

[HIGH COURT OF AUSTRALIA.]

HOPE APPELLANT ;

DEFENDANT,

AND

R.C.A. PHOTOPHONE OF AUSTRALIA }
PROPRIETARY LIMITED } RESPONDENT.

PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

H. C. OF A. *Contract—Interpretation—Description of articles hired—Whether articles to be “ new ”*
1937. *—Extrinsic evidence—Admissibility.*

SYDNEY, *Appeal—High Court—Competence of appeal—Judgment in demurrer—Final judgment*
April 22. —Judiciary Act 1903-1934 (No. 6 of 1903—No. 45 of 1934), sec. 35.

Latham C.J.,
Rich, Dixon and
Evatt JJ.
Aug. 17, 18 ;
Dec. 14.
Latham C.J.,
Rich, Starke,
Dixon, Evatt
and McTiernan
JJ.

By an agreement in writing the plaintiff agreed to lease to the defendant the electrical sound-reproduction equipment described in a schedule to the agreement. The schedule did not identify any specific articles ; under the heading “ Description of the equipment covered by the foregoing agreement,” it described a number of articles. The agreement did not describe the equipment as either new or old. It contained a clause to the effect that the plaintiff should not be liable for delay, provided it had used reasonable despatch in “ procuring the manufacture delivery and installation of the equipment,” and it stipulated that the document contained the entire understanding of the respective parties with reference to the subject matter thereof and that there was no other understanding, agreement, warranty or representation, express or implied, in any way binding, extending, defining or otherwise relating to the equipment or the provisions of the agreement on any of the matters to which those presents related.

Held that upon its proper construction the agreement did not require that the equipment should be new, and parol evidence was not admissible to establish that the parties intended new equipment.

A judgment in demurrer upholding a pleading answering a cause of action may be final, and not interlocutory, if the opposite party has not pleaded as well as demurred to the pleading and has not obtained leave to amend and amended pursuant to that leave.

So held by *Rich, Dixon and Evatt JJ.* (*Latham C.J.* doubting).

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

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APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales R.C.A. Photophone of Australia Pty. Ltd. sued Stuart Hope on a money count for money payable by the defendant to the plaintiff for the hire of sound-reproducing equipment by the plaintiff to the defendant at his request, and for goods sold and delivered by the plaintiff to the defendant at his request, and for money paid by the plaintiff for the defendant at his request. The defendant pleaded, for a plea of cross-action by way of set-off, that, before and at the time of the breaches thereafter alleged, the defendant was the proprietor of a chain of talking-picture businesses and the plaintiff was a manufacturer and supplier of equipment and machinery used in similar businesses, and it was agreed by and between the plaintiff and the defendant that the defendant should for a reward to the plaintiff hire from the plaintiff, and the plaintiff should hire to the defendant, certain new machinery and equipment, more particularly described in a schedule to the said agreement, upon written terms and conditions, and alleged that the plaintiff did not hire to the defendant such new machinery and equipment but certain other machinery and equipment which were not new, whereby the said machinery and equipment were of no use to the defendant, and constantly broke down, and parts thereof had to be replaced, and by reason thereof the defendant was unable to carry on his businesses, and was put to great expense and inconvenience.

In a replication to the plea the plaintiff said that the agreement was in writing and set forth the whole of the agreement.

The defendant demurred to the replication but did not plead to it. Under the demurrer the defendant assigned the ground that the replication confessed but did not avoid the plea. In correspondence which ensued between the solicitors for the parties it was stated that the substantial grounds which were to be argued were (a) that on its

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proper construction the agreement alleged in the replication contained the promise the breach of which was sued for in the plea to which the replication was pleaded, and (b) that oral evidence was admissible to identify the subject matter of the agreement, and when by such evidence it was established that the goods agreed to be delivered were new goods, the replication was no answer to the plea.

The agreement recited that the company (the plaintiff) had agreed to lease to the exhibitor (the defendant) the electrical sound-reproduction equipment described in the schedule thereto upon and subject to the conditions therein contained for and during a term of $3\frac{1}{4}$ years commencing on the day when "the company notifies the exhibitor that the equipment is complete and ready for public operation." The total amount payable by way of premium and rent for the hire of the equipment was shown as £956 1s. Clause 1 of the agreement provided that "the company will procure the equipment and lease the same to the exhibitor for the purpose aforesaid. . . . The company . . . shall not be liable for any delay whatsoever provided the company shall have used reasonable despatch in procuring the manufacture delivery and installation of the equipment." Clause 27 provided that "this agreement and lease as herein set forth contains the entire understanding of the respective parties with reference to the subject matter hereof and there is no other understanding agreement warranty or representation express or implied in any way binding extending defining or otherwise relating to the equipment or the provisions hereof on any of the matters to which these presents relate." The schedule referred to was as follows :—

"Schedule 'A.'

