1884

*May. 15.

*June 23.

JOHN O'DONOHOE (DEFENDANT).....APPELLANT;

AND

SAMUEL JAMES STAMMERS (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Vendor and purchaser—Specific performance—Contract not signed by vendor, but subsequently admitted by his letters—Statute of frauds.

Where property was sold by auction, the particulars and conditions of sale not disclosing the vendor's name, and the contract was duly signed by the purchaser, but was not by the vendor or the auctioneer acting in the matter of sale, and subsequently, in consequence of delays on the part of the purchaser, the attorneys for the vendor (one of whom was the vendor himself) wrote in the course of a correspondence which ensued: "*Re* S.'s purchase, we would like to close this:" And referring to certain representations made in the advertisements of the sale: "They were not made part of the contract of sale. * * Have the goodness to let us know whether the vendee will pay cash or give mortgage. If the latter, we will prepare it at once and send you draft for approval; and on a subsequent occasion: "*Re* S.'s purchase. Herewith please receive deed for approval," and on another occasion the vendor himself wrote "I shall take immediate steps to enforce the contract."

Held, affirming the judgment of the courts below, that the conditions of sale together with the correspondence were sufficient to constitute a complete and perfect contract between the vendor and purchaser within the Statute of Frauds.

APPEAL from the judgment of the Court of Appeal for Ontario (1) affirming the decree of Blake, V.C., in favor of the respondent.

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*PRESENT—Sir W. J. Ritchie C.J. and Strong, Fournier, Henry and Gwynne JJ.

(1) 8 Ont. App. R. 161.

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The respondent, on the 28th day of August, 1880, filed a bill of complaint, in the late Court of Chancery for Ontario, alleging that he was the purchaser at a sale by auction on the 15th day of May, 1880, of a parcel of land in the township of East Gwillimbury, containing 81¼ acres, and that the appellant was the owner and vendor, and prayed *inter alia* for the specific performance of the contract of sale.

The defence was that neither the agreement alleged in the bill for the purchase and sale of the lands and premises in said bill mentioned, and of which the respondent sought to have the benefit, nor any memorandum or note thereof was ever reduced into writing and signed by the appellant or any person lawfully authorized thereunto within the meaning of the Statute of Frauds, and the appellant claimed the benefit of the statute and pleaded the same as a defence to the action.

The circumstances under which the sale of the lot in question was made, and the subsequent correspondence which took place between the parties in reference thereto, are fully set out in the judgment of Ritchie C.J., hereinafter given.

O'Donohoe Q.C. for appellant.

The following authorities were referred to:

Potter v. *Duffield* (1); *Dobell* v. *Hutchison* (2); *Munday* v. *Asprey* (3); *Vandenberg* v. *Spooner* (4); *Wilmot* v. *Stalker* (5); Fry on Specific Performance (6); *McClung* v. *McCracken* (7); *Smith* v. *Surman* (8); *Archer* v. *Baynes* (9); *Boydell* v. *Drummond* (10); *Fitzmaurice* v. *Bayley* (11); *Holmes* v. *Mitchell* (12); *Harnor* v.

(1) L. R. 18 Eq. 4.
(2) 3 A. & E. 371.
(3) 13 Ch. D. 855.
(4) L. R. 1 Ex. 316.
(5) 2 Ont. Rep. p. 78.
(6) Sec. 334, p. 92, 149.
(7) 2 Ont. Rep. 609.
(8) 9 B. & C. 561.
(9) 5 Ex. 625; 20 L. J. Ex. 54.
(10) 11 East. 142.
(11) 9 H. L. Cas. 78.
(12) 7 C. B. N. S. 361; 6 Jur. N. S. 73.

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Groves (1); *Kaitling* v. *Parkin* (2); *Hinde* v. *Whitehouse* (3); *Kenworthy* v. *Schofield* (4); *Peirce* v. *Corf* (5); *Peek* v. *North Staffordshire Railway Co.* (6).

Bain Q.C. for respondent.

In addition to the cases referred to in the judgments, the learned counsel relied on:

Emmerson v. *Hellis* (7); *Glengall* v. *Barnard* (8) *Bland* v. *Eaton* (9); *Ogilvie* v. *Foljambe* (10); *Owen* v. *Thomas* (11); *Catling* v. *King* (12); *Jones* v. *Victoria Graving Dock Co.* (13); *Long* v. *Millar* (14); *Gillattley* v. *White* (15).

Sir W. J. RITCHIE C.J.—The bill sets out that defendant, being the owner of a lot of land as therein described, offered the same by public auction, when plaintiff became the purchaser, and an agreement for such purchase was signed by defendant and plaintiff, and plaintiff, thereupon, paid defendant $50, as the first payment, in accordance with the conditions of sale, under which the said property was sold, the balance of the said purchase money being payable as follows, namely: such other sum as with the said first payment will make one-third of the purchase money within fifteen days after the day of sale, and the remaining two-thirds in three years, secured by mortgage, bearing interest at the rate of seven per cent. per annum, payable half-yearly.

That at the time of the plaintiff's said purchase the

(1) 15 C. B. 667; 24 L. J. C. P. 53.
(2) 23 U. C. C. P. 569.
(3) 7 East 558.
(4) 2 B. & C. 945.
(5) L. R. 9 Q. B. 210.
(6) 10 H. L. Cas. 472-569.
(7) 2 Taunt. 38.
(8) 1 Keene at p. 787.
(9) 6 Ont. App. R. 83.
(10) 3 Mer. 53.
(11) 3 M. & K. 353.
(12) 5 Ch. D. 660.
(13) 2 Q. B. D. 314.
(14) 4 C. P. D. 450.
(15) 18 Gr. 1.

said lands and premises were covered by a mortgage to one A. J. Broughall, on which about two hundred and seventy-five dollars was due and payable, and it was subsequently agreed by and between the plaintiff and defendant that the said defendant should procure a discharge and release of the said mortgage, and that the plaintiff should thereupon pay to the defendant the whole balance of the purchase money without giving a mortgage.

