[HIGH COURT OF AUSTRALIA.]

SINCLAIR, SCOTT & COMPANY LIMITED . APPELLANT; PLAINTIFF,

AND

NAUGHTON . . . . . RESPONDENT. DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Sept.* 26, 27.

MELBOURNE, *Nov.* 7.

Knox C.J., Isaacs, Rich, Starke and Dixon JJ.

Vendor and Purchaser—Crown leasehold—Terms of sale—Signed memorandum—Whether concluded contract—Statute of Frauds (29 *Car.* c. 3).

The appellant Company and the respondent were in negotiation for the sale by the appellant to the respondent of a Crown leasehold station property and of cattle. Three directors of the Company and the respondent attended simultaneously at the office of the Company's agent for sale. After certain written suggestions were communicated between the parties, a discussion took place and points which had been raised were settled. As each was agreed on it was noted by one of the agent's men. The result was a memorandum which contained short notes of the terms of the arrangement, but did not comprise all the detail necessary in a contract to meet such a sale as that contemplated. Then a document was signed by the respondent by which he expressed himself as handing to the agent portion of deposit on purchase of the property for a specified price "on terms as arranged between the vendors and the purchasers." The document concluded with an agreement by the respondent "to sign the contract for sale as soon as the same is available." Subsequently the respondent conducted himself for a time as if a bargain had been made, but he repudiated the transaction before any formal contract was signed.

Held, by *Knox* C.J., *Rich*, *Starke* and *Dixon* JJ. (*Isaacs* J. dissenting), that the execution of a further contract was a condition or term of the bargain, and that no enforceable contract had been entered into.

Von Hatzfeldt-Wildenburg v. *Alexander*, (1912) 1 Ch. 284, applied.

Held, by *Knox* C.J., *Rich* and *Dixon* JJ. (*Isaacs* J. dissenting), that the "terms as arranged" mentioned in the document signed by the agent referred to the whole arrangement made at the interview between the parties and not merely to written terms, and that there was no sufficient memorandum in writing to satisfy the *Statute of Frauds*.

Judgment of the Supreme Court of South Australia (*Piper* J.): *Sinclair Scott Ltd.* v. *Naughton*, (1929) S.A.S.R. 245, affirmed.

APPEAL from the Supreme Court of South Australia.

An action was brought in the Supreme Court of South Australia by Sinclair, Scott & Co. Ltd. (the vendor) against William Naughton (the purchaser) for specific performance of an alleged agreement to purchase a pastoral property in Queensland known as Mt. Leonard Station, together with stock and plant, and to take over a contract held by the plaintiff for the purchase of certain Calton Hills cattle and to pay interest thereon. The plaintiff alleged that the terms of the agreement were contained in two memoranda dated 18th December 1926 (exhibit E) and an undated document (exhibit D). The plaintiff claimed specific performance of the agreement and payment of the purchase price and interest thereon to date of judgment; alternatively the plaintiff claimed damages for breach of contract.

The defences, so far as material, were that no concluded agreement had been entered into, and that there was no memorandum in writing sufficient to satisfy the *Statute of Frauds* or the *Sale of Goods Act* 1895 (S.A.). The defendant counterclaimed the sum of £1,000 paid by him to the plaintiff as a deposit on the signing of the alleged agreement.

In the Supreme Court *Piper* J. held that no concluded contract had been entered into between the parties. He, therefore, dismissed the action and gave judgment for the defendant on the counterclaim for £1,000:—*Sinclair Scott Ltd.* v. *Naughton* (1).

From this decision the plaintiff now appealed to the High Court.

The material facts appear in the judgments hereunder.

Thomson (with him *Stevens*), for the appellant. The trial Judge did not take account of surrounding circumstances. Where it is a question whether there is a concluded contract or mere negotiation,

(1) (1929) S.A.S.R. 245.

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the whole of the conduct at material times must be looked at: it is not merely a matter of construction (*Rossiter* v. *Miller* (1); *Barrier Wharfs Ltd.* v. *W. Scott Fell & Co.* (2); *Niesmann* v. *Collingridge* (3)).

[ISAACS J. referred to *Inglis* v. *Buttery* (4).]

Even if all outside circumstances be excluded, as a matter of sheer construction there is a concluded contract (*Howard Smith & Co.* v. *Varawa* (5); *Farmer* v. *Honan and Dunne* (6)).

[Counsel for the respondent were now asked to address the Court on the question arising under the *Statute of Frauds*.]

Cleland K.C. (with him *Sutherland*), for the respondent. It is impossible to arrive at the "terms arranged" referred to in the document dated 18th December 1926 (exhibit E) without parol evidence. That document, the only material one signed by the respondent, is in no way connected with the other documents. For a contract to be enforceable, there must be internal evidence on the face of the signed memorandum either directly or necessarily incorporating another document.

[DIXON J. Is it not ambiguous whether the reference is to written or oral terms, and, if so, is not parol evidence admissible? (See *Long* v. *Millar* (7); *Stokes* v. *Whicher* (8); *Thomson* v. *McInnes* (9).)]

No, because the reference is to "terms," and not to a document. An agreement to make an agreement is not recognized by the law (*Von Hatzfeldt-Wildenburg* v. *Alexander* (10)).

Thomson, in reply. For the purposes of the *Statute of Frauds*, where there is in the signed memorandum a reference to something else, evidence may be given to show that something else is parol or in writing and, if in writing, identifying the writing (*Stokes* v. *Whicher* (8); *Oliver* v. *Hunting* (11); *Long* v. *Millar* (7); *Cave* v. *Hastings* (12); *Boydell* v. *Drummond* (13); *Ridgway* v. *Wharton* (14); *Harvey* v. *Edwards Dunlop & Co.* (15)).

