[HIGH COURT OF AUSTRALIA.]

HOYT'S PROPRIETARY LIMITED . . APPELLANT;
PLAINTIFF,

AND

SPENCER . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1919.

SYDNEY, *Nov.* 18, 19. 24.

Knox C.J., Isaacs and Rich JJ.

Contract—Validity—Collateral contract—Consideration—Agreement not to enforce provisions of principal contract—Inconsistency.

By a memorandum of lease under the provisions of the *Real Property Act* 1900 the defendant leased to the plaintiff certain premises for a period of four years. The lease contained a proviso that the defendant might at any time during the currency of the term thereby created terminate the lease by giving to the lessee at least four weeks' notice in writing of his intention so to do. The plaintiff brought an action against the defendant, the plaintiff alleging by his declaration that, in consideration that the plaintiff would take a lease and become lessee of the premises from the defendant for a term of four years, the defendant promised that he would not at any time during the currency of the term give four weeks' or any notice to the plaintiff of his intention to terminate the lease in pursuance of a proviso in the lease or otherwise terminate the same unless requested and required so to do by the head lessors of the defendant, and that the plaintiff thereupon took the lease of the premises; and that the defendant, without being requested or required so to do by the head lessors, did give four weeks' notice to the plaintiff of his intention to terminate the lease, and terminated it. The plaintiff claimed damages for the alleged breach. To this declaration the defendant pleaded the lease, and the plaintiff demurred to the plea.

Held, that the agreement alleged by the plaintiff and the proviso in the lease could not consistently stand together so as to allow the proviso to remain in

H. C. OF A. 1919.

HOYT'S PROPRIETARY LTD. v SPENCER.

full force and effect notwithstanding the agreement, that the agreement was therefore invalid and unenforceable and consequently that the plea was good.

Observations as to the nature of collateral contracts.

Decision of the Supreme Court of New South Wales: *Hoyt's Proprietary Ltd.* v. *Spencer*, 19 S.R. (N.S.W.), 200, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Hoyt's Proprietary Ltd. against Cosens Spencer in which the declaration was as follows:—"Hoyt's Proprietary Limited a company duly incorporated and entitled to sue by that name by Matthew John O'Neill its attorney sues Cosens Spencer for that at the time of the making of the agreement hereinafter alleged and at all material times the defendant was the lessee of certain premises from James Edward Carruthers, John George Morris Taylor, William George Taylor, Joseph Woodhouse, William Robson, Percy Newman Slade, Frederick Over, Robert John Lukey, Herbert Middleton Hawkins, Fred Cull, William Elliott Veitch Robson and Gustavus John Waterhouse, his head lessors, and was engaged in theatrical enterprises and the plaintiff Company was engaged in the business of displaying pictures in theatres and in consideration that the plaintiff Company would take a lease of and become lessee of the said premises from the defendant to be used by the plaintiff Company as a theatre for the display of pictures for a term of four years from the first day of February one thousand nine hundred and eighteen upon certain terms the defendant promised that he would not at any time during the currency of the said term give four weeks' or any notice to the plaintiff Company of his intention to terminate the said lease in pursuance of a proviso in the said lease or otherwise terminate the same unless requested and required so to do by the said James Edward Carruthers, John George Morris Taylor, William George Taylor, Joseph Woodhouse, William Robson, Percy Newman Slade, Frederick Over, Robert John Lukey, Herbert Middleton Hawkins, Fred Cull, William Elliott Veitch Robson, Gustavus John Waterhouse, his head lessors, and the plaintiff Company thereupon took a lease of and became lessee of the said premises from the defendant for the said term of four years from the first day of February one thousand nine hundred and eighteen upon the said terms yet the defendant during the

currency of the said term and without being requested or required so to do by the said James Edward Carruthers, John George Morris Taylor, William George Taylor, Joseph Woodhouse, William Robson, Percy Newman Slade, Frederick Over, Robert John Lukey, Herbert Middleton Hawkins, Fred Cull, William Elliott Veitch Robson, Gustavus John Waterhouse, his head lessors, or any of them did give four weeks' notice to the plaintiff Company of his intention to terminate the said lease and terminated the said lease Whereby the said lease was terminated and the plaintiff Company was deprived of and lost the benefit of the said lease and lost the profit that it would otherwise have made during the remainder of the said term from the use of the said premises as a theatre for the display of pictures under the said lease and incurred expense in the moving from the said premises at the termination of the said lease and incurred expense and liability in cancelling and arranging for the cancellation of and in compromising claims on and otherwise in connection with contracts which the plaintiff Company had entered into as the defendant well knew with the Fox Film Corporation (Australasia) Limited and with Feature Films Limited for the supply of pictures to be displayed by the plaintiff Company on the said premises during the remainder of the said lease and for the supply of pictures to the plaintiff Company in its business and was put to great expense and trouble in endeavouring to procure and in procuring the use of other theatres for the display of pictures and was otherwise greatly damaged And the plaintiff claims £10,000."

