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*Nov. 21.

*Dec. 20.

JAMES BYERS (DEFENDANT).....APPELLANT;

AND

DANIEL H. McMILLAN AND WILLIAM W. McMILLAN (PLAINTIFFS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR MANITOBA.

Contract—Written instrument—Collateral parol agreement—Admissibility of evidence of—Work and labor—Security—Lien.

By an agreement in writing B. contracted to cut for A. a quantity of wood and haul and deliver the same at a time and to a place mentioned, B. to pay for the same on delivery. The agreement made no provision for securing to A. the payment of his labor, but when it was drawn up there was a verbal agreement between the parties that in default of payment by B. the wood could be held by A. as security and be sold for the amount of his claim.

Held, reversing the judgment of the court below, Henry J. dissenting, that evidence of this verbal agreement was admissible on the trial of an action of replevin for the wood by an assignee of A., and that its effect was to give B. a lien on the wood for the amount due him.

APPEAL from a decision of the Court of Queen's Bench, Manitoba (1), setting aside a verdict for the defendant and directing judgment to be entered for the plaintiffs.

This was an action of replevin and arose out of an agreement by the defendant to cut and haul a quantity of cordwood for one Andrews who had a license from

*PRESENT—Strong, Fournier, Henry, Taschereau and Gwynne JJ.

(1) 4 Man. L. R. 76.

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the Hudson Bay Company, who owned the land on which the wood originally stood, to cut and remove it. The agreement between the defendant and Andrews was as follows:—

"Sewell, Oct. 6th, 1882.

"Memorandum of agreement made in duplicate this 6th day of October, A.D., 1882, between James Byers, of Sewell, in the County of Brandon and Province of Manitoba, lumberman, of the first part, and Geo. R. Andrew, of the said town of Brandon, hotel keeper, of the second part: Witnesseth, that the said party of the first part hereby agrees to cut and deliver five hundred or more cords of wood taken from section twenty-six, township ten, range 16 west and to be delivered at Sewell station at three dollars per cord, excepting what may be delivered before snow, which amount will be paid for at three dollars and twenty-five cents per cord, also to cut and take from section eight, township ten, range 16 west, two hundred cords or more at three dollars and fifty cents, the whole to be delivered at Sewell station before the twentieth day of March, 1883; and for the due fulfilment of the above contract the said party of the second part hereby agrees to pay to the said party of the first part the contract price less twenty per cent. for all wood according to measurement at Sewell station, which twenty per cent. will be paid on the fulfilment of this contract."

Andrews assigned his license to cut the wood, and all his interest in the contract with the defendant, to one Stephenson, and by various *mesne* assignments it finally became vested in the present plaintiffs.

The defendant cut the wood and carried it to Sewell station, placing it upon the grounds of the railway company, where it remained until after the 20th March when, not having received payment for his work, he shipped three carloads to Brandon, where it was replevied by the respondents.

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On the trial of the action the defendant set up a parol agreement with Andrews made, as he alleged, at the same time that the above contract was signed, to the effect that if the amount due him for cutting and hauling the wood at the rates specified was not paid on the 20th March, 1883, (the date mentioned in the agreement) the defendant would be entitled to hold the wood as security and to sell it to realize what was then due. Evidence of this alleged parol agreement was admitted by the judge subject to objection by plaintiff's counsel.

The learned judge who tried the case held that such a parol agreement was really made, and that it vested the property in the wood in the defendant, who obtained a verdict in accordance with such ruling.

The Court of Queen's Bench set aside this verdict on the ground that the evidence of the parol agreement was improperly admitted as its effect would be to vary the written contract entered into by the parties. From this decision the defendant appealed to the Supreme Court of Canada.

Ewart Q.C. for the appellant.

The original contract was entirely complete and the parol agreement can only be regarded as collateral; in fact, security is generally given by an agreement outside of the main contract. *Harris* v. *Rickett* (1); *Lindley* v. *Lacey* (2); *Morgan* v. *Griffith* (3); *Erskine* v. *Adeane* (4); *Malpas* v. *London & S. W. Ry. Co.* (5); *Porteous* v. *Muir* (6); *McNeely* v. *McWilliams* (7); *Lancey* v. *Brake* (8); *Fitzgerald* v. *G. T. Ry. Co.* (9); *Adamson* v. *Yeager* (10); *Lingley* v. *Smith* (11).

The plaintiff was always in possession of the wood

(1) 4 H. & N. 1.
(2) 17 C. B. N. S. 578.
(3) L. R. 6 Ex. 70.
(4) 8 Ch. App. 756.
(5) L. R. 1 C. P. 336.
(6) 8 O. R. 127.
(7) 9 O. R. 728; 13 Ont. App. R. 324.
(8) 10 O. R. 428.
(9) 4 Ont. App. R. 661; 5 Can. S. C. R. 204.
(10) 10 Ont. App. R. 477.
(11) 1 Han. (N.B.) 600.

and his possession is recognized by the form of the action. That he was in legal possession see *Stanford* v. *Hurlstone* (1).

