RECENT CASES

COMMONWEALTH v. JOHN WHITE & SONS (N.T.) PTY. LTD.[1]

As the Statute of Frauds 1677 nears its 300th anniversary it shows no signs of lying down and dying. It has reared its head in the Supreme Court of the Northern Territory. The facts of the case were that the Crown auctioned unleased land in the Darwin area. The defendant was the highest and successful bidder at the auction and then declined to pay for the land. The Commonwealth sued him for breach of contract.

Section 13(1) of the Darwin Town Area Leases Ordinance 1947-1966 gave authority for the land to be auctioned. Section 13(6) provided that when the bidding at the auction is by capital sum representing the unimproved capital value of the land, the successful bidder shall, at the time of the auction, pay to the Administrator a sum representing the difference (if any) beween the reserve value of the land and the unimproved capital value of the land as bid by the successful bidder. In this case the defendant's agent bid £4,200; the reserve value was £1,000, thus he remained liable to pay £3,200 at the time of the auction. This he did not do. Shortly after the auction the defendant informed the auctioneer that he would not be paying for the land in question.

Previous to the auction a notice had appeared in the Government Gazette of the Northern Territory giving details of the land to be auctioned and shortly after the auction a note was made by the auctioneer of the sale bearing his signature. On learning that the defendant would not pay, the auctioneer re-auctioned the land and the highest bid was £2,700. The plaintiff sued for the difference between the amount of the defendant's final bid, £4,200 and the amount received from the bidder in the re-auction, namely £1,500 (or $3,000).

Blackburn J. was in no doubt that there was a contract. The defendant's agent made the offer and the auctioneer accepted the

[1] (1967) 13 F.L.R. 172.

offer on the fall of the hammer. Secondly, he was satisfied that the Ordinance intended the ordinary law of contract to apply to the auction. Thirdly, he rejected a submission based on *Johnston v. Boyes*[2] that there were two contracts, the first a contract for the sale of land and the second a collateral contract concerning the conditions of the sale. Even if the first was caught by the Statute of Frauds, the second was not. Blackburn J. said it would be fallacious to extract a term from one contract and elevate that term to the status of a conract in its own right.

Fourthly, he held that it is well settled[3] that an auctioneer conducting a sale, in making a note of the purchase, is deemed to have the purchaser's authority to sign a memorandum of the sale so as to bind both parties. In *Chaney v. Maclow*[4] after the bidding the highest bidder refused to sign the memorandum and left the salesroom without interviewing the auctioneer or repudiating the contract. In *Phillips v. Butler*[5] the bidder changed his mind after the auctioneer signed the memorandum. In *Leeman v. Stocks*[6] the highest bidder signed the memorandum after the bidding but the auctioneer did not. In each of these cases it was held there was a binding contract; the memorandum was sufficient to comply with the Statute of Frauds. In other jurisdictions which continue to struggle with the interpretation of the Statute of Frauds the auctioneer is regarded as the agent of both parties to the sale for the purpose of making and signing a memorandum of the contract of sale.[7] But none of the cases seem to be on all fours with this case because here it appears the bidder repudiated the contract *before* the memorandum was signed, not *after* as in the cases cited above. Blackburn J. does not appear to have attached any significance to the difference. The defendant seems to have acted almost immediately after the auction. In *Richards v. Phillips*[8] the Court of Appeal was prepared to find that in the event of a disputed bid there was no binding contract when the auctioneer's hammer fell. In this case there was no disputed bid but the Court of Appeal's

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2 [1899] 2 Ch. 73.

3 Phillips v. Butler, [1945] Ch. 358 where Romer J. reviewed some of the authorities.

4 [1929] 1 Ch. 461 (C.A.).

5 [1945] Ch. 358.

6 [1951] 1 Ch. 941.

7 E.g. in the United States where a memorandum signed by the auctioneer is sufficient to charge both the vendor and the purchaser under the Statute provided it is complete and sufficient as to contents, and provided it is signed by him at a time while his agency still continues. (37 C.J.S. 704.)

8 [1968] 2 All E.R. 859 (C.A.).

decision suggests that the falling of the hammer may not invariably be an end of the matter.