(Description of the equipment covered by the foregoing agreement).

- 1 PG-72 equipment complete with two projector units, amplifier, speaker and 150 ft. stage cable.
- 1 non sync
- 2 pedestals
- 2 5" lenses
- 2 1,000 ft. spools
- 1 complete set spare valves

3 1,000 watt projection lamps

1 240/110 V. transformer

1 sound screen."

The agreement was silent as to whether new or secondhand equipment was to be supplied under the agreement.

The Full Court of the Supreme Court gave judgment for the plaintiff on demurrer. It was ordered "that the defendant do have seven days to file and serve such further or other pleas to the plaintiff's declaration as he may be advised." The defendant did not file any further plea.

From the decision of the Supreme Court the defendant appealed to the High Court.

On 22nd April 1937 the plaintiff applied to have the appeal struck out as incompetent on the ground that the judgment from which the defendant sought to appeal was not a final judgment.

Bavin, for the plaintiff.

Webb, for the defendant.

The following judgments were delivered :—

LATHAM C.J. In this matter I am not at all free from doubt, taking the criterion as to the distinction between final and interlocutory orders as stated in *Isaacs & Sons v. Salbstein* (1) by *Pickford* L.J. ; I have some doubt as to whether this can be regarded as a final order in view of the fact that the judgment for the plaintiff on demurrer gives liberty to amend within seven days, but I am not prepared to dissent from the opinion of my brothers that this is a final order.

RICH J. I am of opinion that this is a final judgment finally disposing of the dispute between the parties, and there is no doubt, there was no dispute, as to the amount in the appeal being over £300.

I suggest that the motion should be dismissed and the costs of the motion made appellant's costs in the appeal.

(1) (1916) 2 K.B. 139, at p. 148.

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DIXON J. I agree that it is not the decision in the case but the order or judgment which was pronounced that must be considered in deciding whether it is final or interlocutory. In the present case we are dealing with a judgment pronounced in reference to a plea by way of cross-action. To that plea there was a replication, and to the replication there was a demurrer. There was no answer pleaded to the replication to the plea by way of cross-action except the demurrer, and the plaintiff had judgment upon demurrer. The plea by way of cross-action sets up an independent cause of action upon which there may be an independent recovery, and, in my opinion, the judgment in demurrer was a final conclusion which of itself determined the rights of the parties and concluded the cross-action. The fact that the defendant might have amended does not affect the matter, because no amendment was made and none of any use could have been made. No doubt, when liberty to amend is given and exercised, it might prevent such a judgment operating in its prima-facie conclusive form.

As far as the amount involved is concerned, we have a very bare affidavit justifying the appeal. The plea by way of cross-action does not claim any definite sum, and possibly it might have been easy to displace the presumption that arises from the affidavit if the matter had been investigated upon facts; it is not a case in which a named amount is claimed. But no attempt has been made to prove that the amount at stake is necessarily less than £300, and I think that we should give effect to the affidavit as it stands.

I agree that the motion should be dismissed.

EVATT J. I agree with the view expressed that the judgment sought to be appealed from is a final judgment. Mr. *Bavin* has argued strongly that every judgment, so long as a judgment upon demurrer, must necessarily be interlocutory. I think he has misunderstood the position and the true position is that stated in *Ex parte Bucknell* (1) and also in *Shields v. Peak* (2), to which Mr. *Webb* referred, as well as *Pagani v. Pagani and Vining* (3). The true position is that a judgment on demurrer may be final or interlocutory; the court has to see

(1) (1936) 56 C.L.R. 221, at pp. 225,
226.

(2) (1883) 8 S.C.R. (Can.) 579.
(3) (1866) L.R. 1 P. & D. 223.

the whole issue between the parties, including those portions of the issue contained in the demurrer, together and see whether the judgment on demurrer finally disposes of the dispute between the parties. Applying that principle to this case, it is a very clear case, I suggest, of a final judgment. There is a specially indorsed writ, the plaintiff in his declaration sues upon a hiring agreement, the defendant relies upon a special plea by way of cross-action. It is, as my brother *Dixon* remarked, an independent claim. On that claim the Full Court has held that it is not consistent in law with the written agreement. Its judgment finally and forever disposed of that claim; it is a claim which evidence shows involves more than £300. I think the case of *Cox Brothers (Australia) Ltd. v. Cox* (1), to which Mr. *Bavin* referred, is quite distinct. This judgment would be regarded as final both under the Judicature practice and also in practice at common law.