The defendant, in his third plea, set out a memorandum of lease under the provisions of the *Real Property Act* 1900 from the defendant to the plaintiff, which, he said, was the lease alleged in the declaration to have been taken by the plaintiff from the defendant, and was executed by the plaintiff under its common seal and duly registered under that Act, and which contained the following proviso: "Provided always that the said Cosens Spencer may at any time during the currency of the term hereby created terminate this lease by giving to the lessee at least four weeks' notice in writing of his intention so to do."

The plaintiff having demurred to the defendant's third plea, the

H. C. OF A. 1919.

HOYT'S PROPRIETARY LTD. v. SPENCER.

demurrer was heard by the Full Court, which gave judgment for the defendant thereon: *Hoyt's Proprietary Ltd.* v. *Spencer* (1).

From that decision the plaintiff now, by leave, appealed to the High Court.

Campbell K.C. (with him *Flannery* and *McTiernan*), for the appellant. The plea is bad. It must be taken that the lease and the agreement were contemporaneous, and that the execution of the lease by the plaintiff was the consideration for the agreement. It is clear that the entering into one contract may be the consideration for another contract (*Heilbut, Symons & Co.* v. *Buckleton* (2)). There is no authority that the fact that a collateral contract is restrictive of the principal contract is a reason for saying that the former is invalid. There is nothing in the lease which prevents the appellant from setting up the collateral agreement as a cause of action. In *Heseltine* v. *Simmons* (3) a collateral agreement not to exercise the powers of a bill of sale until all other remedies had been exhausted was held to be good.

[ISAACS J. referred to *Pym* v. *Campbell* (4).

[RICH J. referred to *Mercantile Agency Co.* v. *Flitwick Chalybeate Co.* (5).]

The fact that the lease is under seal does not render the collateral agreement invalid, for there is no principle of estoppel which prevents a collateral agreement from being made with regard to a contract under seal. [Counsel referred to *Erskine* v. *Adeane* (6); *Fry* v. *Byrne* (7); *Harris* v. *Sydney Glass and Tile Co.* (8).] The Court will not interfere with the contracts of parties unless they are in conflict with some principle of public policy. Apart from estoppel there is no principle which prevents the collateral contract being given effect to.

[RICH J. referred to *Nash* v. *Armstrong* (9); *Steeds* v. *Steeds* (10).]

The test of whether the collateral contract can stand is not whether each party can get the full benefit of the original contract. The

(1) 19 S.R. (N.S.W.), 200.
(2) (1913) A.C., 30, at p. 47.
(3) (1892) 2 Q.B., 547.
(4) 6 El. & Bl., 370.
(5) 14 T.L.R., 90.
(6) L.R. 8 Ch., 756, at p. 765.
(7) 23 C.L.R., 589, at p. 605.
(8) 2 C.L.R., 227.
(9) 10 C.B. (N.S.), 259.
(10) 22 Q.B.D., 537.

collateral contract has only the effect of reducing the value of the consideration which the respondent got under the principal contract. There is nothing inconsistent between the collateral contract and any part of the principal contract. The respondent gets the full consideration for the principal contract, and he may exercise the powers given by it to the full, but if he breaks the promise made by the collateral contract he is liable in damages for the breach (*Lindley* v. *Lacey* (1); *Nash* v. *Armstrong* (2)). There is nothing to prevent the parties to a contract from entering into a collateral contract that the principal contract shall have no operative effect.

