaser in these circumstances to communicate this limitation to the vendor, but he remained silent throughout until after he had received one lot of cattle and determined to reject the other.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, the judgment of the High Court of Australia set aside with costs, and the judgments of the Supreme Court of Queensland restored. The respondent will pay the costs of the appeal.

[PRIVY COUNCIL.]

THE YORKSHIRE INSURANCE COMPANY LIMITED . . . . . } APPELLANTS;

AND

CAMPBELL . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT.

Marine Insurance—Warranty—Proposal for insurance—Description of subject matter—Misstatement—Declaration as to truth of statements—Policy issued thereon—Validity of policy—Marine Insurance Act 1909 (*No.* 11 *of* 1909), *secs.* 32, 39, 41.

A policy of marine insurance on a racehorse was issued upon a proposal signed by the assured, which was the basis of and incorporated in the policy, and which amongst the words giving the description of the horse included a statement of its pedigree. In a subsequent part of the proposal there was a declaration by the proposer in the following terms:—"I the undersigned do hereby warrant and declare the truth of all the above statements." The horse died, and in an action brought upon the policy it was found on the evidence that the pedigree was not truly stated.

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*Present—Lord Buckmaster L.C., Lord Atkinson, Lord Shaw and Lord Sumner.