I therefore agree with the order proposed.

The application was accordingly dismissed, and on 17th August the appeal came on for hearing.

Webb (with him *Vincent*), for the appellant. Upon the proper construction of the agreement, including the schedule thereto, the equipment referred to therein was, by necessary implication, to be new equipment. The replication did not show otherwise and, therefore, was not a good answer to the plea. Clause 27 of the agreement operates to exclude implied conditions and warranties. Evidence of the surrounding circumstances is admissible to identify the kind of equipment that was in the contemplation of the parties and to explain words which are susceptible of more than one meaning (*Phipson on Evidence*, 7th ed. (1930), p. 592; *Marcus Clark (Victoria) Ltd. v. Brown* (2); *R. W. Cameron & Co. v. L. Slutzkin Pty. Ltd.* (3); *Bank of New Zealand v. Simpson* (4)). The supplying of secondhand instead of new equipment was not a compliance with the real agreement between the parties and constitutes a breach

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(1) (1934) 50 C.L.R. 314.

(2) (1928) V.L.R. 195, at p. 208; 49
A.L.T. 209, at p. 216.

(3) (1923) 32 C.L.R. 81, at p. 86.

(4) (1900) A.C. 182, at p. 187.

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which is not affected by the exclusion of the warranty (*Hart-Parr Co. v. Jones* (1); *J. I. Case Threshing Machine Co. v. Mitten Bros.* (2)).

Bavin, for the respondent. The agreement between the parties does not by express words cast any obligation upon the respondent to supply new equipment, nor does an implication so to do necessarily arise from the terms of the agreement (*Lamb v. Evans* (3)). Once the parties have reduced their bargain into writing, no further evidence is admissible. The only obligation on the respondent is the obligation which appears on the written document (*Harnor v. Groves* (4)). The agreement is not ambiguous and can be complied with without resorting to extrinsic evidence (*Case Threshing Machine Co. v. Mitten* (5)). To introduce the word "new" into the agreement would add another term thereto. The appellant is concluded by clause 27 of the agreement from disputing the matter. Where a contract is capable of being performed in two or more ways, the adoption of any of those ways is a proper performance (*Cockburn v. Alexander* (6)). The decision in *Bank of New Zealand v. Simpson* (7) is not adverse to the respondent.

Webb, in reply. A clause expressly excluding all terms, representations, conditions and warranties not set forth in the contract was dealt with in *Hayes Manufacturing Co. v. Perdue & Cope* (8). Under that clause it is permissible to identify the subject matter but not to go *dehors* the contract for other obligations. Extrinsic evidence of the surrounding circumstances may be adduced in order to prove that words susceptible of more than one meaning are intended in one only of those meanings (*Bacchus Marsh Concentrated Milk Co. Ltd. v. Joseph Nathan & Co. Ltd.* (9)).

Cur. adv. vult.

(1) (1917) 2 W.W.R. (Can.) 888.

(2) (1918) 44 D.L.R. 40.

(3) (1893) 1 Ch. 218, at pp. 229, 230.

(4) (1855) 15 C.B. 667, at pp. 673, 674; 139 E.R. 587, at pp. 589, 590.

(5) (1919) 49 D.L.R. 30.

(6) (1848) 6 C.B. 791; 136 E.R. 1459.

(7) (1900) A.C. 182.

(8) (1931) 2 D.L.R. 610.

(9) (1919) 26 C.L.R. 410, at p. 427.

The following written judgments were delivered :—

LATHAM C.J. The plaintiff company sued the defendant, Hope, for moneys alleged to be due under an agreement for the hire of certain sound-picture equipment. The agreement was in writing and provided that “the electrical sound-reproduction equipment described in the schedule” to the agreement should be let to the defendant upon the terms mentioned in the agreement. The schedule did not identify any specific articles of equipment but was in the following form :—

“Schedule ‘A.’

(Description of the equipment covered by the foregoing agreement).

1 PG-72 equipment complete with two projector units, amplifier, speaker and 150 ft. stage cable.

1 non sync

2 5" lenses

2 pedestals

2 1,000 ft. spools

1 complete set spare valves

3 1,000 watt projection lamps

1 240/110 V. transformer

1 sound screen.”

