[HIGH COURT OF AUSTRALIA.]

DOWLING . . . . . APPELLANT;
DEFENDANT,

AND

RAE AND OTHERS . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

H. G. HAMILTON PTY. LTD. . . . . APPELLANT;
DEFENDANT,

AND

RAE AND OTHERS . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

KELLY AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

RAE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Mar.* 1-4, 23.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Powers JJ.

Principal and Agent—Contract of agency—Sale of sheep—Guarantee of purchase-money—Postponement of time for delivery—Variation of contract—Release of guarantor—Statute of Frauds (29 *Car. II.* c. 3), *sec.* 4—*Instruments Act* 1915 (*Vict.*) (*No.* 2672), *sec.* 228.

The respondent R., being the owner of certain sheep which he wished to sell, entered into a contract which, as the majority of the High Court (*Knox* C.J., *Isaacs* and *Powers* JJ.; *Higgins* and *Gavan Duffy* JJ. dissenting) found on the evidence, was a contract with the three appellants that, in consideration of a certain commission, they would, in the event of their bringing about a sale of the sheep, guarantee the payment by the purchaser of the purchase-money. A purchaser was found by them, and a contract in writing for the sale of the sheep was entered into by which delivery was to be made on or before a

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certain date and payment was to be made three months after delivery. At the request of the purchaser, R. verbally agreed to postpone the date for the delivery to a later date, and the sheep were accordingly delivered on the later date. Subsequently the purchaser became insolvent and R. was unable to recover any part of the purchase-money.

Held, by *Knox* C.J., *Isaacs* and *Powers* JJ., that, since the contract of sale was one which was required by the *Statute of Frauds* to be in writing, the verbal postponement of the date of delivery was not a variation of the contract and did not have the effect of releasing the appellants from their liability under the guarantee.

Decision of the Supreme Court of Victoria (*Macfarlan* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by James Eric Rae against Henry John Dowling (trading as Dowling Brothers), J. E. Dowling (trading as J. E. Dowling & Co.), H. G. Hamilton Pty. Ltd., and Percy James Kelly and John McDonald (trading as Kelly & McDonald) in which the statement of claim as amended at the hearing of the action was as follows :—

1. The plaintiff's claim is :—(a) Against the defendants Dowling Brothers as principals and against the other defendants or one or some of them as *del credere* agents and/or sureties for £1,930 17s. 9d., being the price of goods sold and delivered by the plaintiff to the defendants Dowling Brothers: Particulars—1925, 21st August, 1,367 comeback ewes at 28s. 3d. per head, £1,930 17s. 9d. (b) Against the defendants Dowling Brothers for £10 16s., being the amount agreed to be paid by the said defendants to the plaintiff for agistment of 864 sheep at Hopetoun by the plaintiff for the said defendants: Particulars—1925, agistment 864 sheep for one week at the agreed rate of 3d. per head per week, £10 16s.

2. Alternatively on or about 21st August 1925 the plaintiff verbally employed the defendants H. G. Hamilton Pty. Ltd. and J. E. Dowling and Kelly & McDonald or one or some of them as his *del credere* agents to sell on commission approximately 1,500 sheep for the plaintiff upon terms that they or one or some of them in consideration of an extra remuneration would guarantee to the plaintiff that the purchaser would duly pay to the plaintiff the purchase-money for the said sheep: Particulars—(a) The ordinary rate of selling commission on the sale of the said sheep was $2\frac{1}{2}$ per cent; (b) the defendants charged the plaintiff an

additional commission of 2½ per cent less 3d. per head on the said sale; (c) the conversation on or about 21st August 1925 between the plaintiff and one Glide on behalf of the said defendant or of one or of some of them prior to the said sale wherein the said Glide undertook to effect a said sale on terms of *del credere* commission; (d) it was at all times a usage of the stock-selling business known to the plaintiff and to the defendants and intended by them and each of them to have effect on the transaction sued on that the additional agent's charge over and above the ordinary selling commission of 2½ per cent was for a *del credere* commission.

3. The plaintiff further claims against the defendant J. E. Dowling & Co. that it was an express or alternatively an implied term of the said Dowling's employment and of the said agreement for sale and the said Dowling by one Glide warranted that he would for the extra commission agreed to be paid by the plaintiff obtain for the plaintiff within a reasonable time a bill for the amount of the purchase-money endorsed by H. G. Hamilton Pty. Ltd. and/or by the said Dowling and/or by the said Kelly & McDonald.

