[HIGH COURT OF AUSTRALIA.]

FARMER . . . . . APPELLANT;
PLAINTIFF,

AND

HONAN . . . . . RESPONDENT.
DEFENDANT,

FARMER . . . . . APPELLANT;
PLAINTIFF,

AND

DUNNE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 29, 30; *May* 2.

Barton, Isaacs and Rich JJ.

Contract—Formation—Sale of land—Offer and acceptance—Intention of parties to be bound—Reference to future contract—Terms not all expressed—Surrounding circumstances—Statute of Frauds (29 *Car. II. c.* 3), *sec.* 4.

The plaintiff had entered into an agreement to purchase from G. a certain station property at a certain price per acre in respect of which he (the plaintiff) had paid a deposit of £300 and had agreed that £10,000 part of the purchase money should be paid within six months and the balance within five years. Negotiations took place between the plaintiff and the defendant, whom the plaintiff informed of that agreement, for the sale of the property by the plaintiff to the defendant for the purpose of subdivision and sale by the defendant. After inspection by the defendant the parties met, and, after discussion, a document was drawn up addressed to the defendant and signed by the plaintiff substantially in these terms:—"12th January, 1916. I hereby place under offer to you until 18th inst. my property known as M. containing 10,698 acres, slightly

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more or less, subject to the following terms and conditions:—1. The sale price to be at the rate of £3 17s. 6d. per acre. 2. Payment to be £1,000 deposit on signing of the contract of sale, the balance of purchase money to be paid in five years from 1st January, 1916, bearing interest at the rate of 5 per cent. per annum—interest to be payable quarterly. 3. Working plant, stock, hay and furniture to be taken at valuation and to be paid for in cash. 4. The balance of purchase money mentioned in clause 2 herein to be secured by two mortgages." On 17th January the defendant drew a cheque for £1,000, and gave it to D. with instructions to hold it until the defendant's solicitors were satisfied regarding the contract and title. On the same day D. wrote to the plaintiff informing him that he had received £1,000 from the defendant as deposit on the purchase of M. station in terms of the offer of 12th January, and asking the plaintiff to forward particulars of the title and the contract. Subsequently the defendant went into possession of the chattels on the station. The defendant having refused to proceed with the purchase, in an action by the plaintiff against the defendant for breach of contract,

Held, that, assuming that D. was the defendant's agent when he wrote the letter of 17th January to the plaintiff, the offer and the acceptance did not constitute a concluded contract between the plaintiff and the defendant.

Decision of the Supreme Court of New South Wales: *Farmer* v. *Honan*; *Farmer* v. *Dunne*, 18 S.R. (N.S.W.), 162, affirmed.

APPEALS from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Andrew Joseph Farmer against Michael Honan by which the plaintiff sought, by the first count of his declaration, to recover damages for the breach by the defendant of an alleged contract by which the plaintiff agreed to sell and the defendant to buy a station property called "Morangarell." By the second count the plaintiff sought to recover (*inter alia*) the price of certain chattels upon Morangarell alleged to have been sold and delivered by the plaintiff to the defendant, and the amount of the deposit payable under the contract referred to in the first count. By a third count the plaintiff claimed for conversion of a cheque for £1,000 drawn by the defendant. One of the defences raised was that of the *Statute of Frauds*, it being alleged that there was no memorandum or note in writing of the contract.

An action was also brought in the Supreme Court by Farmer against Robert Andrew Dunne to recover £1,008 on the money counts, and for conversion of the cheque above mentioned. The defendant pleaded never indebted, and that the cheque was not the plaintiff's.

The two actions were tried together before *Sly* J. and a jury, who found a verdict for the plaintiff in the first action for £3,350 5s., and a verdict for the defendant in the second action. (The material facts are stated in the judgments hereunder.) The defendant in the first action moved that the verdict for the plaintiff should be set aside, and a nonsuit or a verdict for the defendant be entered or a new trial be granted, or in the alternative that the amount of the verdict should be reduced. The plaintiff in the second action moved for a new trial or to enter a verdict for the plaintiff. Both appeals were heard together, and the Full Court ordered that the verdict for the plaintiff in the first action should be set aside and a verdict entered for the defendant, and that the appeal in the second action should be dismissed : *Farmer* v. *Honan* ; *Farmer* v. *Dunne* (1).