(1) (1878) 3 App. Cas. 1124.
(2) (1908) 5 C.L.R. 647.
(3) (1921) 29 C.L.R. 177.
(4) (1878) 3 App. Cas. 552.
(5) (1907) 5 C.L.R. 68.
(6) (1919) 26 C.L.R. 183.
(7) (1879) 4 C.P.D. 450.
(8) (1920) 1 Ch. 411.
(9) (1911) 12 C.L.R. 562.
(10) (1912) 1 Ch. 284.
(11) (1890) 44 Ch. D. 205.
(12) (1881) 7 Q.B.D. 125.
(13) (1809) 11 East 142; 103 E.R. 958.
(14) (1857) 6 H.L.C. 238; 10 E.R. 1287.
(15) (1927) 39 C.L.R. 302.

[ISAACS J. referred to *Baumann* v. *James* (1).

[STARKE J. referred to *Thirkell* v. *Cambi* (2).]

If the appellant can call this evidence, it clearly shows that exhibit D is the " terms arranged," and if the appellant must show a connecting link on the face of the documents there is much of importance in the wording of exhibits E and D. If the Court is against the appellant on the *Statute of Frauds*, he is not liable to repay the £1,000 (*Monnickendam* v. *Leanse* (3); *Thomas* v. *Brown* (4)).

Cleland K.C. referred to *Coope* v. *Ridout* (5) and *Chillingworth* v. *Esche* (6).

Cur. adv. vult.

Nov. 7.

The following written judgments were delivered :—

KNOX C.J., RICH AND DIXON JJ. This is an appeal by the plaintiff in a vendor's action for specific performance. *Piper* J., who heard the action, considered that the transaction was not a concluded contract but a provisional agreement intended to become binding when, and not before, a more formal instrument was prepared, agreed upon, and executed. Accordingly he dismissed the plaintiff's claim, and gave judgment for the defendant upon his counterclaim, for £1,000, the amount paid in respect of the deposit. The subject of the transaction was a leasehold cattle station called " Mt. Leonard," situated in South-Western Queensland close to the South Australian border. It was to be a " walk-in-walk-out " sale, and the price for the concern was £24,000, of which £7,000 was attributed to the leases, £3,000 to the plant and some horses, and £14,000 to the station cattle, 6,000 in number. An additional 1,060 cattle, called " Calton Hills " cattle, which the plaintiff had acquired just before the sale, were to be taken over at their purchase price of £5 10s. per head, a further sum of £5,830.

The plaintiff's agents, Dalgety & Co. Ltd., furnished the defendant with particulars of the station, of the price sought and the terms

(1) (1868) 18 L.T. 424.
(2) (1919) 2 K.B. 590.
(3) (1923) 39 T.L.R. 445.
(4) (1876) 1 Q.B.D. 714.
(5) (1921) 1 Ch. 291.
(6) (1924) 1 Ch. 97.

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offered; and after some correspondence the defendant caused an inspection to be made on his behalf. The inspection took place at the beginning of December 1926, and after some further communications with Dalgety & Co. Ltd. the defendant came to Adelaide to discuss the matter with them there. He arrived on Saturday 18th December and went at once to the office of Dalgety & Co. Ltd., where three directors of the plaintiff Company also attended. The directors remained in one room while the defendant went to another with two members of Dalgety & Co.'s staff. There he put forward proposals with respect to the date of delivery, the proportion of cash to be paid on account of the cattle, the rate of interest on unpaid purchase-money, the ascertainment of the numbers of the cattle by mustering or otherwise, the limitation of the time within which the plaintiff might brand cattle, the removal of the cattle by the defendant and the payment of a price for cattle so removed, the adjustment of the rates and taxes, and the employment of the plaintiff's station manager. A note of these proposals was made and taken to the plaintiff's directors, who then made their suggestions upon these and other topics. A similar note was made of their suggestions and taken across to the defendant for his consideration. He proceeded to make counter-suggestions, which were being noted down when one or more of the plaintiff's directors came across to the room where the defendant was. They were called into the room and a discussion began in which the points that had been raised were settled. As each was agreed upon, the result was noted upon a fourth memorandum by one of Dalgety & Co.'s representatives. The following is a copy of the notes which he made:—"Delivery if bang tail muster 15th April 1927. Otherwise 1st April 1927. Price £10,000 for leases and plant. Leases to be held by vendors until possession is given and taken. Plant and horses £3,000 (300 horses £2 per hd.). Price for 6,000 cattle £14,000. Terms for leases, 1/3rd cash. Balance 12 months, interest 6½%. Leases to remain in vendors' names until completion of deal. Terms—Stock—terms for station cattle—1/3rd cash, balance in 12 months at 6½%. If in the event of purchaser removes any cattle before end of 12 mos., all males to be paid for at the rate of £5 p. head and females at £3 p. head. Calton Hills cattle to take over to be taken over by the purchaser at the price paid for by the vendor. Station to be under