That the plaintiff has accepted the title to the said lands and premises subject to the discharge of the said mortgage being procured as agreed, and has otherwise been ready and willing to carry out his said purchase.

That in the advertisement of the sale of the said property the said lands and premises were described as a farm of eighty-one and one-quarter acres, having twenty acres cleared and fenced. The said advertisement was read to the plaintiff and others who were present at the said auction at the time and in the course of said sale, and it was on the faith of the correctness of the said description that the plaintiff bid for and became the purchaser of such property; the plaintiff having no previous knowledge of the state or condition of the said lands.

That the plaintiff, shortly after the said sale, discovered that a small part of the said lands had been cleared, but the greater portion having been cut over and the best of the trees removed, but leaving brush-wood and logs lying thereon, and that no portion of the said lands were fenced, nor was there any trees or lumber on the place to make the fence.

That the defendant has threatened, and still threatens, to re-sell the said lands and premises and thereby deprive the plaintiff of the amount he has paid as aforesaid, and also of any profit or advantage he may be able to make out of the said purchase.

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The plaintiff therefore prays :—

1. That the defendant may be ordered specifically to perform his said contract, the plaintiff hereby offering to perform the same on his part.

2. That an allowance by way of compensation for the said fencing may be made to the plaintiff and the said purchase money applied towards payment thereof, and the defendant ordered to pay and make good any additional sum that may be required.

3. That the defendant may be ordered to pay and procure a discharge of the said mortgage now existing on the said lands and premises.

4. That the defendant may be ordered to pay the cost of this suit.

5. That for the purposes aforesaid all necessary accounts may be taken and directions given, and that the plaintiff may have such further and other relief as the nature and circumstances of the case requires, and to your Lordships may seem just.

The defendant's only answer is as follows :—

"That neither the agreement, which is alleged by the said bill, for the purchase and sale of the lands and premises in the said bill mentioned, and of which the plaintiff, by the said bill, seeks to have the benefit, nor any memorandum or note thereof, was ever reduced into writing or signed by me, or any person lawfully authorized thereunto, within the meaning of the statute passed in the twenty-ninth year of King Charles the second, for the prevention of frauds and perjuries, and I claim the benefit of the said statute, and I plead the same as a defence to this suit."

Two questions were raised by the defendant on the argument, viz. :—

1st. That the agreement to purchase was signed by Oliver, the auctioneer, not as auctioneer, but as a witness to the signature of the plaintiff, Stammers. I think

there is nothing whatever in this point; the signature of Oliver was, in my opinion, unquestionably as auctioneer under the fifth condition of sale, viz.: "The auctioneer signing these sale deeds shall bind both vendor and purchaser to these conditions and terms," and in my opinion there is nothing on the face of the paper to indicate that he signed as a witness, but rather that in witness of his signing as a party, he placed his name to the document. The second point is that there was no binding contract in writing under the Statute of Frauds, the vendor's name not being mentioned in the agreement so signed by the auctioneer. It was conceded on the argument that the title to the property was in the defendant, a member of the firm of O'Donohoe & Haverson, which gave the instructions to the auctioneer to sell this property. The defendant attended the sale. Defendant paid the deposit.

After the sale a correspondence took place between Messrs. O'Donohoe & Haverson and A. H. Meyers, who was acting on behalf of the plaintiff. The first letter appears to have been written on the 7th June, 1880, by O'Donohoe & Haverson to A. H. Meyers, as follows:

7th June, 1880.

Re Stammers's Purchase,

A. H. Meyers, Esq.

Dear Sir,—We would like to close this. Please state a time that you will be here, and oblige, yours truly,

O'DONOHOE & HAVERSON.

On the same day A. H. Meyers writes to O'Donohoe & Haverson enquiring if O'Donohoe & Haverson have the probate of will of the late William Hawkins, and on the same day O'Donohoe & Haverson reply in the negative. On the next day O'Donohoe & Haverson write A. H. Meyers, heading the letter:

You require $366.25
Deposit paid, 40.00

$406.25

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enclosing an estimate and stating that it occurred to them that the probate might be found in papers of court to which extract refers. There is then a letter from A. H. Meyers to O'Donohoe & Haverson, which appears to have created the difficulty which resulted in this suit; it is as follows:

June 14th, 1880.

Re Stammers.

Messrs. O'Donohoe & Haverson,
Barristers, Toronto.

Sirs,—Now I am prepared to complete this transaction. Mr. Stammers has apparently three years to pay the balance, and I think for cash he should be allowed a deduction ,as the mortgage at three years would not sell at all, etc.

The adv. says that there are twenty acres cleared and fenced, and that it was a material part of the contract that it should be so, but when Mr. Stammers goes out to see it, there is not a fence or rail on it. Of course you will make some compensation for that. I hav'nt any idea of what the fencing would be worth, but it must be considerable. Please let me hear from you on the different subjects.

Yours, &c., ADAM H. MEYERS.

No notice appears to have been taken of this letter, and, on the 18th June, A. H. Meyers again writes:

June 18th, 1880.

Re Sale, O'Donohoe and Stammers.

Messrs. O'Donohoe & Haverson.

Please let me hear from you in reply to my letter in this matter. Mr. Stammers is now and has for some time been prepared to close the matter up. I am ready at any time.

Yours, &c.,

ADAM H. MEYERS.

On the 18th June, O'Donohoe & Haverson replying to both letters thus:—

18th June, 1880.

Stammers's Purchase.

Adam H. Meyers, Esq.

Dear Sir,—We beg to acknowledge your letters of the 14th and 18th inst. We have no authority to make any allowance for the money. The mortgage is as good as money at the stipulated rate of interest. As to what you say of fencing and clearing, they were not made any part of the contract of sale, and cannot be allowed for.

Have the goodness to let us know whether the vendee will pay cash

or give the mortgage. If the latter, we will prepare it at once and send you draft for approval.

