[HIGH COURT OF AUSTRALIA.]

MASTERS AND ANOTHER . . . . . APPELLANTS;

AND

CAMERON . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 21, 22;

SYDNEY, *Nov.* 30.

Dixon C.J., McTiernan and Kitto JJ.

*Vendor and Purchaser—Sale of land—Contract—"Subject to the preparation of a formal contract of sale which shall be acceptable to my solicitors on the above terms and conditions"—Whether concluded contract—Nature of sum paid as a "deposit"—Intention of parties.*

The expressions "subject to contract," "subject to the preparation of a formal contract" and others of similar import prima facie create an overriding condition so that what has been agreed upon must be regarded as the intended basis for a future contract and not as constituting a contract of itself.

By a document dated 6th December 1951 C. agreed to sell a certain farming property to M. "subject to the preparation of a formal contract of sale which shall be acceptable to my solicitors on the above terms and conditions" and M. agreed to purchase such property "on the above terms and conditions".

*Held*, that the document did not constitute a binding contract between C. and M.

M. paid the sum of £1,750 to the vendor's agent. C. said in evidence that on the date of signing of the document the agent said to her, in the presence of M. after its execution, "Your farm has now been sold," and that she said to the agent, "what about the deposit?" The agent then requested M. to give him a cheque and M. promised to do so on the following day.

*Held*, that the sum of £1,750 was paid to the agent on terms requiring that if a formal contract should be executed the amount should be applied and treated as a deposit on the purchase as contracted for, and that otherwise it should be returned to M.

*Chillingworth* v. *Esche* (1924) 1 Ch. 97 applied.

*Held* further that as the only relationship between M. and C. was constituted by the document of 6th December 1951 certain conduct of M., such as the making of structural alterations and additions to the property did not estop M. from denying that he had agreed to purchase the property.

Decision of the Supreme Court of Western Australia (*Wolff* J.) reversed.

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APPEAL from the Supreme Court of Western Australia.

An originating summons issued out of the Supreme Court of Western Australia at the suit of Dalgety & Co. Ltd. against three defendants of whom the first was the present respondent, and the other two were the present appellants calling upon them to state the nature and particulars of their respective claims to a sum of £1,750 which had come into the possession of the plaintiff company.

On 6th December 1951 the parties to this appeal signed a memorandum in the following terms:—"I, Violet Christina Cameron, widow of Bowelling, agree to sell my farming property at Bowelling, being Wellington Location 4095 comprising approximately 5,000 acres, for the sum of Seventeen Thousand Five Hundred Pounds (£17,500) cash and to complete the fence on the North West portion of the Bowelling/Noggerup Road running through Bokhara, to this extent only. 1. Complete 30 chains of fencing including wire. 2. Erect further 100 chains of bored posts ready for wiring. I agree to sell the land and all fixed improvements on a freehold basis free from all encumbrances, and to pay all costs, including legal fees necessary to procure for the purchaser a freehold unencumbered title thereto. This agreement is made subject to the preparation of a formal contract of sale which shall be acceptable to my solicitors on the above terms and conditions, and to the giving of possession on or about the Fifteenth Day of March 1952. Signed at Bowelling this Sixth Day of December 1951 VIOLET C. CAMERON Witnessed by R. O. WAY 6/12/51. And I, Norman James Masters on behalf of N. J. & M. E. I. Masters, of 5 Waratah Street, Cronulla, N.S.W., hereby agree to purchase the above property on the above terms and conditions. Signed at Bowelling this Sixth day of December 1951. N. J. MASTERS Witnessed by R. O. WAY 6/12/51".

On the same date the appellants paid to Dalgety & Co. Ltd. the sum of £1,750 for which a receipt was issued describing such moneys as "deposit on purchase 'Bokhara' Farm from V. C. Cameron". Subsequently the appellants refused to continue with the purchase and contended that no binding contract of sale had been entered into.