the supervision of the present manager until possession is given and taken. Purchaser has the right to pay off the whole at any time during the 12 months at 6½ %. Subject to consent of Commissioner. Vendors have right to brand until 31st January 1927. Rates Rents to be adjusted." Some discussion then took place as to the preparation of a contract of sale by solicitors who were to be instructed by the plaintiff. Dalgety & Co.'s representative wrote out two memoranda in the form of letters, which, when completed by signing, were as follows:—" Adelaide, 18th December 1926 [South Australian 1s. duty stamp]. Messrs. Dalgety & Co. Ltd., Adelaide. Dear Sirs—W. N. & Co.—We/I hand you herewith £1,000 pounds being portion of deposit on purchase of pastoral property known as Mt. Leonard Station in State of Queensland together with stock and plant for the price of £24,000 on terms as arranged between the vendors and the purchasers and we/I agree to sign the contract for sale as soon as same is available.—Yours faithfully, Wm. Naughton & Co.—Witness, Geo. F. Bruce Coulter. I confirm that the sale has been made by Messrs. Dalgety & Co. Ltd. as above.—For Sinclair, Scott & Co. Ltd., S. B. Sinclair." "Adelaide, 18th December 1926 [South Australian 1s. duty stamp]—Messrs. Sinclair, Scott & Co. Ltd., Mt. Leonard Stn., Queensland. Dear Sirs, W. N. & Co.—We/I agree to take over your contract for purchase of Calton Hills cattle plus 7% interest to date of delivery.—Yours faithfully, Wm. Naughton & Co." The alteration from " I " to " we " was made at the defendant's request because he was undecided whether he would form a company to complete the purchase. The defendant returned that day to Melbourne, and he and Dalgety & Co. Ltd. began at once to correspond with one another for the purpose of carrying the sale into effect. He commenced by telling them that he might form a company of which his family and another person would be members, he being a guarantor only. They responded with " a sketch of the different matters in connection with the agreement made between Sinclair, Scott & Co. and yourself regarding the purchase of Mt. Leonard." He wired that he was posting a cheque for " £500 deposit leases," but this he failed to do. In January they wrote: " We enclose herewith copy of agreement as drawn up by Messrs. Sinclair, Scott & Co.'s solicitors, which we would be glad if you will

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peruse and fill in the names of the purchasers, for which you will see we have left a blank, and return to us, the purchase to be guaranteed by you as arranged." But a week afterwards they sent him copies of a contract which " after consultation with Messrs. Sinclair, Scott's solicitors . . . was drawn up as between you personally and the vendors." This document, as might have been expected, in many particulars went beyond the matters upon which the parties had agreed on 18th December 1926. Beside clauses relating to rescission and resale upon default in payment of the balance of purchase-money, and to requisitions upon title, it contained provisions dealing with the disposal or removal of plant and buildings, the payment of a high rate of interest (10 per cent) in the event of default in completion, insurance, easements, the payment of costs by the purchaser, the assumption by the defendant of the benefit and burden of certain agreements, the time when and the conditions under which the purchaser might pay off purchase-money before it became due, and some details about stores and other matters, and it also included an arbitration clause. The defendant in the meantime began to complain, unjustly as it has been found, that he had been misled in various particulars and on 4th February 1927 he repudiated the transaction. In stating his opinion that no binding contract had been made between the parties *Piper* J. said:—" Upon consideration of the cases and having regard to the nature and importance of the transaction, and the language of the letter signed on 18th December, I think the parties regarded a more complete contract as essential and I feel bound to hold that what was agreed was subject to the preparation and execution of a further document which would be the complete contract." We agree in this conclusion.

We do not think the parties gave their final consent to terms by which they were content to be bound as a complete and exhaustive statement of their rights and liabilities. The transaction was one of some magnitude. It related to the transfer of an undertaking as a going concern, and unless the parties were entirely inexperienced they must have known that many subsidiary questions would require attention and arrangement before such a piece of business could be satisfactorily carried through. They could scarcely have regarded the sale of Queensland Crown leases as a dealing needing no special

provisions or investigations. But, naturally enough, what the parties had done was to discuss and agree upon the matters of financial importance and one or two obvious practical questions. In these circumstances we think it is no mere accident that the letter of 18th December contains no express words of agreement except an agreement "to sign the contract for sale as soon as same is available." The form which the letter takes reflects the minds of the parties. It first narrates the payment of the £1,000 as part of the deposit; it next describes the general character of the transactions in relation to which it was paid, namely, the purchase of the station at the specified price and on the terms as arranged between the vendors and the purchasers, and then proceeds to state what the tenor of the promise is, namely, to sign the contract of sale. We think, as a matter of construction, that the execution of the further contract was a condition or term of the bargain and not a mere expression of the desire of the parties as to the manner in which a transaction already agreed to will in fact go through (*Von Hatzfeldt-Wildenburg* v. *Alexander* (1)). There was not a final consent of the parties such that no new term or variation could be introduced in the formal document to be prepared (*Pollock* on *Principles of Contract*, 8th ed., p. 47). On the contrary the formal contract might contain other terms than those which appear from or are alluded to in the letter, which expresses an agreement to make an indeterminate contract. (See *Rossdale* v. *Denny* (2), per Lord *Sterndale* M.R., and *Chillingworth* v. *Esche* (3), per *Sargant* L.J.) The case is not one in which the parties were content to be bound immediately and exclusively by the terms which they had agreed upon whilst expecting to make a further contract in substitution for the first contract, containing, by consent, additional terms. Such a possible case is mentioned by Lord *Loreburn* in *Love & Stewart Ltd.* v. *S. Instone & Co.* (4), and perhaps it is contemplated by Mr. *Ameer Ali* in *Harichand Mancharam* v. *Govind Luxman Gokhale* (5), when he speaks of the subsidiary terms that a vakil might consider necessary for insertion in a formal document, although his allusion may be to terms implied because usual. We think that the preliminary agreement of the

(1) (1912) 1 Ch., at p. 289.
(2) (1921) 1 Ch. 57, at p. 67.
(3) (1924) 1 Ch., at p. 114.
(4) (1917) 33 T.L.R. 475, at p. 476.
(5) (1922) L.R. 50 Ind. App. 25, at p. 31.

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plaintiff and defendant was directed to the making of a formal contract which alone was to constitute and regulate the sale and purchase of the station.

It follows that a contract binding in point of law was not concluded.

We have not overlooked the fact that the defendant after 18th December for some time conducted himself as if he considered a bargain had been made, but we think this is a matter which affords little or no assistance in forming an opinion upon the question of construction to which we have given our answer. Upon this subject it is enough to refer to the observations made by Lord *Parker* and Lord *Sumner* in *Love & Stewart Ltd.* v. *S. Instone & Co.* (1), when similar considerations were relied upon. Nor do we think any assistance is to be derived from an examination of the commercial propriety or impropriety of the defendant's conduct in retreating from the transaction when he did.