The defendant, for a plea of cross-action by way of set-off, pleaded that the agreement between the parties was that the plaintiff should hire to the defendant “certain new machinery and equipment more particularly described in the schedule to the agreement,” and that the machinery hired was not new, and broke down from time to time, so that the defendant suffered damage. The plaintiff replied that the agreement was in writing, and set forth the whole of the agreement. The defendant demurred. The Full Court gave judgment for the plaintiff in demurrer, and the defendant has appealed to this court.

Upon the demurrer two points were argued, (a) that upon the true construction of the agreement the equipment to be supplied was new equipment; and (b) that oral evidence was admissible to show that the parties negotiated about new equipment and intended to contract with respect to new equipment.

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As to the first point it is sufficient to say that there is nothing in the terms of the written agreement which shows that new equipment was to be supplied. The agreement, as it appears in the document, would have been satisfied by the supply of equipment of the description mentioned in the schedule whether or not it was new.

It is very unsatisfactory to attempt to determine upon proceedings by way of demurrer a question of the admissibility of evidence which has necessarily not yet been tendered and the character of which cannot be ascertained in any defined form. But the Full Court heard argument upon the question raised, and this court must determine it in this appeal.

It is urged for the defendant that parol evidence is admissible for the purpose of identifying the subject matter of an agreement. This undoubtedly may be the case. Where persons have made an agreement about some specific thing, for example, "my motor car," or "my shop in X Street in Y town," parol evidence is admissible to apply the terms of the contract to the subject matter (See *Ogilvie v. Foljambe* (1); *Plant v. Bourne* (2)). But it is not suggested here that the parties had any specific articles of equipment in their minds when they were negotiating their contract, or that they ever agreed that any specific articles of equipment should be supplied under the contract, and, accordingly, the principle mentioned cannot assist the defendant in this case.

It is further argued that there is ambiguity in the description of the goods in the agreement—that they may be either new or old, and that the contract does not state whether they are to be new or old. It is true that the contract does not describe the equipment as either new or old, but this circumstance does not, in my opinion, create ambiguity in any relevant sense. There is no patent ambiguity. It is not suggested that the meaning of the words is not clear to all who understand the terminology used for the purpose of describing sound-reproducing apparatus. Is there, then, a latent ambiguity? Latent ambiguity exists when a description, evidently meant to apply to only one person or thing, is shown to be equally applicable to more than one person or thing; for example, a legacy "to my nephew John," where the testator had two nephews of that name.

(1) (1817) 3 Mer. 53; 36 E.R. 21.

(2) (1897) 2 Ch. 281.

In such a case the ambiguity is raised by extrinsic evidence and it is allowed to be removed by similar evidence. But the existence of ambiguity is not established by the fact that a general description applies to all persons or things falling within a certain class. If this is ambiguity, then all general terms are ambiguous. All class terms, such as those used in the schedule to the agreement between the parties in this case, are in their very nature applicable to the indefinite number of things which possess the attributes which are characteristic of the class. When it is sought to qualify a class term by adding an attribute which, by increasing the connotation, decreases the denotation, it cannot be said either that ambiguity is being removed or that language is being interpreted. Thus, when a right to adduce extrinsic evidence is claimed for the purpose of showing that the equipment referred to in the agreement in this case was new equipment, an attempt is being made, not to explain or to apply a contract, as in the special cases when such evidence is admissible, but to vary it by adding a new term. This is just what the law does not allow. When parties express their agreement in writing they do so for the purpose of securing certainty and preventing disputes. They may choose to leave their arrangements to the risks and chances of verbal evidence. But if they have recourse to writing for the purpose of recording their agreement, they cannot afterwards change their attitude and, by seeking to give parol evidence, introduce the very element of uncertainty which the adoption of writing was intended by both parties to exclude (*Gordon v. Macgregor* (1) and the several leading cases there cited).

It is true that there are exceptional cases where the parties to a contract have not expressed all the terms of their contract in writing, and, accordingly, parol evidence is admitted to complete the written contract (*Jervis v. Berridge* (2)). In the present case, however, the parties have made an agreement in express terms which prevents either of them supplementing the written terms. Clause 27 of the agreement provides that the agreement as set forth in the document "contains the entire understanding of the respective parties with reference to the subject matter hereof and there is no other understanding agreement warranty or representation express or implied

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(1) (1909) 8 C.L.R. 316.

(2) (1873) 8 Ch. App. 351.