Leverrier K.C. (*Shand* K.C. and *Jordan* with him), for the respondent. The words of the lease mean that the lessor may, at his own will and independently of the will of any other person, give notice to terminate the lease. That is inconsistent with the collateral contract, which must be taken to be antecedent to the principal contract. Where a contract in writing is entered into between two parties purporting to deal with the rights of the parties in regard to a particular subject matter, the law will not give effect to another antecedent parol agreement between them inconsistent with the terms of such contract. That is not merely a rule of evidence but is based on substantive law (*Pitcairn* v. *Philip Hiss Co.* (3); *Thayer's Evidence at Common Law*, p. 397; *Wigmore on Evidence* (Canadian edition), vol. IV., par. 2400; *Henderson* v. *Arthur* (4); *De Lassalle* v. *Guildford* (5); *Meres* v. *Ansell* (6); *New London Credit Syndicate Ltd.* v. *Neale* (7)).

[ISAACS J. referred to *Dent* v. *Moore* (8); *Gordon* v. *Macgregor* (9).]

Campbell K.C., in reply, referred to *Gillespie Brothers & Co.* v. *Cheney, Eggar & Co.* (10).

Cur. adv. vult.

(1) 17 C.B. (N.S.), 578.
(2) 10 C.B. (N.S.), 259.
(3) 125 Fed. Rep., 110.
(4) (1907) 1 K.B., 10.
(5) (1901) 2 K.B., 215.
(6) 3 Wils., 275.
(7) (1898) 2 Q.B., 487.
(8) 26 C.L.R., 316.
(9) 8 C.L.R., 316.
(10) (1896) 2 Q.B., 59, at p. 62.

H. C. OF A. 1919.

HOYT'S PROPRIETARY LTD. v. SPENCER.

Nov. 24.

The following judgments were read :—

KNOX C.J. By memorandum of lease under the provisions of the *Real Property Act* 1900, and duly registered, the defendant leased to the plaintiff Company certain premises therein described for four years from 1st February 1918. The lease contained a proviso in the following words :—"Provided always that the said Cosens Spencer may at any time during the currency of the term hereby created terminate this lease by giving to the lessee at least four weeks' notice in writing of his intention so to do." During the currency of the term the defendant gave notice to determine the lease under this proviso, and the plaintiff gave up possession of the premises in accordance with such notice. Subsequently the plaintiff instituted this action in the Supreme Court against the defendant claiming damages for breach of contract.

The declaration in the action was in the following words : [His Honor read the declaration as above set out, and continued :] To this declaration the defendant pleaded several pleas, the third plea setting out *in extenso* the memorandum of lease referred to above, and stating that the memorandum of lease so set out was the lease alleged in the declaration to have been taken by the plaintiff Company from the defendant and was executed by the plaintiff Company under its common seal and duly registered. To this plea the plaintiff Company demurred.

The Supreme Court by majority (*Cullen* C.J. and *Gordon* J., *Ferguson* J. dissenting) overruled the demurrer, and ordered that judgment be entered for the defendant on the third plea, and against this decision the plaintiff Company appealed, by leave, to this Court.

Having regard to the form in which the matter comes before us for decision, I think we must accept as admitted that an agreement was in fact made in writing between the parties in the terms set out in the declaration, and that contemporaneously with or subsequently to the making of such agreement the parties executed the memorandum of lease set out in the third plea. The question is whether on these facts a breach of the agreement alleged in the declaration affords a cause of action to the plaintiff.

From the authorities referred to during the argument the following

propositions may be deduced, viz. :—(*a*) When parties negotiate an agreement by parol and subsequently reduce it to writing, the writing constitutes the contract (*Knight* v. *Barber* (1)), or at any rate is conclusive evidence of its terms (*Wake* v. *Harrop* (2)), subject, of course, to the right of either party to proceed for its rectification or rescission on sufficient grounds. (*b*) A distinct collateral agreement, whether oral or in writing, and whether prior to or contemporaneous with the main agreement, is valid and enforceable even though the main agreement be in writing, provided the two may consistently stand together so that the provisions of the main agreement remain in full force and effect notwithstanding the collateral agreement. This proposition is illustrated by the decisions in *Lindley* v. *Lacey* (3), *Erskine* v. *Adeane* (4), *De Lassalle* v. *Guildford* (5) and other cases. (*c*) There may be a contract the consideration for which is the making of some other contract (*Heilbut, Symons & Co.* v. *Buckleton* (6)). This proposition, properly understood, in no way conflicts with the other propositions set out above. It does not say that any contract the alleged consideration for which is the making of another contract is necessarily valid and enforceable. Whether it is so or not depends, in my opinion, on the nature and contents of the two contracts. For instance, if the main contract was to buy a house for £1,000, payable as to 25 per cent. in cash on signing the contract, and as to the balance by promissory notes of equal amounts at 12, 24 and 36 months, and the so-called collateral contract made by the vendor in consideration of the purchaser signing the main contract provided that the vendor should not be entitled to receive any cash but the whole purchase money should be paid by promissory notes extending over a period of five years, it seems clear to me that the so-called collateral contract would not be valid or enforceable at law or in equity, though it might possibly afford ground for a suit in equity for rectification of the main contract or be set up as a defence to a suit by the vendor for specific performance of that contract. The reason for this conclusion is that the alleged consideration for the collateral contract is the assumption by the purchaser of the obligations specified