Both the appellants and the respondent claimed the moneys held by Dalgety & Co. Ltd. The appellants claimed on the basis that the £1,750 was paid by them to Dalgety & Co. Ltd. on terms which required that if a formal contract should be executed the amount should be applied and treated as a deposit on the purchase so contracted for, and that otherwise it should be returned

to them. The respondent claimed on the basis that the payment was a deposit which had in the circumstances become forfeited.

On the hearing of the summons the plaintiff was ordered to pay the amount in dispute into court and the parties were then given liberty to apply for further directions. Upon an application made for this purpose by the respondent a series of questions entitled "Issue to be tried between the claimants in these proceedings", was drawn up and ordered to be tried. There were four questions, as follows:—"1. Did the claimant, Violet Christina Cameron, agree to sell and the claimants, Norman James Masters and Mavis Ella Iris Masters, agree to buy the farming property of the . . . claimant Violet Christina Cameron, situate at Bowelling in the State of Western Australia, by an agreement partly in writing and partly verbal on or about 6th December 1951? Or was the said document dated 6th December 1951 only a conditional offer by the said Violet Christina Cameron to sell the land therein described on terms and conditions therein set out and on the same day conditionally accepted on and subject to such terms and conditions by the said Norman James Masters and Mavis Ella Iris Masters? 2. Did the claimant, Norman James Masters, on behalf of himself and the claimant, Mavis Ella Iris Masters, pay to the plaintiff on or about 6th December 1951, the sum of £1,750 0s. 0d. by way of deposit on the purchase of the said farming property by them from the claimant, Violet Christina Cameron, or did the claimant, Norman James Masters, pay to the plaintiff the said sum of £1,750 0s. 0d. in respect of the proposed purchase to be held on his account pending the completion of a formal contract of sale and the fulfilment of other conditions mentioned in an offer dated 6th December 1951? 3. Are the claimants, Norman James Masters and Mavis Ella Iris Masters, estopped from denying that they agreed to purchase the said property from the claimant Violet Christina Cameron? 4. Is the claimant, Violet Christina Cameron, entitled to be paid the sum of £1,750 0s. 0d. which has now been paid into court or should such sum be paid to the claimants, Norman James Masters and Mavis Ella Iris Masters?"

These issues were tried by *Wolff* J. who held that the memorandum dated 6th December 1951 constituted a binding contract between the appellants and the respondent. A formal judgment was taken out by which it was ordered that judgment be entered for the respondent against the appellants for the sum of £1,750 with costs to be taxed.

From this judgment the appellants appealed to the High Court.

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*E. F. Downing* Q.C. (with him *R. Holmes*), for the appellants. There was no concluded agreement between the parties. The memorandum of 6th December 1951, whilst setting out in general the terms of the proposed sale, was conditional only and subject to the preparation of a formal contract of sale acceptable to the vendor's solicitors. It has been decided that where parties enter into an arrangement declared to be subject to " the preparation and approval of another document ", there is no concluded or enforceable contract until the second document has been approved and signed : (*Winn* v. *Bull* (1) ; *Rossiter* v. *Miller* (2) ; *Rossdale* v. *Denny* (3) ; *Coope* v. *Ridout* (4) ; *Chillingworth* v. *Esche* (5) ; *Spottiswoode Ballantyne & Co. Ltd.* v. *Doreen Appliances Ltd.* (6) ; *McCallum* v. *Hicks* (7) ; *Riley* v. *Troll* (8) ; *Sinclair, Scott & Co. Ltd.* v. *Naughton* (9) ). This is not a case in which there is a concluded agreement and the reference to a formal contract is related solely to the desire of the parties to have the agreement in proper form : see *Filby* v. *Hounsell* (10) ; *Niesmann* v. *Collingridge* (11). The words " subject to " are conclusive : see *Oxford Dictionary* meaning " conditional upon " and the remarks of Lord *Greene* in *Spottiswoode Ballantyne & Co. Ltd.* v. *Doreen Appliances Ltd.* (12). The condition was inserted for the benefit of the vendor, but she cannot waive the condition and allege a concluded contract (*Lloyd* v. *Nowell* (13) ). It is clear from the evidence that the purchasers did not enter into possession, but in any event this could not affect the position if there was in fact no concluded agreement. As regards deposit, the £1,750 paid by the purchasers was merely an earnest of good faith, which would have become the deposit had the transaction proceeded to a concluded agreement. The conduct of the parties subsequent to signing the memorandum cannot affect its interpretation, nor can such conduct on the part of the purchasers create an estoppel, because at all times the vendor was fully aware of the terms of the memorandum signed, and could not be misled by the purchasers' actions.