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in any way binding extending defining or otherwise relating to the equipment or the provisions hereof on any of the matters to which these presents relate." The presence of this clause makes it unnecessary to discuss whether the defendant might, upon some amendment of his plea, be allowed to allege and prove the existence of a supplementary term that the equipment was to be new equipment.

The law is not incapable of dealing with a case where the parties have intended to make an agreement in particular terms, but, by a mutual mistake in the expression of their agreement, have executed a document including different terms or omitting a term which they had intended to include. In such a case a court of equity can, upon the facts being clearly proved, rectify the document to make it accord with the true intentions of the parties. In this appeal, however, no question arises as to the exercise of this jurisdiction.

In my opinion the proposed evidence is not admissible, and the judgment of the Full Court of the Supreme Court was right and should be affirmed.

RICH J. I agree with the judgment of *Dixon J.* and have nothing to add.

STARKE J. The plaintiff, the respondent here, declared upon common money counts for money payable by the defendant, the appellant here, to the plaintiff for the hire of sound-reproducing equipment by the plaintiff to the defendant at his request, and for goods sold and delivered by the plaintiff to the defendant at his request, and for money paid by the plaintiff to the defendant at his request. The defendant, for a plea of cross-action by way of set-off, alleged that the plaintiff hired to the defendant certain new machinery and equipment more particularly described in the schedule to an agreement and that the machinery and equipment supplied was not new. The plaintiff in its replication to this plea set forth the agreement in writing between the parties. To that replication the defendant demurred.

The defendant on the argument before this court contends that the agreement set forth in the replication is not inconsistent

with his plea because, on a true interpretation of the agreement, the equipment described in the schedule means new equipment, or because parol evidence would be admissible for the purpose of establishing that new equipment was referred to. The equipment is described in the schedule in ordinary commercial terms. It is as follows :—

“ 1 PG-72 equipment complete with two projector units, amplifier, speaker and 150 ft. stage cable.

1 non sync

2 5" lenses

2 pedestals

2 1,000 ft. spools

1 complete set spare valves

3 1,000 watt projection lamps

1 240/110 V. transformer

1 sound screen.”

A clause in the agreement stipulates that it “ contains the entire understanding of the respective parties with reference to the subject matter hereof and there is no other understanding agreement warranty or representation express or implied in any way binding extending defining or otherwise relating to the equipment.” But the defendant contends that the agreement requires that the plaintiff should manufacture the equipment and consequently that it must be new equipment. The agreement, however, merely provides that the plaintiff shall procure the equipment and that it shall not be liable for any delay, provided it uses reasonable despatch in procuring its manufacture, delivery and installation. This provision does not stipulate for new equipment but that the plaintiff will furnish and supply the equipment described in the schedule, which it may procure to be manufactured or otherwise acquired.

The other argument, that parol evidence would be admissible to establish that the parties contemplated and intended new equipment, is, I think, untenable. Parol evidence is not, of course, admissible to supply omissions or introduce terms or to contradict, alter or vary a written instrument. On the other hand, it is admissible for the purpose of explaining a latent ambiguity, for example, to identify subject matter to which writing refers, or to show the situation of

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the parties at the time the writing was made and the circumstances. The evidence, however, suggested by the defendant in the present case is to attach a quality or condition to the equipment described in the schedule and not to identify it. Again, the surrounding circumstances are also sought to be used for the purpose of attaching a quality or condition to the equipment which would alter and vary the terms of the written document contrary to the rules relating to the admissibility of parol evidence. The defendant therefore cannot adduce the parol evidence suggested in the argument.

In my opinion the appeal should be dismissed.

DIXON J. This is an appeal as of right brought by the defendant in the action from a judgment for the plaintiff given on demurrer. The demurrer was to the plaintiff's replication to a plea by way of cross-action. The plea by way of cross-action sets up an independent cause of action upon which the defendant seeks to recover against the plaintiff. The judgment, therefore, means that the matters pleaded in the replication answer the cause of action so set up. It is just as if upon demurrer to a plea to a declaration judgment were given for the defendant. Leave to amend was not exercised, and to amend would have been useless. The defendant did not plead as well as demur to the replication. Thus, the judgment ended the cross-action. It is, therefore, a final judgment, and, as the cause of action involved more than £300, an appeal lies from the judgment as of right. And we so held upon an application to dismiss or strike out the appeal as incompetent. This does not mean that a judgment on demurrer is always final and never interlocutory. If it concludes the cause of action in favour of one party or another, it may be final. If it does not do so, it is necessarily interlocutory.