(1) 16 M. & W., 66, at p. 69.
(2) 1 H. & C., 202.
(3) 17 C.B. (N.S.), 578.
(4) L.R. 8 Ch., 756.
(5) (1901) 2 K.B., 215.
(6) (1913) A.C., at p. 47.

H. C. OF A. 1919.

HOYT'S PROPRIETARY LTD. v. SPENCER.

KNOX C.J.

in the main contract, which obligations are immediately varied or abrogated by the collateral contract. The result is, in effect, as if one party said: "I will sign a contract to pay you £1,000 for a house, £250 in cash and the balance by promissory notes at 12, 24 and 36 months, if in consideration of my signing that contract you will enter into an agreement with me that you will not seek to enforce payment of the £250 cash or delivery of the agreed promissory notes but will accept other promissory notes of different amounts and currency." In such a case the consideration for the so-called collateral contract is the assumption of obligations which, *ex hypothesi*, the purchaser does not, and does not intend to, assume. In my opinion, the application of the propositions (*a*) and (*b*), set out above, to the question for decision in the present case leads to the conclusion that the decision of the majority in the Supreme Court was correct.

The contention for the plaintiff Company may be stated as follows: "In consideration of obtaining a lease of premises for a term, we agreed (*inter alia*) to accept a lease giving the lessor an unqualified right to determine the lease on giving four weeks' notice, but we only consented to execute the lease in consideration of a promise by the lessor that his power to terminate the lease should be qualified by restricting its exercise to an occasion on which his lessors should request and require him to exercise it." This is tantamount to saying that under the proviso of the lease the agreement is that the lessor may determine the lease by giving four weeks' notice whenever he chooses to do so, but under the agreement sued on the lessor is bound not to determine the lease by notice unless requested and required by his lessors so to do; or, in other words, that he has the right under the proviso to determine the lease, but is liable to an action for damages for breach of the collateral agreement if he does so.

In my opinion it is impossible to maintain that the agreement on which the present action is founded would not, if valid and enforceable, modify or vary the agreement contained in the lease executed by the parties in regard to a matter expressly dealt with by a provision of the lease, viz., the right to determine it during the currency of the term for which it was granted. If this be so,

it is clear that the two agreements—that on which the action is founded and that contained in the proviso in the memorandum of lease—are inconsistent, and so cannot stand together.

The question whether the agreement sued on is consistent with the proviso in the lease may be tested in another way. The agreement as alleged is that the defendant will not determine the lease by giving notice during its currency except at the request of his lessors. If the plaintiff's contention that this agreement is valid and enforceable be sound, proceedings could be taken in equity to restrain the defendant from giving notice to determine the lease unless he had been requested by his lessors to do so, although under the terms of the proviso he was entitled to give notice to determine the lease without reference to his lessors' wishes.

Consequently the agreement on which this action is founded does not fulfil the requirement of proposition (*b*) set forth above, and the reasoning of *Blackburn* J. in *Angell* v. *Duke* (1) applies. That being so, the agreement, though admittedly made in fact, cannot be used by either party as the foundation of proceedings against the other to enforce it or to recover damages for its breach.

For these reasons I am of opinion that the appeal should be dismissed.

The order will be that the appeal be dismissed with costs.

ISAACS J. In this case it is essential to ascertain and keep steadily in view the cause of action alleged. The declaration is founded on an agreement consisting of a promise of the defendant upon a consideration given by the plaintiff. The consideration is either the promise of the plaintiff to take a lease or the actual taking of the lease. I think it immaterial, but if material it must, I think, be the actual taking of the lease because there could not possibly be any effect given to the promise or any breach of it except after the lease was actually taken. In any case the same result ensues.

