HENRY PATRICK THOMPSON and Others - *Appellants.*

v.

G. B. OLLIVANT & COMPANY LTD. - - *Respondents.*

29th January, 1923.

Specific performance—Memorandum under Statute of frauds—Costs to be borne by administrators personally.

The facts of this case are sufficiently set out in the judgment.

Appeal from a judgment of Purcell, C.J., in the Supreme Court of the Colony of Sierra Leone.

Sawyerr for the Appellants cites:—

Brown Probate Practice, pp. 175, 594.
Wood *v.* Rendall (1901), 1 Ch., p. 230.
Execution against Real Property Ordinance, 1906 (No. 30 of 1906).[1]
Re Murray, 33 L.J., Prob., p. 108.
Registration of Instruments Ordinance, 1906 (No. 23 of 1906), section 4.[2]
Doe d. Benjamin Hornby *v.* Glen, 1 A. and E., pp. 49-51.
Leake on Contract, 3rd Ed., p. 398.
Green *v.* Kopke, 25 L.J. C.P., p. 297.
Halton *v.* King.
Halsbury, Laws of England, Vol. 7, p. 371, para. 767· p. 373, paras. 768 and 769.
Ibid., Vol. 13, p. 323, para. 452.
Low *v.* Bouverie, 1891, 3 Ch., p. 83.
Mitters *v.* Brown, 32 L.J., Ex., p. 138.
Halsbury, Vol. 13, p. 368, para. 515.
Ibid., Vol. 14, p. 147.
Hall *v.* Franck, 18 L.J., Ch, p. 362.
Lee *v.* Sankey, 15 L.R., pp. 204, 211.

Kempson for the Respondents cites:—

In the goods of Maguire (1884), 9 Prob. Div., p. 236.
In *re* Bagard (1849), 1 Roberts, p. 768.
In *re* Ormonde, 1 Haggard, p. 145.
In *re* Elderton, 4 Haggard, p. 210.
In *re* Barker (1891), Prob., p. 251.
Chitty Contracts, 13th Ed., pp. 88 and 105.

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[1] Now Cap. 61, Vol. I, p. 477.
[2] Now Cap. 182, sec. 4, Vol. II, p. 1292.

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SAWREY-COOKSON, J.

The (Plaintiffs) Respondents in this Appeal, obtained before the learned Chief Justice in the Court below a decree for specific performance of a certain contract made between them and the Appellants, who had been granted Letters of Administration in this Colony to deal with the property, the subject matter of that contract.

The Appellants were three in number, and are named Smith, Johnson and Thompson respectively, and they had been authorised by a power of attorney from certain executors in Lagos to take out these Letters of Administration in this Colony.

It appears that about a fortnight before the Letters of Administration were actually taken out in this Colony, Smith had anticipated matters by entering into negotiations with the Respondents with a view to achieving the purpose for which he (Johnson) and Thompson held those letters in this Colony, with the result that the property in question was (as alleged by the Respondents) agreed to be sold for the sum of £1,750, and a receipt was given by Smith for the part-payment, £500, in the following form:—

" *Re* premises at the corner of Rawdon and Westmore-
" land Streets. Estate of Bishop Johnson, deceased.

" No. 79. " 1st May, 1918.

" Received of Messrs. G. B. Ollivant and Company,
" Ltd., the sum of five hundred pounds, nil shillings, nil
" pence, being amount paid in advance on account of pur-
" chase money for the sale of the above premises. Con-
" sideration money seventeen hundred and fifty pounds
" sterling.

" W. F. SMITH,
" for Executors.
" 1.5.18.
" Stamp."

As I have indicated, the learned Chief Justice held (*inter alia*) that this receipt constituted a sufficient memorandum under the Statute of Frauds, but Mr. Sawyerr, for the Appellants, has argued, with considerable ingenuity and apparent sincerity, that it is no such thing, and for two reasons, as I understood him, viz., because it does not fully set out the consideration, and because Johnson and Thompson also did not sign it. The other point upon which Mr. Sawyerr relied, as I gathered when

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he summed up his submissions following on his very lengthy arguments, was that Smith had no power to negotiate—he had no status, or, as he put it, was " a stranger " at the time he gave the receipt.

As to the first point, Mr. Sawyerr contended that inasmuch as something had been said about some material which would result from the demolition of a certain building on the property to be acquired, forming part of the consideration for the purchase, that fact also should have been stated on the receipt. Even one of the Plaintiff's own witnesses, Dunlop, as he pointed out, had said, " I think something was said about the materials " being included in addition to £1,750 as the consideration " for the purchase "; and, indeed, it would certainly appear that " something was said " on this point. But, as Mr. Kempson argued—what says the Statute of Frauds?—and he quoted from Chitty as follows:—

> " The Statute of Frauds does not require a formal con-
> " tract drawn up with technical precision. The require-
> " ment is of either ' the agreement ' sued upon or ' some
> " ' memorandum or note thereof ' written and signed by the
> " party to be charged. Any memorandum under the hand
> " of the party made before action brought which names,
> " or so describes as to identify, the contracting parties,
> " and which contains, either expressly or by reference to
> " other written papers, the terms of the agreement, is
> " sufficient."