The plea by way of cross-action was for breach of an agreement between the parties which, as appeared from the plea itself, was in writing. For, although the plea does not state in terms that the agreement was in writing, it refers to a schedule to the agreement. The plea alleges that the plaintiff was a manufacturer and supplier of equipment and machinery for talking-picture theatres and that the defendant was a proprietor of a chain of talking-picture businesses. It then alleges that it was agreed between them that the defendant

should hire from the plaintiff and the plaintiff [should] hire to the defendant "certain new machinery and equipment more particularly described in a schedule to the agreement." The plea then alleges breach on the part of the plaintiff in not hiring "such new machinery and equipment but certain other machinery and equipment which was not new." These allegations are capable of a construction by which they would refer to specific or ascertained goods. But we are told that they were not so intended and refer to goods to be supplied according to description. The plea ends with the allegations of damage flowing from the alleged breach. It will thus be seen that the cause of action sued on by way of cross-action consists in breach of a condition or warranty upon an agreement to hire chattels and the condition or warranty is that the chattels should be new.

In answer to the plea, the plaintiff replied by setting out verbatim the whole of the written agreement mentioned in the plea. It is to this replication that the defendant demurred. By so demurring he, of course, admitted that the agreement upon which he sued by way of cross-action was constituted by the writing set out in the replication.

If the writing was inconsistent with the existence of the condition or warranty stated in his plea, then his plea would be well answered. But, if consistently with the writing, there might be a condition or warranty to the effect set up by his plea, the replication would not answer the plea, and, unless some other replication set up an answer, the defendant would be entitled to succeed in his cross-action.

It is as well to remember that the mode of pleading of which the plaintiff has availed itself is a substitute for what was formerly done by way of *oyer*. Before it was introduced, where an instrument was relied upon in a pleading, the opposite party could set the instrument out *verbatim* on *oyer* and thereupon treat it as part of the pleading in which it was referred to. He could then, if he thought fit, demur to the pleading of which the instrument thus came to form part. When *profert* and *oyer* were abolished, the party pleading in answer to any pleading in which a document is mentioned or referred to was given liberty to set out the whole or the material part of the document. But, contrary to the former position, the

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matter set out must be taken to be part of the pleading in which it is set out (*Sim v. Edmands* (1); *Common Law Procedure Act* 1899 (N.S.W.), sec. 64). It is for this reason that the question is whether the writing set out in the replication necessarily excludes the existence of the term or condition sued on. It is not a question whether the written agreement supports the allegation contained in the plea by way of cross-action, but whether that allegation could possibly stand in face of it. It is evident that, although in the bare words of a written agreement interpreted apart from circumstances nothing can be found amounting to a condition or warranty stipulating that articles supplied under the agreement shall be new, yet proof of the character of the parties and of the surrounding circumstances may show that the writing so intended. In such a case the true meaning of terms expressed in the document may be understood only when the surrounding circumstances are known. On the other hand, it may be that the facts throw no new light on the actual meaning of the express terms of the contract, but nevertheless do show that the contract necessarily implies a condition or stipulation. Thus, in *Johnson v. Raylton, Dixon & Co.* (2), to which *Rich J.* has referred me, the implication to be made from the fact that the seller is a manufacturer of such goods as are bought is considered.

In the present case we are called upon, first, to examine the agreement set out in the replication to see whether on its face there is a condition or warranty that the articles shall be new. Having done so, I am clearly of opinion that there is not. We are next called upon to decide whether proof of any facts which within the limits of admissibility may be supposed or imagined could authorize a construction of any of the express terms of the agreement by which it could mean to stipulate that the articles should be new. Again, I am clearly of opinion that none of the express terms of the contract is capable of such a construction. But then we are called upon to take a third and more difficult step. We must answer the question whether proof of circumstances could conceivably provide material such that when the writing is applied to it an implication might be discoverable supporting the term or condition alleged by the plea. Our decision cannot rest on the sufficiency or insufficiency

(1) (1854) 15 C.B. 240; 139 E.R. 413.

(2) (1881) 7 Q.B.D. 438.

for this purpose of any actual facts or circumstances. We must, as it is a demurrer, deal with the question as a matter of hypothesis. But for an express provision contained in the written agreement excluding implications, I should feel it impossible to say in advance that no conceivable facts could enable a court of construction to imply in the agreement such a condition or term. But the twenty-seventh clause of the agreement provides that "this agreement and lease as herein set forth contains the entire understanding of the respective parties with reference to the subject matter hereof and there is no other understanding agreement warranty or representation express or implied in any way binding extending defining or otherwise relating to the equipment or the provisions hereof on any of the matters to which these presents relate." This provision, like that in *L'Estrange v. F. Graucob Ltd.* (1), appears to me effectually to exclude such an implied condition or warranty. I am, therefore, of opinion that the replication sustains the heavy burden the pleader undertook and does exclude the possibility of the legal existence of the condition or warranty alleged by the plea by way of cross-action.

