[HIGH COURT OF AUSTRALIA.]

O'YOUNG AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

WALTER REID AND COMPANY LIMITED . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 22; *May* 12.

Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ.

Contract—Guarantee—Memorandum in writing signed by the party to be charged—Lapsed offer—Subsequent resuscitation——Statute of Frauds (29 *Car. II.*, c. 3), *sec.* 4.

A guarantee in writing was signed by the parties to be charged but was mislaid for some time. Another guarantee was drawn up and also signed by the parties to be charged but the obligation so undertaken was not the same as under the former document. Subsequently the former document was found and the parties verbally acknowledged their signatures to it and agreed that it should operate on their guarantee.

Held, that the guarantee so acknowledged satisfied the requirements of sec. 4 of the *Statute of Frauds*.

Stewart v. *Eddowes*, (1874) L.R. 9 C.P. 311, and *Koenigsblatt* v. *Sweet*, (1923) 2 Ch. 314, applied and followed.

Decision of the Supreme Court of New South Wales (Full Court) affirmed.

APPEAL from the Supreme Court of New South Wales.

The plaintiff, Walter Reid & Co. Ltd., brought an action against the defendants, Luke O'Young and George Lum, by a specially indorsed writ claiming the sum of £400 as being an amount due on a guarantee dated 12th October 1927, whereby the

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defendants jointly and severally guaranteed the due payment by Charles Young of moneys advanced to him and of goods supplied or to be supplied to him. The declaration alleged that in consideration of the plaintiff agreeing to advance moneys to Charles Young and to supply him with goods in the way of his trade in respect of a business then being purchased by Young at Bankstown the defendants jointly and severally guaranteed and promised the plaintiff that they would be responsible to the plaintiff for the due payment by Young of all or any advances made or thereafter to be made by the plaintiff to Young and of the price of the goods supplied; that the guarantee should be a continuing one, but that the joint and several liability of the defendants thereunder should not exceed £400; that the guarantee should extend to and be applicable to the whole debt that should ultimately be due to the plaintiff from Young in respect of the advances or goods supplied; that the plaintiff should be at liberty, without discharging the defendants or either of them from liability under the guarantee, to grant time or indulgence to Young in respect of the advances or goods, and to accept payment from Young in cash or by means of negotiable instruments and to treat Young in all respects as though the defendants were jointly liable with Young as debtor to the plaintiff instead of being merely sureties for Young; that the plaintiff accordingly advanced moneys to Young and supplied him with goods in the way of his trade in respect of the business referred to above to the extent of £400 or more; that, although the plaintiff had done all things requisite under the guarantee, Young had not paid to the plaintiff all moneys due in respect of such advances and goods, nor had the defendants or either of them paid the same to the extent of £400 or at all. Both defendants pleaded that they had not promised as alleged, and the plaintiff joined issue thereon.

At the hearing before *Halse Rogers* J. and a jury, evidence was given to the effect that Young desired to borrow £600 from the plaintiff to enable him to buy a business at Bankstown, and he also desired to obtain supplies of goods on credit from the plaintiff for the purpose of carrying on such business. The plaintiff was unwilling to make the advance or supply the goods unless Young provided a continuing guarantee by satisfactory sureties in an amount of £400.

Young proposed the defendants O'Young and Lum; and the plaintiff was prepared to accept them as guarantors. Young then instructed his solicitor to draw an instrument of guarantee and a document was drawn which met the requirements of the plaintiff, one of whose employees obtained Lum's signature to it. It was then sent for execution to O'Young at Gunnedah. O'Young duly signed it and sent it back to Young, but for some reason it was not received by him, nor was it received by the plaintiff. This document, dated 12th October 1927, was the one sued upon. On learning later of the non-receipt of the document, O'Young asked Young to send up another document for his signature, which Young did. O'Young signed the second document on 21st October 1927, dated it of that day, returned it to Young, and by letter informed the plaintiff what had occurred. Having in the meantime received it from Young, the plaintiff, a few days later, procured Lum's signature to the second document. Upon its being handed to the plaintiff's secretary it was discovered that it did not cover advances but was a guarantee in respect only of goods supplied. A fresh form of guarantee was then prepared by the plaintiff's solicitor, executed by Lum and forwarded on 7th November 1927 to O'Young for his signature, it being pointed out to him that the document of 21st October "was not quite in order." About 9th November Young brought to the plaintiff's office the document of 12th October, which had come into his hands in the meantime. Whilst matters were in this position the plaintiff on 16th November made an advance to Young of £600. On 19th November the plaintiff again wrote to O'Young requesting him to execute the guaratee and return it. On 22nd December 1927 O'Young returned the third form unsigned and in the accompanying letter said: "If you don't think you can supply Mr. Charles Young with goods by the first agreement which I have already signed there is no need for you to keep on sending me an agreement." To this the plaintiff replied on 6th January 1928: "We . . . note that you prefer to be bound by the form of guarantee already signed and we are pleased to advise you that we agree to accept this document." About the same time one Waterhouse, an employee of the plaintiff, interviewed Lum and told him that O'Young would not sign the third form, and that the plaintiff was relying on the first guarantee which

