Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Middleton.

Nov. 25, 1909

ROBSON *v.* AITKEN, SPENCE & CO.

D. C., Colombo, 24,144.

Bought and sold notes—Evidence of a contract—Parol evidence to prove a different agreement—Evidence Ordinance, ss. 91 and 92.

Parol evidence may be given to show that a broker's bought and sold notes do not constitute the record of a concluded agreement, and do not contain the real agreement come to.

APPEAL from a judgment of the District Judge of Colombo (H. A. Loos, Esq.). The facts and arguments are fully set out in the judgments of the Supreme Court.

Bawa (with him *Wadsworth*), for plaintiff, appellant.

Van Langenberg (with him *Hayley*), for the defendants, respondents.

Sampayo, K.C. (with him *S. Obeyesekere*), for the added defendants, respondents.

The following authorities were cited at the argument: *Reuter v. Sala*,[1] *Tancred v. Steel Co. of Scotland*,[2] *Juggernanth Sen Bux v. Ram Dyal*,[3] *Ralli v. Caramalh Fazel*,[4] *Boustead v. Vanderspar*,[5] *Thomson v. Gardiner*,[6] *Sive Wright v. Archibald*,[7] *Durga Prosad v. Bhajam Lal*,[8] *Halbart v. Lewis*.[9]

Cur. adv. vult.

November 25, 1909. HUTCHINSON C.J.—

This is an appeal by the plaintiff against the dismissal of the action. The four original defendants, carrying on business in partnership as "Aitken, Spence & Co.," were agents for a shipping company, and used a considerable quantity of mattress fibre for "dunnage," i.e., for packing with coconut-oil casks in a ship's hold. They used to get a certain quantity of it from local makers and traders free, that is, they had the use of it as dunnage, carrying it freight free or otherwise; the rest they had to buy, and

[1] *(1879) L. R. 4. C. P. D. 239.*
[2] *(1890) 15 A. C. 125.*
[3] *(1883) 9 Cal. 791.*
[4] *(1890) 14 Bom. 102.*
[5] *(1906) 8 N. L. R. 318.*
[6] *(1876) 1 C. P. D. 777.*
[7] *(1815) 20 L. J. Q. B. 529.*
[8] *(1904) 8. C. W. N. 489.*
[9] *(1901) 1 Ch. 344.*

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for this last they had for some years before 1905 been in the habit of making contracts for a year's supply in advance, to be taken when they wanted it. The contract which they made for 1904 was made in December, 1903, with J. A. Martinus; this is the contract referred to in D 2 and D 3, from which it appears that the buyers could take as much of the fibre as they required up to 10,000 cwt.; and their contracts with other sellers in previous years had been to the like effect. In October, 1904, they wanted to arrange for the supply for 1905, and Burns and Armitage, who were employed in their Shipping Department, consulted F. W. Waldock about it. He was a member of the firm of Keel and Waldock, brokers, added as defendants in this case after the original defendants had filed their answer, through whom the previous year's contract with Martinus had been made. Burns had had the working of the previous contracts and knew their terms, and he explained the terms to Waldock; they were, as he says, " that whoever took the contract should supply all the fibre we should require; that we should bind ourselves to buy all that we require to buy from him; but that we received other fibre free of freight, and that we reserve to ourselves the right to take other dunnage. " Armitage was present at all or most of Burns's interviews with Waldock; he said that he also told the broker to make certain that the terms on the next contract were the same as the existing one, viz., " that we were to take from the contractor all the fibre that we had to purchase, and that we had the option of shipping all fibre free of freight or on which freight had been paid, and also the option of taking yarn shipped from Alleppy. " At one of his interviews with Burns the broker wanted to know what quantity should be named in the contract; Burns said that he did not see the necessity for it, but that 10,000 cwt. was the quantity stated in the previous contract.

F. W. Waldock then made a contract with the plaintiff, and he declared that it was in the terms which he had been instructed by Burns and Armitage to make, and that he fully explained all those terms to the plaintiff, except one small matter about harbour dues, which he had been instructed was to be one of the terms, but which he forgot, and that the plaintiff knew beforehand, i.e., before Waldock had spoken to him, what the terms were to be, and that he agreed to them.