The last words quoted would seem at first sight to justify Mr. Sawyerr's contention, as there is certainly no mention in the receipt, either expressly or by reference to other written papers, to this building material as forming part of the consideration. But in this connection as in others I attach great weight to the evidence of Smith, for the simple reason that the learned Chief Justice as trial Judge was more than favourably impressed by this witness's demeanour, which I need hardly say is a matter of the very first importance in coming to one's judgment in any case. Not only has the learned Chief Justice expressed himself in this Court several times to that effect, but there is the ring of truth about Smith's evidence, which, apart from any such expression of opinion by the Chief Justice, greatly impresses me. Smith says, in his examination in chief by Mr. Sawyerr, that after being offered £1,750 by Hebron, he said he must consult with Johnson and Thompson, and that he went to Johnson, and that Johnson told him he thought £1,000

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a fair price, and that the £1,750 was a good offer, but that Smith should ask for a portion of the building; that he (Smith) then said to Johnson that he must also go and consult Thompson, and that he went, and that Thompson also suggested £1,000 as a fair figure, and thought the offer of £1,750 " very good "; that next day he went and reported to Hebron that Johnson and Thompson had agreed to the £1,750, but that Johnson had " added a portion of the building materials "; that Hebron then said, in effect, that if it was only a question of their wanting a portion of the building materials, they might not only have a portion, but could take the whole lot; that he (Smith) then closed the bargain by taking the £500 and giving the receipt, as Johnson and Thompson had agreed. But he adds very honestly " He (Johnson) never authorised me. They did " not say I should sign the receipt on their behalf."

I have set out this evidence, which is in no way materially shaken in cross-examination, because if believed (and I have given the best of all reasons why it should be believed) it seems to me to dispose of two points—the only one in which there might, in my view, be some substance, viz., the defectiveness of the receipt as a memorandum by reason of no reference being made therein to this building material, and also of the failure of Johnson and Thompson to sign the receipt.

It disposes of the first, because, in my clear view, that building material was regarded as of so little value and importance that it was, so to speak, thrown in. The sum of £1,000 being agreed by both Johnson and Thompson as a good price, how is it to be argued, after £1,750 had been offered, that this additional rubble was any material part of the consideration?

It also disposes of the second point simply because, despite the denial by Johnson and Thompson that they authorised Smith to sign the receipt for them, they had in effect agreed that he should do so, and Smith signed in the perfectly well warranted belief that he had their authority to conclude the bargain. Before leaving this point I wish to add that the learned Chief Justice was entirely justified in inferring from the fact that Thompson was not put into the witness box that Mr. Sawyerr could not risk obtaining further evidence corroborating Smith. It was a perfectly fair and proper inference, and I was astounded at Mr. Sawyerr's explanation that had the trial Judge required Thompson's evidence, it was competent to him to have insisted on his going into the box. Who has ever heard of the right of a Judge to order a witness into the box against Counsel's discretion?

The contention that Smith was a stranger is, I think, disposed of by the learned Chief Justice in a passage towards the end of the judgment appealed against, especially by the words therein "on Letters (of administration) being granted, "the administration will have relation back."

I have only to add that if it is necessary to discover a reason for the sudden *volte face* on the part of Johnson (and Thompson and Smith, in so far as they were induced to follow him), it is to be found, I think, in the fact that a better offer had been made after the bargain had been concluded. There is evidence that a certain Mr. Genet had offered £2,000, and I believe it. I do not believe that it was the result of any letter which Johnson wrote to the executors in Lagos, which letter was never shown to either Smith or Johnson, as I conceive it would and should have been.

For these reasons this appeal must be dismissed with costs, such costs to be borne, not by the estate, but personally and in equal shares by the administrators of the estate in this Colony.

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I am satisfied that the crucial document in this case is, albeit not formally drawn up with technical precision, a sufficient memorandum identifying the parties and containing the terms of the deed to satisfy the Statute of Frauds.

I am not impressed with the argument that the consideration was not correctly set forth, owing to omission of reference to building materials over and above the £1,750. One of the vendors asked for a part of the materials, but so little value did the purchasers attach to them that they said in effect "you can "have the whole of them." To estimate them in these circumstances as essential part of the consideration would seem to me unreasonable.

Much stress has been laid by the Appellants on the non-registration of the Power of Attorney, but it is clear from the cases of In *re* Ormonde, In *re* Elderton and In *re* Barker cited by Mr. Kempson, that such a formal document is a superfluous luxury; and in any case its non-registration was the omission of the Appellants themselves.

The receipt was given on May 1st, the grant of administration *cum testamento annexo* was dated 16th May. On 9th May the purchasers' solicitor wrote exhibit "D" to Messrs.

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Thompson, Johnson and Smith, asking for the title deeds in order to enable him to engross the conveyance; but it was not till 17th June that was written the letter (Exhibit " C ") asking for £2,200 instead of £1,750.

In the face of these dates I cannot agree that there was such a refusal by his colleagues to adopt and ratify the act of Smith as to enable them to escape liability for the contract entered into by him on their behalf.

The appeal must be dismissed with costs to be borne personally and in equal shares by the administrators of the estate in this Colony.

PURCELL, C.J.

I agree.