From both of those decisions Farmer now appealed to the High Court, and the two appeals were heard together.

Innes K.C. (with him *N. Pilcher*), for the appellant. The appellant's offer of 12th January 1916 and the acceptance of it on 17th January 1917 signed by Honan's agent, Dunne, constituted a binding contract, and the jury must be taken to have found that Dunne was Honan's agent for the purpose of accepting the offer. The offer contains all the terms of the contract. The only support for the contention that there were to be other terms is the condition that there is to be a payment of £1,000 deposit " on signing of the contract of sale." But that only means that the deposit is to be paid on the signing of a formal document embodying the terms mentioned in the offer. The question whether the parties meant by the offer and acceptance to make a contract was one for the jury, and the construction of the documents is then for the Court (*Lewis* v. *Brass* (2)). The question of whether there was a concluded contract depends not only on the documents but also on the evidence as to the surrounding circumstances, and is a question for the jury (*Howard Smith & Co.* v. *Varawa* (3)). Where a written offer and acceptance contain all the terms agreed to up to that time, further negotiations cannot affect the completed contract (*Perry* v. *Suffields Ltd.* (4)). The only matter left in doubt is the amount of each

(1) 18 S.R. (N.S.W.), 162.
(2) 3 Q.B.D., 667.
(3) 5 C.L.R., 68.
(4) (1916) 2 Ch., 187.

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of the mortgages. Under the condition each of them is to be secured on the whole of the land and the other details of the mortgages were matters to be arranged in working out the contract. The offer was not a mere incidental transaction in the correspondence between the parties, but the evidence shows that it was a formal reduction into writing of the terms which if accepted were to constitute the contract. The mere reference to a formal contract is not sufficient to prevent the offer and acceptance from constituting a contract (*Bonnewell* v. *Jenkins* (1); *Rossiter* v. *Miller* (2)). In determining whether there was a concluded contract the Court may take into consideration the fact that the respondent Honan went into possession of the station.

Alec Thomson, for the respondents, was not called upon.

Cur. adv. vult.

May 2.

The following judgments were read :—

BARTON J. These are two appeals from the judgment of the Full Court of the Supreme Court of New South Wales. The plaintiff is the appellant. He sued Honan—(1) alleging breach of a contract to purchase from the appellant a station property known as Morangarell; (2) on the money counts, including a claim for the deposit alleged to be due under the contract; (3) for the conversion of a cheque for £1,000 drawn by Honan. To this the principal pleas were, as to the first count, *non assumpsit* and the *Statute of Frauds*; as to the second count, never indebted, and, as regards so much of the money counts as depended on the alleged agreement, the *Statute of Frauds*; as to the third count, not guilty and not possessed.

In the action against Dunne the appellant sued (1) for £1,008 on the money counts, and (2) in trover for the conversion of Honan's cheque for £1,000. Dunne pleaded to the money counts never indebted, and as to the count for conversion not possessed.

Against the respondent Honan the appellant recovered £3,350 5s.; and in the action against Dunne that respondent had a verdict.

In *Farmer* v. *Honan* the defendant moved to set aside the verdict,

(1) 8 Ch. D., 70. (2) 3 App. Cas., 1124, at p. 1142.

and for a nonsuit, or a verdict for the defendant, or a new trial. The Full Court set aside the verdict, and entered a verdict for the defendant. In the action *Farmer* v. *Dunne* the plaintiff moved for a new trial or for the entry of a verdict for him. The Full Court dismissed the appeal.

At the trial the two actions had been heard together. They were considered together before the Full Court of New South Wales, and they have now been argued together before us.

As regards the claim against the respondent Honan, the appellant places his reliance upon his signed offer to Honan to sell the station to him, dated 12th January 1916 (Exhibit C), together with a letter from Dunne to Moore & Son, the appellant's agents, confirming a telegram of the same date, namely, 17th January 1916 (Exhibit E), and on a finding of the jury that Dunne had been duly authorized by Honan to sign and send the letter on Honan's behalf. He urged that the two documents (C and E), in conjunction with the agency found by the jury, constituted a binding contract between the appellant and Honan. He adopted the following passage from the summing-up :—" Are you satisfied he " (Dunne) " had authority to write that letter of the 17th ? If he had not, that is an end of the case, and defendant must succeed. If he had authority, there is a binding contract." Mr. *Innes* intimated to us that the appellant stood or fell by that passage.