Hoping to hear from you soon, we are, dear sir, yours,

O'DONOHOE & HAVERSON.

On the 21st June, 1880, Adam H. Meyers writes O'Donohoe & Haverson thus:—

21st June, 1880.

Re Stammers.

Messrs. O'Donohoe & Haverson.

Sirs,—In reply to yours of 18th, received by me on Saturday, I have to say that I am prepared to close the purchase by Mr. Stammers from Mr. O'Donohoe at once, and pay the balance of the purchase money in cash. At the sale it was represented that twenty acres of the land were cleared and fenced, as set out in the advertisement. As this was an inducement to buy, in fact Mr. Stammers would not have bought if he had not expected it to be as advertised and represented, this not being correct he is entitled to compensation, and I would suggest that the amount of it be settled out of court. Please prepare the deed and let me see it before execution. The money is ready now, but the purchaser must have compensation, even if he files a bill to get it, although I would rather not do so if possible.

Yours truly,

ADAM H. MEYERS.

In reply to this on the same day O'Donohoe & Haverson send Adam H. Meyers a deed for approval:—

21st June, 1880.

Re Stammers' Purchase.

A. H. Meyers, Barrister, Toronto.

Dear Sir,—Herewith please receive deed for approval.

Yours, &c.,

O'DONOHOE & HAVERSON.

This Indenture, made in duplicate the day of the year of Our Lord one thousand eight hundred and eighty-

In pursuance of the Act respecting short forms of conveyances:—

Between John O'Donohoe, of the city of Toronto, in the county of York, Esquire, of the first part, and Samuel James Stammers, of the said city of Toronto, in the said county of York, accountant, of the second part.

Witnesseth, that in consideration of four hundred and six dollars and twenty-five cents of lawful money of Canada, now paid by the said party of the second part, to the said party of the first part, (the receipt whereof is hereby by him acknowledged), he the said party

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of the first part doth grant unto the said party of the second part, his heirs and assigns, for ever:

All and singular that certain parcel or tract of land and premises, situate, lying and being in the township of East Gwillimbury, in the county of York, being parts of a block of land consisting of broken lots numbers one hundred and eleven, one hundred and twelve, one hundred and thirteen, and one hundred and fourteen, formerly on the first concession west of Yonge street, of the township of West Gwillimbury, in the county of Simcoe, afterwards annexed to the county of York, laid out and subdivided into lots according to a plan of survey of said block by F. F. Passmore, of the city of Toronto, Esquire, Provincial Land Surveyor, which said parcels of land hereby conveyed consist of the lots or blocks numbers six and seven on said plan, containing together eighty-eight acres of land, less a parcel of six and three-fourth acres of land of said block number six, which has been sold for taxes to one Isaac Grayson, and which is known and described as follows:—Commencing at the north-west angle of block number six; thence along the northern limit of said block seventy-four degrees east six chains; thence along said limit south nine degrees east eleven chains twenty-five links south seventy-four degrees west six chains; thence north nine degrees west eleven chains twenty-five links to the place of beginning.

To have and to hold unto the said party of the second part, his heirs and assigns, to and for his and their sole and only use for ever, subject, nevertheless, to the reservations, limitation, provisoes and conditions expressed in the original grant thereof from the Crown.

The said party of the first part covenants with said party of the second part that he has the right to convey the said lands to the said party of the second part, notwithstanding any act of the said party of the first part.

And that the said party of the second part shall have quiet possession of the said lands, free from all encumbrances.

And the said party of the first part covenants with the said party of the second part, that he will execute such further assurances of the said lands as may be requisite.

(TITLE DEEDS.)

And the said party of the first part covenants with the said party of the second part, that he hath done no act to encumber the said lands.

And the said party of the first part releases to the said party of the second part, all his claims upon the said lands.

(DOWER.)

In witness whereof, the said parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered, in the presence of } [Seal.]

Received on the day of the date of this indenture from the said party of the part the sum of four hundred and six $\frac{25}{100}$ dollars mentioned.

Witness.

COUNTY OF YORK, TO WIT: } I. of the city of Toronto, in the county of York, make oath and say:

1. That I was personally present and did see the within Instrument and Duplicate duly signed, sealed and executed by John O'Donohoe, one of the parties thereto.

2. That the said Instrument and Duplicate were executed at the city of Toronto.

3. That I, know the said party.

4. That I am a subscribing witness to the said Instrument and Duplicate.

Sworn before me at the city of Toronto, in the county of York, this day of in the year of our Lord 1880.

A Commissioner for taking Affidavits in B. R.

On the 24th June A. H. Meyers writes O'Donohoe & Haverson acknowledging receipt of draft deed and saying he would do his utmost to close the matter to-morrow, and asking what about the compensation for non-clearing and fencing. Not having received any reply, on the 28th June, 1880, A. H. Meyers addresses the defendant as follows:—

Toronto, 28th June, 1880.

(Without prejudice.)

John O'Donohoe, Esq., Barrister, City.

Dear Sir,—You have not replied as to the question of compensation to the purchaser. I must have a reply in this positively before I pay any money at all. If you don't want to compensate the purchaser he will give up the bargain on payment of what he is out of pocket and my charges. One thing or the other must be settled before any money is paid, so we may as well agree now as any time. If litigation must be let me know; I don't want it put to compensation.

Yours, ADAM H. MEYERS.

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On the same day, evidently before receiving this, O'Donohoe & Haverson write A. H. Meyers thus:

June 28th, 1880.

Dear Mr. Meyers,—If the deeds have not turned up, give the correct name, etc., of Mr. S. and we will at once fill up a new deed and send it to you for approval. Meantime let me have $225 to send for discharge of the mortgage, and oblige

Yours, O'DONOHOE & HAVERSON.

A. H. Meyers, Esq.

On the 29th June, 1880, defendant writes A. H. Meyers thus:

June 29th, 1880.