The appeal should be dismissed with costs.

EVATT J. The claim of the defendant against the plaintiff takes the form of a plea of cross-action by way of set-off, but, in reality, it is, of course, a distinct action for breach of agreement. In answer to the defendant's plea, the plaintiff's replication set out in full the written agreement between the parties. Such a replication both invited and compelled the defendant to demur, and, the judgment of the Full Court on the demurrer being for the plaintiff, it is a final judgment, entirely disposing of the defendant's cross-action. From an uncontradicted affidavit it appears that the amount intended to be claimed under the cross-action exceeded £300; therefore the defendant's appeal to this court is as of right.

The substance of the cross-action is that the plaintiff promised that the subject matter of the hiring agreement was, or would be, "new" machinery and equipment, and the breach duly assigned is that such machinery and equipment was not "new." A perusal of

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the plea of cross-action shows that the defendant was not attempting to sue upon any oral agreement collateral to the written agreement of hiring, but upon the written agreement itself. The defendant proposed to establish his cross-action (a) by tendering oral evidence in order to "identify" the kind or type or model of machinery and equipment which was the subject of the hiring, and (b) by submitting as a matter of law that, on its true interpretation, the written agreement itself provided for "new" machinery and equipment. The first method of proposed proof introduces questions of the admissibility of evidence and of the effect of evidence when tendered, and the procedure of preliminary demurrer is seldom the best method of determining the question.

The second matter should be disposed of at once. Although a first reading of clause 1 of the written agreement suggests that the plaintiff was itself to manufacture or procure the manufacture of the "equipment," I think that the true meaning of the clause is merely to exonerate the plaintiff from responsibility for delayed delivery, subject to its compliance with a defined condition. It is to be observed that the word "new" in the plea of cross-action is not a term of art, but it may fairly be taken as referring to goods which, although they may have passed through other hands, have never been in "consumer's use" before, and are not "secondhand" goods. Certainly it cannot be implied from clause 1 that *both* machinery and equipment shall be "new," and that is the allegation upon which the cross-action is founded.

The main question, carefully argued by Mr. Webb, still remains. He is correct in asserting that, as a general rule, evidence is admissible to "identify" the actual subject matter of any hiring agreement. But he frankly conceded that the evidence of "identification" which he proposed to tender would be evidence to show in effect that machinery and equipment of the kind called "new" was shown to the defendant at and prior to the time of the contract, and that advertisements of "new" equipment priced as such were also displayed, so that the defendant had a legal right to call for the delivery and installation of machinery and equipment which were of the same kind or character as the model or specimen previously

demonstrated. But evidence of the character so outlined is not, in the strict sense, evidence of "identification." In particular, it may be contrasted with evidence to show that a racehorse A was delivered under a contract although all the previous negotiations concerned only racehorse B. In such a case, there is a complete absence of identity. When analyzed, the attempt of the present defendant is to adduce evidence of an understanding to the effect that the machinery and equipment, when delivered, would correspond in all essentials with the machinery and equipment previously demonstrated, which in fact was "new."

Again the question arises, what is "newness"? The difference between equipment which is "brand new" and equipment which is secondhand, having been used (say) for one day only, is, in one sense, a difference in kind. But very often it may also be regarded as a difference merely in quality or degree of quality.

Clause 27 of the agreement must now be considered. In my opinion, evidence such as the defendant proposed to tender in order to establish his cause of action will, as a result of clause 27, either be excluded altogether, or, if admitted, will not be allowed to operate so as to conflict with clause 27. That clause provides that "this agreement and lease as herein set forth contains the entire understanding of the respective parties with reference to the subject matter hereof and there is no other understanding agreement warranty or representation express or implied in any way binding extending defining or otherwise relating to the equipment or the provisions hereof on any of the matters to which these presents relate."

Clause 27 is so worded as to force the final question between the parties into the form, "Is the defendant seeking to prove that, as a result of material *dehors* the agreement, the jury is at liberty to find that the machinery and equipment were to possess the quality of 'newness,' although, *ex hypothesi*, the written agreement, construed without reference to external circumstance, does *not* call for the presence of such quality?"

