Present: Bertram C.J. and Loos A.J.

1919.

MOHAMED EZAK *v.* MARIKAR.

275—D. C. Colombo, 51,991.

Contract for sale of goods—Enforcement of the contract—Memorandum—Essentials of the contract—Part payment by cheque—Sale of Goods Ordinance, s. 4 (1).

A letter written subsequent to the conclusion of a contract of sale by a party is sufficient to enforce the contract against him if all the ingredients of the bargain agreed upon by the parties are embodied therein.

Where the letter did not specify the place of delivery, though it was one of the actual terms of the contract, it was held that there was not a memorandum to satisfy the requirements of section 4 of the Sale of Goods Ordinance.

It is not open to a party to rely on letters as constituting the memorandum and to perudiate one of the terms which the memorandum so constituted contains.

Where a cheque is tendered in part payment and is accepted in part payment, it is a part payment within the meaning of section 4 (1) of Sale of Goods Ordinance, though it be dishonoured later.

THE facts appear from the judgment.

Hayley, for the defendant, appellant.—There is no contract between the plaintiff and the defendant, as none of the provisions of section 4 (1) of the Sale of Goods Ordinance, No. 11 of 1896, has been complied with. There has not been an acceptance of any part of the goods or any note or memorandum signed by the defendant, or payment of any part of the price. A cheque was given on a Sunday, but the payment of it was stopped on Monday. Thus, it is not part payment as contemplated by the section. *Davis v. Phillips, Mills & Co.*[1] A cheque which is dishonoured later is not payment. *Pape v. Westacoth.*[2] "Payment of a cheque is only a conditional payment, and when the cheque is honoured, that operates as a payment from the date of the giving of the cheque." *Meyappa Chetty v. Weerasoriya*,[3] *Hadley v. Hadley.*[4] In this case the cheque was not honoured, and cannot therefore be considered as part payment.

E. W. Perera, for the plaintiff, respondent.—There is a memorandum in this case sufficient to satisfy the requirements of section 4 (1). All the essential terms of the contract are fully set out in the letter sent by the defendant's proctor. Such a memorandum

[1] *(1907) 24 T. L. R. 4.*
[2] *(1894) 1 Q. B. 272.*
[3] *(1916) 19 N. L. R. 79.*
[4] *(1898) L. R. 2 Ch. 680.*

1919.

Mohamed Ezak v. Marikar

would be sufficient. *Hoyle v. Hoyle*; [1] *25 Hals. 135.* The memorandum need not be made at the time the contract is entered into. It may be at a subsequent date.

In this case the parties did not consider the place of delivery essential. It was not mentioned at the time of entering into the contract. Thus, section 28 of the Ordinance would apply, and the place of delivery would be the seller's place of business.

"The object of the statute is that where there was no contract in writing, there must be some overt act to render the bargain binding." *Kibble v. Gough.*[2] In this case the giving of the cheque would be an overt act contemplated by the statute. When a cheque is tendered as part payment and is accepted as such, it would satisfy the requisites of the section. *Parker v. Crisp & Co.*;[3] *Davis v. Phillips, Mills & Co.*[4]

Hayley, in reply.—Every essential of the contract must appear in the memorandum. *Benjamin on Sales, 5th ed., p. 247; McLean v. Nicoll;* [5] *Ancher v. Baynes.*[6] In this case place of delivery is essential, as it affects the price where there had been an actual agreement as to the price, the paper which did not contain that part of the bargain was held insufficient. *Acebel v. Levy;*[7] *Benjamin on Sales, 5th ed., p. 263.* If the parties considered a term material and decide on it, it must be stated in the memorandum.

[BERTRAM C.J.—Where a cheque is tendered as payment and is accepted as payment, it would satisfy the requirements of the section.]

Only if it is honoured on presentment. A cheque dishonoured is not payment.

The words in the English Act are: "Gives something in earnest or in part payment," while under the Ceylon Ordinance he must "pay the price or part thereof." A cheque may be considered earnest, but it is not part payment unless honoured.