*J. P. Durack* Q.C. (with him *P. D. Durack*), for the respondent. It is in every case a question of construction whether the parties have come to a final agreement. A final agreement may well have been reached in circumstances in which it is contemplated that a

(1) (1877) 7 Ch. D. 29.
(2) (1878) 3 App. Cas. 1124.
(3) (1921) 1 Ch. 57.
(4) (1921) 1 Ch. 291.
(5) (1924) 1 Ch. 97.
(6) (1942) 2 K.B. 32, at p. 35.
(7) (1950) 2 K.B. 271.
(8) (1953) 1 All E.R. 966.
(9) (1929) 43 C.L.R. 310.
(10) (1896) 2 Ch. 737.
(11) (1921) 29 C.L.R. 177.
(12) (1942) 2 K.B. 32, at p. 35.
(13) (1895) 2 Ch. 744.

further and more formal document will be prepared and signed (*Rossiter* v. *Miller* (1); *Filby* v. *Hounsell* (2); *Branca* v. *Cobarro* (3); *Niesmann* v. *Collingridge* (4)). Both *Rossdale* v. *Denny* (5) and *Chillingworth* v. *Esche* (6) are distinguishable. In the former case the offer was subject to "a formal contract to embody such reasonable provisions as my Solicitors may approve and to the lease containing no unusual provisions or covenants". In the latter case the agreement was "subject to a proper contract to be prepared by vendor's Solicitors". In both these cases no limit was placed upon the provisions which might thereafter be inserted. [He referred to *Spottiswoode Ballantyne & Co. Ltd.* v. *Doreen Appliances Ltd.* (7); *Von Hatzfeldt-Wildenburg* v. *Alexander* (8) and *Riley* v. *Troll* (9).] In the present case the agreement to be prepared was to be "on the above terms and conditions". The effect of these words was to limit the subsequent agreement to the terms of the contract as made and by which the parties intended to be immediately bound (*Sinclair Scott & Co. Ltd.* v. *Naughton* (10)). The deposit was paid as a guarantee for the performance of the contract and the appellant having failed to perform his contract has no right to its return (*Howe* v. *Smith* (11)). The appellants entered into possession and their conduct generally was such as to estop them from now setting up that there was no binding contract (*Thomas* v. *Brown* (12)).

*E. F. Downing* Q.C., in reply.

*Cur. adv. vult.*

Nov. 30.

THE COURT delivered the following written judgment:—

On 2nd September 1953 an originating summons was issued out of the Supreme Court of Western Australia at the suit of Dalgety & Co. Ltd. against three defendants, of whom the first was the present respondent and the other two were the present appellants.

The summons called upon the defendants to state the nature and particulars of their respective claims to a sum of £1,750 which was described as having been paid to the plaintiff by the appellants as a deposit on the purchase of certain lands from the respondent.

The summons was supported by an affidavit made by the Perth manager of the plaintiff company, who deposed that by an agreement

(1) (1878) 3 App. Cas. 1124.
(2) (1896) 2 Ch. 737.
(3) (1947) K.B. 854.
(4) (1920) 29 C.L.R. 177.
(5) (1921) 1 Ch. 57.
(6) (1924) 1 Ch. 97.
(7) (1942) 2 K.B. 32.
(8) (1912) 1 Ch. 284.
(9) (1953) 1 All E.R. 966.
(10) (1929) 43 C.L.R. 310.
(11) (1884) 27 Ch. D. 89.
(12) (1875) 1 Q.B.D. 714.