Now, the consideration is stated to be that the plaintiff would take a lease and become lessee for the term mentioned "upon certain terms.' That, in view of the plea and demurrer, is the same as if those terms were set out in the declaration. The declaration avers that the plaintiff took a lease "upon the said terms,"

(1) 32 L.T., 320.

H. C. OF A. 1919.

HOYT'S PROPRIETARY LTD. v. SPENCER.

Isaacs J.

and says "*yet*" the defendant broke his promise. In other words, it avers that the defendant, being entitled to the consideration agreed upon, received that consideration, and yet broke his promise. There is no denial—in fact it is conceded as the very groundwork of the action, as indeed it must be—that the defendant is entitled to have to the full every part of the consideration mentioned, which by the admission on demurrer includes the terms of the proviso, undiminished, unaltered, and unqualified, by anything which took place up to the time of the making of the lease.

Putting the argument in the best form for the appellant, it amounts to this : the respondent Spencer was to have the unqualified right as a matter of *property* to resume possession whenever he chose to exercise his power in terms of the proviso, but he was under a *personal* contractual obligation, by virtue of the collateral promise, not to exercise his property right except in accordance with the collateral promise. The answer to that, however, is that the argument rests on a fallacy. A lease is a contract. The position is very clearly set out in *Bacon's Abridgement*, 7th ed., vol. IV., under the heading "Leases and Terms for Years." It is there said (at p. 632): "A lease for years is a contract between lessor and lessee, for the possession and profits of lands, &c., on the one side, and a recompense by rent, or other consideration, on the other." The learned author goes on to show that originally a lease for years was nothing but a contract, and was not such an act as transferred any property to the lessee, and that was one reason why leases for years are considered as chattels and go to executors. Then, in the time of Henry VII., it was resolved that the lessee should recover not merely damages as a recompense for possession lost, on the lessor's covenant, but should also recover the possession itself. That right continues, but it is based on the same fundamental character of the lease. All that is necessary to constitute the agreement a lease is that the intent of the parties should appear that it operated as a demise for a determinate time, the *termini* being therein contained or sufficiently indicated ; if it does, it is a lease ; if not, it may still be a binding (see *Marshall* v. *Berridge* (1)) executory agreement for a

(1) 19 Ch. D., 233.

lease (*Walsh* v. *Lonsdale* (1)) enforceable in equity and entitling the lessee to a formal lease.

The parties here are bound by the terms of the bargain personally, as well as in point of interest in the property ; and the terms of the contract regulate and define their respective rights with reference to the property. The promise relied on is itself an open variation or qualification of the right conferred by the proviso in the lease ; and it is an undeniable fact that by just so much the rights of the respondent are less than the agreed consideration for the promise. Nevertheless, the appellant insists that the promise must be strictly adhered to, and that the respondent, by exercising the power that incontestably exists under the unqualified proviso, has committed an actionable breach of agreement. The mere statement of the matter seems to me to answer the contention. But as the argument has occupied the attention of two Courts and concerns a topic of the law—collateral agreements—which touches every phase of contract—mercantile and otherwise—I think it desirable to state the way in which I view it.

When two parties are entering into contractual relations with respect to a given subject matter, they may (apart from special technical requirements) elect to conclude their bargain without writing, or they may elect to record it in writing, and, if in writing, they may further decide to have it under seal. But in whatever form they determine to leave their bargain, they may further agree to have one contract only, or to have separate and distinct contracts. All that is for the parties themselves to resolve upon. If they determine to make one contract only, then the terms they decide to include are the only terms that affect them contractually. It connotes that all else is abandoned. And that is the case whatever the form of the contract. If the matter is not committed to writing, though the principle is clear, the evidence is manifestly open to great dispute. But if the parties agree to commit their agreement to writing, then what is written is the conclusive record of the terms of their agreement, and, unless it can be shown that the document was not intended as the complete record of their bargain, no oral evidence can be admitted to alter or qualify it. I have

(1) 21 Ch. D., 9.

H. C. OF A. 1919.

HOYT'S PROPRIETARY LTD. v. SPENCER.