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had been temporarily mislaid; to which Lum replied: "All right." The plaintiff then continued the supply of goods to Young. Promissory notes given by Young for the advance of £600 were all paid by November 1929. In June 1930 Young assigned his estate. His indebtedness to the plaintiff was, at that time, £781 4s. 8d. for goods supplied after November 1929. The plaintiff called upon O'Young and Lum to pay £400 of such indebtedness as sureties up to that limit, and they failed to do so. Lum denied in evidence that any such conversation as was deposed to by Waterhouse in his evidence, which is indicated above, took place, and the only question submitted to the jury was: Did the conversation between Waterhouse and Lum take place substantially as deposed to by Waterhouse? The jury answered the question in the affirmative; whereupon *Halse Rogers* J. entered judgment for the plaintiff in the amount claimed, his Honor remarking that upon that finding there had been a revival of the original contract and although there was nothing in writing to evidence the agreement made in January 1928, in the circumstances, the original document covered the whole transaction and was sufficient to satisfy the requirements of the *Statute of Frauds*.

An application by the defendants to the Full Court of the Supreme Court to enter a nonsuit or for a new trial on the grounds that the evidence given by Waterhouse should not have been admitted, that the agreement on which the plaintiff succeeded was not the agreement alleged in the declaration, and that there was no sufficient note of the agreement within the meaning of the *Statute of Frauds*, was dismissed.

From this decision the defendants now appealed to the High Court, but the defendant Lum, who had in the meantime assigned his estate for the benefit of his creditors, did not appear either in person or by counsel at the hearing of the appeal.

Further material facts appear in the judgments hereunder.

Nield, for the appellant O'Young. The conversation alleged to have taken place between the defendant Lum and a representative of the respondent was not admissible in evidence because the contract it sought to establish was not the contract alleged in the

specially indorsed writ and pleaded in the declaration; therefore the question of the *Statute of Frauds* did not arise (*Maddock* v. *Vacuum Oil Co. Pty. Ltd.* (1)). The contract established by the conversation, being in respect of moneys and goods already advanced and supplied, is different in its terms from the contract sued upon.

Owen, for the respondent. Leave was, and is now, sought to amend the writ and declaration by alleging that the contract as sued upon was made in January 1928.

GAVAN DUFFY C.J. The argument may proceed as if the action was brought on a contract alleged in January 1928, upon terms that the *Statute of Frauds* is available to the appellant as a defence.

Nield. The words "advances made" which appear in the contract as shown in the declaration refer to advances made on the making of the contract, that is, January 1928, whereas the moneys sued for were in fact advanced long before that date. At the time of the conversation referred to, neither the appellant nor Lum was aware that the advances had been made, nor had it been brought to their knowledge by the respondent. The contract was based upon a past consideration. There is not, in the circumstances, any memorandum of the agreement between the parties. If it only covers future consideration the document of 12th October 1927 is not a memorandum of agreement, but an offer only, which was not accepted. Neither of the defendants is bound unless the other also is bound (*Ellesmere Brewery Co.* v. *Cooper* (2)). The appellant O'Young is not bound because he entered into the contract on the footing that both guarantors were to be liable in the sense of being entitled to be sued. At the time the advance was made the respondent did not have before it any offer of the appellants that was capable of acceptance by it with regard to past advances (see *Raikes* v. *Todd* (3)). An alternative construction that can be placed upon the conversation between the witness Waterhouse and the appellant Lum is that in consideration of the respondent Company advancing

(1) (1928) 28 S.R. (N.S.W.) 421.
(2) (1896) 1 Q.B. 75.
(3) (1838) 8 A. & E. 846; 112 E.R. 1058.

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money or supplying goods Lum was content to pay whatever Young was found to owe in respect of advances made or goods supplied, past or future. In order to meet the requirements of the *Statute of Frauds* a memorandum should show the actual terms or nature of the promise made; here the memorandum is a memorandum of a promise merely to pay in respect of goods supplied and advances made at the time of the making of the promise or subsequently, and has no reference to advances made or goods supplied prior to the making of the promise.

Owen, for the respondent. The evidence of the witness Waterhouse was admissible whether the *Statute of Frauds* applies or not, and, having been admitted, it proves a contract of which there is a written memorandum and on which the declaration is framed. The requirements of the *Statute of Frauds* have been fully satisfied (*Reuss* v. *Picksley* (1)). The consideration in respect of the agreement arrived at in January 1928 was the supply of goods in the future; goods were in fact subsequently supplied, and this action was brought in respect of those goods.

Nield, in reply.

The following written judgments were delivered :—

May 12.

GAVAN DUFFY C.J. AND STARKE J. The plaintiff in this action declared upon a guarantee dated 12th October 1927 whereby the defendants, jointly and severally, guaranteed the due payment by Charles Young of moneys advanced to him, and of goods supplied, or to be supplied, to him. The defendants did not raise the *Statute of Frauds* but each in his plea denied the promise as alleged. The case was tried before *Halse Rogers* J. with a jury, and, by arrangement, the jury did not return a general verdict, but answered a specific question in favour of the plaintiff. The parties also agreed that the trial Judge should consider certain questions of law, and that judgment should be entered in accordance with his decision.

