[ORIGINAL CIVIL.]

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Macpherson.

J. A. CHARRIOL AND OTHERS (PLAINTIFFS) *v.* C. G. M. SHIRCORE (DEFENDANT).

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Contract—Signature—Contract altered after being signed—Repudiation—Statute of Frauds.

The plaintiffscontracted with the defendant for the purchase from him of a certain quantity of hog's lard. The terms of the contract were contained in a letter which was drafted by the plaintiffs and sent to the defendant for signature. The defendant returned the letter unsigned, with two additional clauses. The plaintiffs not being able to agree to one of these clauses had an interview with the defendant, when the defendant took the document away with him, and subsequently on 17th May returned it signed, but with the additional clauses still remaining. The plaintiffs had another interview with the defendant on 5th June during which the additional clause objected to by the plaintiffs was struck out, one of the plaintiffs writing the word "cancelled" against that clause, and the defendant putting his initials against the word "cancelled." The plaintiffs then added to the contract the words "approved," together with "R. and C.," being initials of their firm. Other alterations had been made in the document, and, it containing many erasures, the plaintiffs on the same day sent a fair copy to the defendant for signature, but the defendant wrote repudiating the alleged contract, and refusing to sign the document. *Held* confirming the decision of the Court below, there was no binding contract between the parties. The signature of the defendant put to the document on 17th May was not a sufficient signature by the party to be charged, so as to satisfy the Statute of Frauds.

THIS was an appeal from a decision aiaon of Mr. Justice Phear dated 16th August 1871. The suit was brought to recover the sum of Rs. 5,000 as damages for breach of contract. The plaintiffs were the members of the firm of Messrs. Robert and Charriol, carrying on business in Calcutta; the defendant was the messenger of the Court for the relief of insolvent debtors in Calcutta.

The written statement of the plaintiffs stated that in April and May 1871 they were in treaty with the defendant for the purchase from him of hog's lard of his manufacture, and on 1st May terms were agreed upon and embodied in the following

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lettar which the plaintiffs drafted and sent to the defendant for signature :—

Calcutta, 1*st May* 1871.

MESSRS. ROBERT and CHARRIOL.

DEAR SIRS,—I have this day sold to you from 500 to 700 (five hundred to seven hundred) cases of first quality hog's lard of my manufacture and mark, at 42-8 (forty-two rupees and eight annas) per case of 8 tins of 100 seers each, or two bazar maunds ; as usual, delivery to be given and taken in all 12 months, as it is prepared, by instalments of 40 to 60 cases at a time at Koilahghat or at your godowns, as it might be convenient to yourselves, commencing from 1st May instant ; cash on delivery of each lot. I engoge not to sell any hog's lard to any party besides yourselves, nor to make any shipments during the term of this contract, without first obtaining your consent in writing or I will render myself liable to yourselves to a penalty of five thousand rupees by way of liquidated damages without prejudice to your other rights, should I fail to deliver the hog's lard to you according to this contract."

That a few days after, the defendant returned the letter unsigned with the addtion of the two following clauses:—

" And should you fail to take delivery in any month of the instalment of hog's lard when ready, and after I have given you notice in writing, you must render yourselves similarly liable to a penalty of five thoussand rupees by way of liquidated damages.

" And monthly and every month so long as the contract continues, shall be at liberty to take advances from you between 3 to 5,000 rupees, which amount you will have to give me as advances for lard, without interest and on demand."

That the plaintiffs not being able to agree to these alterations, had an interview with the defendant, when the defendant took the proposed contract away with him, and subsequently on 17th May, he returned it signed by him, but with the additions made by him still remaining ; that on 5th June the defendant called on Mr. Beer, one of the plaintiffs, and it was finally agreed between them that the addtional clause relating to advances should be, and the same then was struck out, and Mr. Beer then wrote the word "cantelled" in the margin of the letter against that clause, and the defendant put his initials against the word " cancelled." and Mr. Beer further subscribed the contract with the initials

of the name of his firm, superscribed by him with the word "approved"; that in consideration of this clause being struck out, the price was altered from Rs. 42-8 to 43, the date of the contract being altered to 5th June the date when it was finally concluded between the parties; that the letter being full of alterations and erasures, the plaintiffs sent on the same day a fair copy to the defendant for signature, but the defendant refused to sign it, and on the same day wrote to the plaintiffs repudiating the contract; and that the defendant on 17th June committed a breach of the contract by shipping 100 cases of hog's lard to other persons, without the consent of the plaintiffs in writing.