4. The said Dowling has not within a reasonable time nor at all obtained for the plaintiff a bill so endorsed or any bill.

5. The plaintiff has delivered 1,367 sheep pursuant to the said agreement for sale and the purchasers thereof have failed to duly pay for the same and their estate has been sequestrated and the plaintiff has lost the whole of the value of the said sheep and the plaintiff claims damages against the said Dowling £1,930 17s. 9d.

The plaintiff claims damages against the defendants or some or one of them the sum of £1,930 17s. 9d.

In answer to a request for further particulars of the acts and/or facts which were alleged to constitute the defendants other than Dowling Brothers *del credere* agents and/or sureties, the plaintiff alleged that "it was at all times material a custom of the stock-selling business known to the plaintiff and the defendants and intended by them and each of them to have effect in respect of the transaction sued on that in consideration of a vendor of stock agreeing to pay 5 per cent commission the selling agent or agents

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would and did warrant the due payment of the purchase-money for such stock by the purchaser."

The sale note, dated 21st August 1925, in respect of the sale of the sheep was, so far as material, in the following terms:—"J. E. Dowling & Co. acting as agents for Mr. J. E. Rae . . . Warracknabeal have this day sold to Mr. Dowling Bros. Kerang the undermentioned stock 1,500 four and six tooth comeback ewes . . . numbers more or less believed to be approximate, but not guaranteed, now depasturing at Hopetoun and Warracknabeal as represented by Mr. J. E. Rae on 20th day of August 1925. At the rate of 28s. 3d. o/s . . . terms of payment 3 months from delivery. Commission 5 per cent (less) 3d. per head. Shearing 25th August and delivery to be given and taken, and the above-mentioned stock to be counted at Warracknabeal and vendor and purchaser to share droving from Hopetoun to Warracknabeal on or before 1st day of November 1925" &c.—"Agents for the vendor, J. E. Dowling & Co., per Harold E. Glide."

One of the defences taken was that if the agreement alleged in par. 3 of the statement of claim was made, the defendants were discharged from their liability thereunder by the plaintiff having, without the knowledge or consent of the defendants, altered the terms of the contract by agreeing to deliver the sheep on a different date.

The action was heard by *Macfarlan* J., who found that the plaintiff employed the three firms of agents, J. E. Dowling & Co., H. G. Hamilton Pty. Ltd. and Kelly & McDonald, and that they acted as the plaintiff's agents, for a 5 per cent commission on terms that they would guarantee the payment of the purchase-money by the purchaser of the sheep; that there was a usage of stock agents in the Wimmera district, where a commission of 5 per cent was charged, to guarantee payment by the purchaser; and that the alteration of the date for delivery of the sheep did not release the defendants from their guarantee, since with a full knowledge of the alteration they treated the contract as still subsisting. He therefore gave judgment for the plaintiff against all the defendants for £1,930 17s. 9d. with costs.

From that decision J. E. Dowling, H. G. Hamilton Pty. Ltd. and Kelly & McDonald now appealed to the High Court.

Other material facts are stated in the judgments hereunder.

Ham K.C. (with him *Stanley Lewis*), for the appellant J. E. Dowling. There was no proof of a custom such as that which was found. The only custom of which there is evidence is that if bills approved by the agent are given for the purchase-money the agent guarantees their payment. Nor was there an implication that the agents or any one of them would guarantee the payment of the purchase-money; for an implication imports necessity. If there was a guarantee, the postponement of the date for delivery was a variation of the contract which relieved the guarantors from their liability under the guarantee (*Polak* v. *Everett* (1)).

Sir Edward Mitchell K.C. (with him *Norris*), for the appellant H. G. Hamilton Pty. Ltd. This appellant was never in privity with the respondent and there was no evidence that it was an agent for him at all. Certainly it was not a *del credere* agent, and, unless it was, the action against it must fail. There was no evidence of any custom which would make this appellant liable upon the terms of a contract such as that in the present case. This appellant had no notice of the time for delivery being postponed nor as to when delivery was about to be made, and it is therefore released from the guarantee (*Croydon Gas Co.* v. *Dickinson* (2)).