Re Stammers.

A. H. Meyers, Esq.

Dear Sir,—I am unable to find any authority for such compensation as you speak of. I think if you look at the subject in Sugden's V. & P., you will abandon any claim of the kind.

I have to state explicitly that no such claim will be entertained, and that on your refusal any longer to complete the purchase, I shall take immediate steps to enforce the contract. Hoping to have a definite reply to this at once,

I am, dear sir, your obedient servant, J. O'DONOHOE.

(written across) without prejudice.

On July 3rd, 1880, A. H. Meyers writes:

3rd July, 1880.

Re Stammers' Purchase.

Messrs. O'Donohoe & Haverson, Barristers, Toronto.

Gents,—I am quite at a loss to know why Mr. Stammers should not get all he bargained for when he agreed to purchase the land as advertised and represented. I have no doubt but what he is entitled o compensation which he must have. I will file a bill if necessary to convince you of it, but would much prefer not doing so. I think if you consider the matter you will agree with me. Please let me hear from you as Mr. Stammers is ready with the cash to pay you when he gets what he is entitled to.

Yours, &c., ADAM H. MEYERS.

And again on the 9th July, 1880:

9th July, 1880.

Re Stammers.

Messrs. O'Donohoe & Haverson:

I sent your last letter to Mr. Stammers and only received a reply this morning. He says that "as regards the statement of forty acres

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of land cleared, I have written to the owner of the adjoining land, who is an old resident, for a corroboration of the fact. My own impression derived from actual inspection is, it is true, only in the sense of all wood having been stripped from the property, leaving the stumps fallen making rotten logs on the ground, and that it has never been brushed or logged; so far from this being an advantage it detracts from the value, as were there any timber it would be utilized for fencing in the process of clearing." Mr. Stammers also says he thinks you never could have seen the land and he has. You will notice how widely different your respective views are, but they must be reconciled in some way. Mr. Stammers is willing to give up the sale, you paying my charges and what he has paid to visit the land, and return the deposit, or he will go to the land with any competent person to view it, and see if a solution of the difficulty can't be made on the premises; or he will early in the week make you a counter proposition.

Yours, &c., ADAM H. MEYERS.

to which O'Donohoe & Haverson reply:

July 22nd, 1880.

Re Stammers' Purchase.

A. H. Meyers, Esq.

Dear Sir,—In your last letter you said that in about a week you would let us know your ultimatum in this matter. We have now to request you will do so, as we must get the sale closed without further delay. Hoping you will favor us with a prompt reply,

We are, dear sir, yours truly,

O'DONOHOE & HAVERSON.

to which A. H. Meyers replies:

5th August, 1880,

Messrs. O'Donohoe & Haverson.

I have had an interview with Mr. Stammers; he says to fence the land will cost nearly if not quite $200. But to settle it he is willing to be allowed one hundred dollars for the fencing. This offer is without prejudice; he says he will go with either of you on the 16th and see the land, and try if an arrangement can be come to; he is prepared to pay cash when he can get what he purchased.

Yours truly, ADAM H. MEYERS.

On the 10th August, 1880, O'Donohoe & Haverson write A. H. Meyers.

August 10th, 1880.

Re Stammers.

Answer at once and oblige. Without prejudice.

A. H. Meyers, Esq.,

Dear Sir,—Your letters indicate that your client, Mr. Stammers,

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would rather not carry out his contract. We will take $150 damages and rescind the contract. We must now close the matter, and unless you accede to this we shall at once issue a writ.

Yours, &c., O'DONOHOE & HAVERSON.

On the same day A. H. Meyers replies :

Re Stammers.

10 August, 1880.

Messrs. O'Donohoe & Haverson,
Barristers, Toronto.

I am at a loss to know in what respect my letter indicated that Mr. Stammers would either not carry out his contract ; I never intended it so, nor do I think you can read it so. I have always asked to carry it out, and he is ready and willing now to do so. I am instructed to file a bill for specific performance, which I will do tomorrow, and ask the court for compensation. It is childish to ask him to pay you $150 damages because you cannot complete your contract. Mr. Stammers has had no desire for law, and has not now ; but he had no intention of being imposed upon. I reserve to myself the right to read all the letters to the court to show our anxiety to settle the matter out of court.

Yours, ADAM H. MEYERS.

August 11th, 1880.

A. H. Meyers, Esq., (Without prejudice.)

Dear Sir—We think that any attempt at agreeing upon facts would be futile. Therefore let the conversation of this a. m. stand cancelled. We would sooner than have any more trouble, make an abatement of say $25 in the price ; this of course without prejudice. Hoping this may be acceptable, we are, dear sir, yours, &c.,

O'DONOHOE & HAVERSON.

On the 12th August, A. H. Meyers writes :

Toronto, 12 August, 1880.

Re Stammers.

O'Donohoe & Haverson, (Without prejudice.)
Barristers, Toronto.

Gents—Mr. Stammers claims he should have $200 (two hundred dollars) for the fencing ; but as I wrote before he will close the matter up by your reducing the price one hundred dollars. Now, this is quite reasonable ; or, if you like to pay him back the deposit and say $25 for disbursements ; which will you do ? Let me know, and oblige

ADAM H. MEYERS.

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And O'Donohoe & Haverson close the correspondence as follows:

August 21, 1880.

Stammers v. Corbett.

A. H. Meyers, Esq.,

Dear Sir—We must decline acceding to the proposal of your last letter in this matter. We wrote you, not having before us the conditions of sale, that we would issue a writ; but now having these before us we have to intimate that unless the purchase-money is paid without any reduction on or before the 25th inst., we shall pursuant to said conditions proceed to re-sell and look to your client, the purchaser, for all damages, &c., &c., occasioned by his default.

Your obed't servt,

O'DONOHOE & HAVERSON.

