[HIGH COURT OF AUSTRALIA.]

ANDERSON . . . . . APPELLANT;
DEFENDANT,

AND

DENSLEY . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1953.

BRISBANE, *Aug.* 5, 6;

SYDNEY, *Aug.* 28.

Williams, A.C.J., Webb and Taylor JJ.

Principal and Agent—Commission—Action for recovery of commission by agent—Sale of property—Engagement or appointment in writing—Connected documents—The Auctioneers and Commission Agents Acts, 1922 *to* 1951 (*Q.*) (13 *Geo. V. No.* 27—15 *Geo. VI. No.* 16), *s.* 23 (1) (*b*).

Section 23 (1) (b) of *The Auctioneers and Commission Agents Acts*, 1922 *to* 1951, provides that "a commission agent shall not be entitled to sue for or recover . . . commission, reward, or other remuneration for or in respect of any transaction, unless his engagement or appointment to act as commission agent in respect of such transaction is in writing, signed by the person to be charged with such . . . commission, reward, or remuneration, or his agent or representative".

Held, that s. 23 (1) (b) of the Acts does not require the engagement or appointment of the agent to be in writing and it is sufficient if some writing or connected writings exist evidencing the creation of the relationship of principal and agent in respect of the transaction pursuant to an oral contract.

On the sale of two grazing properties without plant or stock the contract was signed by the principal, as vendor, the agent being described therein as agent for the principal. Through no fault of the vendor the sale was never completed and subsequently by another contract of sale the grazing properties with plant and livestock were sold to the same purchaser, without any reference to the agent. In an action brought by the agent to recover commission in respect of the second transaction, the agent relied on the first contract of sale as evidence of his engagement or appointment in writing.

Held, that the contracts of sale were not writings so connected as to constitute evidence in writing, within the meaning of s. 23 (1) (b) of *The Auctioneers and Commission Agents Acts* 1922 *to* 1951, of the engagement or appointment of the agent in respect of the second transaction.

Canniffe v. *Howie* (1925) Q.S.R. 121; *Skipper* v. *Syrmis* (1925) Q.S.R. 129; *Pettigrew* v. *Klumpp* (1942) Q.S.R. 131, approved.

Decision of the Supreme Court of Queensland (*Matthews* J.) reversed.

APPEAL from the Supreme Court of Queensland.

In the Supreme Court of Queensland Mark Densley sued William Charles Anderson for commission due to him as an agent on the sale to Noel Pryce of certain grazing properties together with plant and livestock.

At the trial the jury found that the defendant engaged the plaintiff to act as his agent in the sale of the properties and that the plaintiff found the purchaser and was the effective cause of the sale. The trial judge (*Matthews* J.) held that the first contract of sale evidenced an engagement or appointment of the plaintiff to act as commission agent in respect of the transaction and entered judgment for the plaintiff.

From this decision the defendant appealed to the High Court.

The facts are fully set out in the judgment hereunder.

T. D. McCawley, for the appellant. In enacting *The Auctioneers and Commission Agents Acts Amendment Act of* 1936 (Q.) whereby the definition of " commission agent " was altered and the words " act as commission agent " were substituted for the words " act as agent " in s. 23 (1) (b) of *The Auctioneers and Commission Agents Acts* 1922 *to* 1951 (Q.), it was the intention of the legislature that, after such amendments, there could be no engagement or appointment in writing of an agent to act as commission agent unless the writing expressly appointed the agent to act as a commission agent by describing him as a commission agent or by stating that he was to be remunerated by a commission or other remuneration for doing the particular work for which he was engaged. The legislature deliberately made this amendment to the existing legislation and by so doing must have intended some alteration to the law. It has been decided in Queensland in *Canniffe* v. *Howie* (1); *Skipper* v. *Syrmis* (2) and in other cases namely, *Roach* v. *Hough* (3); *Dawson* v. *Wade* (4); *Pettigrew* v. *Klumpp* (5); *Bennett & Co.* v. *Connors* (6), that there is sufficient compliance with s. 23 (1) (b) of the Acts, if the engagement or appointment of the agent is evidenced by connected writings or documents. The first contract of sale evidences or is an acknowledgment that the agent was engaged to sell the lands owned by the appellant. It is not an acknowledgment of the engagement or appointment of the agent for the purpose of selling the lands together with plant and stock. The trial judge was wrong in holding that the first contract of sale evidenced an engagement or appointment of the respondent to act as commission agent in respect of the relevant transaction.

(1) (1925) Q.S.R. 121.
(2) (1925) Q.S.R. 129.
(3) (1926) Q.S.R. 24.
(4) (1933) Q.S.R. 105.
(5) (1942) Q.S.R. 131.
(6) (1953) Q.S.R. 14.