December 19, 1919. BERTRAM C.J.—

This case raises two interesting points under the Sale of Goods Ordinance. It is the case of a copra contract. The sale was agreed upon by the parties on a Sunday, and a cheque for Rs. 1,000 was given and received in part payment. On the following day, whether in good faith or in bad faith it is not necessary to determine, the purchasers stopped payment of the cheque and repudiated the contract, on the ground that no delivery had been tendered at his own stores. According to the seller, delivery was to be made at the seller's store. An action for damages was brought by the seller, who obtained judgment.

[1] *(1893) 1 Ch. Div. 84.*
[2] *(1878) 38 L. J. 206.*
[3] *(1919) 1 K. B. 481.*
[4] *(1907) 24 T. L. R. 19.*
[5] *(1861) 7 Jur. N. S. 999.*
[6] *(1850) 20 L. J. Ex. 54.*
[7] *(1834) 10 Bing. 376.*

Mr. Hayley, for the appellant, in this Court relied entirely upon section 4 (1) of the Sale of Goods Ordinance, No. 11 of 1896. Mr. E. W. Perera, for the respondent, claims that he does not come within that sub-section. He alleges, first of all, that there is, in fact, a sufficient note or memorandum in writing of the contract made and signed by the agent of the party, and he points to a letter written subsequent to the conclusion of the contract by the proctors of the purchaser which refers to the terms of the contract, and he says that this memorandum is sufficient. In the second place, he contends that part payment by cheque is a good part payment.

With regard to the first point, there is no doubt that, as far as form goes, a subsequent letter written by the party or his proctor would be sufficient. The subject is explained in the judgment of A. L. Smith L.J. in *Hoyle v. Hoyle:*[1] " The statute enacts that no action shall be brought upon a promise of a certain description, unless there is a note or memorandum thereof signed by the party to be charged. A letter to a third party has been held to be enough; an affidavit made in a different matter has been held to suffice, and I should say that an entry in a man's own diary, if it were signed by him and the contents were sufficient, would do. The question is not what is the intention of the person signing the memorandum, but it is of fact, viz., is there a note or memorandum of the promise signed by the party to be charged? "

There are two difficulties, however, in the way of the respondent at this point. In the first place, the memorandum on which he relies does not specify the place of delivery. The place of delivery seems to me clearly an essential part of this contract. It affects the price, inasmuch as the cost of cartage is involved. Moreover, it does appear that the place of delivery was one of the actual terms of the contract. This is pleaded by the plaintiff in his plaint, and he himself in his evidence expressly says so. There is no room, therefore, for the presumption under section 28 that, where no place is expressed or implied, the place of delivery is assumed to be the seller's place of business. The place of delivery was, in fact, one of the terms of the contract. Under this section or the corresponding section in English law it has been held that the price need not necessarily be mentioned if no fixed price is agreed upon. But if the price is one of the ingredients of the bargain, then it must be specified *Hoadly v. M'Laine.*[2] See also *Noorbhai & Co. v. Janoo.*[3] The same principle must be applied to the place of delivery, where, as in this case, the place of delivery is one of the ingredients of the bargain.

In the second place, the memorandum contains certain inaccuracies, and in order to correct these, it is necessary to refer to subsequent letters from the same proctors. Those subsequent letters,

[1] *(1893) 1 Ch. Div. 84.* [2] *(1834) 10 Bing. 482.*
[3] *(1919) 21 N. L. R. 186.*

1919.

BERTRAM C.J.

Mohamed Ezak v. Marikar

however, embody the very term which is in dispute, that is to say, they assert that delivery was to be made at the buyer's stores. If these letters are to be admitted as constituting the memorandum, that term would also have to be accepted. It is not open to the respondent to pray in aid the letters as showing the memorandum, and to repudiate one of the terms which the memorandum so constituted contains. Mr. Perera's first point, therefore, fails.

