ment which the Judge gave, after hearing the evidence, must be considered as if it was given at the proper time, and as if he had rejected the plaint on its being first presented to him. When a plaint which ought to be rejected is received by the Court, and it is afterwards found that the plaint ought to have been rejected, the proper course is to dismiss the suit, as has been done here. Then, as regards any costs which the plaintiff may have been put to by the taking of the evidence, it seems that, after the objection of misjoinder had been taken by the defendants, and an issue raised upon it, the pleader for the plaintiff deliberately insisted on his right to proceed in this suit against all the separate purchasers.

We dismiss the appeal, and confirm the judgment of the lower Court with costs. Our judgment will not prejudice the right of the plaintiff to bring his suit in the proper form.

Appeal dismissed.

[ORIGINAL CIVIL.]

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

H. CLARTON *v.* D. N. SHAW AND ANOTHER.

1872 *August* 31.

Contract of Sale—Variance between bought and sold Notes—Admissibility of Parol Evidence.

The defendant, a Hindu, entered into a contract of sale with the plaintiff through the medium of a broker. The broker made no entry of the contract in his book, and there was a material variance in the bought and sold notes delivered by him. The notes were accepted and retained by the plaintiff and defendant respectively. In an action for non-delivery under the contract, *held* that the contract was made before the notes were written; the notes were sent by the broker to his principals merely by way of information; and the Statute of Frauds not applying, the plaintiff was at liberty to give parol evidence of the terms of the contract.

CASE stated by the first Judge of the Court of Small Causes, Calcutta, for the opinion of the High Court, under s. 7 of Act XXVI of 1864.

In this case the plaintiff sued the defendants for damages sustained through their breach of contract in failing to deliver

1872

CLARTON v. SHAW.

certain bales for jute. The facts of the case, so far as they are material for its decision, are the following :—

1. The defendants are Hindus.

2. Mr. J. K. Moran, who acted as broker for the parties, delivered to the plaintiff the bought note marked B, and to the defendants the sold note marked A, which documents were received and retained by the parties respectively.

2*a*. Mr. Moran made no entry of the contract in his broker's book.

3. Subsequently Mr. Moran, at the request of the plaintiff, obtained from the defendants, and made over to the plaintiff, the exhibit marked C.

4. The first two parcels of jute referred to in exhibit C were delivered by the defendants on boardship on the 23rd, and were paid for by the plaintiff on the 24th January last.

5. On the 25th January the plaintiff, in his letter marked E, demanded delivery on that day of 250 more bales in terms of the exhibit C, which delivery the defendants, in their letter of the same date, marked F, declined to give, alleging a breach of contract on the part of the plaintiff in not having at once paid for the two parcels of jute referred to in paragraph 4.

6. An attempt was made by the plaintiff to prove that the defendants had, subsequently to the acceptance of the notes on both sides, accepted and ratified the contract as expressed in the bought note of the plaintiff. But this entirely failed.

The case coming on for hearing, the defendants' attorney, among other pleas, contended that, as there was a variance between the bought and sold notes, there was in fact no contract between the parties, and that the claim should therefore be dismissed. I decided the case against the plaintiff on this issue, holding that, as the bought note gave the plaintiff a right to insist on delivery on boardship, while the sold note gave the defendants an option of delivering on shore, the variance between the notes was material, and there was consequently no contract.

At the trial the plaintiff proposed to show by parol evidence what the contract between the parties really was; but, as I was of opinion that the fact of the interchange of bought and sold notes showed it to be the intention of the parties that the

terms of the contract should be reduced to writing, and that the notes which they had respectively accepted must be regarded as the ultimate expression by each of his several intention as to what the terms of the contract which he would assent to should be, and also as to what they had been made, and that everything which had passed between the parties through their broker previously could only be looked upon as the early stages of the negotiation, I declined to admit parol evidence of a contract which was not contained in the notes.

A new trial was applied for on the ground that I should not have refused to receive the parol evidence tendered, and it was argued that, as it is admissible in cases falling within the provisions of the Statute of Frauds in which the bought and sold notes are found to vary, to establish the contract by a reference to the entry in the broker's book, so here in a case in which, the defendants being Hindus, the Statute of Frauds does not apply, it was competent to show, by the parol evidence of the broker or of others, what was in fact the contract which the parties intended to make for themselves. In support of this view, reference was made to the case of *Sievewright* v. *Archibald* (1), and more particularly to the elaborate judgment of Erle, J., in that case, as showing that the only reason for refusing to admit parol evidence to prove the contract where bought and sold notes differ, is the restriction contained in the Statute of Frauds. I have given that case my careful consideration. It appears to me that the learned Judges in that case do not decide that the entry in the broker's book may be referred to in case of variance between the notes; but that, where there is an entry in the broker's book, that entry is itself the contract. It also appears to me that the majority of the Court there held in very pointed terms that, where there is no entry in the broker's book, there the bought and sold notes are themselves the contract. Further, if Erle, J., be correct in his view that these holdings can only be considered quite sound, if we interpret the word contract as meaning what is, to some extent and in a strictly practical point of view, the same thing, *viz.*, the statutory evidence

(1) 17 Q. B., 103

1872

CLARTON v. SHAW.