The facts found, proved or admitted were as follows :—On 12th October 1927 the defendants O'Young and Lum signed a guarantee whereby they, jointly and severally, guaranteed the plaintiff the

(1) (1866) L.R. 1 Ex. 342.

payment by one Charles Young of all or any advances made, or thereafter to be made, by the plaintiff, and of all goods supplied by the plaintiff to the said Charles Young not exceeding the sum of £400. This document was mislaid and did not come to the hands of the plaintiff until early in November 1927. Another document was drawn up and signed by the defendants. It is dated 21st October 1927, and guaranteed the payment by Charles Young of all goods supplied by the plaintiff to him up to the sum of £400. So soon as this document was signed the plaintiff made advances to Young and also apparently supplied him with goods. It was observed that this second document only guaranteed payment in respect of goods supplied and the solicitors for the plaintiff then drew up a third document of guarantee covering goods supplied, or to be supplied, to Charles Young, and advances made, or to be made, to him up to the sum of £400. This was early in November 1927 and before the guarantee of 12th October 1927 had come to the hands of the plaintiff. The defendant Lum signed this third document but the defendant O'Young refused in writing to do so, and added : " Well, if you don't think you can supply Mr. Charles Young with goods by the first agreement which I have already signed there is no need for you to keep on sending me an agreement." The learned Judge and the parties at the trial regarded this intimation as a confirmation of the guarantee of 12th October and an expression of willingness on the part of O'Young " to go right back to the first document." A dispute in fact arose in the case of Lum. About December 1927 or January 1928 the plaintiff asserted that one Waterhouse, a traveller, was sent to see Lum and inform him that O'Young would not sign the third document. He so informed Lum, and said to him, that the plaintiff was relying upon the first document, namely, the guarantee of 12th October 1927. Waterhouse deposed that Lum agreed to this and said : " All right." Lum denied the whole conversation ; but the jury found that the conversation between Waterhouse and Lum took place substantially as deposed to by Waterhouse. So Lum also confirmed the guarantee of 12th October 1927.

The result of all this is that the parties fell back upon the document of 12th October as their agreement. The defendants acknowledged their signatures to that document and agreed that it should

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operate as the agreement between them. It is quite immaterial, on this view of the facts, whether the agreement is considered as made on 12th October 1927, or in December 1927, or January 1928, for in any case there would be either the agreement of the parties or a memorandum thereof in writing sufficient to satisfy the *Statute of Frauds*.

The case as we regard the facts is free from difficulty, and cases such as *Stewart* v. *Eddowes* (1) and *Koenigsblatt* v. *Sweet* (2) are authorities, if any be needed, in favour of the view already expressed.

DIXON J. The respondent Company sued the appellants upon an instrument dated 12th October 1927 expressing a joint and several agreement on the part of the appellants to guarantee to the respondent Company the payment by one Charles Young of all advances made or thereafter made, and of all goods supplied by the Company to him up to £400 in the way of his trade in respect of a business then being purchased by him at Bankstown.

Evidence was given at the trial of the following facts:— Charles Young desired to borrow £600 from the Company to enable him to buy a business at Bankstown, and he also desired to obtain supplies of goods on credit from the Company for the purpose of carrying on the business when he purchased it. The Company was unwilling to make the advance or supply the goods unless Young provided a continuing guarantee by satisfactory sureties in an amount of £400. Young proposed the appellants, Luke O'Young, a storekeeper carrying on business at Gunnedah, and George Lum, a grocer carrying on business at Auburn, and the Company was prepared to accept them as guarantors. Young then instructed his solicitor to draw an instrument of guarantee, and a document was drawn which met the Company's requirements. One of the Company's employees took it to the appellant George Lum and obtained his signature to it. The instrument was then sent up to Gunnedah for execution by the appellant Luke O'Young, who duly signed it. It was dated 12th October 1927, and is the document sued on. Having signed it, Luke O'Young sent it back to Young, but for some reason he did not receive it. On learning this later, Luke

(1) (1874) L.R. 9 C.P. 311. (2) (1923) 2 Ch. 314.

O'Young asked him to send up another document for his signature, and Young did so. Luke O'Young signed the second document on 21st October 1927 and dated it of that day, and returned it to Young. He wrote next day telling the Company what had occurred. On 24th October 1927 Young took the document dated 21st October 1927 to the Company, which sent it to Lum. Two or three days later one of the employees of the Company called on Lum and obtained his signature to the document. He brought it back to the secretary of the Company, who then noticed that the instrument did not cover advances but was a guarantee in respect only of goods supplied. The Company thereupon requested its own solicitors to draw a guarantee. When this document was ready Lum executed it, and the Company on 7th November 1927 wrote a reply to Luke O'Young's letter of 22nd October saying "Our solicitors have prepared a fresh form of guarantee as the former form was not quite in order and we would thank you to kindly complete the enclosed document in duplicate and return to us by return mail." A day or two after 7th November 1927 Young brought into the Company's office the document of 12th October 1927 which somehow had come into his hands in the meantime. While matters were in this position, the Company on 16th November 1927 made the advance to Young by paying on his behalf to the vendor the purchase price of the business, £600. On 19th November 1927 the Company again wrote to Luke O'Young requesting him to execute the guarantee and send it back. But Luke O'Young sent the document unexecuted to Young, who brought it back to the Company saying that, as Luke O'Young had already signed two forms, he was not disposed to complete another document. The Company returned it to Luke O'Young, saying that the time for stamping the other forms without fine had passed and requesting him to execute it. On 22nd December 1927 Luke O'Young answered by returning the document unsigned and by animadverting upon the conditions which it contained. In the course of his observations he wrote: "Well if you do not think you can supply Mr. Charles Young with goods by the first agreement which I have already signed there is no need for you to keep on sending me the agreement there is plenty other wholesale house." The Company replied on 6th January 1928: "We acknowledge receipt