What we have said is enough to dispose of the appeal. But we think it right to add that, in our opinion, the plaintiff's action ought in any case to fail, because the requirements of the *Statute of Frauds* are not satisfied. The plaintiff's contention that the signed writing of 18th December 1926 was sufficiently connected with unsigned writings, and that these together contained all the terms of the agreement fails, we think, upon the facts.

The "terms as arranged between the vendors and purchasers" to which this document refers are shown by the facts to be terms orally agreed on, and the reference is to the whole arrangement made at the interview, and not simply to the terms noted upon the fourth memorandum. Moreover, this memorandum does not contain a complete statement of those terms. It does not state that the sale is "upon a walk-in-and-walk-out basis." It does not state that the defendant's option to require a bang tail muster was exercisable only before 31st January 1927. It does not state the true arrangement about the manager, nor, indeed, state any part of it intelligibly. More important still there is no statement of the arrangement for the deposit. To overcome this last difficulty it was contended that a letter written by the plaintiff to the defendant on 26th November

(1) (1917) 33 T.L.R., at pp. 476, 477.

1926 in the course of the negotiations leading up to the discussions of 18th December 1926 should be considered as covered by the reference to the "terms as arranged." In point of fact we cannot agree that this phrase in the document of 18th December 1926 was intended so to refer to the letter of 26th November; but, even if it did so, the difficulty would not be overcome. The letter of 6th November 1926 expresses the willingness of the vendor to accept 10 per cent deposit, and the balance of the purchase-money on completion of delivery. This is inconsistent with the terms ultimately arranged by which one-third was to be paid in cash, and the balance in twelve months. The inconsistency cannot be reconciled by anything but oral evidence showing the true terms actually agreed upon.

For these reasons we think that the requirements of the *Statute of Frauds* were not satisfied.

We think that the appeal should be dismissed with costs.

ISAACS J. Only two questions were argued on this appeal. They are of considerable importance, because the circumstances giving rise to them are typical of many transactions of magnitude. One was whether, on the true interpretation of the signed documents, the parties had arrived at a concluded bargain, or had stopped while still in negotiation only. That is to say, whether the documents, properly construed, constituted a bargain of sale and purchase, containing a provision to reduce the briefly expressed terms of agreement to a formal contract, or by the reference to a contract to be signed indicated that no sale or purchase had yet been made. The other was whether, assuming there was a concluded bargain, it was evidenced as required by the *Statute of Frauds*.

In my opinion, the Court, in the proved circumstances of this case, having regard not merely to the justice of the present cause, but also to the science of the law and the business community generally, who expect honest bargains to be carried out as business men would understand them, should uphold the appellants' claim to enforce the contract. Indeed, as will presently be seen, the respondent's claim to have his deposit returned on the ground that no contract exists, is a self-confessed fraud.

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Perhaps I may with advantage at once make one or two observations on the law of the case, applicable to both branches. The documents signed by the parties and to be construed by the Court are not formal documents, prepared by lawyers and couched in set legal terms. They are informal business instruments, prepared in the hurry of business, purporting only to be memoranda of the agreement verbally arrived at by men engaged in selling and purchasing property. They are not required to be very exact (per *Tindal* C.J. in *Acebal* v. *Levy* (1)). Even where more formal documents are framed, " the words must not be applied to everything that might be said to come within a possible dictionary use of them, but must be interpreted in the way in which business men would interpret them, when used in relation to a business matter of " that " description " (per Lord *Herschell* in *Southland Frozen Meat and Produce Export Co.* v. *Nelson Bros.* (2)). But where informal documents occur, a further precaution has to be observed. In *The " Teutonia "* (3) *Mellish* L.J., speaking for the Judicial Committee, said : " Although it is true that the Court ought not to make a contract for the parties which they have not made themselves, yet a mercantile contract, which is usually expressed shortly, and leaves much to be understood, ought to be construed fairly and liberally for the purpose of carrying out the object of the parties." And further, where, as here, the documents are on their face mere memoranda of what has been definitely agreed to, and without words of condition such as " subject to " or " if approved," reference is made to what is called " the contract "—the case being one where a formal document would naturally be contemplated—then " the contract " is primarily at all events merely in contrast with the " memorandum " of the bargain, and the meaning is that the terms contained in the memorandum shall simply be reduced to formal expression with perhaps subsidiary provisions well understood. It is this doctrine of fair and liberal interpretation of what on their face are memoranda, that pervades this class of case, including the nature of the description sufficient in a signed document respecting the document said to be referred to therein.

(1) (1834) 4 Moo. & S. 217, at p. 220; 131 E.R. 949.

(2) (1898) A.C. 442, at p. 444.

(3) (1872) L.R. 4 P.C. 171, at p. 182.

Now, before stating the precise difficulties attending each of the points mentioned, a short sketch of the material facts will be necessary. The appellants were owners of a cattle station in Queensland, called "Mount Leonard," and in September 1926 placed it in the hands of Dalgety & Co. Ltd. for sale. From October 1926 to 18th December 1926 the parties were in negotiation for a walk-in-walk-out sale and purchase. During those negotiations the respondent was expressly informed that in the event of a purchase two things would be required by the appellants, namely, (1) that certain Calton Hills cattle recently purchased by the vendors and placed on the station under offer would have to be taken over at cost price (letter of 17th November 1926); and (2) that there would be a deposit of 10 per cent, balance on completion of delivery, unless extended payments were arranged for (letter of 26th November 1926). Those were, so to speak, made the basis of the negotiations and stood on record. On 18th December 1926 the respondent met directors of the appellant Company and certain officials of Dalgety & Co. at Dalgety's office, and further negotiated. The learned trial Judge inferred, and I agree with him, that the requirement as to the deposit was included in the basis of negotiation. His finding inevitably connoted that the defendant had received the letter of 26th November. It could not well be otherwise. Indeed, the "deposit" itself is specifically mentioned in the signed memorandum, and is clearly referable to the letter of 26th November 1926, and to nothing else. Then, as *Piper* J. says, "proposals and counter-proposals were made and noted down, and ultimately plaintiff's directors and defendant came to terms, noted down in a memorandum, exhibit D." That exhibit sets out a number of terms stated in a typically mercantile way, as for instance:—"Price £10,000 for leases and plant. Leases to be held by vendors until possession is given and taken. . . . Terms for leases, 1/3rd cash. Balance 12 months, interest 6½%. Leases to remain in vendors' names until completion of deal. Terms—Stock—terms for station cattle—1/3rd cash, balance in 12 months at 6½%. . . . Calton Hills cattle . . . to be taken over by the purchaser at the price paid by the vendor." And so on. The evidence for the appellants, uncontradicted and even unchallenged