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W. G. Taylor, for the respondent. In reality the first transaction was a sale of the lands, plant and livestock. It was effected by two separate contracts of sale, one for the lands with H. A. Pryce and the other for the plant and livestock with Noel Pryce. The real purchaser was Noel Pryce and the contracts referred to each other and were interdependent, both with regard to possession and completion. They were connected documents, so that the acknowledgment of the respondent as agent in the contract for the sale of the lands had the effect of an acknowledgment that the respondent was also agent for the sale of the plant and livestock. These two contracts of sale and the contract of sale in respect of the lands and grazing assets of the vendor are all connected documents and evidence the appointment or engagement of the respondent as commission agent for the purpose of selling the grazing properties, plant and livestock to Noel Pryce. [He referred to *Canniffe* v. *Howie* (1); *Skipper* v. *Syrmis* (2); *Dawson* v. *Wade* (3); *Roach* v. *Hough* (4).] The legislature had no intention of altering the law when in the year 1936 it made amendments to s. 23 (1) (b) of *The Auctioneers and Commission Agents Acts* 1922 *to* 1951 (Q.). All the legislature did was to bring the section into conformity with other sections which were amended by the Act, particularly as the definition of " commission agent " had been altered. In *Pettigrew* v. *Klumpp* (5) and *Bennett & Co.* v. *Connors* (6), the Full Court of the Supreme Court of Queensland applied the principles enunciated in *Canniffe* v. *Howie* (1) and *Skipper* v. *Syrmis* (2), after the amendment to s. 23 (1) (b) of the Acts had been made.

T. D. McCawley, in reply, referred to *Hill* v. *William Hill (Park Lane) Ltd.* (7) and *Barnett & Son* v. *Boyle Bros.* (8).

Cur. adv. vult.

Aug. 28. THE COURT delivered the following written judgment:—

The appellant is the defendant in an action in the Supreme Court of Queensland brought by the plaintiff, the respondent in this Court, to recover commission alleged to have been earned by the plaintiff as a commission agent for the defendant on the sale by the plaintiff of the defendant's grazing properties, Redmarley Pastoral Holding, containing sixteen square miles being portion 6 in the County of Auburn, parish of Quandong, and grazing farm No. 10209, containing 9,323 acres, being portion 2 in that county and

(1) (1925) Q.S.R. 121.
(2) (1925) Q.S.R. 129.
(3) (1933) Q.S.R. 105.
(4) (1926) Q.S.R. 24.
(5) (1942) Q.S.R. 131.
(6) (1953) Q.S.R. 14.
(7) (1949) A.C. 530.
(8) (1932) N.Z.L.R. 1087.

parish, together with the plant and livestock thereon, for the total sale price of £14,000 or in the alternative the sum of £13,700 in or about the month of June 1951, or thereafter. The plaintiff claims £300 commission, that being the sum he alleges was agreed upon between the parties, or in the alternative £355 being commission payable at the prescribed rate on £13,700. The action was tried by *Matthews* J. and a jury. At the conclusion of the evidence his Honour submitted certain questions to the jury. Before setting out these questions and the answers of the jury it will be convenient to state a few facts. Between 1st May 1951 and 1st January 1952 the plaintiff was carrying on the business of a commission agent at Chinchilla in Queensland. In May 1951 the defendant orally instructed the plaintiff to sell the abovementioned land and chattels and livestock for the sum of £17,500 or such lesser sum as the defendant would accept. The plaintiff introduced as possible purchasers H. A. Pryce and his son, Noel Pryce, then an infant. Eventually two contracts were entered into on 12th June 1951 (Exhibits 9 and 10), the first for the sale of the real estate to Noel Pryce for £9,542 and the second for the sale of the livestock and chattels to H. A. Pryce for £4,458. Clause 6 of the second contract provided that possession of the property sold should be given and taken on the same day as possession was given and taken under the first contract and that the second contract was entered into conditionally upon completion of the first contract. These contracts were never completed but on 23rd February 1952, a third contract (Exhibit 13) was entered into between the defendant and Noel Pryce, who had attained his majority, for the sale of the defendant's two grazing properties and the plant and livestock for the sum of £13,700 and this contract was completed. The plaintiff admits that in respect of the first two contracts he had agreed to accept £300 as commission, the dispute at the trial being whether the commission was to be paid by the defendant or by the purchasers. The plaintiff said that he had arranged with the purchasers that they would pay the total sum of £14,300 for the two grazing properties and the plant and livestock thereon and of this sum £300 was to be paid by the defendant as commission, whereas the defendant said that the plaintiff had agreed to look to the purchasers for this commission. The third contract was entered into after the plaintiff had sold his business as a commission agent but he claims that he was the effective cause of this sale. The commission on a sale of £13,700 at the prescribed rates would be £355. The questions left by his Honour to the jury and their answers were as follows :

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" 1. Did the defendant engage plaintiff to act as agent for him in the sale of the properties mentioned in the statement of claim ? Yes.