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of your letter dated 22nd December and note that you prefer to be bound by the form of guarantee already signed and we are pleased to advise that we agree to accept this document." About the same time an employee of the Company interviewed Lum at his shop at Auburn. He told Lum that Luke O'Young would not sign the third guarantee and the Company was relying on the first guarantee which was mislaid at Gunnedah. Lum said "all right" or that he was satisfied. The Company appears then to have continued the supply of goods to Young. He had given promissory notes for the advance of £600, and these were all paid by about November 1929. In or about June 1930 Young assigned his estate; and at that time he owed the Company £781 4s. 8d. for goods supplied. This amount was all incurred after November 1929 when the last of the promissory notes was met. The respondent Company called upon the appellants Luke O'Young and Lum to pay £400 of this amount as sureties up to that limit, and upon their failure to do so brought the present action. At the trial Lum contradicted the evidence of the interview at which he was said to have expressed his assent to the statement that the Company was relying upon the first instrument, and the only question submitted to the jury was whether that conversation took place substantially as deposed to by the Company's employee. The jury answered the question in the affirmative. Upon these facts the Company made no attempt to rely on the instrument dated 12th October 1927 as amounting to a contract actually made on or about that date. Its counsel recognized that until it was communicated to the Company and acted upon after it had been executed by O'Young, it amounted to an offer only and that it had lapsed when, before it was found or received by Young, the second document, that dated 21st October 1927, was executed by Lum and Luke O'Young and received by the Company.

The second document was not declared on and therefore could not be relied upon as a contract. No doubt, if the Company had declared upon it, the appellants would have contended that the preparation of the third instrument and the request to execute it amounted to a refusal of the second writing.

The Company's case rested upon Luke O'Young's letter of 22nd December 1927, the Company's letter of 7th January 1928 and

Lum's oral statement of about the same date as amounting to new assents to that document which gave rise to a contractual obligation according to its tenor. Counsel for the appellants objected to the admissibility of the evidence of Lum's statement and relied upon the *Statute of Frauds*. Apparently the fact that the plaintiff Company's case departed from its pleading or particulars was not treated in itself as fatal but the defendants were allowed to rely upon the *Statute of Frauds* in answer to the case made as if that defence had been pleaded, as it might have been if the plaintiff amended.

Halse Rogers J., who tried the action, gave judgment for the plaintiff Company upon the ground that Luke O'Young's letter was a written statement that he was willing to carry on under the instrument of 12th October 1927, that the conversation with Lum was to be viewed as if Lum had then handed over the original document as the contract on which he was willing to carry on, and that, if he had actually done so, it would have amounted to a note or memorandum of the contract on which the parties were to act. This view was adopted by the Full Court.

Upon the hearing of the appeal before us, the decision of the Supreme Court was attacked upon the ground that it disregarded the true nature of the agreement made in January 1928 and overlooked the questions whether any consideration existed for the agreement, and, if so, whether it was not a consideration misdescribed by the instrument. The advances had already been made to Young and he had become indebted to the Company for goods supplied. The parties must have intended to include this indebtedness in their contract of suretyship. Accordingly it was contended in support of the appeal that even supposing that Lum must be taken to have acknowledged his old signature afresh, the document could not be a memorandum of a contract to guarantee a past indebtedness. It was further said that no consideration could be found for such a contract except the supply of further goods on credit, or a forbearance in respect of past indebtedness, that the promises of January 1928 were not given in respect of any such consideration, and, if they were, the contract stated a different consideration, a consideration moreover which in fact by that date had become a past consideration.

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It appears to me that if the assumption be accepted completely that the intending guarantors did in January 1928 do what was equivalent to a redelivery of the paper bearing the date 12th October 1927 as and for a guarantee so ante-dated, most of the difficulties raised by these contentions vanish. If it be supposed that an instrument expressed as that document is and dated 12th October 1927 was in January 1928 signed by Luke O'Young and Lum and delivered as a statement of their promises to the Company, the instrument, if so accepted, would itself have been the agreement and not a memorandum or note thereof. An objection that it did not amount to a contract because there was no consideration might be fairly open, but it could not be said that a contract existed but was unenforceable for want of a sufficient writing. For the only contract offered by the intending guarantors would be in writing, and it would be immaterial that the creditor's simple assent or acceptance was not also expressed in writing. In *Reuss* v. *Picksley* (1) *Willes* J. says :—" The only question is, whether it is sufficient to satisfy the statute that the party charged should sign what he proposes as an agreement, and that the other party should afterwards assent without writing to the proposal ? As to this it is clear, both on reasoning and authority, that the proposal so signed and assented to, does become a memorandum or note of an agreement within the 4th section of the statute." The fact that it was ante-dated would make it necessary to interpret it as a contract which, although made in January 1928, was intended to operate by retrospection as from 12th October 1927, as in fact was the evident intention of all parties. The consideration is expressed in the instrument as follows : " In consideration of your agreeing to advance certain moneys and to supply Charles Young with goods in the way of his trade in respect of a business now being purchased by him at Bankstown." The " now " means 12th October 1927 and properly serves to identify the business. The statement of the consideration necessarily includes a consideration past at the time of making the promises, but it also includes a future consideration, namely, further supplies of goods and advances. On further goods being supplied on credit, there appears to be no reason why the supply should not