The defendant's account of the transaction was that the plaintiff, Mr. Beer, told him that he did not wish the advance clause to appear in the contract, but he promised verbally to make the advances required by the defendant; that Mr. Beer drew his pen through the advance clause, and wrote in the letter the words "approved R. & C.," and requested the defendant also to approve and initial the letter, but the defendant refused saying he wanted time to think of it; that at the request of the plaintiff, the defendant appended his initials to the word "cancelled" which the plaintiff had written against the advance clause; that the plaintiff then called one of his assistants, and told him to send for two stamped papers and draw out contracts, but the defendant objected that he did not wish to complete the matter without further consideration, whereupon the plaintiff told his assistant to send for only one stamped paper; that the plaintiff then informed the defendant that he would send him two papers, one stamped and one unstamped; that if, on receiving the same, he was willing to sign without alteration, he could sign the stamped copy, and retain the unstamped copy as a memo., and that the plaintiffs would thereupon send him a stamped counterpart executed by them; but if he wished to make any alteration, he should make it on the unstamped copy; and that, having no certainty that the plaintiffs would carry out their promise to make advances, he after some correspondence returned the copy of the contract unsigned to the plaintiffs.

The only question material to this report was whether there was a binding contract between the parties.

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PHEAR, J.—This suit is a very remarkable one. If I should accept the plaintiffs' own view of the case, it would appear that the contract on which they sue was signed on the morning of the 5th June by the defendant and repudiated before the day was out, and before a single step was taken under it by either party: yet the plaintiffs come to a Court of Equity without having rendered the defendant the slightest consideration, without having themselves incurred any further responsibility than the future responsibility of eventually having to pay for the goods at less than bazar prices, when they may receive them, and no sooner; they come to a Court of Equity to compel the defendant to perform the letter of his contract, and to pay them a very large sum of money under it. In other words they ask this Court as a Court bound to administer strict law to give them substantial damages for the loss which they have suffered by the defendant's breach on the ground that those damages have been agreed upon between the parties, while it is quite clear that they have in fact suffered no damage whatever. In either alternative of the suit, if I gave the plaintiffs a substantial pecuniary verdict, they would be really getting so much money for nothing. I make these few remarks by way of preface, in order to show how necessary it is in this case for the Court to look closely indeed into the facts, and to see if the defendant has without doubt brought himself under the obligation which the plaintiffs try to enforce against him; for I suppose no Judge in a Court of Law or Equity, would willingly give such a verdict as that which the plaintiffs ask. As to some of the facts there has been unfortunately a conflict between Mr. Beer and Mr. Shircore; but I think I may well refrain from holding the balance between them as to their relative veracity. It seems to me that on Mr. Beer's own showing I ought to stop short of holding that the paper exhibited a binding contract. Unquestionably by Mr. Beer's own account something more was to be done before the evidence of the contract was put into its final shape. He says a fair copy was to be made in two parts, one of which was to be sent to the defendant for signature. He was exceedingly prompt in setting his servants to work in making a fair copy, but still I suppose, from his own statement, inasmuch

as the stamped paper had to be sent for and two copies of the document to be made, I might almost say the ink could hardly have been dry before Shircore penned his letter. At the outside it was a question of two or three hours on the same day. If Shircore on his way down the stairs, had turned back to Beer's room and had there orally said what he afterwards in fact wrote on the same day, Mr. Beer could not, I think, have even thought of asking any Judge to say that a binding contract had been come to. It would be unreasonable in the affairs of life to say that a man should be found by what he almost immediately recalled, nothing having been done in the interval by either party to the contract. It seems to me that no difference in this respect arises out of the fact that Shircore did not write his letter till he got home.

Whether Mr. Beer is strictly accurate or not as to what took place on 5th June, I think that no such binding contract was made, as this Court can be called upon either to enforce by decreeing specific performance, or ought to treat as a completed agreement for liquidated damages. I cannot but think that Messrs. Robert and Charriol have been precipitate and have been ill advised in bringing such an action as this is. I dismiss the case with costs No 2.

From this decision the plaintiffs appealed, on the grounds :—

1. That the Judge was in error in holding that on the plaintiffs' own showing, there was no binding contract between them and the defendant.

2. That on the evidence before him the Judge ought to have held that the agreement was a binding contract between the plaintiffs and defendant, and that there had been a breach of such agreement and that the plaintiffs were entitled to the relief prayed for against the defendant with costs.