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by cross-examination, as to the genesis and purpose of exhibit D, leaves no doubt as to its having been written down in the presence of vendors and purchasers as the written record of the terms agreed upon, other than the basic term of deposit. It is proved that on 18th December Naughton desired to discuss matters with Dalgety's representatives, Coulter and Bolitho, apart from the vendors' directors. This was done in a separate room, Coulter's room. Some proposals were written down, the writing brought into the room where the directors were, and there discussed in Naughton's absence. Counter-proposals were written down and taken back to Naughton by Bolitho. This resulted in a third document being submitted to the directors. When that occurred, then says Mr. Stanley Sinclair, one of the directors, "Bolitho asked us to go into Coulter's room, . . . I went into room—Coulter's room. *Naughton was there and we went through the various points mentioned, and as they were finalized Coulter wrote them on a sheet of paper. The exhibit D is the document Coulter wrote out.*" This is the evidence accepted by the learned trial Judge, and it is to me incomprehensible how any conclusion other than that at which his Honor arrived is possible with respect to exhibit D. If such a document, written in such circumstances, with the assent and in presence of buyer and seller, is not to be regarded as the written record of terms agreed on, then business men will have no sense of security in their mutual transactions. Of course, so far, such a document is only evidence, when identified, of the terms orally agreed to. But still it is written evidence, and if in some way referred to in a signed memorandum, proves the terms agreed to. Exhibit D having been thus brought into existence, obviously as a record, the next step was to make a written agreement. Mr. Stanley Sinclair thus describes the process:—"Later a contract for sale of the station was written out —the Calton Hills property. The two letters, exhibit E, were written by Mr. Coulter. I signed and saw the signatures put there by others. Coulter signed as a witness." The process is thus referred to by the learned Judge:—"Having come to these terms, two memoranda in the form of letters were written out and signed—both by the defendant by his firm name, Wm. Naughton & Co.—and one by Mr. S. B. Sinclair for plaintiff Company, and defendant

paid the £1,000. The memoranda are as follows:—"Adelaide, 18th December 1926 [South Australian 1s. duty stamp]. Messrs. Dalgety & Co. Ltd., Adelaide. Dear Sirs, . . . We hand you herewith £1,000 being portion of deposit on purchase of pastoral property known as Mt. Leonard Station in State of Queensland together with stock and plant for the price of £24,000 on terms as arranged between the vendors and purchasers, and we agree to sign the contract for sale as soon as same is available.—Yours faithfully, Wm. Naughton & Co.—Witness, George F. Bruce Coulter. I confirm that the sale has been made by Messrs. Dalgety & Co. Ltd. as above.—For Sinclair, Scott & Co. Ltd., S. B. Sinclair." "Adelaide, 18th December 1926 [South Australian 1s. duty stamp]—Messrs. Sinclair, Scott & Co. Ltd., Mt. Leonard Stn., Queensland. Dear Sirs, W. N. & Co.—We agree to take over your contract for purchase of Calton Hills cattle plus 7% interest to date of delivery.—Yours faithfully, Wm. Naughton & Co." At this point Mr. Stanley Sinclair says: "When the matter was finalized Naughton gave Coulter his cheque for £1,000 . . . and said he would send the balance of deposit over as soon as he got to Melbourne." "The balance" could only mean one thing, namely, the balance of the 10 per cent stipulated in the letter of 26th November. That was a distinct reference to the required deposit, and leaves no doubt that the expression "deposit on purchase of pastoral property" &c. in exhibit E was understood by both parties as referring to the written stipulation in the letter mentioned. In truth, when Naughton reached Melbourne, he wired to Dalgety on 22nd December that he was posting a cheque for £500 that night "deposit leases." That was to have been another portion of the deposit, and, though not actually sent, the telegram is unanswerable proof that Naughton thought he was bound to send it, and that he understood what "deposit" meant. As the learned trial Judge finds, the respondent at the interview of 18th December intimated "that he might arrange for the purchase to be completed by a firm or by a company, and on 20th December he telegraphed and wrote Dalgety's for delay (evidently meaning delay in drawing up a formal contract) pending his decision as to names with my (defendant's) guarantee." The delay requested was clearly for completion, not negotiation.

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On 23rd December Dalgety & Co. wrote to the respondent that the appellants were not "prepared to make any alteration in the *arrangements already completed in connection with the sale.*" Among the recorded terms arranged on 18th December was this: "Vendors have right to brand until 31st January 1927." Now the respondent on 7th January wrote to Dalgety a letter containing, *inter alia*, this sentence: "Brand until 31st January and count all branded cattle"—a most extraordinary statement unless the writer felt he was bound by the contract. On 11th January Dalgety's sent Naughton a copy of a formal agreement as drawn by appellants' solicitors, with blanks to be filled in. Ultimately, respondent, as *Piper* J. says, "objected that the leases were subject to certain government rights of resumption and that he refused to go on with the purchase." But in this connection two letters are of extreme importance. On 24th February the appellants' solicitors wrote to the respondent's solicitors, asking if it were true that he refused to proceed further with the contract. His solicitor replied on 1st March, acknowledging receipt of that letter, stating that he was in another State, and adding what, to my mind, is a decisive answer to any suggestion that the respondent understood there was as yet no binding contract, namely, "*At the last interview we had with him on the subject, he stated that he intended to hold your client to the contract.*" If that is a true statement—and its truth cannot be doubted—the respondent's claim now that he understood the transaction as still in negotiation only is palpably dishonest. The learned trial Judge finds that Naughton refused on 4th February 1927 to perform the contract. Reading that with his statement to his own solicitor, it means that he then believed the appellants were responsible to him for breach of a concluded contract. That, however, is somewhat anticipating, and I now proceed to consider the legal position as to the two points referred to in order.