The offer (Exhibit C) was in the following terms :—" Junee, 12th January, 1916.—Mr. Michael Honan, Hawthorn, Victoria.—Dear Sir,—I hereby place under offer to you until Monday next, the 18th inst., my property known as ' Morangarell ' containing 10,698 acres, slightly more or less, subject to the following terms and conditions :— (1) The sale price to be at the rate of £3 17s. 6d. (three pounds seventeen shillings and sixpence) per acre. (2) Payment to be one thousand pounds deposit on signing of the contract of sale, the balance of purchase money to be made in five years from January 1, 1916, bearing interest at the rate of five pounds per centum per annum, interest to be payable quarterly. (3) Working plant, stock, hay and furniture to be taken at valuation and to be paid for in cash. (4) The balance of purchase money mentioned in clause 2 herein to be secured by two mortgages.—Yours faithfully, A. J. Farmer.—

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Witness, R. A. Dunne." The alleged acceptance (Exhibit E) was as follows:—"243 Glenferrie Road, Glenferrie, Hawthorn, 17th Jany. 1916.—Messrs. W. E. Moore & Son, 82 Pitt Street, Sydney, N.S.W.—Dear Sirs,—I have to confirm the following wire sent you this evening:—'Received thousand pounds from Michael Honan deposit purchase Morangarell terms letter twelfth forward particulars title and contract.' If you will let me have particulars of the title and the contract of sale I shall get the matter completed as soon as possible.—Yours faithfully, R. A. Dunne."

The circumstances surrounding the making of the offer were these:—The appellant had made a contract with the owner of the Morangarell Station, Mrs. Glasson, on 9th December 1915. Ostensibly he was not a party to the document, but in the negotiations with Honan he spoke of the purchase as his. The relations between them are not quite clear, but he spoke of Mutual Investments Ltd., who on the face of the contract were the purchasers, as trustees for him. Further reference will be made to this contract. He was a director of the company. At the end of December he and his agent, Moore, met Honan at Cootamundra. They discussed the property and the terms of payment if Honan purchased. Honan inspected in company with the appellant and Moore. The appellant told Honan (I am giving his version, which the jury believed) that he had purchased the property from Mrs. Glasson for £3 15s. an acre, that he had to make a payment of £10,000 within a given time, and the balance was to run for five years from the time of purchase. The next interview was at Junee. Dunne was there as well as the appellant, Moore, and Honan. The latter introduced Dunne as his agent. The same night Exhibit C was drawn up after a long discussion. The plaintiff told Honan his position in relation to Mrs. Glasson. He said:—"I told him the conditions under which I had purchased, and that was, I had to pay the sum of £10,000 within a given date. I gave him that date." (The date was six months from the 1st of January following.) He continued:—"I said: 'Now I am willing to accept £1,000 down providing you give me two separate mortgages. I have seen Mrs. Glasson and got her consent that she will transfer direct to you, and you give me two separate mortgages back, one for £10,000 and

the other for the balance of the purchase money.'" This was before the appellant's offer was written, in which the writing was Dunne's. The appellant admitted that Mutual Investments Ltd. had no money except £4 paid for four single shares, and said that Mutual Investments Ltd. had nothing to do with any purchase he made, not even Morangarell. They entered into it because three directors, of whom he was one, discussed it, and they thought it would be a good thing to have the matter in the company's name, so that they could see the arrangements were carried out, as the appellant thought he was going to England in December. Mutual Investments Ltd. were to have no interest in the property or in the sale. He paid £300 deposit to Mrs. Glasson on the contract with her, or, if it was paid by Mutual Investments Ltd., he said it was with his money.

The Glasson contract went off after Honan, as will be seen, refused to complete with the appellant. Moore says that Honan, at his visit on 30th December 1915, told him that he was "buying for subdivision." That was said in the appellant's presence. It was arranged between Moore and Dunne that they were to divide the commission on the sale to Honan, and Dunne said that he was acting in conjunction with Moore for the sale of the property. But the appellant's case is that Dunne was Honan's agent, as the jury found. As to the £1,000 mentioned in Exhibit E, the facts are that Honan gave Dunne a cheque for that amount with explicit instructions. According to Dunne he was told to hold it until Honan's solicitors were satisfied regarding the contract and the title, and Honan says:— "I told him distinctly to hold the cheque until my solicitors were satisfied that the contract and title were correct—'satisfactory,' I think, was the word I used. I did not authorize Dunne to send the telegram to Mr. Moore stating 'Received deposit of £1,000 terms letter of 12th.' I did not give Dunne any instructions whatever other than what I have mentioned, except to hold the deposit until my solicitors were satisfied."

