
(1872) 08 CAL CK 0008

Calcutta High Court

Case No: None

H. Clarton

APPELLANT

Vs

D.N. Shaw and Another

RESPONDENT

Date of Decision: Aug. 31, 1872

Judgement

Sir Richard Couch, Kt., C.J.

It being stated that the Statute of Frauds does not apply, we are of opinion that the plaintiff was at liberty to prove by parol evidence the existence and terms of a contract on which he could maintain the action. In Sievwright V. Archibald 17 Q.B., 103 a memorandum in writing of the contract was necessary, as it was within the Statute of Frauds; and Erle, J.'s opinion that the mere delivery of bought and sold notes does not prove an intention to contract in writing, and does not exclude other evidence of the contract in case they disagree, was in accordance with that of the other Judges.

Patterson, J., says:-- "I consider that the memorandum need not be the contract itself, but that a contract may be made without writing; and if a memorandum in writing be afterwards made, embodying that contract, and be signed by one of the parties or his agent, he being the party to be charged thereby, the statute is satisfied." And the ground of his judgment is that, where the bought and sold notes are the only writing, and they differ materially, the statute is not satisfied. Lord Campbell says:--

I by no means say that, where there are bought and sold notes, they must necessarily be the only evidence of the contract; circumstances may be imagined in which they might be used as a memorandum of "parol agreement."..... What are called the bought and sold notes were sent by him (the broker to his principals by way of information that he had acted upon their instructions, but not as the actual contract which was to be binding upon them.... In the present case there being a material variance between the bought and sold notes, they do not constitute a binding contract; there is no entry in the broker's book signed by him; and if there were a parol agreement, there being no sufficient memorandum of it in writing, nor any part acceptance or part payment, the Statute of Frauds has not been complied with, and I agree with my brother Patterson in thinking that

the defendant is entitled to the verdict.

2. There may be a complete binding contract, if the parties intend it, although, bought and sold notes are to be exchanged, or a more formal contract is to be draw up. This is shown by *Heyworth v. Knight* 33 L.J., C.P., 203 : 17 C.B., N.S., 293 If the bought and sold notes do not agree, they cannot be used as evidence of the contract, but we cannot agree with the first Judge that their differing, and not being returned, is positive evidence that, at the conclusion of the negotiation, the parties did not agree; the fact being, as we think, that the negotiation was concluded, and the contract made, before the notes were written, and that they were sent by the broker to his principals by way of information. To support the opinion of the first Judge, it would be necessary that there should exist a custom between merchants that they should not be bound until regular bought and sold notes have been exchanged.