Magennis, for the appellant Kelly & McDonald, adopted the arguments for the other appellants.

Owen Dixon K.C. (with him *Gorman* and *Moore*), for the respondent. On the evidence the three appellants were co-contractors with the respondent, and they all agreed that they would guarantee the payment of the purchase-money. The postponement of the time for delivery did not operate to release the guarantors. The debt which the purchaser incurred when he took delivery of the sheep was not different in character from the debt which was contemplated

(1) (1876) 1 Q.B.D. 669, at pp. 673, 674. (2) (1876) 2 C.P.D. 46.

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when the contract of sale was made. The postponement of delivery at the request of the purchaser is not a variation of the contract, but is merely a postponement of performance of the contract (see *Thomas Gabriel & Sons* v. *Churchill & Sim* (1); *Levey & Co.* v. *Goldberg* (2); *Hickman* v. *Haynes* (3); *Ogle* v. *Earl Vane* (4)). The position is no different from that which would have existed if the purchaser failed to accept delivery on the due date. The postponement of the date for delivery did not have the effect of postponing the date for payment of the purchase-money. Even if the contract was altered the appellants knew of the change and assented to it.

Ham K.C., *Sir Edward Mitchell* K.C. and *Magennis* in reply.

Cur. adv. vult.

Mar. 23. The following written judgments were delivered :—

KNOX C.J. I have had the advantage of reading the opinion prepared by my brother *Isaacs* in these appeals. For the reasons about to be stated by him, in which I concur, I am of opinion that these appeals should be dismissed.

ISAACS J. This appeal divides itself into three distinct branches, the making of the contract of agency, its interpretation and the release of the agents from any liability incurred.

With respect to the making of the contract, the evidence, when proper business inferences are drawn, leads to the following conclusions :—Rae in August 1925 had about 1,500 ewes for sale. He placed them in the hands of Kelly & McDonald as his agents to sell at 30s. a head. They were unable to effect a sale on those terms. J. E. Dowling & Co. were agents who had a prospective buyer of sheep, but they were cash agents and did not guarantee payment to vendors. Hamilton & Co. were agents who did guarantee vendors. A mutual arrangement was made between the three agents whereby each firm agreed among themselves to contribute

(1) (1914) 1 K.B. 449; (1914) 3 K.B. 1272.
(2) (1922) 1 K.B. 688.
(3) (1875) L.R. 10 C.P. 598.
(4) (1868) L.R. 3 Q.B. 272.

operations in attempting to sell Rae's sheep. To the common agency enterprise Kelly & McDonald contributed the vendor, Dowling & Co. the purchaser, and Hamilton & Co. the promise to guarantee. That was the internal arrangement. But naturally to Rae the transaction was indivisible: he wanted to sell his sheep and, unless he was sure of his purchaser's solvency, to be guaranteed. The ordinary commission, that is, without guarantee, was $2\frac{1}{2}$ per cent, but where in some way the vendor was secured by the agent's guarantee the commission was 5 per cent. Judging by what was said by Dowling & Co.'s representative to Rae, and by all that happened afterwards, the fact appears to be that Dowling & Co. were authorized by the associated firms of agents to communicate with Rae on behalf of all of them, to present to him the agency enterprise as a complete task, but, in order to satisfy him that it would be satisfactorily conducted, Dowling & Co. were to explain to him the several parts intended to be played. Those several parts were, in the end, indicated to Rae partly by words and partly by acts. The mention of Kelly & McDonald indicated that they were moving on Rae's instructions. Dowling & Co., he could see, were providing the purchasers and were to effect the actual sale if possible; and Hamilton & Co. were to do the financing part of the agency. He could also see that for this combined transaction the commission was to be, as regards Rae, an indivisible 5 per cent which, in accordance with the internal arrangements of the agents, would be by them apportioned, so as to give $1\frac{1}{4}$ per cent to Kelly & McDonald, $1\frac{1}{4}$ per cent to Dowling & Co., and $2\frac{1}{2}$ per cent to Hamilton & Co. But above all the clear inference, as a business transaction, is that Dowling in making the agency contract was doing so as the representative and agent of all three; that is, all three promised for the due performance of so much of the agency duties as were still executory. Consequently all three were bound by its terms.