(1) (1862) L.R. 1 Ex. 342, at p. 351.

operate as a consideration for the whole guarantee. But on the facts of this case, the same result would arise if the instrument were treated as containing what may be called a divisible or distributable promise or offer of a promise, that is to say as promising to discharge the liability in respect of each separate advance or separate supply of goods made on the faith of the existence of the offer or promise, so that in respect of past advances and supplies of goods the consideration failed. (See *Offord* v. *Davies* (1); *Burgess* v. *Eve* (2).) For the indebtedness relied upon in the action is all in respect of goods which in fact were afterwards supplied.

The great difficulty of the case seems to me to lie in the assumption required, namely, that the paper must be treated as if the signatures thereon had been adopted as authenticating an instrument offered as a guarantee in January 1928. It seems perhaps more natural to regard the conversation with Lum as amounting to no more than an assent by Lum to a proposal that he should be bound by the terms of the document. It would then be something short of that acknowledgment afresh of his old signature which would be necessary to make the contract of January 1928 a written one. But if two inferences are open, the question is one of fact and it was not submitted to the jury. The notice of appeal to the Full Court did not include a complaint that this question had not been submitted to the jury, but, in any case, it seems unlikely having regard to the course of the trial that the appellants would have been permitted to rely upon it in the Full Court. In these circumstances, I think the matter is reduced to the question whether an inference was reasonably open that Lum adopted his former signature and assented to the paper's being considered as again put forward by himself and Luke O'Young as a fresh proposal or contract. The decision of this question must be much affected by the judgments of the Court of Appeal in *Koenigsblatt* v. *Sweet* (3). In that case the party to be charged signed an engrossed contract of sale to two purchasers, leaving certain blanks. He left it in the hands of his agent for the purpose of negotiating its acceptance with the proposing purchasers. His agent arrived at an agreement with the purchasers'

(1) (1862) 12 C.B. (N.S.) 748; 142 E.R. 1336.

(2) (1872) L.R. 13 Eq. 450, at p. 460.

(3) (1923) 2 Ch. 314.

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agents for a sale upon the terms contained in the document, except that it was to be a sale to one only of the two intended purchasers. The vendor's agent amended the signed contract by striking out the name of one of the two purchasers and exchanged the signed copy for the vendor's copy signed by the remaining purchaser. Afterwards he reported the alteration to the vendor, who approved of it. *Russell* J. decided (1) that the vendor's defence of the *Statute of Frauds* failed upon the ground that his subsequent ratification of his agent's actions related back, and that accordingly the position was as if the agent had in his possession a document containing all the alterations and signed by the vendor as altered which he was authorized to hand over as one part of an operative agreement in writing in exchange for the other part. This decision was affirmed by the Court of Appeal, but additional reasons were given which appear to me to be material to the decision of the present case and to support the conclusion of the Supreme Court. Lord *Sterndale* M.R. (2) relied upon *Stewart* v. *Eddowes* (3), and said that the facts would have been the same if the agent had taken back the signed document to the vendor after it had been altered, and the vendor on seeing it had said " Oh yes ; that is all right " : but he had before him the counterpart and knew the copy signed by him to be in the purchaser's possession; " therefore, when he said to his agent . . . that he approved of the alterations as they appeared not only in the part signed by " the purchaser " which he had before him, but in the one that was signed by him, which he knew to be in " the purchaser's " possession, he recognized his signature as attached to the document containing those alterations. It seems to be admitted that if, on approving the alterations, the defendant had said to " his agent : " ' All right, go and get that document,' and " he " had got the document and brought it back to the defendant, who thereupon had looked at it and said : ' Now take it back again, it is all right,' the case would be on all fours with *Stewart* v. *Eddowes* (4) ; and I can see no difference whatever between the case where, knowing the alterations are in the document which the other party

(1) (1923) 2 Ch., at p. 321.
(2) (1923) 2 Ch., at p. 327.
(3) (1874) L.R. 9 C.P. 311 ; 43 L.J. C.P. 333 ; 22 W.R. 534.
(4) (1874) L.R. 9 C.P. 311.

has, he approves that and says in effect, 'Let it stay there,' and does let it stay there as a memorandum of the contract, and a case where he had looked at it and said: 'Oh yes, that is all right; take it back again.'" *Warrington* L.J. (1) said:—"We, as a Court, are drawing I think the same inference that was drawn by the Court in *Stewart* v. *Eddowes* (2), that the acceptance of the alterations, the ratification of what had been done by" the agent "carried with it an acceptance of the signature as being a signature to the memorandum of that agreement, which was then made for the first time. . . . I have no hesitation in inferring from what took place between" the agent "and the vendor, that the vendor agreed that the signature which he had affixed to the previous document should be his signature to the agreement then for the first time arrived at." *Younger* L.J. said (3): "The result of what happened at that interview was that the defendant must be taken to have ratified and acknowledged his signature to the memorandum in its then state."

