[PRIVY COUNCIL.]

DALGETY & COMPANY LIMITED . . APPELLANTS;
DEFENDANTS,

AND

GRAY . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE HIGH COURT.

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May 13.

Contract—Agency—Agreement to procure loan on mortgage—Validity—Contract concerning interest in land—Evidence—Breach—Agent lending his own money—Conflict of interests—Exoneration—Estoppel—Appeal to High Court—High Court making new case for party—Instruments Act 1890 (*Vict.*) (*No.* 1103), *sec.* 208 (*Statute of Frauds* (29 *Car. II. c.* 3), *sec.* 4).

In an action for breach of contract which was tried by a jury, the plaintiff had alleged in his pleadings an oral contract whereby the defendant Company "agreed with the plaintiff . . . to raise for the plaintiff, and promised that it would raise for the plaintiff the sum of £84,000 upon the security of" the plaintiff's station, "of which the sum of £72,000 or thereabouts was to be secured upon first mortgage of the said station at 4 per centum per annum and the balance £12,000 or thereabouts on second mortgage of the said station at 5 per centum per annum."

The trial Judge having withdrawn the case from the jury, and the Full Court of the Supreme Court of Victoria having upheld his decision,

Held, that the evidence established the contract as alleged, and that it was an agreement to get a mortgage, involving a promise on the part of the Company to produce a mortgagee and a correlative obligation on the plaintiff to execute a mortgage on the terms specified, and was therefore an agreement to create an interest in land which by sec. 4 of the *Statute of Frauds* (*Instruments Act* 1890 (Vict.), sec. 208) was required to be in writing, and that the trial Judge properly withdrew the case from the jury.

* Present—Viscount Haldane, Viscount Cave, Lord Dunedin, Lord Shaw and Lord Phillimore.

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Held, also, that such a contract did not raise a conflicting interest in the person of the agent, and therefore, in the absence of any special stipulation to the contrary, there was no reason why the defendant Company should not itself lend the £12,000 on second mortgage.

Held, further, that on appeal to the High Court that Court was not entitled to make for the plaintiff a case which he had not made for himself at the trial.

Decisions of the High Court: *Gray* v. *Dalgety & Co. Ltd.*, 19 C.L.R., 356; 21 C.L.R., 509, reversed.

APPEAL from the High Court.

This was an appeal to the Privy Council by Dalgety & Co. Ltd. from the decision of the High Court: *Gray* v. *Dalgety & Co. Ltd.* (1).

The judgment of their Lordships, which was read by Lord DUNEDIN, was as follows:—

The plaintiff is a farmer, and the defendants are a company who do financing and loan business.

This is an action for damages for breach of contract. The ground of action as stated in the statement of claim is as follows:— "The defendant for reward to it and in consideration of the plaintiff entrusting it exclusively with the raising of money for the purchase of Kentucky Station aforesaid and refusing an offer of one Griffith to lend to or procure for the plaintiff the sum of £84,000 at 4½ per centum per annum on the security of the said Kentucky Station agreed with the plaintiff on or about 26th August 1907 to raise for the plaintiff and promised that it would raise for the plaintiff the sum of £84,000 upon the security of Kentucky Station aforesaid of which the sum of £72,000 or thereabouts was to be secured upon first mortgage of the said station at 4 per centum per annum and the balance £12,000 or thereabouts on second mortgage of the said station at 5 per centum per annum. The defendant did not raise the said sum of £84,000 or any part thereof for the plaintiff or at all, and wholly refused and neglected so to do. By reason of the premises the plaintiff lost in particular the benefit of his option to purchase the said station and was otherwise damnified."

The defence was that the contract made was a verbal contract, and was to the effect that the defendants would endeavour to get a lender to advance £72,000 on first mortgage, and, that being

(1) 21 C.L.R., 509.

done, would themselves advance £12,000 on second mortgage, and that of that contract there was no breach. The defendants also pleaded that the contract averred by the plaintiff was struck at by sec. 208 of the *Instruments Act* 1890, which is practically in identical terms with the *Statute of Frauds*, and is commonly known by that name. There was also a defence that in respect of subsequent letters the plaintiff had himself interpelled the defendants from proceeding further with the transaction.

The case was tried by *Hood* J. and a jury. At the conclusion of the plaintiff's evidence the learned Judge told the jury that they must find for the defendants as the only contract proved was a contract which by the Statute could only be proved by writing and admittedly no such writing existed.