The second question is as to its interpretation: when it was agreed that Hamilton & Co. should "do the financing," what did that mean? Ordinarily that is done by first making the contract of sale in a form which binds the purchaser to give an approved bill, which is then endorsed by the agent. But for some reason, probably because all the agents knew Dowling & Co.'s usual method of dealing,

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that form was not adopted. Still, 5 per cent was charged, which means security to the vendor in some way; and no other meaning can be given in the circumstances to the promise that Hamilton & Co. would do the financing than that they would, as agents, guarantee the solvency of the purchaser. The usage proved is inapplicable, but the evidence clearly shows that 5 per cent commission imports guarantee by the agents. In the result, there was a contract of agency, by which all the three agents undertook that Hamilton & Co. would guarantee the solvency of the purchaser.

The purchaser failed, and, unless relieved, as suggested, by an alteration of the contract, they would all be liable because Hamilton & Co. have failed to secure the purchaser's unpaid liability. The rule of law appropriate to this case is stated by the Privy Council in *Taylor* v. *Bank of New South Wales* (1). If there was an alteration of the contract between Rae and his purchaser as to the date of payment, without the consent of the agents, they would be discharged entirely. Was there a variation of the contract? It is said there was, because the vendor stated in evidence that at the purchaser's request "it was arranged that they would take over the sheep from me on 12th November," and also that, "by some arrangements between vendor and purchasers, the delivery was postponed until 12th November." Now, that is the only evidence on the point. The contract provided peremptorily that delivery was to be given and taken on or before 1st November and that payment was to be made three months after delivery. That is to say, the contract was that payment was to be made not later than three months after 1st November. The contract was in writing, and is one which requires to be in writing by the *Statute of Frauds*. The evidence does not disclose that there was any valid agreement to vary the contract (*Morris* v. *Baron & Co.* (2)). All that can be said of the evidence is that though the *contract* stood unimpaired and though the vendor was always ready and willing to carry it out in its integrity, the purchaser requested a delayed performance as to delivery, which was acceded to at his request. The vendor, being ready and willing to deliver, could require the purchaser to accept by 1st November and to pay within three months. If at the purchaser's request the

(1) (1886) 11 App. Cas. 596, at pp. 602-603. (2) (1918) A.C. 1, at p. 18.

delivery was postponed, it was, unless the contrary were shown, at the purchaser's risk without prejudice to the vendor's right to be paid as if delivery were accepted at due date. The contract standing intact, the position was this:—If, notwithstanding the arrangement, the purchaser had failed on 12th November to take possession, the vendor, as shown in *Morris* v. *Baron & Co.* (1) and *British and Beningtons Ltd.* v. *North-Western Cachar Tea Co.* (2), could have sued him on the written contract as made, which shows it was not varied. *Ogle* v. *Earl Vane* (3) established "the distinction between a substitution of one agreement for another and a voluntary forbearance to deliver at the request of another" (per *Lindley* J. in *Hickman* v. *Haynes* (4)), and the party requesting forbearance does so "at his own risk" (*Hartley* v. *Hymans* (5) and *Levey & Co.* v. *Goldberg* (6)). Any other conclusion would, as Viscount *Haldane* pointed out in *Morris* v. *Baron & Co.*, lead to injustice.

This defence failing, the appeal should be dismissed.

HIGGINS J. So far as the defendants H. G. Hamilton Pty. Ltd. and Kelly & McDonald are concerned, it is, to my mind, clear that no privity of contract has been established as between either of them and Rae, the vendor. Whatever arrangements they had between themselves and with the other defendant, J. H. Dowling & Co., they were not agents of Rae; and, *a fortiori*, they were not his *del credere* agents. According to the contract for sale of the sheep to Dowling Brothers (H. J. Dowling), the agent for the sale was J. E. Dowling & Co. (J. E. Dowling), and the only agent. The contract was made expressly by J. E. Dowling & Co.—"J. E. Dowling & Co. acting as agents for Mr. J. E. Rae . . . have this day sold to Mr." (*sic*) "Dowling Bros."; and J. E. Dowling & Co. sign the contract as "agents for the vendor." After a careful perusal of the evidence, I can find nothing to contradict or qualify the position set forth in this written document, even if verbal evidence were admissible on the subject. In coming to general conclusions as to the facts, it seems to be overlooked that all the defendants objected

(1) (1918) A.C. 1.
(2) (1923) A.C. 48.
(3) (1868) L.R. 3 Q.B. 272.
(4) (1875) L.R. 10 C.P., at p. 606.
(5) (1920) 3 K.B. 475.
(6) (1922) 1 K.B. 688.