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in writing dated 6th December 1951 the respondent agreed to sell and the male appellant on behalf of himself and the female appellant (who is his wife) agreed to purchase a farming property of the respondent subject to the preparation of a formal contract of sale acceptable to the solicitors of the respondent on the terms and conditions set out in the agreement and to the giving of possession on or about 15th March 1952. The affidavit added, in effect, that at or shortly before the date of that agreement the male appellant paid to the plaintiff the sum of £1,750 by way of deposit, that both sides now claimed this sum, and that the plaintiff claimed no interest in it except for commission in the event of the money being payable to the respondent and for its costs of the proceedings.

On the hearing of the summons the plaintiff was ordered to pay the amount in dispute into court to abide further order. The taxed costs of the plaintiff were ordered to be paid out of the sum, and the costs of the other parties were reserved. The order added that no payment out of court be made to either defendant (*sic*) without the plaintiff being given notice and the opportunity to claim commission.

The parties were given liberty to apply for further directions; and upon an application made for this purpose by the respondent a series of questions entitled " Issue to be tried between the claimants in these proceedings " was drawn up and ordered to be tried, the claimants referred to being the appellants on the one side and the respondent on the other. There were four questions: " 1. Did the claimant, Violet Christina Cameron, agree to sell and the claimants, Norman James Masters and Mavis Ella Iris Masters, agree to buy the farming property of the . . . claimant Violet Christina Cameron, situate at Bowelling in the State of Western Australia, by an agreement partly in writing and partly verbal on or about 6th December 1951 ? Or was the said document dated 6th December 1951 only a conditional offer by the said Violet Christina Cameron to sell the land therein described on terms and conditions therein set out and on the same day conditionally accepted on and subject to such terms and conditions by the said Norman James Masters and Mavis Ella Iris Masters ? 2. Did the claimant, Norman James Masters, on behalf of himself and the claimant, Mavis Ella Iris Masters, pay to the plaintiff on or about 6th December 1951, the sum of £1,750 0s. 0d. by way of deposit on the purchase of the said farming property by them from the claimant, Violet Christina Cameron, or did the claimant, Norman James Masters, pay to the plaintiff the said sum of £1,750 0s. 0d. in respect of the proposed purchase to be held on his account

pending the completion of a formal contract of sale and the fulfilment of other conditions mentioned in an offer dated 6th December 1951 ? 3. Are the claimants, Norman James Masters and Mavis Ella Iris Masters, estopped from denying that they agreed to purchase the said property from the claimant Violet Christina Cameron ? 4. Is the claimant, Violet Christina Cameron, entitled to be paid the sum of £1,750 0s. 0d. which has now been paid into Court or should such sum be paid to the claimants, Norman James Masters and Mavis Ella Iris Masters ? "

A trial was had before *Wolff* J., who decided that a binding contract was concluded between the parties by the signing of the document of 6th December 1951. His Honour's reasons dealt only with the first of the four questions, but he concluded by giving judgment for the respondent on " the issue ". A formal judgment was taken out which recited that his Honour had " found on the memorandum of 6th December 1951 that it was an enforceable agreement in writing to sell ", and proceeded to order that judgment be entered for the respondent against the appellants for the sum of £1,750 with costs to be taxed, inclusive of any costs recoverable by the plaintiff out of funds paid into court. Apparently by the time this judgment was framed the parties had either forgotten the four questions—they had certainly done so by the time the appeal book was prepared—or were content that they should be left without any more specific answers than the order contained or implied. In particular, no express provision was made as to the destination of the fund in court. It is from this judgment that the present appeal is brought.

The memorandum of 6th December 1951, to which the judgment refers, was as follows :—" I, Violet Christina Cameron, widow of Bowelling, agree to sell my farming property at Bowelling, being Wellington Location 4095 comprising approximately 5,000 acres, for the sum of Seventeen Thousand Five Hundred Pounds (£17,500) cash and to complete the fence on the North West portion of the Bowelling/Noggerup Road running through Bokhara, to this extent only. 1. Complete 30 chains of fencing including wire. 2. Erect further 100 chains of bored posts ready for wiring. I agree to sell the land and all fixed improvements on a freehold basis free from all encumbrances, and to pay all costs, including legal fees necessary to procure for the purchaser a freehold unencumbered title thereto. This agreement is made subject to the preparation of a formal contract of sale which shall be acceptable to my solicitors on the above terms and conditions, and to the giving of possession on or about the Fifteenth Day of March 1952. Signed at Bowelling this