(1) The law on the first point is authoritatively expressed by the Privy Council in *Harichand Mancharam* v. *Govind Luxman Gokhale* (1). In that case, which was even less clear than this, it was a question whether there was a concluded bargain for the sale of land. Exhibit A, after giving the name and designation of the

(1) (1922) L.R. 50 Ind. App., at p. 27.

intending purchaser, the plaintiff, and describing the vendor, the appellant, proceeded thus :—" I agree to give you in sale " the land for the price mentioned. It then gave the " conditions " of the sale in these terms :—" The conditions thereof are as follows : (1) The bargain paper in respect of the sale of the said immovable property shall be made through a vakil within two days from this day and at the time of making the bargain paper I am to take from you by way of earnest money in respect thereof R's 10,000," &c. At the trial the learned Judge came to the conclusion that there was no constituted contract, chiefly relying on the use of the words " the conditions thereof are as follows," and he considered that the bargain was subject to the conditions as to the making of the " bargain paper." The High Court of Bombay in its appellate jurisdiction reversed that decision, holding that there was already a binding contract. From that decision an appeal came to the Judicial Committee, constituted by Lord *Atkinson*, Lord *Sumner*, Lord *Carson* and Mr. *Ameer Ali*, the judgment being delivered by Mr. *Ameer Ali*. In that judgment, it is said (1) :—" The learned Chief Justice points out in his judgment that the word ' conditions ' used at the beginning of exhibit A in connection with the preparation of the ' bargain paper ' by a vakil, does not mean that it is a condition to which the bargain is subject, but that it is only one of the terms of the contract. Their Lordships concur in that view." Note the word " subject." Then follows this passage :—" Whether an agreement is a completed bargain or merely a provisional arrangement depends on the intention of the parties, as deducible from the language used by the parties on the occasion when the negotiations take a concrete shape. As observed by the Lord Chancellor (Lord *Cranworth*) in *Ridgway* v. *Wharton* (2), the fact of a subsequent agreement being prepared may be evidence that the previous negotiations did not amount to an agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. In *Von Hatzfeldt-Wildenburg* v. *Alexander* (3) *Parker* J. laid down that where the acceptance by the plaintiff was subject to a condition that

(1) (1922) L.R. 50 Ind. App., at p. 30.
(2) (1857) 6 H.L.C., at pp. 263, 264; 10 E.R. 1287.
(3) (1912) 1 Ch. 284.

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the plaintiff's solicitors should approve the title to and the covenants contained in the lease, the title from the freeholder and the form of contract, the negotiations did not form a binding agreement between the parties. The facts of that case were wholly different from the present, but the judgment marks the difference between *a completed and binding agreement and one subject to a condition.* Here exhibits A and A1 show clearly that the parties had come to a definite and complete agreement on the subject of the sale. They embodied in the documents that were exchanged the principal terms of the bargain on which they were in absolute agreement, and regarding which they did not contemplate any variation or change. *The reservation in respect of a formal document to be prepared by a vakil only means that it should be put into proper shape and in legal phraseology with any subsidiary terms that the vakil might consider necessary for insertion in the formal document.*" (Italics are mine.) Then reference is made to a letter of the defendant's attorney, written three days later than the bargain, which their Lordships say shows that the defendants regarded the document A as forming the foundation of the contract. Finally, reference is made to a clause of exhibit A1, stating: "This bargain is for the purchase of this immovable property together with buildings and structures thereon (you) have given and I have taken from you the agreement to the above effect of our free will and pleasure." This, say their Lordships, shows clearly that a completed bargain was intended by the plaintiff. The appeal was accordingly dismissed.

Practically every above-quoted word of that judgment is apposite to the present case, and every feature of importance in that case has its counterpart here. There are here, however, as will be presently seen, further confirmatory features. The words "purchase," "deposit," "terms as arranged," "vendors and purchasers," "sign the contract for sale," "as soon as the same is available," "confirm that the sale has been made," "agree to take over the contract for purchase of Calton Hills cattle" and the letter of 1st March, are almost the replicas of "sale," "I give you," "the bargain paper," "through a vakil," "earnest money," the letter of 1st December, and clause 7 of exhibit A. And the main ground on which the learned trial Judge arrived at his conclusion is singularly

like that on which the primary judgment in the Indian case was chiefly founded. But there is one distinguishing feature in the present case of high importance, and entirely in favour of the appellants: in the Indian case the word "conditions" gave rise to difficulty; here there is no such word. After the words "vendors and purchasers" in exhibit E, the words are not words of qualification or limitation, but of addition, namely, "*and* we agree to sign the contract for sale as soon as same is available." If the agreement uses the words "subject to," the primary signification is that a true condition is prescribed, which the context or circumstances may reduce to a mere term of a concluded bargain. (See per *Jessel* M.R. in *Winn* v. *Bull* (1).) But the word "and" is primarily and almost certainly not conditional, but something added. Context or circumstances may alter it, but with difficulty, and the onus is on the one setting up the extraordinary meaning.