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to the evidence of the conversations, that the objections were reserved for after-determination, and that most of the objections were justified. No doubt there is evidence that these defendants joined in the efforts to retrieve the situation when the transaction of sale was in danger of collapse; but such efforts were only natural for men who were to share the commission of 5 per cent payable by the vendor, and who could not foresee how the Courts would regard their responsibilities. I can find nothing in their conduct which is not fully consistent with the position indicated by the words of the written contract, that J. E. Dowling was the only agent of Rae, the vendor, and that the other defendants were in privity with J. E. Dowling and not with Rae. Far too much importance has been given to the fact that on the corner of the written contract there appeared, in pencil, the names "H. G. Hamilton & Co. $2\frac{1}{2}$ p.c. —Kelly and Macdonald $1\frac{1}{4}$ p.c.—J. E. Dowling & Co. $1\frac{1}{4}$ p.c." I accept, of course, the fact as uncontested that these words and figures did once appear there, though they are now, in the original exhibit, obliterated; and, as Rae says, they were put there by Glide at the interview when the contract was signed. But they were not part of the contract, even grammatically; they were evidently a mere memorandum for information or in aid of memory. Glide clearly did not regard them as being part of the contract, for when he posted to Rae a copy of the contract he did not in the copy insert the figures.

But this answer to the claim against those whom I may call the sub-agents of J. E. Dowling & Co. is not an answer to the claim against J. E. Dowling as the agent of Rae; and it is necessary to examine par. 2 of the amended statement of claim further. It is based on the fact that the contract stipulates for a commission of 5 per cent less 3d. per head of sheep; and on this allegation in the particulars given under par. 2: "It was at all times a usage of the stock-selling business known to the plaintiff and to the defendants and intended by them and each of them to take effect on the transaction sued on that the additional agent's charge over and above the ordinary selling commission of $2\frac{1}{2}$ per cent was for a *del credere* commission." It should be noticed that par. 2 does not rest on any allegation that Hamilton & Co. made a promise to Rae

apart from this alleged usage. If there was no such usage, there can be no judgment for the plaintiff under par. 2; and the plaintiff must be confined to his particulars. But if the statement made by Glide to Rae that Hamilton & Co. were to do the financing can be used by the plaintiff at all, it shows that any usage which would bind the agent Dowling was not to bind him in this case, as Hamilton & Co., not Dowling, were to guarantee the payment. The usage was excluded, because it was inconsistent with the expressed intention of the parties.

But, in my opinion, the conditions under which the Courts can give effect to a usage or custom have not been satisfied, in several respects. It is to be observed that the alleged usage is not, in the particulars under par. 2, confined to transactions in the Wimmera district; the usage is said to be a usage "of the stock-selling business," and it certainly has not been shown to be generally in force in that business. Witnesses have been called by the plaintiff to prove the alleged usage; and they have successfully proved, probably, that in the Wimmera there are very few, if any, sales for cash; all are on credit. Assuming their evidence to be admissible at all, they have not proved any usage in the technical sense, but they have proved that in making arrangements between vendors and agents it is very common for the agent to charge $2\frac{1}{2}$ per cent more as commission if he endorses bills given by purchaser to vendor. But, as the witnesses say, again and again, it all depends on the arrangement made between vendor or purchaser and agent. As Mr. Young, stock and station agent of Horsham, says, if the purchaser requires to get an endorsement for the bill, he says "Are you prepared to endorse my bill? And under what conditions will you do it?" "In some instances I say 'I will do it and charge you $2\frac{1}{2}$ per cent.'" But he does not back the bill until satisfied that the purchaser is in a satisfactory position: "we have no responsibility unless we accept that man's approved bill"; that is, approved by the agent. "It is a matter of arrangement in each case." Mr. Young was asked, "And if it was intimated to the vendor that one of the agents was only getting $1\frac{1}{4}$ per cent commission, would not that be an intimation to him that that agent was not going to accept any responsibility for finance?"; and he answered, "I

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could not say that; that is a matter of arrangement amongst themselves. I could not say." It is sufficient to say that what the plaintiff has succeeded in proving is not a usage or custom in the legal sense, such as adds an unexpressed incident to a given contract, but merely what, in the business, is an arrangement very commonly made. Moreover, here the contract does not provide for bills or mention bills in any way.