Isaacs J.

stated my views on this point in *Gordon* v. *Macgregor* (1), citing authorities. This principle applies even to the case where the agreement is partly written and partly verbal. To the extent to which the parties have deliberately agreed to record any part of their contract, that record stands unimpeachable by oral testimony (*Bank of Australasia* v. *Palmer* (2)). It may be that the parties have, in their discretion, chosen to record a single bargain in several documents contemporaneously, or so close in point of time that they are treated as being contemporaneously executed. In that case, as *Jessel* M.R. says in *In re Wedgwood Coal and Iron Co.*; *Anderson's Case* (3), ambiguities and even inconsistencies have to be resolved and reconciled as best the Court can. The same thing is said by the same learned Judge in *Smith* v. *Chadwick* (4). In such case, if there be an action on the whole agreement as one entire indivisible agreement, the whole of the documents are read together, and the words of one may have to be modified by the words of another. And if in this case the plaintiff were suing on one entire indivisible contract into the composition of which both the proviso in the lease and the promise alleged in the declaration entered, the plaintiff's position would be that the agreement would have to be treated very much as postulated by Sir *George Jessel* in *Anderson's Case* (5). But the plaintiff is not suing upon such an entire indivisible contract. The contract contained in the lease is one under the *Real Property Act*, and by virtue of sec. 36 of that Act has the force of a deed. It could not be contended that the promise sued on (assuming, as perhaps by the rules of pleading we may be bound to assume, it was in writing though not under seal and not registered) was intended to be part of the one contract along with the proviso. If such were the appellant's contention the remedy would have been a suit for rectification or injunction at the proper time. At all events this is not the claim in the declaration. The claim is on the basis that there was no mistake in framing the main contract of lease, that that contract is complete in itself and correctly recorded, and that its only function

(1) 8 C.L.R., at pp. 322 *et seqq.*
(2) (1897) A.C., 540, at p. 545.
(3) 7 Ch. D., 75, at p. 99.
(4) 20 Ch. D., 27, at pp. 62-63.
(5) 7 Ch. D., at p. 99.

now is as the sole consideration for the independent collateral agreement sued on. *Ferguson* J. truly says that no question arises here as to admissibility of evidence, such as parol evidence to affect a written document, or evidence of any kind to affect a deed, or evidence proper to found a claim for rectification of the lease, or in any other way. All the observations in the authorities as to parol evidence are beside the question, because it is to be assumed that the "agreement" as pleaded is established in fact. The only question on this demurrer is as to its legal effect; and up to this point I entirely agree with the view taken by *Ferguson* J. At one point I diverge; and that is, what is the legal force and effect to be given to the promise pleaded, having regard to the consideration on which it is alleged to be based, namely, the making of the lease with all the terms it contains? The contract contained in the lease is, as observed, complete in itself. It contains the mutual covenants and considerations of the parties, and it stands entirely on its own footing. A transferee would take it upon the very terms of the document and upon no others. And in that document the plaintiff says :— "I Hoyt's Proprietary Limited the within named lessee do hereby accept this lease as tenant subject to the conditions restrictions and covenants above set forth." But, though complete in itself as a contract, it might well play another part as consideration for another promise. In *Heilbut's Case* (1) Lord *Moulton* states the law in distinct terms. He says :—"It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds,' is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract." Now that passage was read and relied on by Mr. *Campbell*. But though it supports him in principle, yet the same principle destroys his case. The main contract here, when utilized to form the consideration for the collateral contract, must be taken exactly as it is. Its provisions do not change according as it is considered as an independent contract or as a consideration

(1) (1913) A.C., at p. 47.

H. C. OF A. 1919.

HOYT'S PROPRIETARY LTD. v. SPENCER.

Isaacs J.

for the collateral contract. A principle that must govern the bargain of a contractual promise made in consideration of entering into the main contract is that the parties shall have and be subject to *all* (not some only) of the respective benefits and burdens of the main contract. When the collateral promise is truly consistent with the main contract, that principle has full play. The main contract is not then interfered with. The collateral contract alters, as every contract must, the contractual relations of the parties; but it does not alter, and from the simple statement of the bargain is not intended to alter, the contractual relations which are established by the main contract. When both are worked out, it may be that in the final outcome the parties are in the same position as if those contractual relations had been varied. But the practical result cannot affect the independence and legal effect of each contract; and that is what we are here concerned with.