I do not in this case, reading the documents as a whole by the light of surrounding circumstances, think there is any ambiguity which lets in extrinsic evidence as to the construction of the plain words used. Conduct by which *both parties* concur in placing *the same construction on words* that are in themselves of doubtful construction, sometimes, but very rarely, may be accepted by the Court (see *Forbes* v. *Watt* (2)). But here both parties (letters of 24th February 1927 and 1st March 1927) treat the bargain as concluded. The draft formal contract was at least consistent with that view, and as a mere endeavour on one side to attain formality with necessary subsidiary terms, which might or might not be justified. The appellants never suggested the lack of a concluded bargain. Nor did the respondent till much later—I think only by his pleader after action brought. Therefore we are left to the bare construction of the words used, having regard to their natural signification and the surrounding circumstances, confirmed by the respondent's own admission in March 1927 above referred to.

In addition to what I have already said, two or three observations seem desirable. The words "agree to sign" the contract for sale as soon as the "same is available" appear fairly free from doubt. They contemplate a formal contract embodying the agreed terms

(1) (1877) 7 Ch. D. 29, at p. 32.

(2) (1872) L.R. 2 Sc. App. 214.

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of the memorandum to be prepared by or on behalf of the vendors, and then—assuming it correctly sets out the bargain—it is to be *signed*. There is no further negotiation contemplated, and no "approval" is stipulated for, no new terms are suggested, the "terms as arranged" are treated as complete after the prior reference to the deposit, and the signature is regarded as obligatory. Next, the appellants' written confirmation of a "sale," unless it had definitely occurred, would hardly be a business operation. The payment of £1,000 and the subsequent step towards paying £500 more before the "contract" was prepared, are more strongly indicative of a completed bargain than of mere negotiation. The learned trial Judge thought that the postponement of payment of part of the deposit was of some significance that a final contract had not been made, and his Honor relied on two cases. But, with great respect, there is a vital distinction. In both the cases cited the agreement was to pay the deposit on the signing of the formal contract. There is nothing to outweigh the facts that £1,000 was paid and £500 further was intended to be paid before "the contract" was signed. Lastly, the absolutely expressed agreement to take over the Calton Hills cattle contract is flatly inconsistent with a state of freedom in respect of the station plant and other cattle. In one sense, it may be said the Calton Hills cattle was a separate transaction. That is the liability was taken over. But the letter of 17th November says that "in the event of a sale of Mt. Leonard, the buyer will be expected to take these over at cost price." Only if there is a "sale," and the "buyer" is to take them over.

On the whole, this case falls within the class of cases represented by the Indian case cited, and others which may be found quoted, for instance, in *Williams* on *Vendor and Purchaser*, 3rd ed., p. 17, note (k). It is in notable contrast with the class of cases exemplified in note 1, p. 18. Lord *Westbury* L.C. drew the line in *Chinnock* v. *Marchioness of Ely* (1).

There is, in my opinion, no legal reason compelling me to assist the respondent to commit a fraud.

(2) The second point is, to my mind, equally clear. There can be no doubt that the *Statute of Frauds* requires that all the terms of the

(1) (1864) 4 DeG. J. & S. 638, at p. 646; 46 E.R. 1066.

contract sued on shall be in writing, and that the defendant's signature shall govern all the terms. Where it is necessary to refer to some document other than that actually signed, they must be properly connected. In *Franco-British Ship Store Co.* v. *Compagnie des Chargeurs Française* (1) the present Lord Chancellor (then *Sankey* J.) said :—" The rule is that the connection between several documents must appear on the face of the documents themselves. . . . The statute is not complied with unless the whole contract is embodied either in some writing signed by the party or in some paper referred to in a signed document and capable of being identified by means of the description of it contained in the signed paper." That is the rule of the interpretation of the statute established by *Ridgway* v. *Wharton* (2), *Baumann* v. *James* (3), *Cave* v. *Hastings* (4), *Long* v. *Millar* (5) and other cases.

But two questions remain, and to prevent confusion need to be separately stated. One is as to the extent of description permissible, and the other as to the legitimate nature of the evidence of identification. While it is, according to the cases cited, an error to attempt by parol evidence to connect with the signed document another document not itself in some way referred to therein, it is equally in these days an error to exclude parol evidence merely because the reference to a document is not specific. As *Holdsworth* says in his *History of English Law* (vol. VI., at p. 393), the clauses of the statute " have remained amid changes, not only in legal, but also in social and commercial ideas. But case law is naturally influenced by these changes—that it is so influenced is not the least of the advantages which it possesses." Naturally that occurs most readily in relation to those rules of evidence which find their authority in the practice of the Court. The cases above referred to indicate the elasticity which the Court thinks consistent with a just amplification of the statute in modern circumstances. In *Ridgway* v. *Wharton* (2) the only reference was by the word " instructions " ; in *Baumann* v. *James* (3) it was by the words " terms agreed upon " ; in *Cave* v. *Hastings* (4), by the word " arrangement " ; in *Long* v. *Millar* (5), by the word " purchase " ; in the *Franco-British &c. Co.'s Case* (6),

(1) (1926) 42 T.L.R. 735, at p 736.
(2) (1857) 6 H.L.C. 238 ; 10 E.R. 1287.
(3) (1868) L.R. 3 Ch. 508.
(4) (1881) 7 Q.B.D. 125.
(5) (1879) 4 C.P.D. 450.
(6) (1926) 42 T.L.R. 735.