In my opinion the claim under par. 2 fails.

As for par. 3, it concerns J. E. Dowling & Co. only. It alleges that Dowling *warranted* that he would obtain for the plaintiff a bill for the amount of the purchase-money endorsed by Hamilton & Co. and/or by the said Dowling and/or by the said Kelly & McDonald. There is no evidence of any such warranty. The only difficulty on the subject arises from the loose practice which seems to have crept into pleadings in recent times of averments in such a form as in the statement of claim, and, indeed, in the defences.

It is unnecessary for me in view of the position, to discuss the question which has been raised by the defence as to the effect of Rae extending the time for delivery of the sheep from 1st to 12th November.

GAVAN DUFFY J. concurred in the judgment delivered by *Higgins* J.

POWERS J. In this case the learned Judge of the State Court found "that the plaintiff did employ the three agents" (the defendants) "and that they must be treated as having acted as his agents for a 5 per cent commission—a sharing commission it is called in the written document—a 5 per cent commission on terms that they would guarantee payment." I do not find that the commission is called in the *sale note* a sharing commission, but the names of the three agents and the part of the 5 per cent commission each of the agents was to receive were set out in the sale note. With that qualification I hold the learned Judge was justified on the evidence—including exhibits—in finding as he did.

The sheep were first placed by the plaintiff in the hands of Kelly & McDonald for sale. As they had not any purchaser, they arranged

to act with another defendant, Hamilton & Co., in the sale of the sheep. Later on they agreed to act with Dowling & Co., the other defendant, as co-agents and agreed to divide a 5 per cent commission. Dowling & Co. found the purchaser and effected the sale on behalf of the three, setting out in the sale note the manner in which the three co-agents were to divide the commission. Before the plaintiff would authorize the agents to sell the sheep in question he asked "who was to do the financing," and he was told that Hamilton & Co. (one of three agents) would do it; and because they would do it they were to receive $2\frac{1}{2}$ per cent of the 5 per cent commission, and the other two would divide the other $2\frac{1}{2}$ per cent. It is also clear that, although Dowling & Co. effected the sale on 21st August 1925 and signed the sale note as agents for the vendor, the three agents were co-agents in the sale of the sheep and the financing of the transaction. The three agents, on the evidence, were informed of the sale by Dowling & Co., and on 26th August, five days after the sale, the plaintiff was informed by letter that the co-agents had agreed to a condition imposed by the vendor, namely, that the 5 per cent commission would be reduced by 3d. a head on the sheep sold on condition that he agreed to take 28s. instead of 28s. 3d. per head for the sheep. The vendor, on that condition, accepted 28s. a head. In that way the co-agents confirmed the sale by Dowling & Co. at the 5 per cent commission. Later on Dowling & Co. submitted to each of their co-agents a copy of the sale note of the sheep in question, showing on such copies their names as agents for the plaintiff and not Dowling & Co. only. No objection was made by any of the co-agents to the terms of the sale note or to the commission to be paid. The sale note itself did not contain any clause guaranteeing the payment of the purchase price of the sheep by the agents or any of them; but the learned Judge found (and the evidence submitted justified that finding) that in the Wimmera district—where the sheep were sold—according to the ordinary course of dealings, and also according to usage proved by the witnesses called, it was always recognized by agents for vendors of sheep that there was an implied contract that if an agent charged $2\frac{1}{2}$ per cent commission he did not guarantee payment by the purchaser of the sheep, but that if 5 per cent commission

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were charged the agent guaranteed payment by the purchaser for the sheep purchased. It was, however, also implied that, if, after inquiries were made by the agent, *before the sheep were delivered* he decided he would not guarantee the purchase-money and he informed the vendor *before delivery of the sheep* that he would not do so, he was released from the implied undertaking to guarantee the payment. That course of trade, usage or custom was not denied by the defendants.