The agreement between Mrs. Glasson and (ostensibly) Mutual Investments Ltd. included the cash deposit of £300 already mentioned, payable on the signing of the agreement, the payment to the vendor of a further £10,000 within six months from 1st January 1916,

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and the balance of £27,143 on or before 8th December 1920. The purchaser was to be entitled to possession on the date of the agreement and payment of deposit, and from the last-mentioned date the purchaser was to be entitled to subdivide and sell the lands at a price not less than £3 10s. per acre, Mrs. Glasson's price for the whole station being "£3 15s. per acre less 5s. per acre." There were many other provisions in the agreement (Exhibit No. 3), and particularly one for delivery within a reasonable time of particulars of title sufficient to enable the purchaser to investigate the title of the vendor, but the purchaser was not to be entitled to obtain a transfer of the lands until payment of the whole of the purchase money, unless after payment of the £10,000 he were granted a transfer or transfers providing he executed a mortgage back to the vendor for the balance of the purchase money.

The first thing that strikes one in connection with the alleged contract sued on is that finding of the jury which amounted to affirming that Dunne was Honan's agent for the purpose of making a binding contract for the purchase of land. That proposition was necessary to the appellant's success. But I am not at all sure that the finding was warranted by the evidence.

It was assumed that Dunne's acceptance, if it was one, completed the evidence of a contract, and we have now to consider the grounds of that assumption. The evidence accepted is certainly that Dunne attended in company with Honan at the interview at Junee, but the question is really whether he was authorized to treat the bargain as complete by accepting. Now, I do not find any evidence to that effect. The authority would have to be a specific one, but Honan's express instructions to Dunne on handing him the cheque were to hold it until Honan's solicitors were satisfied that the contract and title were correct, or satisfactory. This is very far from an authority to bind Honan to a simple acceptance of the offer. The appellant had to prove his case, and, if the whole matter rested on this portion of the case, I should be disposed to hold that the jury have come to a manifestly wrong conclusion on an essential point.

But the parties appear to have conducted the case before the Full Court on the basis that it rested on the documents and the surrounding circumstances. Did that evidence show a complete

contract, if Dunne's agency is taken for granted? At this point I should mention that after perusing Exhibits C and E the appellant's solicitors prepared a draft contract of sale, and sent it to Melbourne for the approval of Honan's solicitors (Exhibit M). The latter made alterations, and the appellant's solicitors then made further alterations. The term that the cash deposit of £1,000 should be paid upon the signing of the contract then in draft appeared therein, and a number of important provisions were incorporated which it is scarcely reasonable to suppose would not have found a place in a finally binding contract. Such, for instance, is that printed in the transcript as Rider A, empowering the purchaser to make arrangements with sub-purchasers for the sale to them of portions of the property. The materiality of this provision is very clear, when one considers that Honan's intention to subdivide and sell, if he finally bought, was known to both parties at the time of the offer. It is unnecessary to refer to other material provisions; as *Gordon* J. says, they are all far in excess of any terms mentioned in Exhibit C. The vendor appeared by this draft contract to be Mutual Investments Ltd. While the contract of sale was still in negotiation between the solicitors, Honan refused to go any further with the matter, and I suppose received his cheque again from Dunne.

I turn to Exhibit C, the offer of 12th January 1916. It mentions the sale price, and says that there is to be a payment of £1,000 deposit "on signing of the contract of sale," the balance to be paid in the manner therein stated. It provides for the working plant, stock, hay and furniture to be taken at a valuation, and to be paid for in cash. (This stipulation was obviously dependent on the sale of the station.) And it was provided that the balance of the purchase money after payment of the deposit should be "secured by two mortgages." If the offer embodied the terms which were to be the whole terms of the contract, it was not a workable one. There is not a word to entitle Honan to subdivide and sell after buying. For all that appears in the offer, he could not sell any part until all the purchase money had been paid and the two mortgages mentioned had been discharged, presumably at the end of five years. There was no provision for Mrs. Glasson to convey direct to Honan