From these expressions, it appears to me that the Court of Appeal considered that it was enough if the party to be charged evinced an intention to treat the paper bearing his signature as the authentic expression of the proposal or contract he was making. In view of this treatment of the matter by the Court of Appeal, I think it should be held that the jury would have been at liberty to find that Lum assented to the paper's being treated as delivered afresh as a signed instrument. It follows that this appeal fails.

I desire to add that I am not satisfied that if Lum were bound by the guarantee in point of contract but his contract were unenforceable by action merely by reason of the want of a sufficient memorandum to satisfy the requirements of the Statute, Luke O'Young, who assented in writing should escape. His assent may perhaps have been subject to an implied condition that, unless Lum also assented in such a way as to incur a liability enforceable by action, he should not be bound. But this question was not argued, and it is unnecessary in the view I have taken to deal with it.

The appeal should be dismissed with costs.

(1) (1923) 2 Ch., at pp. 329, 330.
(2) (1874) L.R. 9 C.P. 311.
(3) (1923) 2 Ch., at p. 332.

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EVATT J. The main question on this appeal is whether an agreement between the respondent and a Chinese named Lum to answer for specified defaults on the part of another Chinese named Young, is supported by sufficient written evidence to satisfy sec. 4 of the *Statute of Frauds*.

It is admitted that the document dated October 12th, 1927, which was signed by Lum and his co-guarantor (the appellant O'Young), amounted merely to an offer by Lum and O'Young which lapsed when a second document prepared by the respondent was executed by Lum and O'Young on October 21st, 1927.

The defendants came to trial prepared to meet the case declared upon, which was that on October 12th, 1927, an agreement was concluded. They therefore pleaded *non assumpsit* only, verified the plea, and did not set up the *Statute of Frauds*. If agreement there was on October 12th, the first document was a written and signed memorandum thereof.

The defendants were therefore taken by surprise when the plaintiff set up at the trial that, although on October 12th there was only an offer to contract and that offer lapsed later in that month, in the following January the plaintiff induced O'Young and Lum to renew and repeat the offer contained in the original document and duly accepted that offer.

In order to support this new case, the plaintiff produced a letter from O'Young and tendered evidence of an interview between Lum and a witness named Waterhouse. The latter said :—

> "I went out there after I had got certain instructions from Mr. Hickson, and I had a conversation with Lum. I did not see any of the letters from O'Young. The date of the conversation with Lum would be either late December or early January. That would be late December, 1927, or early January, 1928. I told Lum that Mr. O'Young, of Gunnedah, would not sign the document compiled by Sly and Russell, and that we were relying on the first form of guarantee, and he informed me that he already knew that—that Mr. O'Young would not sign the document, and I informed him that we were relying on the first guarantee which was delayed at Gunnedah, and he was quite agreeable.
>
> "Q. You saw Mr. Lum late in December or early in January ?
>
> "A. Yes. I saw him at the shop at Auburn, and told him that Mr. O'Young, of Gunnedah, would not sign the third guarantee, and that the firm were relying on the first guarantee which was mislaid in transit at Gunnedah, and he seemed quite agreeable. He said that he knew Mr. O'Young had not

signed that first document. When I told him that the firm were proposing to rely on the first document he was quite agreeable. He said 'All right.' "

And further :—

"Q. What was it you told Lum on that particular occasion ?

"A. That Mr. Luke O'Young would not sign the third document and that we were relying on the first document which was signed, as that contained advances, and he said he was satisfied. That is what I told Mr. Lum."

And further :—

"*His Honor.*—Q. Do you say that you distinguished between the two earlier documents—the first and the second document ?

"A. Yes. I drew his attention to what document we were relying on."

In order to meet this new case, the defendants were allowed by the learned trial Judge to avail themselves of the *Statute of Frauds*. The jury answered a specific question in a way which showed that Waterhouse's evidence was accepted. *Halse Rogers* J. then held :—

"In my view the situation is exactly the same as if the agent of the plaintiff Company had taken the original document out to Lum, put it in his hands, and said 'This is the document that you originally signed, O'Young is willing to carry on under it, are you willing to carry on under it ?' and Lum had said 'Yes, I am willing to carry on under it,' and had handed that document over to the plaintiff Company. It seems to me in those circumstances there would be a revival of the original contract, and that the note or memorandum is sufficient to cover the whole transaction."

He accordingly entered judgment for the plaintiff, and the Full Court affirmed that judgment.

A memorandum may be sufficient to satisfy sec. 4 of the *Statute of Frauds* although it is signed by the party to be charged, before the agreement is concluded by verbal acceptance. When the signed offer is accepted by parol, such writing is not merely a memorandum or note of the agreement, it is "the agreement" itself "in writing and signed by the party to be charged therewith." If alterations are made in the document after it has been signed, and afterwards the signatory gives a verbal assent to the alterations and concludes an agreement, the document may still be a sufficient memorandum, although it is not actually produced to the signatory at the time of his verbal assent to the alterations (*Stewart* v. *Eddowes* (1) ; *Koenigsblatt* v. *Sweet* (2)).