The contract, however, was not reduced into writing, if it was such as the broker asserts. But he sent to the parties bought and sold notes, these are the documents P 5 and D1. That which was sent to the plaintiff was as follows: " We beg to confirm sale made by us this day on your account to Messrs. Aitken, Spence & Co. about 10,000 cwt., more or less, cleaned Ceylon mattress fibre, well ballotted, at Rs. 2.10 per cwt. f. o. b., as per sample tendered. Ship's weight to be accepted. Delivery as required from time to time from January 1 to December 31, 1905. Brokerage, 10 cents per cwt."

D 1 sent to the defendant was in identical terms, only substituting the defendants' names for the plaintiff's and " purchase from Messrs. George Robson & Co: " for " sale to Aitken, Spence & Co. " These notes, if they constituted the contract, would bind the defendants to buy " about 10,000 cwt. more or less, " no mention being made in them of the terms that the defendants were to buy from the plaintiff all that they required to buy, and that they were to be entitled to take as much as they wanted up to about 10,000 cwt.

On receipt of D 1 Armitage informed Waldock the next day that the contract authorized by him had not been carried out, and they could not accept this contract. Waldock assured him that the plaintiff fully understood all the terms of the contract, but said that he would see the plaintiff again about it, and he says (and the Judge believes him) that he did see the plaintiff about it the same day, and then went back and reported to Armitage. Armitage says that what Waldock then told him was that he had cancelled the contract and made a verbal one on the terms of the pre-existing (Martinus's) contract; but Waldock's account of his interview with the plaintiff is that he merely asked him again if he understood the position, the terms; whether he was fully aware of the terms; and that the plaintiff replied that he was; and he says that he went back and told Armitage that everything was all right. Waldock says, and I have no doubt that it is the fact, that he himself thought that " more or less " in the bought and sold notes meant " up to "; and he adds that they all understod that and that was the intention of all the parties.

The previous year's contract with Martinus was evidenced by two documents: (1) A bought note, D. 2, in the same form as the one in the present case; and (2) a memorandum of the same date, D 3, setting out the terms of the contract in detail and showing that the buyers were to have the option of taking any quantity as required up to 10,000 cwt. There was no such memorandum in the present case.

As it turned out, chiefly in consequence of a contract made by the shipping company in England for the supply of fibre for dunnage free, the defendants did not require to buy, and did not take from the plaintiff, any fibre in 1905, except a few small quantities amounting to a little more than 600 cwt. And the plaintiff in this action alleges the contract to be that which is shown by the bought and sold notes, and claims from the defendants, or, in the alternative, from the brokers, damages for its breach. If the bought and sold notes are the contract, and if oral evidence is not admissible to prove that they are not, the plaintiff must succeed.

The Evidence Ordinance enacts in sections 91 and 92 that when the terms of a contract have been reduced, by or by the consent of the parties, to the form of a document, no evidence shall be given in proof of the terms of the contract except the document itself (or

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secondary evidence of the document where that is admissible); and that, when the terms of such contract have been so proved by the document, no evidence of any oral agreement or statement shall be admitted, as between the parties or their representatives in interest, for the purpose of contradicting, varying, adding to, or substracting from its terms. And there are provisions allowing oral proof of, amongst other things, any separate oral agreement as to any matter on which the document is silent, and which is not inconsistent with it. The defendants have therefore to prove that the terms of this contract were not reduced to the form of a document, or, in other words, that the bought and sold notes are not the contract, but are only evidence of a contract, and may be supplemented by oral evidence to prove the full terms of the contract.

What are these notes? They are in form and substance information given by the broker to his principal of what he has done on his behalf; to the buyer that the broker has bought for him, and to the seller that he has sold for him, so much at such a price. They are not a contract, but a memorandum that a contract has been made. This is the ruling of the Privy Council in *Durga Prosad v. Bhajan Lal.*[1] They are evidence of the contract; but oral evidence of it is also admissible except in cases where some law requires written evidence, as would be the case under the Sale of Goods Act, where there had been no part performance as there was here. Oral evidence being therefore admissible as to the terms of this contract, and the notes being regarded as merely a piece of evidence like any other, the only question is as to their value; and that depends on the circumstances of each case. If, for example, the notes agree and are delivered and accepted without objection, the acceptance without objection is strong evidence of mutual assent to their terms. See Ameer Ali on the *Indian Law of Evidence, p. 465; Encyclopædia of the Laws of England, II., 382.*

The bought note delivered to the defendants was not accepted by them without objection. They objected to it at once, and so informed the broker, who as their agent at once informed the plaintiff and received his assurance that he fully understood what the full terms of the contract were as they had been explained to him by the broker when the contract was made. And the correspondence between the plaintiff and the defendants in 1905 shows unmistakably that he knew the contract to be that which the defendants and the broker say that it was. There are several letters from which this appears; it is enough to refer to the plaintiff's letters D 5 of March 18, P 23 of May 13, and P 29 of August 11. The District Judge has so found, and the evidence amply proves that he was right.