The plaintiff appealed to the Full Court of Victoria, and the case was heard by *à Beckett* A.C.J. and *Hodges* and *Cussen* JJ., who unanimously affirmed the decree of the trial Judge, but on differing grounds—*à Beckett* A.C.J. holding that upon the plaintiff's own showing there was no concluded contract, *Hodges* J. and *Cussen* J. both holding that the only contract proved was obnoxious to the *Statute of Frauds*, and in addition holding that the plaintiff himself had prevented the defendants from going on with the contract. From this judgment an appeal was taken to the High Court of Australia who by a majority—*Isaacs* and *Powers* JJ.—held that there must be a new trial as the case had been in their view wrongly taken away from the jury. In their view, it was open on the facts for a jury to find that there was a concluded contract and that that contract was to find a lender, a contract not involving the creation of an interest in land, and therefore not obnoxious to the *Statute of Frauds*. *Griffith* C.J. dissented upon both grounds, holding, namely, that there was no evidence of a concluded contract, the terms of the mortgages not being fully fixed, and that the only contract alleged and sought to be proved was obnoxious to the *Statute of Frauds*.

The case then came back to the Supreme Court of Victoria, and was tried by *Madden* C.J. and a jury. The learned Chief Justice put specific questions to the jury. With their appended answers they stood as follows :—

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

"(2) Was the contract between Gray and Dalgety & Co. that Dalgety & Co. absolutely promised for valuable consideration that they Dalgety & Co. would procure and introduce to Gray some person or persons corporation or corporations able and willing to lend Gray £84,000 upon the security of Kentucky Station in two sums namely £72,000 on first mortgage at 4 per cent. and £12,000 on second mortgage at 5 per cent. within a reasonable time?"—Answer: "Yes."

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

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

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

"(6) Was the contract mentioned in Question 2 discharged by mutual consent of Gray and Dalgety & Co. if you find that such contract was made?"—Answer: "No."

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

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

"(9) If you find contract mentioned in Question 2 was made and that it was broken what damages do you award to Gray?"—Answer: "£1,800."

In accordance with these findings, he pronounced judgment in favour of the plaintiff.

Appeal was then taken by the defendants to the Full Court of Victoria. The case was heard by *àBeckett* A.C.J., *Hodges* and *Cussen* JJ. These learned Judges, while holding themselves bound by the opinions, given at the time of the decision, of the High Court to hold that the contract held proved by the jury was not contrary to evidence, considered that the question of whether there was not subsequent exoneration was untouched by the former judgment; that the finding on that head by the jury was perverse; and accordingly they set aside the judgment.

Appeal being again taken by the plaintiff to the High Court of Australia, that Court, by a majority—*Isaacs* and *Higgins* JJ.—reversed the judgment and restored the judgment at the trial. *Griffith* C.J. dissented.* Summarized, his view was that all the findings of the jury were perverse, and that the only contract, if a contract at all there was, was a contract obnoxious to the *Statute of Frauds*. From this judgment appeal has been taken to this Board by special leave.

The judgments of the learned Judges have dealt with great minuteness with the several questions raised. In the view that their Lordships take, it is unnecessary to discuss several of these questions. Their Lordships think that the trial Judge was right in withdrawing the case from the jury at the first trial, and that that ought to have been the end of the case. They agree with the view of two of the learned Judges of the Full Court and with the learned Chief Justice in the High Court as to this. In order to withdraw the case from the jury, the case must be taken as it stood on the pleadings of the plaintiff and on the evidence given by the plaintiff. The plaintiff cannot complain if he is judged upon his own statement and his own story. The plaintiff's pleading has already been set forth. The contract so alleged was made at a single meeting with the defendants, and it will be well to give the plaintiff's own version in full. The plaintiff said that on 26th August 1907, negotiations for the loan of £84,000 being then in progress, he called at defendants' office in Melbourne, and saw two of their principal officers, Messrs. MacRae and Aitken. His account of the interview, and of the

* The majority also comprised *Gavan Duffy*, *Powers* and *Rich* JJ.; *Barton* J., as well as *Griffith* C.J., dissented.—*Ed. C.L.R.*

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conversation between them, was as follows :—" I first saw Mr. MacRae, and I said to Mr. MacRae : ' I have come down to see you on the matter of financing the purchase of the Kentucky property.' Mr. MacRae at once said : ' I had better call Mr. Aitken in.' He then left the room, and walked into Mr. Aitken's room, which adjoins his. He was acting manager then in Mr. Campbell's place, who was at Home. On their return, Mr. MacRae took his seat, and Mr. Aitken stood by the table. I said I wanted the money for the purpose of exercising my option in two sums of £72,000 on first mortgage at 4 per cent. and £12,000 at 5 per cent. on second mortgage. One of them said : ' There will be no difficulty in getting the sum of £72,000 at 4 per cent., but I doubt whether we will get any money at 5 per cent. on second mortgage.' I then said : ' I may as well tell you that since my arrival in town I met a man who, after an interview with his principal, has promised to lend me £84,000 '—without mentioning the rate of interest or mentioning his name—' but if you are not inclined to take up the business I intend at once to settle with him.' Mr. MacRae then looked at Mr. Aitken, and Mr. Aitken, after a moment's hesitation, said : ' Well, we will do it ; but you must give us a week or ten days to look around for the money.' I said : ' This is an important matter with me, and very urgent. I want something settled.' Mr. Aitken then said : ' Don't worry any more about it. Go home and attend to your shearing, and look upon the matter as done.' "