The signatures of O'Donohoe and Haverson throughout this correspondence are in the handwriting of O'Donohoe. The head of this letter, *Stammers* v. *Corbett*, is explained by what Mr. O'Donohoe asserts in his evidence, that though the legal estate in the land in question was conveyed to him by Corbett, he held it only for Corbett's benefit and for convenience of sale and transfer.

The contract signed by the auctioneer and vendee was full and explicit, wanting only the vendor's name, the vendor subsequently recognizes this contract and admits receiving the deposit money, and in a correspondence which ensues, growing out of a claim by the purchaser for compensation, by reason of there not being on the premises the clearing and fencing represented, the vendor, while denying his liability to make such compensation, so far from repudiating the character of vendor, or in any way impugning the contract or sale as made by him, insists on its fulfilment, and, with a view to its being carried out, transmits to plaintiff's solicitor a deed purporting to be made in pursuance of the act respecting short forms of conveyances, between John O'Donohoe, of the city of Toronto, in the county of York, Esquire, of the first

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part, and Samuel James Stammers, of the said city of Toronto, in the said county of York, accountant, of the second part, whereby O'Donohoe, &c., &c., grants to the plaintiff and his heirs, the land in question, and, on compensation being still insisted on, threatens proceedings at law for the enforcement of the contract. This correspondence supplies, in my opinion, any deficiency in the original agreement read in connection with the advertisement, conditions of sale and contract signed by the auctioneer and deed transmitted by the defendant, to all which the letters clearly refer. The subject of sale, the price and conditions of sale, and identification of vendor and purchaser, and all particulars connected with the sale are clearly set forth and thereby establish a complete and perfect contract between the defendant as vendor and plaintiff as purchaser, within the statute of frauds. I cannot understand how the vendor can claim that his name is wanting on this contract, when in writing as vendor he insists on the validity of the contract, and claims its performance. *Dobell* v. *Hutchison* (1) seems very analogous to this case. Denman C.J. thus states the facts of that case and the law governing it.

Three questions arose: 1st. Whether there was a contract binding upon the defendants within the statute of frauds; 2nd. Whether the defect of title was the subject of compensation within the terms of the ninth condition of sale; 3rd. Whether, in case the special contract was not proved, an action for money had and received would lie against these defendants.

As to the first question the facts were, that the plaintiff had signed a written contract on the back of written conditions of sale, in which conditions the names of the vendors appeared as solicitors only, and not as vendors. Nothing was signed by the vendors or by the auctioneer. An abstract of title was sent, on the face of which it appeared that a yard, which was proved to be an essential part of the premises, was held from year to year at a separate rent of $81, in addition to a rent of $551, at which the conditions described the

(1) 3 A. & E. 355.

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whole premises to be held for a term of twenty-three years. The plaintiff's attorney wrote and rejected the title, demanding a return of the deposit. The defendants wrote in answer, and several letters passed between the parties, the letters of the defendants insisting that the defect was matter of compensation within the condition of sale, calling on the plaintiff to perform the contract, speaking of our sale to Mr. Dobell, and mentioning the premises by name and the price contracted for, and threatening to file a bill for a specific performance; they were signed by one of the defendants (they being attorneys) for both. They now contend that there is no contract binding them with the Statute of Frauds

The cases on this subject are not at first sight uniform; but, on examination, it will be found that they establish this principle, that, where a contract in writing or note exists which binds one party, any subsequent note in writing, signed by the other, is sufficient to bind him, provided it either contains in itself the terms of the contract or refers to any writing which contains them. Here the letters of the defendants refer expressly and distinctly to the conditions of sale, and they had in their hands, or the hands of the auctioneer, at that very time, the conditions of sale signed by the plaintiff, to which reference is made, so that no parol evidence of any kind was requisite to show a contract binding both parties, except of the handwriting of each, which must be adduced in all cases. In the case of *Boydell* v. *Drummond* (1), the book signed by the defendant did not refer to any prospectus or contract. In *Richards* v. *Porter* (2) the letter of the buyer referring to the invoice sent by the seller expressly repudiated the contract.

If it could for a moment be doubted that the contract was not sufficiently made out without the introduction of parol evidence to identify the documents referred to in the correspondence, the evidence of the defendant himself places beyond all doubt the identity of the documents which he referred to in his letters as being the terms of the contract, and himself the vendor referred to, he says:

John O'Donohoe, of the City of Toronto, sworn:—

By *Mr. Meyers*—I am the defendant; I have no copy or draft of the advertisement of the sale of the lands in the pleadings mentioned; I believe I drafted the advertisement; I don't remember

(1) 11 East. 142. (2) 6 B. & C. 437.

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whether it was published in more papers than one; I believe Exhibit A is a copy of it; I believe the land was sold on the day mentioned in the advertisement; it was purchased by the plaintiff Stammers; I don't remember whether that or any advertisement was read out at the sale; I don't remember any one then asking me if the land or any part of it was fenced; it was offered just as the advertisement stated. At the time of the sale I believed that it was fenced, but when I went to see it a month or six weeks after the sale, there was no fence on it, and I was then informed that there had been a fence upon it, but that it had been stolen and carried away. I won't swear that Exhibit A was not read over at the sale; I don't remember either Mr. Stammers or one of the Mr. McLeans asking if twenty acres were cleared and fenced; I am quite sure that if I had been asked I would have said that I believed it was. I think I intended to sell the property according to the advertisement. It was not given out by me, or by any one on my behalf, that the sale would be different from what it was advertised; I don't remember the terms of the sale. There was a mortgage to a man named Broughall, which afterwards became the property of Mrs. Whitty; I employed the auctioneer to sell the lands in the bill mentioned; there was a conveyance made of the lands by the owner to me to enable me to sell them and convey them when sold, in his name; I was intended to be the conduit of conveyance; it was after the conveyance to me that I employed the auctioneer; I did not tell the auctioneer that the lands were not mine, and I don't know what he knew about it. The land was to be sold free from the mortgage; it was sold at $5 an acre; there were 81¼ acres; I never sold any other land to Mr. Stammers; I had no transaction between Stammers and Corbett during this year, 1880. The auctioneers employed to sell this land were Coate & Co., the firm was composed of Coate & Oliver, as I believe; I gave them no authority to sign any contract for me; I did not reserve to myself the right to sign the contract myself, and never at any time informed them that I had done so. I authorized them to sell the land; I don't remember giving them instructions as to the terms; I suppose I did; I don't remember hearing the terms read out at the time of the sale. There was no other transaction with Stammers that I had anything to do with except the Stammers purchase. When I refer to the matter of "Stammers' purchase" or "Stammers and Corbett transaction" I refer to this land. I don't know that Mr. Stammers paid any deposit, but I believe he did; if I didn't get it, I got credit for it, which is the same as if it was paid to me. Exhibit B is written by me; the figures at the top refer to the purchase of this land, and so does the letter; $406.25