The appeal, therefore, fails as against Aitken, Spence & Co. There remains the claim against the brokers, which is founded on an express or implied warranty by them that they were authorized

[1] *(1904) 8 C. W. N. 489.*

by Aitken, Spence & Co. to make on their behalf the contract which as said to be contained in the sold note which Waldock delivered to the plaintiff. But there, again, the evidence proves that he never made any such representation to them, but that he represented to them that he was authorized to make a contract in the terms of that which the defendants allege, and which he did in fact make.

I therefore am of opinion that the decree of the District Court was right, and that the appeal should be dismissed with costs.

MIDDLETON J.—

This was an action for the recovery of Rs. 8,644.55, claimed as damages for a breach of a contract as alleged by the plaintiff, by which defendants bound themselves to buy 10,000 cwt. of mattress fibre at Rs. 2.10 delivered f.o.b., well ballotted, from the plaintiff, between January 1 and December 31, 1905.

The action was originally brought against the defendants alone, but subsequently, by order of the Court, the added defendants were made parties to the action. The plaintiff pleaded that the contract in question was contained in a memorandum No. 1,064, dated November 14, 1904, issued in duplicate, and signed by the added defendants as agents and brokers for the contracting parties, to the plaintiff and defendants respectively, and now marked in this action respectively P 5 and D 1: that between the months of January and June the defendants purchased from the plaintiff and paid for 606 cwt. 2 qr. and 12 lb. of fibre, and in the month of July, 1905, informed the plaintiff they would not buy any more of the said fibre. The denfendants denied the authority of the added defendants to enter into the contract, as pleaded by the plaintiff, which they alleged was signed by them without their authority, and denying any breach, alleged that their authority to the added defendants was to arrange a contract with the plaintiff for the supply during the year 1905 of such quantities of fibre as they might require from time to time for dunnage for the purpose of storing cargo on the Bucknall line of steamers; that upon receiving D 1 they immediately informed the added defendants they repudiated it as not carrying out their instructions, and that thereafter it was verbally agreed between the plaintiff and defendants through the added defendants that plaintiff should supply to the defendants such quantities of fibre during the year 1905 as defendants might require for the purpose of such dunnage; the defendants reserving for themselves the right to accept any fibre for the purposes of dunnage without freight from any shipper, and only agreeing to purchase from the plaintiff any fibre they might require for dunnage in excess of the quantity which they might accept for shipping.

The defendants further pleaded that it was on the terms of such verbal agreement they accepted and paid for the fibre delivered by the plaintiff as set out in his plaint, and that this quantity, with the

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exception of 40 cwt. 3 qr. 19 lb. purchased in error in January, 1905, and 75 cwt. purchased in March, 1905, owing to plaintiff's failure to supply the same, was all they required for dunnage as aforesaid, and that in terms of the said agreement the defendants were not bound to accept any quantity in excess of such quantity.

The added defendants admitted instructions from the defendants in the terms alleged by them, with the exception that the quantity of fibre required to be purchased was subsequently estimated at 10,000 cwt. They pleaded that the plaintiff agreed to the proposals formulated in accordance with such instructions, and added defendants drew up the note in writing, No. 1,064, dated November 14, 1904, that upon receipt of D 1 the defendants objected to the form of it as not containing the whole contract intended to be effected that the added defendants assured the defendants that plaintiff had accepted their terms and that the note was subject thereto, and that they had further referred to the plaintiff, who confirmed the said terms. It was further pleaded by the added defendants that the defendants and plaintiff subsequently personally arranged between themselves for the supply of fibre on the above terms, but this plea was afterwards withdrawn.

[His Lordship then set out the issues, and continued.]