2. Did the plaintiff find a purchaser or purchasers of the said properties under the terms of his engagement ? Yes.

3. If ' Yes ' to 1 and 2, did plaintiff in or about June 1951 agree with Herbert Augustus Pryce to accept from the said Herbert Augustus Pryce the sum of £300 as commission on the sale of the said properties as then contemplated ? Orally, yes.

4. Was the plaintiff the effective cause of the sale in February 1952 by the defendant to Noel Pryce of the properties mentioned in the statement of claim ? Yes.

5. Did the plaintiff orally agree with defendant that he (the plaintiff) would not require the defendant to pay any commission in respect of the sale of the properties mentioned in the statement of claim ? (a) On the proposed transaction in June 1951. No. (b) On the transaction in February 1952. No.

6. If ' No ' to 5 (b), what remuneration is plaintiff entitled to receive from the defendant ? £355 ".

After the jury had given these answers each side moved for judgment. His Honour gave judgment for the plaintiff. The submissions on behalf of the defendant which his Honour rejected (and they are the submissions now made on his behalf) were that there was no appointment or engagement in writing of the plaintiff as required by statute and that the appointment or engagement, if any, proved by the plaintiff, was not in respect of the transaction of 23rd February 1952. His Honour's reasons for rejecting these submissions were as follows : " In this matter, whilst I appreciate the argument of Mr. *McCawley*, I am not prepared to agree with it at the moment. I think the amendment to the Act by the substitution of the words in s. 23 (b) ' act as Commission Agent ' for the words ' act as Agent ' were inserted for the purpose of bringing that section into line with the other sections of the Act where the term ' Commission Agent ' is used. The definition of commission agent in s. 4 is ' an agent for others . . . reward '. The amendment does not alter the meaning of the section as interpreted in the cases referred to by Mr. *Taylor*. I find therefore that the writing contained in Exhibit 9 evidences an engagement or appointment of the plaintiff to act as commission agent in respect of transactions here in question. The documents, Exhibit 9 and Exhibit 10, are connected by references in each document, one to the other, I think therefore on the findings of the jury I should give judgment for the plaintiff for £355 0s. 0d., with costs ".

The submissions relate to the legal effect of certain provisions of *The Auctioneers and Commission Agents Acts* 1922 *to* 1951 (Q.), and in particular to the provisions of s. 23 (1) (b) of that Act. Paragraph (b) now provides that: " A commission agent shall not be entitled to sue for or recover or retain any fees, charges, commission, reward, or other remuneration for or in respect of any transaction, unless his engagement or appointment to act as commission agent in respect of such transaction is in writing signed by the person to be charged with such fees, charges, commission, reward, or remuneration, or his agent or representative ". The words " act as commission agent " were substituted for the words " act as agent " by s. 12 of *The Auctioneers and Commission Agents Acts Amendment Act of* 1936 (Q.) and the words " or retain " were inserted by s. 13 of *The Auctioneers and Commission Agents Acts Amendment Act of* 1951 (Q.). The same section of the Act of 1951 introduced a second sub-section into s. 23 but its contents are not material to these reasons and need not be referred to. The Act of 1936 also substituted a new definition of " commission agent " in s. 4 of the Act for the original definition. The original definition so far as material, provided that unless the context otherwise indicated " commission agent " means: " Any person who, within a district in which the provisions of this Act relating to commission agents are in force, as an agent for others, whether on commission or for or in expectation of any fee gain or reward, and either alone or in connection with any other business, exercises or carries on the business or advertises or notifies that he exercises or carries on the business of buying selling or letting houses land or estates, or negotiating for such buying selling or letting, or buying or selling hotel businesses boarding-house businesses store-keeping businesses manufacturing businesses or trading businesses whatsoever or any interest in any of such businesses or buying or selling live stock ". The definition substituted by the Act of 1936 converted this definition into par. (b) and inserted ahead of it par. (a) which reads " is a motor dealer ". The definition was further amended by the Act of 1951 by striking out the words " within a district in which the provisions of this Act relating to commission agents are in force ". The Act of 1936 also introduced the following definition of " motor dealer " into the principal Act: " Any person who—(a) On his own behalf, and either alone or in connection with any other business, exercises or carries on the business or advertises or notifies that he exercises or carries on the business of buying or selling (including the letting or selling upon a hire-purchase agreement within the meaning of ' The Hire-purchase Agreement Acts, 1933