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as arranged. There was not a word of description of the two mortgages, nor was it stated whether these mortgages were to be over separate parts of the property or over the whole. There is no date fixed for possession. Here are a number of matters for which no reasonably prudent man would omit to stipulate before he accepted by way of binding contract an offer for the sale of a large area of freehold land. But there is the provision for the payment of deposit on signing of the contract of sale. As to this the appellant contends that it is a mere reference to a future formal contract embodying these terms and the necessary provisions for detail. Honan contends that it refers to an intention to make a future contract "of sale," in the sense that the contract should embody all such terms as the parties had in effect already agreed upon, or as were necessarily implied in such a purchase, such as the date of taking possession and provisions appropriate to a purchase with a view to subdivision and sale, and the direct transfer from Mrs. Glasson. I think the use of the term "contract of sale" in this connection points to the intention to draw up something more than a mere formal embodiment by solicitors of the terms of the offer. The absence of terms normally to be expected in a binding contract strengthens the inference that a contract of sale was, before finality would be attained, to be executed, embodying these matters, which were to be expected, and, indeed, to any reasonable man were necessary to the completion of a contract of the kind. It is true that the mere reference "to the preparation of an agreement by which the terms agreed upon would be put into a more formal shape does not prevent the existence of a binding contract." (See per Lord *Thesiger* in *Bonnewell* v. *Jenkins* (1).) The question is always one of construction of the words of the alleged contract, but they must be taken in relation to the surrounding circumstances. There may be a binding contract even where a formal agreement is intended. But if the offer is made subject to such an agreement, or if it can be gathered from the terms expressed, or even from the absence of terms necessary to or even usual in a binding contract, that the future document is to contain provisions material to an agreement fairly and fully expressing the intentions of the parties,

(1) 8 Ch. D., at p. 74.

then I think it cannot be concluded that the offer, if accepted, is intended by the parties to be the final expression of their compact. It is noticeable that Dunne himself, in the alleged acceptance (Exhibit E), concludes by saying: "If you will let me have particulars of the title and the contract of sale I shall get the matter completed as soon as possible." So that there he expected a further and final document before completion. The expression in his telegram, "terms letter twelfth," appears to refer to the deposit only, and it does not appear even from his letter that he was ready to hand over the £1,000 unless the matter were duly completed by a future contract of sale.

Even supposing Exhibit E to contain a definite acceptance upon the specific authority of Honan, it does not in conjunction with the offer amount, in my opinion, to a binding contract.

Now, a number of cases were cited below, and very fully discussed by their Honors, and no exception can, I think, be taken to the description by the learned Judges of the effect of the several authorities. A few more cases were cited to us by Mr. *Innes*, but they do not modify the law applicable to the case as deducible from those previously cited. It is not necessary to expatiate upon them. I conclude, with *Pring* J., that both parties contemplated that a formal contract should be drawn up not merely registering the terms of the offer. With him, although that view is confirmed by the subsequent conduct of the parties, I do not think it is necessary to rely on it because both offer and acceptance clearly indicate that they had in mind a future contract defining their rights and liabilities in the event of a completed sale. On the two grounds that the offer and alleged acceptance do not constitute a binding contract, and that the writings do not contain the whole agreement of the parties so as to satisfy the *Statute of Frauds*, I think the appellant fails in this part of the case. As to the remainder, for the reasons given in the Court below, the position of the appellant is no better: as the appeal fails on the contract the transaction as to the plant, hay, &c., fails also, for, as I have said, it was obviously dependent on a completed contract for the sale of the station. Nor can the appellant succeed as to the claim for the conversion of the cheque, and in fact Mr. *Innes* practically admitted so much.

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As to the appeal against Dunne, that must also fail. Seeing that there was no complete contract, the appellant cannot contend that he was entitled to the cheque or the paper on which it was written, even as against Dunne.

It follows that both of the appeals must be dismissed, and with costs.

ISAACS AND RICH JJ. The only material part of this case, as it has developed, is the claim for damages for breach of contract to purchase Morangarell Station. The defendant admits his refusal to proceed, and two specific answers have been given by him to the claim. The first is, that there never was any concluded contract to purchase; and the second, that the *Statute of Frauds* has not been complied with. As the evidence eventuates, the plaintiff rests his case on two documents only—the plaintiff's written offer of 12th January 1916, and a letter written by Dunne, dated 17th January 1916, which, according to the finding of the jury, was written by him as defendant's agent. That finding is challenged, and in other circumstances it might have been necessary to determine whether it could be rationally supported, but, in the view we take, that necessity does not arise. We assume its accuracy.