is the amount of the purchase money, the $40 is the deposit paid, and the $366.25 is the balance still unpaid. Exhibit C is a letter written by me and relates to this transaction, the $225 asked for there is a part of the purchase money to discharge the Whitty mortgage. Mr. S. refers to Mr. Stammers, and I wrote to you (Mr. Meyers) as you were acting for him. Exhibit D is written by me and relates to this matter; Exhibit E is written by me and refers to this matter. When I employed the auctioneers I took no authority away from them that they had to sign a contract for me and the purchaser. I don't remember whether the conditions were read at the sale; I was present at the sale and so was Mr. Archibald McLean; there were a large number of others, but I don't remember any names. I don't remember signing the contract of sale myself; I don't remember seeing it since the sale; I won't swear I didn't sign it.

By Mr. Haverson—All the Exhibits, B, C, D and E, were written by me, but for the firm.

J. O'DONOHOE.

Certified a true copy.

GEO. M. EVANS,
Special Examiner.

Numerous authorities might be referred to, I think it only necessary to cite one. *Ridgway* v. *Wharton* (1) The Lord Chancellor says:

The authorities lead to this conclusion, that if there is an agreement to do something, not expressed on the face of the agreement signed, that something which is to be done being included in some other writing, parol evidence may be admitted to show what that writing is, so that the two taken together may constitute a binding agreement within the statute of Frauds.

* * * * * *

Then, my Lords, there was a case of *Dobell* v. *Hutchison*, (2) which went exactly upon the same principle. There, the defendant having put up a thing for sale by auction, the plaintiff entered into a written agreement, signed by himself, to purchase it upon certain specified terms. It turned out that Hutchison, the defendant, had not a title which authorized him to sell, and consequently, that he could not complete the sale; but, in the correspondence which took place afterwards, several letters referred to the terms which had been signed by Dobell, the plaintiff, as being the terms which were then subsisting between them, and the Court of Queen's Bench held that,

(1) 6 H. L. 257. (2) 3 A. & E. 355.

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parol evidence being given to show what the terms were to which Hutchison referred in his letters, the two might be taken together, so as to bind Hutchison, and to show that that was the written paper, signed by the plaintiff, to which he referred as being the terms of the contract.

I am clearly of opinion that this appeal should be dismissed.

STRONG J.—I am of opinion that a contract in writing sufficient to satisfy all the requirements of the statute of Frauds is made out by the correspondence taken in conjunction with the conditions of sale. In *Ridgway* v. *Wharton* (1) when that case was before the Court of Chancery, Lord Cranworth said:

> The statute is not complied with unless the whole contract is either embodied in some writing signed by the party, or in some paper referred to in a signed document, and capable of being identified by means of the description of it contained in the signed paper. Thus a contract to grant a lease in certain specified terms is of course good. So, too, even if the terms are not specified in the written contract, yet if the written contract is to grant a lease on the terms of the lease or written agreement under which the tenant now holds the same, or on the same terms as are contained in some other designated paper, then the terms of the statute are complied with. The two writings in the cases I have put become one writing. Parol evidence is, in such a case, not resorted to for the purpose of showing what the terms of the contract are, but only in order to show what the writing is which is referred to. When that fact,—which is to be observed—is a fact collateral to the contract, is established by parol evidence, the contract itself is wholly in writing signed by the party.

Subsequent cases so far from having shown this statement of the law by Lord Cranworth to be too loose have, on the contrary, much relaxed the principle as to the admissibility of parol evidence for the purpose of identification (2). Then proceeding to apply this rule to the correspondence in evidence in the present case,

(1) 3 DeG. M. & G. 693.

(2) See *Baumann* v. *James* L. R. 3 Ch. 508.

we find, in my opinion, some of the letters written by the appellant or by the firm in which he was a partner, and which, for this purpose, is to be considered his agent, so referring to the conditions of sale as to make out a sufficient contract in writing, signed by the appellant within the provisions of the statute. The conditions of sale are insufficient by themselves to constitute a contract, because they fail to show who the vendor was. This defect is, however, fully supplied by the letters. In a letter of the 21st June, 1880, Mr. Meyers, the solicitor of the respondent, writes to Messrs. O'Donohoe & Haverson, the firm of solicitors in which the respondent is a partner, a letter which is headed *Re* "Stammers," in which he says: "In reply to yours of the 18th received by me on Saturday, I have to say that I am prepared to close the purchase by Mr. Stammers from Mr. O'Donohoe at once, and pay the balance of the purchase-money in cash." The same letter concludes with this request: "Please prepare the deed, and let me see it before execution." The same day, the 21st June, 1880, Messrs. O'Donohoe & Haverson wrote to Mr. Meyers a letter entitled "*Re* Stammers purchase," saying "herewith please receive deed for approval," thus recognizing the matter in negotiation, designated as *Re* Stammers, to have reference to a purchase of land by Mr. Stammers from Mr. O'Donohoe, and what the land so sold consisted of, was also made to appear in writing from the deed enclosed in the letter of Messrs. O'Donohoe & Haverson and showed this as well as the price to be paid for the land, which must be presumed to be that mentioned as the consideration in the purchase deed. The heading already referred to is sufficient to identify the letters as referring to the same matter of a contract for the sale of a particular piece of land by Mr. O'Donohoe to Stammers, but even without this heading, I should have been of opinion that this sufficiently ap-

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peared, for where a contract is to be made out from letters, the reference to previous letters in the line of correspondence need not be express but may be shown by inference arising from the contents and terms of the letters.