There is one case that I have found since the argument, where the principle is well stated. *Carter* v. *Salmon* (1) was a case which up to a point was singularly like the present. A agreed in writing to let a farm to B. The agreement reserved a rent payable at stated intervals, and provided that A should put the premises in repair. B alleged that prior to the agreement being signed A promised verbally that if B would take the farm the buildings should be put into a thorough state of repair, and that no rent should be demanded till this was done; and that, on the faith of that, B took the farm. At that point the facts varied. A mortgaged the farm to C, and C distrained on B, who set up the parol agreement. It was held that C, having taken without notice, was not bound by the parol promise, but *James* and *Cotton* L.JJ. were very clear that even as between A and B the parol agreement was unavailable as an actionable collateral agreement inasmuch as it altered the operation of the written agreement. *James* L.J., referring to the cases cited of the type of *Lindley* v. *Lacey* (2), said (3): —"The only principle upon which those cases have been decided is that it is a collateral agreement, resulting in a distinct right of action between the parties to it, and in no way qualifying or contradicting

(1) 43 L.T., 490.

(2) 17 C.B. (N.S.), 578.

(3) 43 L.T., at p. 492.

or affecting the rights of the parties under the written agreement. Under this written instrument I doubt myself very much whether anything of the kind could be set up, even against Mr. Smith" (that is, A) "himself. It would not be a collateral agreement, the subject of a distinct action, but it might be set up as a counterclaim if Mr. Smith were a plaintiff in the action." The Lord Justice evidently meant by "counterclaim" one for rectification or injunction in equity. *Cotton* L.J. said (1): "This supposed agreement—for I will assume it exists—contradicts the term of the written contract under which the plaintiff holds, and if there were no other objection, there would be an objection to admitting that to impose upon the defendant the obligation of abiding by this supposed agreement, which is inconsistent with the terms of the holding of the plaintiff under the written contract." The Lord Justice then proceeded to show that, if good as a collateral agreement, it would not affect the rights of the landlord *quâ* landlord, and therefore would not affect the mortgagee without notice. And he gave no opinion as to an equity against Smith. But the passages I have quoted, though obiter, are sufficiently strong to show that the opinions of those very learned Judges on the points relevant here were quite opposed to the present appellant's first contention, viz., that, even assuming inconsistency between the so-called collateral contract and the main contract, the collateral contract would bind the respondent. I may add that *in arguendo Cotton* L.J. said (2): "Where there is a contract and a term is left out, a collateral agreement as to that term may be supplied."

The truth is that a collateral contract, which may be either antecedent or contemporaneous (per *Erle* C.J. and *Byles* J. in *Lindley* v. *Lacey* (3) and per *Cockburn* C.J. in *Angell* v. *Duke* (4)), being supplementary only to the main contract, cannot impinge on it, or alter its provisions or the *rights created by it*; consequently, where the main contract is relied on as the consideration in whole or part for the promise contained in the collateral contract, it is a wholly inconsistent and impossible contention that the other party is not to have the full benefit of the main contract as made; and the

(1) 43 L.T., at p. 492.
(2) 43 L.T., at pp. 491-492.
(3) 17 C.B. (N.S.), at pp. 586, 587.
(4) L.R. 10 Q.B., 174, at p. 177.

H. C. OF A. 1919.

HOYT'S PROPRIETARY LTD. v. SPENCER.

Isaacs J.

appellant's first contention is therefore unsound. If in any case the Court finds two enforceable agreements executed in such circumstances that one is intended to affect the other, no doubt such effect will be given to them as the superimposing operation of the governing contract requires; but in that case it is not collateral, but dominant. (See the observations of *Fry* J. in *Gartside* v. *Silkstone and Dodworth Coal and Iron Co.* (1).)

It only remains to consider whether the alleged promise does leave the contractual rights of the respondent under the main contract unimpaired. *Ex concessis*, it does not. The very argument on which the claim is founded is that but for the additional promise the respondent had the power by virtue of the proviso to do what he did. And the plaintiff's case is that that power was cut down by the further promise. There is at once a conflict between the two, with the result that the appellant, though in one breath conceding the full extent of the proviso as a consideration, yet, in the next, cuts it down almost to the point of rendering it nugatory.

In my opinion the judgment should be affirmed, and this appeal dismissed.

RICH J. I have had the advantage of reading the judgments just delivered. As I agree with them, I consider that it is inexpedient to add, and I refrain from adding, collateral matter which, at best, merely paraphrases and often blurs the clearness of the main judgments, and so increases the difficulty of the profession in interpreting the decision of the Court.

Appeal dismissed with costs.

Solicitors for the appellant, *Murphy & Moloney.*

Solicitors for the respondent, *Abbott, Tout & Balcombe.*

B. L.

(1) 21 Ch. D., 762, at pp. 767-768.