In cases of this class there will often be an issue at the trial between conflicting oral testimony, and one object of the *Statute of Frauds* will be circumvented. But such is the binding rule of the decisions.

(1) (1874) L.R. 9 C.P. 311.

(2) (1923) 2 Ch. 314.

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The present case is not quite analogous because the signed offer was not merely altered, it completely lapsed as an offer. But the signed offer may be revived either by the signatory's re-offering the document to the other party or by the other party's offering to accept it as a binding agreement. If agreement results, the document may satisfy the *Statute of Frauds* as against the signatory although the issue of acceptance even turns upon conflicting oral evidence.

In some cases however there may be, and there was here, a considerable change of circumstances between the original date of the document and that of the concluded contract. Before January 1928, when some agreement between Waterhouse and Lum was effected, the respondent Company had made a large advance of money to Young. Did Lum (1) agree with Waterhouse that he could be taken as again making or accepting an offer in accordance with his and O'Young's document and as authenticating his signature for such purposes ? Or did he only (2) agree, in case of Young's default, to do the things described in such document ?

(2) If the latter were the correct view, there would arise the points stated by Mr. *Nield* in his clear argument. There was consideration for such a promise on Lum's part in January 1928, and the plaintiff could not fail for lack of it or of proof of it. But the real consideration for it was neither that alleged in the declaration, which is not important in view of the course of the trial, nor, which is important, that stated in the document.

It is true that the provision in the document is that O'Young and Lum " jointly and severally agree to guarantee to you the payment by the said Charles Young of all or any such advances made or hereafter to be made by you and of all goods supplied by you to him as aforesaid up to the sum of four hundred pounds," that " hereafter " means after October 12th, the date of the document, and that Young's business is clearly specified. In these circumstances there is no difficulty in establishing an identity between the written statement in the document of Lum's promise and the actual promise he intended to make to Waterhouse in January. Moreover, sec. 8 of the *Usury, Bills of Lading, and Written Memoranda Act* 1902, following *Lord Tenterden's Act* (19 & 20 Vict. c. 97, sec. 3) prevents

the document from being deemed invalid to support the action " by reason only that the consideration for " Lum's promise of January does not appear in, or by necessary inference from, the document.

But, none the less, the consideration stated in the document as supporting the promise therein described would be different from the consideration accepted for Lum's promise in the following January. If the document did not state any consideration at all, parol evidence of the actual consideration for the January agreement would have sufficed. In such circumstances, the absence of the statement of the consideration from the written memorandum of the promise or its failure to appear therefrom by necessary inference would be curable.

In *Holmes* v. *Mitchell* (1) *Byles* J. pointed out that before *Lord Tenterden's Act*,

> " a consideration expressed in writing formerly discharged two offices, it sustained the promise and might also explain it. Now, however, parol evidence, though it may supply the consideration, cannot go further, and explain the promise."

It might also be added that parol evidence, though it may supply the consideration, cannot go further and contradict the consideration for the agreement as it is expressed in the only written memorandum thereof.

Upon this second view of the facts, the January agreement being oral, although Lum's promise was to do the very same thing as is expressed in the document, the document was not a memorandum or note of " the agreement upon which such action shall be brought," but of an agreement supported by an entirely different consideration.

(1) But the first view is that the jury should be taken as having found that, in January 1928, Lum was addressing his mind to the contents of the document and re-offering or accepting that document and his signature to it for the purpose of authenticating his part in the arrangement. Is Lum to be " taken to have ratified and acknowledged his signature to the memorandum in its then state " ? (Per *Younger* L.J., *Koenigsblatt* v. *Sweet* (2)). Did Lum accept the signature " as being a signature to the memorandum of that agreement, which was then made for the first time " (per *Warrington* L.J., *Koenigsblatt* v. *Sweet* (3)). It was quite open for Lum to have

(1) (1859) 28 L.J. C.P. 301, at p. 304. (2) (1923) 2 Ch., at p. 332.
(3) (1923) 2 Ch., at p. 329.

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treated the document as his January offer capable of acceptance according to its tenor and operating in all respects as from October 12th. But did he do so ?

The position is not altogether satisfactory because the second view of the facts was not considered by the jury. The real issues were, not only whether Waterhouse's evidence was true, but what was the reasonable inference to be drawn from the facts as narrated by him. Unfortunately this part of the case was not debated, even upon the appeal to the Full Court. It was there assumed that the correct view of the transaction between Lum and Waterhouse in January was " that the document signed by both defendants was accepted as their guarantee in January " (per *Stephen* J.).

Although the appellant is entitled to consideration because of the way in which the plaintiff altered its case at the trial, I do not think that a new trial should now be ordered merely for the purpose of obtaining the additional finding I have mentioned. This conclusion is reached mainly because of the way in which the appeal to the Full Court was presented, and not at all because the *Statute of Frauds* was availed of by the appellant. Indeed many would agree that this case provides a good illustration of the need for extending rather than restricting the sweep of the Statute.