Lord Justice Fry, in the last edition of his learned treatise on Specific Performance (1), says on this head:

> Whether the reference must be express and on the face of the paper containing the signature, or whether it is enough that a jury or judge of fact would conclude from the circumstances and contents that the two papers are parts of one correspondence, may be open to doubt. The latter is probably the better view.

Here if these two letters of the 21st of June had not been entitled as they were, the fact that by one of them Mr. Meyers asked for a draft deed of land sold by O'Donohoe to Stammers and that in the other O'Donohoe enclosed to him such a deed would have been sufficient to connect them. Had the matter stopped here, however, there might have been difficulties in saying that the contract was sufficiently made out. But on the 29th of June, 1880, the respondent writes to Mr. Meyers a letter signed by himself and in his own name, which is also entitled *Re* Stammers, in which he says *inter alia* "on your refusal any longer to complete the purchase I shall take immediate steps to enforce the contract." This letter, in addition to being entitled like those before referred to, in *Re* Stammers, is sufficiently connected by its contents with those of the 21st of June, for in the interval, two letters dated respectively the 24th and 28th of June had been written by Mr. Meyers, claiming compensation, to which claim of compensation Mr. O'Donohoe refers in his letter of the 29th of June in these words, "I am unable to find any authority for such compensation as

(1) P. 240.

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you speak of." We have then here an express admission by Mr. O'Donohoe, signed by him, that there was a contract relating to land sold by O'Donohoe to Stammers. It may be said, however, and was argued by the appellant that the reference must be to a written contract, and that it is consistent with the admission of "a contract" contained in this letter, that it may relate to a contract the terms of which were in parol merely. At the argument it appeared to me that such was the law, and that to bring a case within the propositions of Lord Cranworth in *Ridgway* v. *Wharton* (1), there must be a reference not merely to a general contract but to some specified written paper embodying such contract, parol evidence being then, and only then admissible to identify the writing referred to. This proposition was, however, strenuously controverted by Mr. Bain on behalf the respondent, who cited *Baumann* v. *James* (2), as an authority showing that when the reference was to a contract or agreement generally, without saying or implying that such contract was in writing, parol evidence was admissible to identity the contract so referred to with the terms of an agreement set out in some prior unsigned or imperfect writing,— and subsequent consideration of this case of *Baumann* v. *James* has convinced me that the learned counsel was entirely right in his contention. In this case of *Baumann* v. *James* it was held that an agreement by letters for a lease of 14 years, "at the rent and terms agreed upon" was sufficient to warrant the admission of a report of a surveyor containing the terms which had been previously agreed to, except as to the duration of the term. The case of *Baumann* v. *James* is, therefore, as was held by the court below, alone a sufficient authority to show that the conditions of sale signed by the auctioneer were, upon being as they were sufficiently

(1) 3 DeG. M. & G. 577. (2) L. R. 3 Ch. 508.

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identified, admissible in evidence, and being admitted they, taken in conjunction with the correspondence down to and inclusive of the letter of the 29th of June, make out a sufficient contract in writing satisfying all the requirements of the Statute of Frauds. I confess, however, that *Baumann* v. *James* seems to me to sanction a much greater infringement upon the enactment and policy of the Statute of Frauds, than previous authorities had admitted, and particularly to overstep the limitation as to the admissibility of parol evidence laid down by Lord Cranworth in *Ridgway* v. *Wharton*. It is, however, the decision of a Court of Appeal and has not so far as I have been able to discover been questioned by any late judicial decision, although it is true that it has been strongly disapproved of by text writers. I think, however, we ought to follow it, and, if we do, it concludes the present appeal.

Were we, however, to disregard *Baumann* v *James* altogether and apply the far stricter rule already stated laid down by Lord Cranworth in *Ridgway* v *Wharton*, the result would as it appears to me be the same, for on the 21st August, 1880, a letter signed by Messrs. O'Donohoe & Haverson, was written to Mr. Meyers, which is as follows:—

Aug. 21, 1880.

Stammers v *Corbett.*

A. H. Meyers, Esq.

Dear Sir.—We must decline acceding to the proposal of your last letter in this matter. We wrote you, not having before us the conditions of sale, that we would issue a writ; but now having these before us we have to intimate that unless the purchase money is paid without any reduction on or before the 25th inst., we shall pursuant to said conditions proceed to re-sell, and look to your client, the purchaser, for all damage, &c., &c., occasioned by his default.

This letter of the 21st August, is connected with the letters contained in the correspondence previously remarked upon, written on, and previously to the 29th June, by several intermediate letters, by which

the correspondence was continued in the interval between the last mentioned date and the 21st of August, and the letter of this last date is sufficiently identified as referring to the same matter as the previous correspondence related to, viz., to the sale and purchase mentioned in the two letters of June 21st, by the terms and contents of these intermediate letters without requiring the aid of any extrinsic evidence for that purpose. Therefore, finding in this letter of the 21st August, a reference not to some agreement or contract, which might or might not be in writing, but a distinct reference to a particular document embodying conditions of sale which the writer of the letter had then before him, the Court below was entitled to receive parol evidence, not for the purpose of showing what the contract was, but in order to establish the identity of this document produced by the auctioneer, and proved to have been signed by him, as the agent of the appellant, with that referred to in Mr. O'Donohoe's letter—which, as Lord Cranworth says, was to admit parol evidence, not to make out the contract, but to establish a fact altogether collateral to it. Then reading the conditions of sale together with the correspondence, we have a perfect contract in writing, signed by the appellant, containing all the terms of the sale and complying with all the requirements of the Statute of Frauds.