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Sixth Day of December 1951. VIOLET C. CAMERON Witnessed by R. O. WAY 6/12/51. And I, Norman James Masters on behalf of N. J. & M. E. I. Masters, of 5 Waratah Street, Cronulla, N.S.W., hereby agree to purchase the above property on the above terms and conditions. Signed at Bowelling this Sixth day of December 1951. N. J. MASTERS Witnessed by R. O. WAY 6/12/51."

The first question in the appeal is whether, as *Wolff* J. considered, this document on its true construction constitutes a binding contract between the respondent and the appellants, or only a record of terms upon which the signatories were agreed as a basis for the negotiation of a contract. Plainly enough they were agreed that there should be a sale and purchase, and the parties, the property, the price, and the date for possession were all clearly settled between them. All the essentials of a contract are there ; but whether there is a contract depends entirely upon the meaning and effect of the final sentence in that portion of the document which the appellant signed.

Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.

In each of the first two cases there is a binding contract : in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document ; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution. Of these two cases the first is the more common. Throughout the decisions on this branch of the law the proposition is insisted upon which Lord

*Blackburn* expressed in *Rossiter* v. *Miller* (1) when he said that the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, show that they continue merely in negotiation. His Lordship proceeded: ". . . as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed" (2): see also *Sinclair, Scott & Co. Ltd.* v. *Naughton* (3). A case of the second class came before this Court in *Niesmann* v. *Collingridge* (4) where all the essential terms of a contract had been agreed upon, and the only reference to the execution of a further document was in the term as to price, which stipulated that payment should be made "on the signing of the contract". *Rich* and *Starke* JJ. observed (5) that this did not make the signing of a contract a condition of agreement, but made it a condition of the obligation to pay, and carried a necessary implication that each party would sign a contract in accordance with the terms of agreement. Their Honours, agreeing with *Knox* C.J., held that there was no difficulty in decreeing specific performance of the agreement, "and so compelling the performance of a stipulation of the agreement necessary to its carrying out and due completion" (6): see also *O'Brien* v. *Dawson* (7).

Cases of the third class are fundamentally different. They are cases in which the terms of agreement are not intended to have, and therefore do not have, any binding effect of their own: *Governor &c. of the Poor of Kingston-upon-Hull* v. *Petch* (8). The parties may have so provided either because they have dealt only with major matters and contemplate that others will or may be regulated by provisions to be introduced into the formal document, as in *Summergreene* v. *Parker* (9) or simply because they wish to reserve to themselves a right to withdraw at any time until the formal document is signed. These possibilities were both referred to in *Rossiter* v. *Miller* (1). Lord *O'Hagan* said: "Undoubtedly, if any prospective contract, involving the possibility of new terms, or the modification of those already discussed, remains to be adopted, matters must be taken to be still in a train of negotiation, and a dissatisfied party may refuse to proceed. But when an agreement

(1) (1878) 3 App. Cas. 1124.
(2) (1878) 3 App. Cas., at p. 1151.
(3) (1929) 43 C.L.R. 310, at p. 317.
(4) (1921) 29 C.L.R. 177.
(5) (1921) 29 C.L.R., at pp. 184, 185.
(6) (1921) 29 C.L.R., at p. 185.
(7) (1942) 66 C.L.R. 18, at p. 31.
(8) (1854) 10 Exch. 610 [156 E.R. 583].
(9) (1950) 80 C.L.R. 304.