of the contract necessary under English law, it appears to me that even then, and even when the Statute of Frauds does not prevail, bought and sold notes delivered, accepted, and retained by the parties cannot be regarded in a more degraded light than as the expression, reduced into writing with the consent of the parties, of what their wishes and intentions with regard to the intended contract were at the last stage which the negotiations reached. If this view of mine be not erroneous, it seems to me that varying bought and sold notes accepted, retained, and acted on amount to positive evidence of the negative fact that, at the conclusion of the negotiation, the parties did not agree, and this evidence having been in fact (though unnecessarily as far as any statutory provision is concerned) reduced into writing by the parties themselves, or accepted by them when so reduced by their agent, no parol evidence is admissible to contradict them. There is surely some want of clearness in the argument of the learned dissentient Judge when he remarks that the Court must, according to the view of the majority of his colleagues, first arrive at the conclusion that there was a contract, before it can, by inspection of the terms of that contract, arrive at the opposite determination that there had after all been no contract. All that the law of evidence requires is that there should have been an intention to contract, and to reduce the terms of such intended contract into writing. This will be sufficient to exclude parol evidence, and then the Court, by inspectionn of the written expression of their intentions, may conclude that the parties have failed to carry out those intentions—1 Taylor on Evidence, p. 401, edition 1868, *note* 2. My colleague, Mr. Thomson, does not agree with me in these views, but considers that, for the reasons given by Erle, J., in the case of *Sievewright* v. *Archibald* (1) above referred to, parol evidence as to what the parties really intended to be their contract should be admitted. I have therefore the honor to submit for the opinion of the High Court the following points, *viz.* :—

1. Whether, on the facts of the case as set forth in paraphs 1 to 6 of the foregoing statement, it was open to the

(1) 17 Q. B., 103.

1872

CLARTON v. SHAW.

plaintiff to prove by parol evidence the existence and terms of a contract on which he could maintain the present action ?

2. Whether bought and sold notes materially varying are not, when received and retained by each party, as has been stated, conclusive evidence that, in the last stage of their negotiations, the parties did intend to make, and believed themselves to have made, a contract, but failed to do so ?

The five exhibits marked A, B, C, E, and F were as follows :—

A.

No. 859.

Calcutta, 12th December 1871.

To MESSRS D. N. SHAW, P. N. MITTER AND CO.,

DEAR SIRS,—We have this day sold by your order for and on your account to Messrs. H. Clarton and Co. (1,250) one thousand two hundred and fifty bales (four P. in heart, No. 5) jute, of the standard quality of the mark, of 300 lbs. each at Rs. (21-12) twenty-one, twelve *per* bale, or Rs. 22 free on board, measurement as customary on wharf 52 feet to ton of 5 bales.

Terms—Cash on delivery, which is to be taken and given within as each 250 bales are ready in all January 1872.

Yours faithfully,

J. K. MORAN AND CO.,
Brokers.

Brokerage at one per cent.

B.

No. 859.

Calcutta, 12th December 1871.

MESSRS. H. CLARTON AND CO.

DEAR SIRS,—We have this day bought by your order for and on your account from Messrs. D. N. Shaw, P. N. Mitter and Co., twelve hundred and fifty bales (four P. in heart, No. 5) jute, of the standard quality of the mark, of 300 lbs. each, at Rs. 22 free on board (twenty-two rupees *per* bale), measurement as customary on wharf 52 feet to the ton of 5 bales.

1872

CLARTON v. SHAW.

Terms—Cash on delivery, which is to be taken and given within as each 250 bales are ready in all Januaay 1872.

Yours faithfully.

J. K. MORAN AND Co.,

Brokers.

C.

MEMORANDUM.

19th January 1872.

MESSRS H. CLARTON AND Co.

We are requested by Messrs. Shaw and Mitter to inform you that they will give delivery of your 1,256 B., four P., No. 5, as follows :—

250	on	22nd	January.
250	,,	23rd	,,
250	"	25th	,,
250	,,	27th	,,
250	,.	31st	,,
1,250			

Yours faithfully.

J. K. MORAN AND Co.,

Brokers.

E.

MEMORANDUM.

FROM	To
H. CLARTON AND Co., *No.* 12, *Clive Row.* *Calcutta, 25th January* 1872.	MESSRS. SHAW AND MITTER.

DEAR SIRS,—The Captain of the "Anne Ryden" tells us that your 250 bales have not come alongside. Please state whether you intend shipping them, otherwise we must be compelled to buy in their place.

Yours faithfully,

H. CLARTON AND Co.

P. S.—We should be glad to know at once, as the ship will be stopped in her lading.

H. C. AND Co.

F.

1872

CLARTON v. SHAW.

Calcutta, 25th January 1872.

MESSRS. H. CLARTON AND Co.

DEAR SIRS,—In reply to your note just received, we beg to refer you to our solicitor's letter of yesterday. As you have broken the contract by not paying us on delivery of the goods as *per* contract, you cannot expect us to deliver any more.

Yours faithfully.

D. N. SHAW, P. N. MITTER AND Co.

The case was not argued before the High Court.

The judgment of the Court was delivered by

COUCH, 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 *Sievewright* v. *Archibald* (1) 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. Patteson, 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

(1) 17 Q. B., 103.

1872

CLARTON v. SHAW.

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 Patteson in thinking that the defendant is entitled to the verdict."

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* (1). 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.

(1) 33 L. J., C. P., 293 ; S. C., 17 C. B., N. S., 298.