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to 1934 '), used or second-hand motor vehicles, and/or (b) As an agent for others, and whether on commission or for or in expectation of any fee, gain, or reward, and either alone or in connection with any other business, and either generally or in respect of any one transaction, exercises or carries on the business, or advertises or notifies that he exercises or carries on the business, of buying or selling (including the letting or selling upon a hire-purchase agreement within the meaning of ' The Hire-purchase Agreement Acts, 1933 to 1934 '), used or second-hand motor vehicles ".

The only document in evidence in the present case that could possibly have been an engagement or appointment of the plaintiff in writing to act as commission agent on behalf of the plaintiff in respect of any sale of his grazing assets is the contract of sale of the two grazing properties by the defendant to Noel Pryce on 12th June 1951. The opening provisions of this contract are as follows :—" Mark Densley as Agent for the Vendor William Charles Anderson do hereby acknowledge that I/we have sold this day to Noel Pryce of Warra the property situated in the County of Auburn Parish of Quandong Town of containing acres roods perches, be the same a little more or less, and being the Land described as (a) Redmarley Pastoral Holding containing 16 square miles being Portion 6 and term 20 years from 1st January 1946

(b) Grazing Farm No. 10209 containing 9,323 acres being Portion 2 and term 28 years from 1st October 1944

for the sum of £9,542 clear of rates and taxes to date, and have received the sum of £2,600 by way of deposit and in part payment of the said purchase money. And I/we as Agent for the Vendor do hereby agree to fulfil on my/our part the Conditions of Sale hereunder written and printed.

And I/we the abovenamed Purchaser hereby acknowledge that I/we have this day purchased the said property for the sum first abovenamed, and agree to fulfil in all respects on my/our part and to be bound by the Conditions of Sale hereunder written and printed.

Dated at Chinchilla this Twelfth day of June 1951.

.....

Vendors Agent

Witness.....

Noel Pryce Purchaser.

Witness Leslie R. Ross

Confirmed

Witness Leslie R. Ross

W. C. Anderson

Vendor "

It will be seen that this contract is signed by the defendant as the vendor and states that the plaintiff as agent for the defendant acknowledges that he has sold the two grazing properties to Noel Pryce for the sum of £9,542. No mention is made in the second contract of the same date or in the contract of 23rd February 1952 of the plaintiff acting as agent for the defendant on the sale of the assets to which these contracts refer. The contract of 23rd February 1952 relates to the assets separately sold under the two earlier contracts but the chattels and livestock are not identical with those sold under the second contract due to the lapse of time and a bushfire having occurred on the grazing properties in the meantime. But it would seem that the contract of 23rd February 1952 grew out of the two earlier contracts and the introduction by the plaintiff to the defendant of the Pryces as possible purchasers of his grazing assets and the jury answered the fourth question whether the plaintiff was the effective cause of the sale in February 1952 by the defendant to Noel Pryce in favour of the plaintiff. That contract was completed. Where an agent is employed on commission to sell a property (and non-completion is not due to the default of the vendor) the commission only becomes payable if the sale is completed : *James* v. *Smith* (1) ; *Boots* v. *E. Christopher & Co.* (2) ; *Midgley Estates Ltd.* v. *Hand* (3). If the plaintiff was the effective cause of that sale, as the jury found he was, he would at common law have earned his commission.

The real question at issue is whether s. 23 (1) (b) of *The Auctioneers and Commission Agents Act* is a bar to the plaintiff recovering this commission. The first submission is that since the words " act as commission agent " were inserted in par. (b) of s. 23 (1) of the Act by the amending Act of 1936 there can be no engagement or appointment in writing of an agent to act as a commission agent in respect of a transaction within the meaning of the paragraph unless the writing expressly appoints or evidences the appointment of the agent to act as a commission agent either by describing the agent as a commission agent or referring to the fact that he is to be remunerated by fees, &c., for doing the work for which he is engaged or appointed. It was argued that the amendment must have been made to carry out some new intention of the legislature and that an intention to this effect is disclosed by the change in the language of the paragraph. We are unable to accept this submission. The words " act as commission agent " appear to us to have been substituted for the words " act as agent " so as to bring the paragraph into conformity with the other amendments

(1) (1931) 2 K.B. 317 (n).
(2) (1952) 1 K.B. 89.
(3) (1952) 2 Q.B. 432, at p. 435.