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embracing all the particulars essential for finality and completeness, even though it may be desired to reduce it to shape by a solicitor, is such that those particulars must remain unchanged, it is not, in my mind, less coercive because of the technical formality which remains to be made" (1). And Lord *Blackburn* said: "parties often do enter into a negotiation meaning that, when they have (or think they have) come to one mind, the result shall be put into formal shape, and then (if on seeing the result in that shape they find they are agreed) signed and made binding; but that each party is to reserve to himself the right to retire from the contract, if, on looking at the formal contract, he finds that though it may represent what he said, it does not represent what he meant to say. Whenever, on the true construction of the evidence, this appears to be the intention, I think that the parties ought not to be held bound till they have executed the formal agreement" (2). So, as *Parker* J. said in *Von Hatzfeldt-Wildenburg* v. *Alexander* (3) in such a case there is no enforceable contract, either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract.

The question depends upon the intention disclosed by the language the parties have employed, and no special form of words is essential to be used in order that there shall be no contract binding upon the parties before the execution of their agreement in its ultimate shape: *Farmer* v. *Honan* (4). Nor is any formula, such as "subject to contract", so intractable as always and necessarily to produce that result: cf. *Filby* v. *Hounsell* (5). But the natural sense of such words was shown by the language of Lord *Westbury* when he said in *Chinnock* v. *Marchioness of Ely* (6): "if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation" (7). Again, Sir *George Jessel* M.R. said in *Crossley* v. *Maycock* (8): "if the agreement is made subject to certain conditions then specified or to be specified by the party making it, or by his solicitor, then, until those conditions are accepted, there is no final agreement such as the Court will enforce" (9).

This being the natural meaning of "subject to contract", "subject to the preparation of a formal contract", and expressions

(1) (1878) 3 App. Cas., at p. 1149.
(2) (1878) 3 App. Cas., at p. 1152.
(3) (1912) 1 Ch. 284, at p. 289.
(4) (1919) 26 C.L.R. 183.
(5) (1896) 2 Ch. 737.
(6) (1865) 4 De. G. J. & S. 638 [46 E.R. 1066].
(7) (1865) 4 De G. J. & S. 638, at p. 646 [46 E.R., at p. 1069].
(8) (1874) L.R. 18 Eq. 180.
(9) (1874) L.R. 18 Eq., at pp. 181, 182.

of similar import, it has been recognized throughout the cases on the topic that such words prima facie create an overriding condition, so that what has been agreed upon must be regarded as the intended basis for a future contract and not as constituting a contract. Indeed, Lord *Greene* M.R. remarked during the argument in *Eccles* v. *Bryant and Pollock* (1) that when the expression " subject to contract " was used he had never known a case in which it had been suggested, much less held, that this did not import that there was nothing binding till the exchange of parts of the formal contract was made. The effect of the early cases on the subject was stated by Sir *George Jessel* M.R. in *Winn* v. *Bull* (2) when he said in a passage which has become well-known : " It comes, therefore, to this, that where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says ; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail " (3).

The subsequent cases on the point have been numerous, and it will suffice to refer to two only in addition to those already cited. A case very like the present is *Santa Fé Land Co. Ltd.* v. *Forestal Land etc. Ltd.* (4) in which an offer was made " subject to a formal contract to be approved by your solicitors and ourselves on acceptance of the offer, when any minor details can be settled ". The acceptance of this offer was held by *Neville* J. not to constitute a concluded contract. The learned judge, following *Winn* v. *Bull* (2) said : " Now it is important not only in cases of the sale of land, but in all cases where letters pass with regard to the sale of any property which is being negotiated, that the parties should be able to protect themselves by some suitable words from being bound by the negotiation they are conducting. In the present case I think the words in question do impose the condition that if the offer is accepted a more formal contract is to be prepared by the solicitors which is to embody all the details " (5). The other case is *Spottiswoode Ballantyne & Co. Ltd.* v. *Doreen Appliances Ltd.* (6). The Court of Appeal there had to consider an agreement for the letting of premises, expressed to be " subject to the terms of a formal agreement to be prepared by their (the owners') solicitors ". The court

(1) (1948) Ch. 93, at p. 94.
(2) (1877) 7 Ch. D. 29.
(3) (1877) 7 Ch. D., at p. 32.
(4) (1910) 26 T.L.R. 534.
(5) (1910) 26 T.L.R., at pp. 534-535.
(6) (1942) 2 K.B. 32.