In this case the sale was only made after the undertaking had been given that the transaction was to be financed. The agents in this case did not make any inquiries as to the financial position of the purchaser until after the sheep were delivered on 12th November 1925—two and a half months after the sale note was signed; and they did not inform the plaintiff before the delivery of the sheep on 12th November that they would not guarantee the payment. The purchaser sold some of the sheep before the agents took any steps to protect the plaintiff and later on became bankrupt. The plaintiff has lost the price of the sheep, £1,930 17s. 9d.

The contract form was an unusual one. It gave the purchaser three months for payment, and did not expressly require him to give a bill or promissory note for the purchase price of the sheep; but according to the course of dealing in that district—not denied by the defendants—it was implied that the purchaser would give a bill or promissory note which would be endorsed by the agent and handed over to the vendor, unless before delivery the vendor was notified that the agent would not guarantee the payment. The agents did not obtain any bill from the purchaser before delivery, and did not object to the delivery or take any steps to protect the vendor. After the delivery of the sheep, namely, on 26th November 1925, the contracting agent, Dowling & Co., asked for the number of sheep delivered to enable them to arrange a settlement. This information was supplied on the same date, and particulars were given as to the promissory note to be received by the plaintiff for the purchase price of the sheep. Four days after, namely, on 30th November, or eighteen days after the delivery of the sheep, Hamilton & Co. appear to have made inquiries from the bank as to the financial position of the purchaser. That fact confirms the information

given by the co-agent that Hamilton & Co. were the agents who agreed as between themselves to guarantee the money.

On 12th December Dowling & Co., the contracting agents, first wrote denying any liability for guaranteeing the payment of the purchase-money and referred the plaintiff to Hamilton & Co. as the agents who had agreed "to take up or fix up the purchaser's bill." That letter recognized the implied undertaking to get a bill and guarantee the price. Correspondence and interviews followed, but from 12th December 1925 the co-agents repudiated any liability by any one of them to guarantee the purchase price. Dowling & Co. and Kelly & McDonald insisted that Hamilton & Co. had to guarantee the purchase price, and Hamilton & Co. insisted that Dowling & Co. had to do so and that Dowling & Co. had not any authority to undertake that Hamilton & Co. would guarantee the amount. The plaintiff properly, I think, claimed that he had nothing to do with any private arrangements between the parties as to who would, between themselves, be liable. The sale was by the three agents on a 5 per cent commission, and they were all liable to him. Further, he was specially assured before he sold the sheep that the transaction would be financed. Although the co-agents agreed to assist the plaintiff to try and get the sheep back—which he failed to do—they refused to guarantee the payment by the purchaser or to pay the plaintiff; and the purchaser failed to pay and became bankrupt. This action was subsequently brought.

The defendants did not, prior to the commencement of the action, repudiate liability as sureties on the ground that the date for the delivery of the sheep was postponed by the vendor from 1st November to 12th November without any notice to or consent by the guarantors. The defendants in the action, however, in addition to other defences, press the defence that, assuming they were jointly liable as sureties or guarantors, they were relieved from that liability by the act of plaintiff in extending the date for payment until 12th February 1926 instead of the 1st February 1926, without any notice to, and without the assent or even the knowledge of, the defendants that the date of delivery was to be altered or was altered. By extending the date of delivery it was alleged the date for payment was extended for eleven days. Evidence was given that such an

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alteration would be a very material alteration in dealing with sheep where the prices frequently differed greatly in a few days. The question, therefore, for the Court to decide is: assuming that the agents acted jointly and were liable to the plaintiff as guarantors up to 1st November 1925, were they relieved from that liability by the act of the plaintiff in verbally extending the time for delivery of the sheep in the manner mentioned? It was claimed, and I think rightly, that mere delivery of the sheep on a different date, if it did not extend the time for payment of the extended debt, would not release the guarantors or sureties. In this case the purchaser and vendor did verbally agree to the postponement of the date of delivery, and, if that legally varied the contract, it did, in my opinion, extend the time for payment by eleven days at least. I think this is clear from the contract note itself. The words used in the contract note were "terms of payment three months *from delivery*," and, later on, "delivery to be given and taken . . . *on or before* 1st day of November 1925." The plaintiff's evidence clearly shows that he did agree verbally to postpone the delivery and that it was postponed. He said:—"About the end of October I received certain communications from the purchaser arranging for the delivery of the sheep, and eventually it was arranged that they would take over the sheep from me on 12th November. On 12th November I attended with one of the purchasers and gave him 1,367 sheep." In the cross-examination of the plaintiff this passage occurs:—"Q.—Delivery of the sheep were to be given on 1st November? A.—Yes, that is correct. Q.—By some arrangement between you and Dowling Brothers" (the purchaser not the agent) "the delivery was postponed until 12th November? A.—Yes, that is correct."