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that were introduced by the Act of 1936 into the principal Act. In particular there was the amendment in the definition of "commission agent" which made that definition include persons who were dealers in used or second-hand motor vehicles. "Motor dealers" were also divided into two classes, the first class consisting of persons who were dealing in such vehicles on their own behalf and therefore as principals and the second class consisting of persons who were dealing in such vehicles as commission agents on behalf of others. Paragraph (b) of s. 23 (1) was amended, we think, so as to confine its operation to cases where a person who is a commission agent within the meaning of the definition is acting as an agent for another in a transaction of the kind defined in par. (b) of the definition of commission agent or par. (b) of the definition of motor dealer. The amendment of the language of par. (b) of s. 23 (1) was a natural, if not a necessary, corollary of these amendments. There will, in our opinion, be a sufficient engagement or appointment of a commission agent in writing within the meaning of this paragraph if the writing shows that a person is engaged or appointed as the agent of another to do any of the work specified in par. (b) of the definition of commission agent or par. (b) of the definition of motor dealer, whether or not the writing expressly refers to the appointment of the agent as a commission agent or to the fact that he is to be remunerated by commission. The fact that he is engaged or appointed to do this work implies, in the absence of an agreement to the contrary, that he is to be paid the usual or prescribed remuneration (if there be any such prescription) for the performance of his duties.

A long line of cases in Queensland has decided that the paragraph does not require the contract of engagement or appointment of the agent to be in writing. It is sufficient if some writing or connected writings exist evidencing the creation of the relationship of principal and agent in respect of the transaction pursuant to an oral contract. The leading case is *Canniffe* v. *Howie* (1), and that case has been followed and applied in *Skipper* v. *Syrmis* (2); *Roach* v. *Hough* (3); *Dawson* v. *Wade* (4); *Pettigrew* v. *Klumpp* (5); and *Bennett & Co.* v. *Connors* (6). The principle of construction embodied in these decisions is that stated by *Lukin* J. in *Canniffe* v. *Howie* (1): "Any document signed by the principal at any time before action brought which evidences the essential fact, the existence of the relationship in respect of the transaction in question, is sufficient to comply with the statute" (7).

(1) (1925) Q.S.R. 121.
(2) (1925) Q.S.R. 129.
(3) (1926) Q.S.R 24.
(4) (1933) Q.S.R. 105.
(5) (1942) Q.S.R. 131.
(6) (1953) Q.S.R. 14.
(7) (1925) Q.S.R., at p. 127.

In *Pettigrew* v. *Klumpp* (1) and *Bennett & Co.* v. *Connors* (2) the Supreme Court continued to apply this principle although par. (b) had been amended in 1936. It was not submitted to the Supreme Court in those cases, as it is now submitted to us, that this construction had been affected by the amendment. The point could of course have been overlooked but, for the reasons already given, we do not think that the amendment had the effect contended for. The first submission made on behalf of the appellant therefore fails.

But the second submission remains for consideration. The provisions of the first contract of 12th June 1951, which we have set out, are at most an acknowledgment by the defendant of the engagement or appointment of the plaintiff to act as the agent of the defendant to sell the land owned by the defendant to Noel Pryce for £9,542. It is not an acknowledgment of the engagement or appointment of the plaintiff to sell the whole of the defendant's grazing assets. In the end the defendant did sell the whole of these assets to Noel Pryce on a walk-in-walk-out basis. But the plaintiff is unable to point to any writing evidencing his engagement or appointment to act as a commission agent on behalf of the defendant other than an acknowledgment of his engagement or appointment to act on the sale of the defendant's land. We are unable to agree with the learned trial judge that " the writing contained in Exhibit 9 evidences an engagement or appointment of the plaintiff to act as commission agent in respect of transactions here in question ". Exhibits 9 and 10 do, as he said, refer to each other, but there is no acknowledgment in either document of the engagement or appointment of the plaintiff to act as a commission agent except in respect of the sale of the defendant's land.

For these reasons we must allow the appeal with costs. The judgment below must be set aside and in lieu thereof there must be judgment for the defendant with costs including two refreshers.

Appeal allowed with costs. Order that judgment below be set aside and in lieu thereof that judgment be entered for the defendant with costs including two refreshers.

Solicitors for the appellant, *E. W. Cleary & Lee*, Toowoomba, by *Macrossan & Co.*

Solicitors for the respondent, *Wonderley & Hall*, Toowoomba, by *Frederick B. Hemming & Hall.*

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(1) (1942) Q.S.R. 131. (2) (1953) Q.S.R. 14.