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construed this phrase as meaning that the formal agreement had to be not only prepared by the solicitors but executed by the parties. Lord *Greene* concluded that the language used was equivalent to the common and more concise phrase " subject to contract ", and added that " it is well settled that that phrase makes it clear that the intention of the parties is that neither of them is to be contractually bound until a contract is signed in the usual way " (1). *Goddard* L.J. repeated the observation of *Bankes* L.J. in *Keppel* v. *Wheeler* (2): " I pause here to state plainly what is now well established, that where a person accepts an offer subject to contract, it means that the matter remains in negotiation until a formal contract is settled and the formal contracts are exchanged " (3).

In the present case the context provides no reason for holding that the case is outside the application of these authorities. The formal contract, it is true, is to be " on the above terms and conditions ", but it is to be acceptable to the vendor's solicitors, and the meaning is sufficiently evident that the contract shall contain, not only the stated terms and conditions expressed in a form satisfactory to the solicitors, but also whatever else the solicitors may fairly consider appropriate to the case. Accordingly the first of the four questions which went to trial should have been answered by saying that no binding contract for the sale and purchase of the property mentioned in the document dated 6th December 1951 was made between the defendant Cameron (the respondent) and the defendants Masters (the appellants).

The second question relates to the terms upon which the £1,750 was paid to the plaintiff company, the agent employed by the respondent to sell her property. From the fact that a so-called deposit was paid upon the signing of a document which left each party free to decide against entering into a binding contract the prima facie inference is that the intention was to provide a sum which should take on the character of a deposit upon the making of a contract, but in the meantime should not become the property of the intending vendor. The Court of Appeal so decided in *Chillingworth* v. *Esche* (4). *Sargant* L.J. there said: " Then on the basis that the contract is conditional, what is the result of the payment of the deposit ? One obvious object of such payment was that it should form a deposit in the ordinary way if and when the contemplated definite contract was subsequently signed and exchanged. Is it necessary to assume any additional object, such as that the purchaser was giving an interim guarantee that he would

(1) (1942) 2 K.B., at p. 35.
(2) (1927) 1 K.B. 577.
(3) (1927) 1 K.B., at p. 584.
(4) (1924) 1 Ch. 97.

enter into a reasonable contract? In my judgment that is not common sense. The parties were not agreeing that they would enter into a reasonable contract, but that they would enter into such a contract, if any, as they might ultimately agree and sign. I look on the whole payment as being sufficiently explained as being an anticipatory payment intended only to fulfil the ordinary purpose of a deposit if and when the contemplated agreement should be arrived at. I see no sufficient reason for thinking that it was also made to secure the intermediate purpose contended for by the vendor" (1).

This is, of course, only the prima facie inference, as *Napier* J. pointed out in *Maywald* v. *Riedel* (2) and on the face of the affidavits which were filed in the present case there was a conflict between the respondent and the male appellant as to the basis upon which the payment was made. The respondent, however, gave oral evidence before *Wolff* J., in which she described what took place concerning the deposit when the document of 6th December 1951 was signed, that being the only occasion when the matter was mentioned between the parties. She said: "After the document had been executed Mr. Way said in the presence of Mr. Masters—'Mrs. Cameron your farm has now been sold.' I said 'What about the deposit' (to Mr. Way). He spoke to Mr. Masters—he said 'Come on Norm, give me the cheque'. Masters hit his four pockets and said 'I've left it at the Ocean View Hotel and I'll call and give it to you to-morrow or the next day. I'll call into the office'. That interview took place on the farm at Bowelling. Way said that would be all right". The plaintiff company's representative, Mr. Way, also gave evidence. He said: "After the document was executed I said 'Mrs. Cameron your property is sold'. I can't recall the words but that was the effect. Mrs. Cameron mentioned the deposit. I turned to Masters. I think I said 'What about it'. He said 'I'll give you the deposit in Perth within a day or so'. The next day he called and paid the deposit. I gave him a receipt. The cheque was paid to me personally by Masters. I deny that Masters paid the money pending completion of contract. I told Masters it was our common practice to hold deposit moneys in trust till we were directed by our legal advisers it was in order to pay over". The receipt was in evidence, but it throws no light on the matter. It describes the payment simply as "deposit on purchase 'Bokhara' Farm from V. C. Cameron."