I am of opinion the appeal should be dismissed with costs.

Fournier J. concurred.

HENRY J.—The action in this case was brought to enforce specific performance of a contract for the sale of a lot of land by the appellant to the purchaser. The bill sets out the contract and described the land and set forth the price thereof, and the terms of the

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sale, and prays that specific performance of the contract may be adjudged with costs. The land belonged at the time of the sale to the appellant, and he caused the same to be sold at auction on the 15th of May, 1880, and the respondent being the highest bidder became the purchaser, and signed an agreement to become such purchaser on the conditions and terms contained in the printed conditions of sale upon which the said agreement was written. The name of the vendor does not appear in either of those documents, nor does it appear satisfactorily that the auctioneer signed the agreement as such under the authority given to him by the fifth article of the conditions. His name was signed to it, but it is merely under the word "witness," and the evidence does not show in which capacity he so signed. Nor will I say it would have been sufficient had he signed it as the auctioneer, without giving the name of the vendor for whom he sold. As a general rule a contract for the sale of land must, according to the provision of the statute of Frauds, show the subject, terms and names of the parties. It is not necessary, however, that the names or terms should appear in any single paper. The contract may be collected from several connected papers. If a document properly signed does not contain the whole agreement, yet, if it refers to a writing that does, it will be sufficient, though the latter is not signed, and oral evidence is admissible to identify the writing referred to, and where a contract in writing exists which binds one party to it under the statute, any subsequent note signed by the other is sufficient to bind him. If an offer be made by one party in writing stating the subject and terms to sell or to purchase, he is bound thereby if the offer be accepted by a writing signed by the other referring to the offer. If, therefore, the appellant, by any writing signed by him,

adopted the agreement which was signed by the respondent at the instance and request of the agent or auctioneer who was authorized by the appellant to sell, it appears to me that according to binding decisions on the subject, no objection can be raised under the statute. The appellant, in his answer, denies that neither the agreement nor any memorandum or note thereof was ever reduced into writing or signed by him, and that is the only issue raised by the pleadings.

It is shown that the appellant was the owner of the lot of land in question and was present at the sale of it to the respondent. That sale was made at the instance of the legal firm of O'Donohoe & Haverson, of which the appellant was the head or leading partner. He says in his cross-examination on his answer that he believes he drafted the advertisement, and that he believes Exhibit A (Exhibit I of the case) is a copy of it, and the land sold on the day and on the terms mentioned in the advertisement and that the respondent became the purchaser. He acknowledges therein that Exhibit B (Exhibit 4 of case) was written by him. It is dated the 8th of June, 1880, and addressed to A. H. Meyers, who was then acting as the solicitor of the respondent, and was signed O'Donohoe & Haverson. "The figures at the top," he says, "refer to the purchase of this land and so does the letter; $406.25 is the amount of the purchase money, the $40 is the deposit paid, and the $366.25 is the balance still unpaid." That letter bears his firm's signature and includes his. If he had signed it "O'Donohoe" only it would still be his signature made as it was by himself, and the adding the name of his partner could not lessen the effect of it. He therein admits that he wrote and signed Exhibit C (Exhibit 12 of the case) dated 28th June, 1880, and directed to A. H. Meyers, in which he refers to deeds which were apparently mislaid. He says in it: "If the deeds have not

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turned up give the correct name of Mr. S. (referring to the respondent) and we will at once fill up a new deed and send it for your approval. Meantime let me have $225 to send for discharge of mortgage." He further, in his cross-examination, says that the letter related to the transaction in question and that the $225 asked in the letter was a part of the purchase money. He also says that "Mr. S." in the letter refers to the respondent. In reference to a claim for compensation put forward by Mr. Meyers on behalf of the respondent, because the fences referred to in the advertisement as being on the land were not there as ascertained after the sale, the appellant addressed to him a letter as follows:—

June 29, 1884.

Re Stammers.

A. H. Meyers, Esq.:—

Dear Sir,—I am unable to find any authority for such compensation as you speak of. I think if you look at the subject in Sugden's V. & P., you will abandon any claim of the kind. I have to state explicitly that no such claim will be entertained, and that on your refusal any longer to complete the purchase, I shall take immediate steps to enforce the contract. Hoping to have a definite reply to this at once.

I am, dear sir, your obedient servant,

J. O'DONOHOE.

Across the letter was written the words "without prejudice," but I do not see how these words can lessen the effect of what was previously written. Again, on the 22nd July the appellant addressed another note to Mr. Meyers, as follows:—

July 22, 1880.

Re Stammers Purchase.

A. H. Meyers, Esq.:—

Dear Sir,—In your last letter you said that in about a week you would let us know your ultimatum in the matter. We have now to request you will do so, as we must get the sale closed without delay. Hoping you will favor us with a prompt reply.

We are, dear sir, yours truly,

O'DONOHOE & HAVERSON.

With a full knowledge of the advertisement, the sale

and purchase by the respondent and the agreement giving the description of the property, and the terms and conditions of the sale, and of the execution of it by the respondent, and by Oliver the auctioneer, as such, as stated by the latter, or as a witness, the appellant writes and signs the several letters I have referred to and quoted, and they, in my opinion, are quite sufficient to satisfy the requirements of the statute and to bind the appellant as well as the respondent. I think, therefore, the respondent was entitled to the decree for specific performance, and inasmuch as the advertisement was drafted by the appellant, and was referred to by Mr. Meyers in his correspondence with the appellants firm, and tacitly, if not expressly, admitted by the latter, as constituting a part of the terms and conditions of the sale. I think that part of the decree which refers the matter of compensation to the Master may, also, be sustained, and that the decree and the judgment of the court below should be affirmed with costs.

GWYNNE J. was also of opinion that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for appellant: *Adam H. Meyers.*

Solicitor for respondent: *John O'Donohoe.*