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by the word "agreement." It is clear to me that the description may be by any reference which the parties in the circumstances would consider capable of satisfactory identification. To apply *The "Teutonia"* (1) doctrine to the present case:—With the knowledge on both sides that a basic requirement of a deposit of 10 per cent had been stipulated by letter, what other meaning, if exhibit E be "construed fairly and liberally for the purpose of carrying out the object of the parties" (2), could be attributed to the words "portion of deposit," &c., than the stipulation referred to? And in the same way, what other meaning could be attached to the "terms as arranged between the vendors and purchasers" than the term *as* recorded in Coulter's memorandum? As to both these provisions, they come directly within Lord *Cranworth's* formulation in *Ridgway* v. *Wharton*, in the House of Lords (3), for altering the opinion he had expressed in the Court below (4), a formulation necessarily framed after grave and careful consideration. It is in these words: "The authorities lead to this conclusion, that if there is an agreement to do something, not expressed on the face of the agreement signed, that something which is to be done being included in some other writing, parol evidence may be admitted to show what that writing is, so that the two taken together may constitute a binding agreement within the *Statute of Frauds*." There is no word in the Lord Chancellor's formulation, nor in his whole judgment, requiring one writing to be the only document containing the terms, nor excluding it so long as it does in fact contain the terms, and is in some way referred to in the signed document. All that is necessary is satisfactory proof of identity of a document referred to in a signed document containing a statement of what is agreed to be done. For instance, in *Baumann* v. *James* (5) the absence of other instructions than the document produced is not stated as a legal necessity, but as a circumstance affecting the conclusion of fact. That is made perfectly clear both by the reference to *Ridgway* v. *Wharton* (6) and by the reports of *Baumann* v. *James* in the *Law Times* and in the *Weekly Reporter* (7). In both these reports (I quote from the former for the sake of

(1) (1872) L.R. 4 P.C. 171.
(2) (1872) L.R. 4 P.C., at p. 182.
(3) (1857) 6 H.L.C., at pp. 256-257; 10 E.R. 1287.
(4) (1854) 3 DeG. M. & G. 677, at p. 694; 43 E.R. 266.
(5) (1868) L.R. 3 Ch. 508.
(6) (1857) 6 H.L.C. 238; 10 E.R. 1287.
(7) (1868) 18 L.T., at p. 425; 16 W.R. p. 877.

one word) it appears that *Wood* L.J. said with reference to *Ridgway* v. *Wharton* (1): "It did not necessarily follow that the instructions there given were in writing; it was sufficient to identify them by parol evidence, and to show that there were instructions in writing: to which one ought to add that the case would be quite clear if there were no other written instructions." The case of *Newell* v. *Radford* (2) is most valuable on this point. It shows that the surrounding circumstances may be proved in order that the Court may *by reasonable intendment* gather the meaning the parties put upon the words of reference used in the signed memorandum. That case is approved in this point by *Chitty* L.J. in *Sheers* v. *Thimbleby & Son* (3), and followed by *McCardie* J. in *Cohen* v. *Roche* (4).

It becomes then a mere ordinary matter of evidence as to the identity of the document or documents referred to. The expression "terms agreed upon" in *Baumann* v. *James* (5) included the actual matters of agreement as much as the present case, but because those were in fact embodied in a document, that embodiment was taken to be what the parties understood by the expressions used. It is in that respect indistinguishable from this case. Similarly as to "deposit." Again in *Baumann* v. *James* the expression referred to required reference to more than one document. That was even a stronger case than the present.

In this case, as *Piper* J. has found, the "terms as arranged" and the term as to the "deposit" are included in two documents, both of which existed prior to the execution of the signed memorandum (*Williams* v. *Jordan* (6)), and are as identified covered by the signature of the respondent.

I entirely agree with the conclusion come to by the learned trial Judge on this part of the case, and I regret that an honest and plain business transaction, deliberately entered into, should be considered as incapable of enforcement.

STARKE J. Two questions were argued in this case, firstly, whether there was any concluded contract between the parties, and secondly, whether there existed any memorandum of the contract sufficient to satisfy the *Statute of Frauds*.

(1) (1857) 6 H.L.C. 238; 10 E.R. 1287.
(2) (1867) L.R. 3 C.P. 52.
(3) (1897) 76 L.T. 709, at p. 712.
(4) (1927) 1 K.B. 169.
(5) (1868) L.R. 3 Ch. 508.
(6) (1877) 6 Ch. D. 517.

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The first question depends upon the proper interpretation of a short document signed by Naughton and confirmed by Sinclair, Scott & Co. Ltd. The document reads as follows: "We/I hand you herewith 1,000 pounds being portion of deposit on purchase of pastoral property known as Mt. Leonard Station in State of Queensland together with stock and plant for the price of £24,000, on terms arranged between the vendors and purchasers, and we/I agree to sign the contract of sale as soon as same is available. . . . I confirm that the sale has been made by Messrs. Dalgety & Co. Ltd. as above . . . ." The "terms arranged" between the parties refer to certain heads or notes of arrangement, in writing but unsigned, which I shall mention later, and to certain verbal communications between the parties. In *Von Hatzfeldt-Wildenburg* v. *Alexander* (1) *Parker* J. said:—"It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored." In an arrangement for the sale of a station, together with stock and plant, a great many details must remain to be subsequently settled—especially as to title, delivery, and so forth. In the present case the heads of the arrangement to which I have referred supply short notes of the terms of that arrangement, and the verbal communications some further stipulations; but between them they by no means comprise the detail necessary in a contract of the character relied upon in this case. The parties therefore stipulated for "the contract of sale," and that it should be signed as soon as available. "It is one thing for two parties to settle what are to be the terms of an agreement, if it should be made; and quite another

(1) (1912) 1 Ch., at pp. 288-289.

thing to make the agreement" (*Barrier Wharfs Ltd.* v. *W. Scott Fell & Co.* (1)). The subject matter of the transaction, its involved nature and the words of the document itself convince me that the parties stipulated for "the contract of sale" as a condition or term of the bargain, without which there was no enforceable contract.

In this view, it is unnecessary to determine whether there was any memorandum of the contract sufficient to satisfy the *Statute of Frauds*, and I think it safer to refrain from any pronouncement on the subject.

Appeal dismissed with costs.

Solicitors for the appellant, *Varley, Evan & Thomson.*

Solicitor for the respondent, *A. J. L. Sutherland.*

C. C. B.

(1) (1908) 5 C.L.R., at pp. 650, 666.