Fifthly, Blackburn J. held that the auctioneer's reply when the defendant told him that he was not going to pay for the land did not amount to a discharge of the conract. Nor did his action in re-auctioning the land mean that the auctioneer was waiving his rights. It did not affect the issue.

Sixthly, the learned judge held that the note made by the auctioneer after the bidding together with the published notice in the Gazette formed a sufficient memorandum under the Statute. Faced with two conflicting decisions of the High Court of Australia[9] he preferred the decision that accorded with the Court of Appeal's decision in *Timmins v. Moreland Street Property Ltd.*[10] where it was held that a plaintiff who wishes to imply reference by one document to another document must prove: (a) the existence of a document signed by the defendant; (b) a sufficient reference, express or implied, in that document to a second document; and (c) a sufficient memorandum formed by the two when read as one.

Lastly, the question of estoppel arose. It was proved that several times in the past, at similar auctions, a successful bidder had failed or refused to make payment and the auctioneer had resold the land without making any claim for damages. The plaintiff had refrained from exercising his rights on previous occasions but Blackburn J. could find no authority that this amounted to estoppel. For estoppel to succeed it would have required a promise to be derived from the conduct of one of the parties in the transaction in question.

Clearly it would give rise to an impossible situation if successful bidders at an auction could back out on what might be termed a 'technicality'. Yet it seems curious that in the so-called space age the courts in Australia, England, New Zealand, the United States, Ireland and elsewhere still have to wrestle with the Statute. If Blackburn J. had decided to interpret the Statute literally then perhaps legislatures might feel more inclined to grapple with the reform of the law in this field. Interpretation of the Statute did not rate a mention in the English Law Commissioner's report on "The

9 Thomson v. McInnes, (1911) 12 C.L.R. 562 where it was held that in order to allow two documents to be connected as a memorandum there must be a reference from one document to the other; and Harvey v. Edwards, Dunlop & Co. Ltd., (1927) 39 C.L.R. 302 where there was no reference from one to the other but merely a reference to a transaction.

10 [1958] Ch. 110 (C.A.), which accorded with Harvey v. Edwards, Dunlop & Co. Ltd.

Interpretation of Statutes",[11] but we are reminded in the report of Lord Devlin's dictum that the 'law is what the judges say it is'.[12]

DOUGLAS BROWN

RICHARDSON v. KOEFOD[1]

It looks as if the English Court of Appeal has finally buried the presumption of a yearly hiring. From Blackstone's day it was said that in a case of a contract of employment wholly indefinite in duration, it would be presumed that the contract was to be on a yearly basis. The presumption found favour in Australia. In *Manners v. Denny Bros.*[2] it was held that there is a legal presumption that the hiring being for an indefinite period was a hiring for a year. Again in *Bullock v. Wimmera Fellmongery & Woolscouring Co. Ltd.*[3] the Supreme Court of Victoria held that where an original contract of hiring was entered into for a year certain, and at its expiration, nothing being mentioned to the contrary, the engagement ran on, the presumption is that the period of service was to be for another year on the same conditions as those mutually binding on the parties during the previous year.

In other parts of the Commonwealth the old common law rule has frequently prevailed. In *Nsenagu v. Umuahia-Ibeku Urban County Council*[4] the High Court of Eastern Nigeria followed *Mulholland v. Bexwell Estates Co. Ltd.*[5] and held that where a servant is engaged without any limitation as to time, it is termed a general hiring and the common law rule is that there is a presumption of a yearly hiring when a servant is employed for an indefinite period, regardless of the nature of his occupation.

Now, however, this dubious presumption need no longer prevail in the law of master and servant. In *Richardson v. Koefod*[6] the employee was engaged as manageress of a café at an annual salary of £700, payable monthly and was entitled to occupy a flat above the

11 Law Com. No. 21 (H.M.S.O., 1969).
12 DEVLIN, SAMPLES OF LAW MAKING 2.
1 [1969] 3 All E.R. 1264.
2 (1912) 14 W.A.L.R. 91.
3 (1879) 5 V.L.R. (L.) 262.
4 1965 A.L.R. Comm. 187.
5 (1950) 66 T.L.R. (Pt. 2) 764.
6 [1969] 3 All E.R. 1264.