There is, however, another mode of escape from the effect of the section. Mr. Perera maintains that a good part payment was made on the day of the contract by means of a cheque. Mr. Hayley contends in reply that in the nature of the case the tender and acceptance of a cheque is not a " part payment." On this point there is express authority, which seems to me to conclude the question. In the case of *Parker v. Crisp & Co.*[1] it was held that, where a cheque was sent in payment of goods that had been ordered, the payment of that cheque was a good payment within the meaning of the Sale of Goods Act, 1893, section 4, in spite of the fact that the cheque was subsequently returned. There is also the case of *Davies v. Phillips, Mills & Co.*,[2] on which Mr. Hayley himself relied. But it does not seem to me that that case really supports him. In that case Channel J. appears to have said: " That a payment to satisfy the statute meant a payment made to and accepted by the vendor. " Channel J. is there speaking of payment by cheque. He is clearly, therefore, of opinion that payment by cheque satisfied the statute. In *Parker v. Crisp & Co.*,[1] Avery J. goes further than Channel J.: " Then was it part payment? It has been rightly admitted that a mere tender of payment is not sufficient; but it has been contended by Mr. Gandy that there can be no payment within the section without an unqualified acceptance by the person to whom the cheque is sent. I doubt whether that is right. A man might receive a cheque and might write to the sender: 'I have received your cheque, but I have changed my mind, and I am not going to fulfil my contract.' That would not be an unqualified acceptance of the cheque, but it cannot be disputed that there would have been a part payment to satisfy the section. " This case goes further, as here there was an unqualified acceptance of the cheque. I doubt whether it is necessary to go so far as Avery J. I think it is sufficient to say that where a cheque is tendered in part payment and is accepted in part payment, it is part payment within the meaning of the section.

Mr. Hayley has, however, drawn two ingenious distinctions. In the first place, he points to a difference in the wording of our own Ordinance as compared with the English Act. The English Act uses the words " unless the buyer gives something in earnest to bind the contract or in part payment. " Our own Ordinance says " unless the buyer pays the price or a part thereof. " He

[1] *(1919) 1 K. B. 481.* [2] *(1907) 24 T. L. R. 4.*

suggest that, though under the English Act a cheque might be "something given in part payment," it is not in fact part payment. This seems to me to be too fine a distinction. I cannot think that there was any intention in the mind of the draftsman or of the Legislature, when this verbal difference was made, to draw a distinction between payment in money and payment by security or in kind. The term "something" was used broadly, because the English Act dealt with two things: firstly, earnest; and secondly, "part payment." In its application to part payment what was referred to by "something" was either money or the equivalent of money.

The other distinction is this. Both cases which I have referred to, namely, *Davis v. Phillips, Mills & Co.*[1] and *Parker v. Crisp & Co.*,[2] are cases in which the cheques were returned. This is a case in which the cheque was not returned, but dishonoured, or rather a case in which payment was stopped. Mr. Hayley suggests that, inasmuch as a cheque is in the nature of the case only a conditional payment, if anything is done to prevent payment taking effect, then it is no payment at all. This is no doubt the case from some points of view. But what we have to do here is to interpret the Ordinance in accordance with its intention. The reason I take it for stipulating that if a man made a part payment, he was to be bound, was an equitable one. It would not be fair, when a man had done an overt and unmistakable act in acceptance of the contract, to allow him to go back on his bargain. It would be equally inequitable, where he has tendered a cheque in part payment, and that has been accepted as part payment, to say that he is entitled to go back on the bargain by taking steps to make that payment ineffective. I think this ingenious distinction also fails.

Another point was raised as to whether the learned District Judge was right in giving damages for storage. I think the learned District Judge acted rightly. The effect of the evidence was that, owing to the copra being in the purchaser's own store, he had to spend money for the storage of other copra at the stores of other persons. I am, therefore, of opinion that the appeal should be dismissed, with costs.

LOOS J.—I agree.

Appeal dismissed.

---

[1] *(1907) 24 T. L. R. 4.*

[2] *(1919) 1 K. B. 481.*