The question is whether such a verbal extension of the time fixed in a written agreement (for the sale of goods) for payment of money guaranteed by an agent without the consent or even the knowledge of the surety releases the defendants in this action, assuming they are otherwise liable. I think that if the contract had been legally varied in writing the claim would have been a good one, but it appears that the time for delivery was extended by a verbal arrangement which did not cancel the contract or legally vary it. The purchaser was still bound by the original

contract. In the circumstances the original contract was not varied. Such a new contract by variation would have had to be in writing. This contention has been definitely settled by the judgments in *Morris* v. *Baron & Co.* (1) and in the many cases referred to in those judgments. In that case Viscount *Haldane* said (2): "What was therefore decided" in *Noble* v. *Ward* (3) "was merely that where parties enter into an invalid contract, which purports to vary, and only to that extent to supersede or rescind, an earlier written contract" (which must be in writing), "the later one does not operate validly." The other learned Lords concurred in that statement. Lord *Parmoor*, in the same case, said (4):—"'The principle as laid down by *Willes* J., who delivered the judgment of the Court, in *Noble* v. *Ward* (5), is where there is alleged to have been a variation of a written contract by a new parol contract, which incorporates some of the terms of the old contract, the new contract must be looked at in its entirety, and if the terms of the new contract when thus considered are such that by reason of the *Statute of Frauds* it cannot be given in evidence unless in writing, then being an unenforceable contract it cannot operate to effect a variation of the original contract. That principle is to be found in a number of cases, which I need not refer to in detail' (6). After referring to the cases of *Goss* v. *Lord Nugent* (7), *Stead* v. *Dawber* (8), *Giraud* v. *Richmond* (9), *Marshall* v. *Lynn* (10) and *Stowell* v. *Robinson* (11), the learned Judge continues (12): 'Those cases show that whenever the parties vary a material term of an existing contract they are in effect entering into a new contract, the terms of which must be looked at in their entirety, and if the new contract is one which is required to be in writing but is not in writing, then it must be wholly disregarded and the parties are relegated to their rights under the original contract.' Unless the principle is maintained that it is not admissible to vary the terms of a contract in writing by a subsequent parol contract, which in itself would be required to be in writing

(1) (1918) A.C. 1.
(2) (1918) A.C., at p. 18.
(3) (1867) L.R. 2 Ex. 135.
(4) (1918) A.C., at p. 39.
(5) (1866) L.R. 1 Ex. 117; (1867) L.R. 2 Ex. 135.
(6) *Williams* v. *Moss' Empires Ltd.*, (1915) 3 K.B. 242, at pp. 246-247 (per *Shearman* J.).
(7) (1833) 5 B. & Ad. 58.
(8) (1839) 10 Ad. & E. 57.
(9) (1846) 2 C.B. 835.
(10) (1840) 6 M. & W. 109.
(11) (1837) 3 Bing. N.C. 928.
(12) (1915) 3 K.B., at p. 247.

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to be enforceable, the safeguards provided either by the *Statute of Frauds* or the *Sale of Goods Act* 1893 might be practically evaded and rendered of little value as a protection against fraud or to ensure certainty." The cases referred to in *Morris* v. *Baron & Co.* (1) include *Noble* v. *Ward* (2), *Hickman* v. *Haynes* (3) and *Plevins* v. *Downing* (4).

I hold, following the decisions in the above cases, that no legally binding arrangement had been made to extend the time for payment of the purchase-money, and therefore that the sureties were not relieved from liability by the verbal arrangement to deliver the sheep on 12th November instead of on or before 1st November 1925.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Blake & Riggall*; *A. G. Roberts & Dawson*; *Shaw & Turner.*

Solicitors for the respondent Rae, *J. Allen Anderson & Co.*

B. L.

(1) (1918) A.C. 1.
(2) (1866) L.R. 1 Ex. 117; (1867) L.R. 2 Ex. 135.
(3) (1875) L.R. 10 C.P. 598.
(4) (1876) 1 C.P.D. 220.