3. That the decision was against the weight of evidence.

Mr. *Marindin* and Mr. *Macrae* for the appellants.

The *Advocate-General* and Mr. *Woodroffe* for the respondents.

Mr. *Marindin* contended that the signature of the defendant appended to the document on 17th May was a sufficient signature

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to satisfy the State of Frauds ; and that there was, under the circumstances which had taken place, a binding contract between the parties. [COUCH, C. J.—The judgment appealed from proceeds on the ground that the contract was not completed, and says that repudiation is evidence that it was not intended to be final.] The question whether it is a binding contract or not, is not one to be decided on a conflict of testimony, but is a matter of law. The initialling would probably only apply to the cancelled clause ; but the signature of the defendant put to the document on 17th May was sufficient. The cancelling of the clause struck out was made as to avoid the signature which had been put to the document by the defendant. The fact that the defendant allowed his signature to remain, and handed the document to the plaintiff would amount to a fresh signature—*Durrell* v. *Evans* (1). [COUCH, C. J.—There it clearly appeared what the intention of the parties was. All your contention amounts to is that if the parties intended it to be binding, a fresh signature would be unnecessary. MACPHERSON, J.—It does not appear to have been treated by the parties as a final signature ; a fair copy of the contract was to be sent for signature.] The fact that a fair copy was to be drawn up for signature does not prevent an approved draft from being sufficient. A document may be sued upon, though it was intended that another should be signed as final—*Fowle* v. *Freeman* (2). There the Master of the Rolls says " proposals if accepted are binding." In that view this draft would be binding as a proposal.

Mr. *Macrae* on the same side.

The *Advocate-General*, for the respondents, contended that there was no complete contract between the parties. There was no intention that what was drawn up should be a binding and final agreement ; something more remained to be done namely the fair copy had to be drawn up and signed before the contract could be considered a complete and binding contract. All that was agreed on was that the alteration in price should be made, and that the advance clause should be cancelled. Though the defendant appears to have agreed that that particular clause

(1) 1 H. & C., 174. (2) 9 Ves., 351.

should be struck out, he did not suppose that the whole contract was finally settled. The defendant put his signature with the intention of agreeing to a different contract to what is now sued on: that was not accepted by the plaintiffs. *Durrell* v. *Evans* (1) is distinguishable on the facts, and this point was not taken in that case.

Mr. *Marindin*, in reply, submitted that *Durrell* v. *Evans* (1) was in point, and also the cases there cited by Blackburn, J., in which it was held that a printed name at the head of a document was a sufficient signature though put there before the final agreement was come to—*Schneider* v. *Norris* (2).

The Judgment of the Court was delivered by.

COUCH, C. J.—The two questions which have been raised in this case appear to me to be substantially the same: because unless the signature which was put on the 17th May to the document was a sufficient signature to satisfy the Statute of Frauds, the plaintiffs cannot recover; and the ground upon which the Advocate-General rests his case is that the agreement which the parties came to on the 5th June, was not complete, because there was something further to be done in the shape of signing. The real question is, whether the parties, on the 5th of June, intended that the signature which was put on the 17th May, should be treated as a signature to the agreement as it had been altered by them; because, unless they did so intend, there would be no binding writing signed by the party to be charged which would satisfy the Statute of Frauds.

We have been referred by the learned Counsel for the appellants to the case of *Durrell* v. *Evans* (1), on which he appears considerably to rely. Now the language of Mr. Justice Blackburn in that case shows what is the real question. Mr. Justice Blackburn says in more than one passage of his Judgment, that what is necessary is not merely that the signature, which was at the head of the document and which was printed, should be there when it

(1) 1 H. & C.. 174. (2) 2 M. & S., 286,

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had been altered; but that being so signed it must be intended by the parties to be a binding instrument of contract. He says at page 191, "I cannot look upon this document as an invoice "or bill of parcels in the sense that it was only intended to be "the vendor's account of the contract. If the facts are looked at, "it is impossible to deny that there is evidence from which a jury "might draw the inference that it was written by the defendant's "authority as a record of a contract by which both parties "meant to be bound." He then speaks of the evidence, and says at page 192, "that is evidence for the jury that Noakes "was requested to alter this writing, not merely as the seller's "account, but as a record of the contract binding on both "parties," and further on in the same page he says: "There is "the desicion of two eminent Judges that where a document "contains the name of the party to be charged, and he "intended it to be a binding memorandum of the contract, that is "sufficient."