The question whether there was a concluded contract or not depends on whether clause 2 of the offer imports that before the parties are finally bound they are to execute a formal contract of sale. A great many authorities have been cited, but the principle, which is clear, cannot be better stated than it was in the judgment of Lord *Blackburn* in *Rossiter* v. *Miller* (1). At p. 1151 Lord *Blackburn* said:—"So long as they are only in negotiation either party may retract; and though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties, in such a case, are still only in negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, show that they continue merely in negotiation.

(1) 3 App. Cas., at pp. 1151-1152.

It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed." At p. 1152 he says: "I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up."

It is a recognized rule of construction of a written document put forward as a contract, that direct extrinsic evidence cannot be given of the intention of the parties. That must be determined upon a fair construction of the document itself, read by the same light as the parties had in framing it. The subject matter and surrounding circumstances are legitimate considerations, and in this instance it is important to know what the parties understood by the expression in the offer "my property known as 'Morangarell.'" Morangarell is a station of 10,698 acres, the legal owner of which was, and is, a Mrs. Glasson. That lady, at the time Honan came into the matter, according to the plaintiff's evidence had, by an informal contract, agreed to sell the land to Farmer at £3 12s. 6d. an acre, but Farmer, according to his own evidence, told Honan that the price was £3 15s., and that he had to make a payment of £10,000 and the balance within a given time. He had to give certain mortgages to the seller, one for £10,000 and one for the balance of the purchase money.

At some time, either then or afterwards, probably afterwards—after 26th February—because the plaintiff stated in cross-examination that the company had nothing to do with the land at the time he says he sold to Honan, a formal contract was drawn up between Mutual Investments Ltd. (a company said to have some property at Cowra, but without any uncalled capital, and of which Farmer was a director) and Mrs. Glasson, by which that lady agreed to sell the station to the company at the price of £3 15s. per acre, less 5s. per acre, whatever that deduction means. £300 was paid; how, it is doubtful. £10,000 was agreed to be paid within six months from 1st January 1916 and the balance by December 1920. That

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contract bears date 9th December 1915, and has been put in evidence for the defendant (Exhibit No. 3). The only possible inference favourable to the plaintiff is that after he thought Honan was going to take over the property the arrangement with Glasson was put into formal shape and the company named as purchasers. The terms of this contract included provisions for cutting up, and selling the land in allotments at a minimum price per acre, and for the vendor not transferring the property *en bloc* and receiving a mortgage or mortgages, but transferring the allotments piecemeal as resold on receiving a proportion of the purchase money with a minimum fixed. The whole of these terms, except that instead of gradual transfers by the vendor there was to be a mortgage to her, were mentioned by Farmer to Honan.

Having regard to the known state of the title, and the intermediate contract, and to the terms of the offer of 12th January and the letter of 17th January, it is impossible, we think, in the first place, to resist the conclusion that the parties intended to have their mutual rights and liabilities more fully and strictly defined than can be gathered from the letters relied upon. The letter of 12th January is an offer which itself, as an offer, stipulates for a contract in writing. It postulates that there will be the " signing of the contract of sale "—which means, a signing by both parties of same, and that the document when signed will be " *the* contract of sale." It provides that then, and then only, shall a deposit be given, which, in the plaintiff's view, should be given on acceptance of the offer, for a deposit is the vendor's security that the contract will be carried out.

Several cases were cited by Mr. *Innes* (who made the best of a very difficult case) in which it is laid down that, where an offer is accepted, the mere fact that the acceptance also requires a formal contract does not show the incompleteness of the contract. As Lord *Hatherley* says in *Rossiter* v. *Miller* (1), the matter may nevertheless have passed from treaty to agreement. But, in this case, the stipulation as to a formal contract is not a collateral addition by the offeree. It is part of the offer itself, and an acceptance of the offer must include that term. That is a material circumstance to

(1) 3 App. Cas., 1124.

bear in mind in construing the documents. And from the complicated position in which Farmer stood in relation to the land, known to both parties, it was very important that he and Honan should both have a very definite contract on which to rely. The letter of 17th January is equally explicit in referring to "the contract of sale" as being required after the deposit is paid. And, further, the fourth clause is altogether too vague to be considered as definitely agreed upon. The expression "two mortgages" leaves it entirely unsettled as to the property to be given as security and as to the respective amounts of the mortgages. It also leaves it entirely unsettled how Honan could at once mortgage this land—if this be the land to be mortgaged—and yet cut it up and dispose of it as it is said he wanted to do and as the draft contract provides, and so the clause, by its vagueness, tends materially to assist the construction to which the words "the contract of sale" primarily lend themselves, particularly in relation to the property of the description sold. That being so, it follows that the judgment appealed from is correct, and should be affirmed.