There is nothing whatever in all this to displace the prima facie inference, and the case falls within the authority of *Chillingworth* v.

(1) (1924) 1 Ch., at pp. 114, 115. (2) (1927) S.A.S.R. 345.

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MASTERS v. CAMERON.

Dixon C.J. McTiernan J. Kitto J.

*Esche* (1). The answer to the second question should therefore be that the £1,750 was paid to the plaintiff company on terms which required that if a formal contract should be executed the amount should be applied and treated as a deposit on the purchase so contracted for, and that otherwise it should be returned to the appellants.

The third question refers to conduct of the male appellant after 6th December 1951 and before he finally refused to proceed with the purchase. By this conduct the respondent asserts that she was led to believe that a binding contract of sale and purchase existed between the appellants and herself and was led in that belief to change her own position substantially. He requested the respondent's sons, and they complied with the request, to leave work they were doing on the fencing of the property in the manner required by the signed document, and to help him clean up timber which had fallen as a result of a fire on the property. He took possession of a room in the house and brought some of his goods on to the property. He effected some structural alterations and additions to the house. He put down superphosphate and seed on the land and erected a tank, employing labour for the purpose. During all this time he was insisting upon the respondent being ready to hand over exclusive possession of the property on the date mentioned in the document, 15th March 1952 ; and in order to be in a position to do so she sold her sheep and bought a house in Perth.

It was certainly most unfortunate for the respondent that after all this the appellants should be at liberty to turn round, as they did when they encountered financial difficulties which had nothing to do with the respondent, and deny that they were legally bound to purchase " Bokhara ". But their liberty to do this arose from the fact that the respondent had herself introduced the qualifying sentence into her portion of the document of 6th December 1951 ; and it may be remarked in passing that according to Way's evidence she had done so very deliberately, with an eye to the fact that the property had come to her under a will and she felt a need to consult her solicitor before completing a formal contract. Whilst undoubtedly the male appellant's conduct showed that he confidently expected the transaction to go through and realized that the respondent had a like expectation, it plainly could not have been intended by him or relied upon by the respondent as a representation that there was any other relationship between them than that which was to be found within the four corners of the agreement of

(1) (1924) 1 Ch. 97.

6th December 1951. The question as to estoppel must be answered in favour of the appellants.

For the reasons which have been given, the answer to the fourth question must be that the balance of the sum of £1,750 after payment thereout of the plaintiff's costs, should be paid to the appellants, subject to any right the plaintiff may have in respect of commission. On the material before us it would seem prima facie that the plaintiff has no such right, and the affidavit made by its manager indicated an intention to claim commission in the event only of its being held that a concluded contract had been made between the appellants and the respondent. However, the plaintiff was not represented before us, and as the order for payment of the £1,750 into court directed that no payment out should be made without the plaintiff's being given an opportunity to claim commission, the order now to be made must protect the plaintiff accordingly.

The appeal should be allowed, the judgment of the Supreme Court should be discharged, and there should be an appropriate order for payment out to the appellants.

*Appeal allowed with costs.*

*Judgment of the Supreme Court discharged.*

*In lieu thereof, order as follows, subject however to any order that the Supreme Court or a judge thereof may see fit to make in pursuance of par. (e) of the order of Wolff J. dated 1st October 1953 upon an application made by the plaintiff Dalgety & Co. Ltd. within fourteen days of this order:*

(1) *Out of the moneys paid into court let the balance remaining after payment of the costs ordered to be paid to the plaintiff by the order of 1st October 1953 be paid out of court to the appellants.*

(2) *Let the respondent pay to the appellants their taxed costs of the proceedings in the Supreme Court (including reserved costs) and the amount of the plaintiff's costs paid to it as aforesaid.*

Solicitors for the appellants, *Downing & Downing.*
Solicitors for the respondent, *Dwyer, Durack & Dunphy.*

F. T. P. B.