The Acting District Judge held that the main issue in the case in which I agree with him, was whether the written memorandum No. 1,064, dated November 14, 1904 (P 5), constituted the contract entered into between the plaintiff and the defendants, and if not, what was the contract? Upon that issue he found that the document P 5 did not contain the terms of the contract, and held that the defendants were entitled to establish what the terms of the contract were, under the provisions of section 92 of "The Evidence Ordnance, 1895."

Upon a full review of the evidence he found that the defendants did not authorize the making of the contract put forward by the plaintiff, and we intimated to counsel engaged in the case during the argument that we were in accord with the learned Judge's finding on this point. The learned Judge further found that the plaintiff was aware that the actual contract entered into between the parties was that set out by the defendants and added defendants, and gave judgment for the defendants, dismissing the plaintiff's action. With the findings of the District Judge on the facts I see no reason to disagree.

In order to be able to apply section 91 of the Evidence Ordinance of 1895, which is relied on here by the appellant, to exclude all evidence of any terms of the contract other than those contained in the document P 5 itself, which he relies on alone, it was necessary to ascertain what in fact constituted the contract between the parties. The cross-examination of the plaintiff and documents shown to him

supplied a strong ground for the belief that the terms of the contract were not reduced into the form of the document P 5, but were to be found in certain oral arrangements come to between the plaintiff and the agent of both parties, F. W. Waldock, before the bought and sold notes were sent out, and that those documents purported to be memoranda in writing, but not the contract itself. This belief is converted into a certainty by the evidence of the brokers, Burns and Armitage, and I have no hesitation in agreeing with the conclusion the District Judge arrived at on the evidence that P 5 was not intended to contain the terms of the contract.

The evidence relied on by the District Judge was unobjectionable, on the ground that parol evidence may be admitted to show that the writing which purports to be a note or memorandum of the contract is not the record of a concluded agreement or does not contain the real agreement come to (*Pym v. Campbell* [1] followed in *Pattle v. Hornibrook*,[2] and *Rogers v. Hadley* [3]). Here the broker apparently had the authority of the parties to make an oral contract and to sign a memorandum of it, and there is nothing in the English Law to prevent a contract being substituted verbally, though bought and sold notes are exchanged (*14 Bombay, p. 102*, per Erle and Pullen J.J., in *Sivewright v. Archibald, 20 L. J. J. Q. B. 529*). And Ameer Ali, *Law of Evidence, p. 715, 3rd edition*, states that the Privy Council in disposing of the appeal in *Durga Prosad v. Bhajan Lal*,[4] a report of which case I cannot find, held that bought and sold notes do not constitute a contract of sale, but are mere evidence, which may be looked to for the purpose of ascertaining whether there was a contract, and what the terms of the contract were.

The broker had not the authority of the defendants to make the contract in the sense attributed to the bought and sold notes by the plaintiff, but the defendants' objection to the note was stated, and the broker communicated with, and ascertained from, the plaintiff that he fully understood the terms upon which the contract had been made, and that he did so with regard to free dunnage is, I think, apparent from the evidence in the record, as the District Judge finds. Interpreted by the light of the verbal terms agreed upon by the broker, the quantity of fibre mentioned in the note P 5 amount to no more than an estimate, a very wide one, of what might be required under the circumstances of the contract during the year (*Tancred v. Steel Co. of Scotland* [5]).

If the contract was as the plaintiff contends it is, it seems surprising that he was not constantly tendering portions of the 10,000 cwt. to be delivered during the year to the defendants at proportional periods of time, but we find no evidence of this in the record, but

[1] *(1856) 6 E. and B. 370.*
[2] *(1897) 1 Ch. 25.*
[3] *(1863) 2 H. and C. 227.*
[4] *(1904) 8 C. W. N. 489-492.*
[5] *(1890) 15 A. C. 125.*

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merely anxiety on the part of the plaintiff that defendants should take all that was required by each ship of the Bucknall line, and complains of their not doing so on two occasions. I do not think either that the evidence would justify us in holding that the contract was ratified by the defendants in the sense attributed to it by the plaintiff.

In my opinion the plaintiff is not entitled to succeed on his appeal as against the defendants. As regards the added defendants, I think it is clear they made the contract for the defendants as their declared agents in the terms it has been found that the defendants contend for, and I cannot see how they can be liable to the plaintiff on the contract if the defendants are not. As regards a breach of warranty or deceit on the part of the added defendants, there is no evidence of either. I would dismiss the appeal with costs, and affirm the decision of the District Judge.

Appeal dismissed.