In my opinion, the answer to this question is against the defendant, and it is fatal to his cross-action.

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In *Case Threshing Machine Co. v. Mitten* (1) *Duff J.* pointed out that

“the written contract declares in explicit words that the terms of the agreement between the parties are to be found in the writing and in the writing exclusively. In face of this provision, it is not, in my opinion, competent for a court of law to resort to contemporary conversations or prior conversations or even to the legend on the article for the purpose of discovering a contract differing in its terms from that expressed in the unambiguous language of the instrument.”

In that case, the difference of judicial opinion which arose was caused by the fact that the written agreement left room for the contention that the “generic” term, “gas engine” (contained in the written agreement), permitted or required evidence of prior conversations in order to prove that “gas” was intended to include a kerosene-burning as well as a gasoline-burning engine. The written contract contained a clause corresponding fairly closely to clause 27 of the present agreement. Although there was a good deal to be said in favour of the contention that the written agreement itself raised an ambiguity, the opinion of *Duff J.*, from which I have quoted, prevailed.

In my opinion, the case of the defendant here is a much weaker one. Here the written agreement contains no phrase which can be regarded as being ambiguous or as requiring further particularization.

The appeal should be dismissed.

McTIERNAN J. To the appellant’s plea of cross-action by way of set-off, in which he alleged that it was agreed between him and the respondent that the respondent would supply certain new machinery and equipment more particularly described in a schedule to the agreement, the respondent pleaded the very terms of the agreement. Neither in the agreement nor in the schedule are the articles, the subject matter of the agreement, described as new or old. It is clear that the respondent could perform the agreement by supplying new or used machinery and equipment, unless the respondent contractually bound itself to supply articles which were new.

“It is a wholesome rule of law that, when parties have put an agreement into writing, parol evidence is not admissible to contradict, or

vary the terms of the written agreement " (*New London Credit Syndicate Ltd. v. Neale* (1)). But it is not contrary to this rule to adduce evidence to apply the contract to the subject matter which the parties had in mind and were negotiating about when they made the agreement. "It may be laid down as a broad and distinct rule of law that extrinsic evidence of every material fact which will enable the court to ascertain the nature and qualities of the subject matter of the instrument, or, in other words, to identify the persons and things to which the instrument refers, must of necessity be received" (*Taylor on Evidence*, 12th ed. (1931), vol. 2, sec. 1194). The rule is expressed by Brett L.J. in *Lewis v. Great Western Railway Co.* (2) in the following terms:—"Now I apprehend that, in order to construe a written document, the court is entitled to have all the facts relating to it and which were existing at the time the written contract was made, and which were known to both parties. Certain facts existing at a time when a written document is made are sometimes customs of trade, or the ordinary usages of trade; sometimes the course of business between the parties; sometimes they consist of a knowledge of the matter about which the parties were negotiating; the court is entitled to ask for those facts, to enable it to construe the written document; not simply because they are customs of trade, or the course of business between the parties, but because they are facts which were existing at the time, and which have a relation to the written contract, and which must be taken to have been known by both parties to the contract." (See also *Grant v. Grant* (3), per *Blackburn J.*, and *Bank of New Zealand v. Simpson* (4).)

The subject matter of the contract was machinery and equipment of an agreed description only. If the identity of the subject matter had been agreed upon it might appear from the evidence that it consisted of articles which were new. In that case, of course, the appellant would succeed because any old or used machinery and equipment could not be identical with the subject matter of the contract. But it is inconsistent with the terms of the contract that the parties agreed upon the identity of the articles to be supplied under it. The agreed subject matter consists of the articles of

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(1) (1898) 2 Q.B. 487, at p. 491.

(2) (1877) 3 Q.B.D. 195, at p. 208.

(3) (1870) L.R. 5 C.P. 727, at p. 728.

(4) (1900) A.C., at pp. 187, 188.

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machinery and equipment answering the description in the schedule. It was not agreed that in addition to bearing that description those articles should have the quality of being new. The appellant's plea is answered by the express terms of the contract unless a term should be implied that the machinery and equipment were to be new. But to imply that term would contradict the express term of the contract which says: "This agreement and lease as herein set forth contains the entire understanding of the respective parties with reference to the subject matter hereof and there is no other understanding agreement warranty or representation express or implied in any way binding extending defining or otherwise relating to the equipment or the provisions hereof on any of the matters to which these presents relate."

In my opinion the decision of the Supreme Court was right and the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Joseph J. Jagelman & Son.*

Solicitors for the respondent, *Minter, Simpson & Co.*

J. B.