We, of course, recognize the admissibility of evidence as to the circumstances in which the contract was made (see *Commissioners of Stamps* v. *Queensland Meat Export Co.* (1)), and also as to the conduct of the parties to elucidate the contract, where its terms are doubtful. The latest and most complete authority is *Watcham* v. *Attorney-General* (2). The payment of the deposit cannot be considered as evidencing any intention inconsistent with the defendant's view, because it was admittedly paid before it was due on any construction of the letters. And the oral evidence as to the terms on which it was paid shows that Honan, by his language, guarded whatever rights he had. The inspection of 25th February and 26th February, which is called delivery of chattels, is an important consideration, but, having careful regard to the whole of the circumstances and the nature of what was done, it does not in any way overcome the other circumstances in determining the intention of the parties. Besides, it is common ground in argument that some other document to record the contract was to be executed, and that the deposit was not payable

(1) (1917) A.C., 624, at p. 627. (2) 87 L.J. P.C., 150.

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Isaacs J. Rich J.

before that was done. So that there is nothing to disturb the conclusion we have stated. There is one circumstance which deserves special reference. At the trial the agreement of 15th December 1915, Glasson to the company (Exhibit No. 3), was put in on the issue of the plaintiff's readiness and willingness to perform his own contract. Exhibit No. 3 appears now to be cancelled, but, as it was stamped with a £1 stamp in December 1917, its cancellation must have taken place after that date.

If the term "two mortgages" in the alleged contract sued on means two mortgages of Morangarell, it is difficult to see how the defendant could get title in his name, consistently with Mrs. Glasson's retention of title in her own name. The necessity of a more precise form of contract between the parties becomes increasingly evident.

We desire to draw attention to two collateral matters of importance. The damages for breach were assessed (*inter alia*) on the basis of profit on resale 2s. 6d. an acre, or £1,337 5s.; interest on purchase money; price of stock, &c. Had it been necessary, we might have been called upon to consider how the damages could validly be assessed on any such basis. The subject matter of sale, if there was a sale, was the land, not Farmer's equitable interest subject to his liabilities, and not his contractual profit.

Another matter is the admission in evidence of the Glasson contract. It was not put in evidence merely for the purposes permitted by sec. 8 (4) of Act No. 3 of 1914, although it appears to have been stamped only with £1 duty stamp. It was put in as a valid effectual contract, whether subsequently cancelled or not. It might have been the duty of the Court, in protection of the revenue, to inquire as to how far that document was proper to be considered, having regard to sec. 15 of the *Stamp Duties Act* 1898.

However, these matters are mentioned, not because they are necessary to this decision, but in order that it may not be understood that we have overlooked them or tacitly assented to their correctness in the absence of any possible explanation.

There is still a matter to which before parting with this case we feel bound to draw attention. We have assumed the jury properly found, as the plaintiff urged, that Dunne, in writing what is relied on as the letter of acceptance by Honan, dated 17th January, was

his agent, that is, the purchaser's agent. But there is in evidence a letter dated 14th January written by Moore & Son, the vendor's agents, to Dunne asking to be advised early whether Honan would close for the property and offering him half share of commission, and expressing the hope that this would be the forerunner of many more sales in conjunction. We asked if there was any evidence that Honan was aware of this offer, and we were not referred to any. We wish to express our strong opinion that such offers made to the agent of the opposite party without his knowledge and uncommunicated to him strike at the root of faithful service and confidence, and have consistently met with the reprobation of Courts of Justice. In some jurisdictions it is met with stringent enactment. It is fair to Dunne to say that he denied he was Honan's agent; but the plaintiff contended that he was, at all events to accept the offer and conclude the contract.

Each appeal dismissed with costs.

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B. L.