It is not enough that this paper, as altered on the 5th June, contains the name of Mr. Shircore, which was put on it on the 17th of May and was not struck out on the 5th of June; but did Mr. Shircore intend at that time that it should remain as the signature to the document as altered? If he did not so intend, there is no signature to the document as altered, and therefore, no contract to satisfy the Statute of Frauds.

It is to be observed, that the plaintiffs who sue to enforce this contract, must make out that there was such a contract, and if they are unable to satisfy us on that and have left the matter in doubt, they cannot be entitled to recover in this action.

Now let us look on this question at the evidence of Mr. Beer, one of the plaintiffs. Mr. Beer's account of what took place on the 5th of June is this. He says, "the defendant called on "the following Monday, the 5th June. I explained to him "again I would on no consideration accept such a clause as he "had put at the end of the contract. I also said, you know very "well you may always find money here when you want it, but I "will not bind myself to give advances unless you find security "when called on to do so. Why I may hear to-day you are running away from Calcutta and you may come to me and call

"on me for advances, and I shall be bound to give them if I accept "your contract." He then goes on to speak about the alterations regarding the price; and says he struck out the clause with regard to advances, put " cancelled" against, it and put the words "approved R. and C." " I then passed it on to Mr. "Shircore and asked him to put his initials to the word 'can "celled.' He said what is the use of signing on this paper "there are so many corrections? I said never mind, put your "initials. I shall have a fair copy made out and sent to you "for your signature. I told him I would send an unstamped "copy for him to keep, and a stamped copy to be returned. He "did put his initials to it (A). After defendant so initialled A, "nothing further was done." Then in cross-examination by the learned Advocate, General, Mr. Beer said: " He objected "to write on it at all on the ground it was so full of alterations. "It was to be signed after it was fair copied. He said what is "the good of signing this paper, it is so full of corrections? "The paper was to be copied out word for word, and he was to sign it again", and then he goes on to say he had signed the paper, and the signature of the 17th of May was a sufficient signature to the document.

Now the fair inference to de drawn from Mr. Beer's evidence is that both parties did not, on the 5th of June, contemplate or consider that the signature, put on the 17th of May on the paper, was to treated as the signature to the document as altered. Mr. Beer evidently considered that the document so altered should be fair copied and signed, and if he thought that the document as altered was to be treated as the agreement, the signature being then there, there would have been no necessity for having the argeement fairly copied and stamped and sent to Mr. Shircore for signature. The proper course would have been not to have taken the initials of Mr. Shircore merely to the cancellation of the clause as to advances, but to have authenticated all the alterations by obtaining his initials to them, because there is nothing to show, as the document stands, that Mr. Shircore consented to be bound by all these alterations.

Then the state of the document itself appears to me to show that both parties intended that the document was to form the

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draft from which the agreement ultimately to be signed was to be prepared. You find that at the foot of that part of the agreement which remained and which was to be binding, the words "approved R. and C." were written by Mr. Beer, showing that Mr. Beer had approved of that part of it and that it was intended that the defendant should sign it after he had approved of it on his part. I cannot see that at that time Mr. Beer thought at all of the signature of the 17th May, or that he contemplated that signeture as being the defendant's signature to the altered document. If he did not or the defendant did not, then the paper was never signed by the defendant so as to satisfy the Statute of Frauds.

On the other question, *viz.*, whether on the 5th of June Mr. Shircore reserved to himself the right to recede from the contract until he had affixed his signature to the instrument, there is possibly some difficulty and even some conflict of evidence. His own letter, which was written on the 5th of June, and which was received by Mr. Beer on the same day, certainly rather indicates that he did so consider, and that he thought that till he signed the fair copy of the agreement he had the power of receding. I see no reason to think that that letter was not honestly written. I think it states what he honestly believed, and it confirms what he now contends for, that he understood on the 5th of June that the contract was not to be a binding contract till the draft had been copied out fairly on stamped paper and signed by him. It is quite possible that there has been a misunderstanding, and that one party understood one thing and the other party another thing; but if Mr. Shircore really understood that he was not to be bound till he had signed the fair copy, there was no contract.

I therefore think that the judgment of the learned Judge in the Court below, holding that there was no signature in this case to satisfy the Statute of Frauds is correct. I only think it necessary to remark that in confirming that Judgment I wish not to be understood as concurring in all the law laid down in it. I think some propositions there stated may be questionable.

The decree will be affirmed with costs on scale No. 2.

Appeal dismissed.

Attorneys for the appellants: Messrs, *Gray & Sen.*

Attorney for the respondent: Mr. *Dover.*