This is taken textually from the evidence in the first trial, as reported [see 19 C.L.R., at pp. 359 *et seq.*], but the account given by the plaintiff in the second trial is, though not textually, still substantially the same. Now, the view of the plaintiff as to what this conversation amounted to was given by him in his pleading in the action. It was that the defendants " agreed with the plaintiff . . . to raise for the plaintiff and promised that it would raise for the plaintiff the sum of £84,000 upon the security of Kentucky Station . . . of which the sum of £72,000 or thereabouts was to be secured upon first mortgage of the said station at 4 per centum per annum and the balance £12,000 or thereabouts on second mortgage of the said station at 5 per centum per annum." That is in plain language an agreement to get a mortgage, involving

a promise on the part of the Company to produce a mortgagee and a correlative obligation on the plaintiff to execute a mortgage—all on the terms specified. That is an agreement to create an interest in land, and is struck at by the *Statute of Frauds*, and that is what the conversation clearly shows. Summarized, that conversation comes to this:—The plaintiff says: "I need the money on mortgage —£72,000 on first mortgage at 4 per cent., £12,000 on second mortgage at 5 per cent." The defendants say: "No difficulty as to the first mortgage, but we doubt the possibility of the £12,000 at 5 per cent." The plaintiff retorts: "I know another person who has offered me the whole £84,000, and if you don't close with me I shall close with him." To which the defendants reply: "All right; go away, and it shall be done." If a contract at all (that is to say, leaving out all question of whether the terms of redemption are of such essence as to make no bargain while they remain unsettled), that seems to their Lordships clearly a contract by which the defendants bound themselves to get the mortgages—that is to say, to get the money in exchange for mortgages granted for the specified amounts at the specified rates by the plaintiff.

It will be at once noted that the question put to the jury at the new trial deserts the pleading, and puts quite another issue. It is in these terms: "Was the contract between Gray and Dalgety & Co. that Dalgety & Co. absolutely promised for valuable consideration that they Dalgety & Co. would procure and introduce to Gray some person or persons corporation or corporations able and willing to lend Gray £84,000 upon the security of Kentucky Station in two sums namely £72,000 on first mortgage at 4 per cent. and £12,000 on second mortgage at 5 per cent. within a reasonable time?"

The form of the question is most likely suggested by the judgment of *Isaacs* J. in the first appeal to the High Court, and the learned Chief Justice was indeed bound to put a question in such form as he was instructed by the judgment of the High Court. Their Lordships think that the majority of the High Court were not entitled to make for the plaintiff a case which he had not made for himself. When the case was made as made by the plaintiff, the original judgment of the trial Judge affirmed by the Full Court was right.

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The evidence was in accordance with the pleading, and that, in their Lordships' view, ended the matter.

It, therefore, becomes unnecessary to consider whether an answer such as the jury gave to the question as put was on the evidence perverse or not.

It also renders otiose any further discussion of the points raised; but there are two remarks which their Lordships think it right to make.

It seems to their Lordships that "exoneration" was scarcely the head under which the actings of the plaintiff should have been considered. The request of the plaintiff to the defendants to stay their hand was not an exoneration from the contract, but was rather a proceeding on his part which estopped him until he had withdrawn the embargo from alleging breach.

Then as to the second mortgage for the £12,000, the finding of the jury as to this was necessarily based on a direction by the trial Judge that, the position of the defendants being that of agents, it was illegal for them to find the £12,000 themselves unless there was a special stipulation to that effect. Their Lordships think that direction was wrong. The rule of law as to an agent not acting as a principal really rests on the consideration of a conflicting interest in the person of the agent, but in a contract such as this was, to get a mortgage on specified terms, there could be no conflicting interest, and their Lordships can see no reason whatever why the defendants should not have advanced the £12,000 themselves, assuming that there was no special stipulation to the contrary. That there was no such special stipulation is certain, for the plaintiff admits that if he had got the money he would not have cared from whom it came. If this is so, the finding of the jury in that matter would be perverse, and in the opinion of *Isaacs* J. the contract then would be obnoxious to the *Statute of Frauds*.

Their Lordships will humbly advise His Majesty to allow the appeal, and to restore the judgment of the learned trial Judge on the first trial. The defendants will have their costs in the Courts below and before this Board.