On the whole, I am for dismissing the appeal.

McTIERNAN J. The judgment of the learned trial Judge, *Halse Rogers* J., contains a summary of the steps which led to the making of the agreement in January 1928 on which the respondent relied at the trial. His Honor said :—" In this case the original document which is now sued on was superseded by another contract of guarantee in different form which was not satisfactory to the plaintiff Company and was obtained by them because the first document which had been sent to the defendants had been mislaid. When the unsatisfactory nature of the second document was discovered they attempted to obtain the signatures of the parties to a third but somewhat more elaborate document prepared by solicitors, and the defendant Lum signed it, but the defendant O'Young refused to sign it. The defendant O'Young, in returning the document unsigned, said that he was willing to carry on under the original

agreement of guarantee. According to the facts as found by the jury, the plaintiff Company then sent one of its travellers out to interview Lum, and a conversation took place in which it was pointed out to Lum that his proposed co-guarantor had refused to sign the third document, and it was stated that the Company was proposing to carry on under the original contract of guarantee, and, according to the finding of the jury, the defendant Lum said 'I am satisfied.' "

O'Young's assent to be bound by the terms of the memorandum dated 12th October was in writing, and was given to the plaintiff in December 1927. The conversation between Lum and the plaintiff's traveller took place in January 1928. The sum of £400 for which the plaintiff claimed in the action was for goods supplied by the plaintiff to the storekeeper Young after November 1929.

The particulars indorsed on the writ of summons in the action stated that the agreement, described by his Honor as the " original document," upon which the plaintiff sued, was dated 12th October 1927. As it appeared by the particulars that the agreement was in writing, the defendants did not plead the *Statute of Frauds*. At the trial of the action, the plaintiff did not rely upon this agreement, but set up that an agreement of guarantee was made in January 1928, when, as the jury found, Lum orally expressed his assent to be bound by the terms of the memorandum of 12th October 1927. In December 1927 O'Young had by writing expressed his assent to be bound by the terms of that memorandum.

It was contended on behalf of the appellants that as the agreement of guarantee, alleged to have been made in January, was an oral agreement, the *Statute of Frauds* is fatal to the plaintiff's case. The document, dated 12th October and signed before January 1928 could not, it was said, be relied upon as a note or memorandum, within the Statute, of an agreement made in January. I agree with the view of *Halse Rogers* J., which was approved by the Full Court, as to the meaning to be ascribed to the events which the jury found took place in January between the plaintiff's agent and Lum. His Honor expressed his view of the transaction in these words: " In my view the situation is exactly the same as if the agent of the plaintiff Company had taken the original document out to Lum, put

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it in his hands, and said 'This is the document that you originally signed, O'Young is willing to carry on under it, are you willing to carry on under it?' and Lum had said 'Yes, I am willing to carry on under it,' and had handed that document over to the plaintiff Company."

It follows, in my opinion, that the document in question may be relied upon as a note or memorandum, sufficient to satisfy the *Statute of Frauds*, of the agreement which was arrived at in January (*Koenigsblatt* v. *Sweet* (1)). The memorandum commences with the following words: "To Walter Reid & Co. Limited. In consideration of you agreeing to advance certain moneys to and supply Charles Young of Paddington with goods in the way of his trade in respect of a business now being purchased by him at Bankstown We the undersigned Luke O'Young of Gunnedah storekeeper and George Lum of Auburn grocer hereby jointly and severally agree to guarantee to you the payment by the said Charles Young of all or any such advances made or hereafter to be made by you and of all goods supplied by you to him as aforesaid up to the sum of four hundred pounds."

The words "now being purchased" relate to a business which was being purchased by Young at the time the document was signed. The plaintiff did advance certain moneys to Charles Young in respect of that business. This advance was made of course before January 1928. Upon these facts it was contended that what the plaintiff alleged to be a binding agreement entered into in January was a *nudum pactum*, as the consideration for the appellants' promise to guarantee the payment of debts due by the storekeeper to the respondent was past. The answer to this contention is that the consideration for the appellants' promise to guarantee payment by Charles Young was, *inter alia*, the supply of goods by the respondent to him in the future. I think that there was ample consideration for the appellants' promise to guarantee the payment of the moneys claimed in the action.

It was further contended that if the document of 12th October is to be relied upon as evidence of the agreement between the parties, it establishes an agreement which is at variance in important

(1) (1923) 2 Ch. 314.

respects from the agreement alleged in the declaration. The agreement, made in January to guarantee debts to be incurred in the future, it was said was not established by a memorandum which contains a promise to guarantee debts incurred prior to the making of the agreement. I do not think that there is a variance between the agreement contained in the memorandum and the agreements alleged. What took place in January did not merely make the document of 12th October a note or memorandum of the agreement the parties then made, but it established the terms contained in that memorandum, as the agreement by which the parties intended that they should be bound. Though made in January it had a retrospective operation to the date which it bore, namely 12th October. If this view is correct, there is no variance between the agreement alleged and the agreement proved.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant O'Young, *J. P. Bryen*, Gunnedah, by *Murphy & Moloney*.

Solicitors for the respondent, *Sly & Russell*.

J .B.