Being in lawful possession of the property a demand is necessary before replevin will lie. *Alexander* v. *Southey* (2).

Robinson Q.C. for the respondents.

If the evidence is admissible at all the parol agreement must be clearly proved. *Erskine* v. *Adeane* (3).

The cases in our own courts show clearly that the appellant is not entitled to the relief claimed. *Re Mason* and *Scott* (4). *McNeely* v. *McWilliams* (5).

STRONG J.—This is an appeal from a judgment of the Court of Queen's Bench of Manitoba, reversing the decision of Mr. Justice Dubuc, before whom the action was tried without a jury, and directing judgment to be entered for the plaintiffs in the action.

The material facts disclosed by the evidence are as follows: George Andrew having a permit from the Hudson's Bay Company, authorising him to cut and remove from certain lands belonging to them a quantity of wood—five hundred cords or upwards, on the 6th of October, 1882, entered into an agreement with the defendant, James Byers, to cut the before mentioned quantityof wood and haul it to a railway station known as "Sewell Station." This agreement was reduced into writing by Andrew and was signed by the parties to it, and was in the following words :—

Memorandum of agreement made in duplicate this 6th day of October, A.D., 1882, between James Byers of Sewell, in the County of Brandon and Province of Manitoba, lumberman, of the first part, and Geo. R. Andrews of the said town of Brandon, hotelkeeper, of the second part; Witnesseth, that the said party of the first part hereby agrees to cut and deliver 500 or more cords of wood taken from section 26, township 10, range 16 west, and to be delivered at

(1) 9 Ch. App. 116.
(2) 5 B. & Al. 247.
(3) 8 Ch. App. 764.
(4) 22 Gr. 592.
(5) 9 O. R. 728; 13 Ont. App. R. 324.

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Sewell station at $3 per cord, excepting what may be delivered before snow, which amount will be paid for at $3.25 per cord, also to cut and take from section 8, township 10, range 16 west, 200 cords or more at $3.50, the whole to be delivered at Sewell station before the 20th day of March, 1883; and for the due fulfilment of the above contract the said party of the second part hereby agrees to pay to the said party of the first part the contract price less 20 per cent. for all wood according to measurement at Sewell station, which 20 per cent. will be paid on the fulfilment of contract.

The agreement was prepared by Andrews himself and the parties had no professional assistance.

Before signing, however, the appellant raised a question as to what security he was to have for the monies to be paid him under the agreement, and both he and Andrews state that it was then verbally agreed that he was to have security for the amount to which he would be entitled under the agreement upon the wood itself which, in case of default in payment, he was to be at liberty to sell in order to raise the amount due to him; in other words, that he was to have a lien or right of retention until payment, with a power of sale superadded.

What passed between the parties is thus detailed in the depositions of the appellant and Andrews. Byers' evidence is as follows:—

Q. I want to know as to any security? A. I spoke to Mr. Andrews as to any security for this wood, for the pay, and he said it was not necessary to have any security for the wood, that he thought it was enough security that it was mine until he paid for it.

Q. Was there anything further? A. He also said that it was agreed that if at the expiration of the agreement it was not paid, if he did not pay for the wood and take possession of it, that I had a right to sell the wood.

Q. Had you known Mr. Andrews previous to that time? A. No, that is the reason I asked for security; that was the first time I had seen him.

Q. Now you spoke about a verbal agreement that was made with Mr. Andrews, now was that made at the time the writing was drawn up? A. Yes.

Q. Who drew up the written agreement? A. Mr. Andrews.

Q. And you signed it then and there? A. Yes.

Q. And it was when this was being drawn up that you came to the

agreement about the security? A. Yes.

Q. It was not made afterward or before it? A. No.

Q. It was part of the same agreement really? A. Yes, it was a verbal agreement.

Q. But was really part of the same agreement? A. Yes.

Q. Was there anything on the face of this document that induced you to sign it—was there anything in this exhibit "4" that induced you to sign it? A. Yes.

Q. What was it? A. I was to have the wood as security for my pay in case of his not paying me when the time was up, I had a right to sell the wood.

Q. And that is what induced you to sign it? A. Yes.

A. I spoke to him about security and he said he did not see that I needed any more security, that I had the wood, that the wood was my security until I was paid according to the contract, and that in case I was not paid at the time the contract was up I had a right to sell the wood.

And this is entirely confirmed by Andrews as shewn by the following extract from his evidence:—

A. The bargain was, when he talked about security, and I told him that the wood was all the security he needed, that he could hold the wood until he was paid for it; I intended to take the wood right along as he got it out and pay the balance on the first of March when the contract expired.

Q. That is the bargain that was made as to security? A. Yes, as to security, if I did not pay him he had the wood, that he was the owner of it?

Q. That is what was said? A. Yes.

Q. Now what was the bargain? A. I cannot profess to repeat it in the same words. I cannot remember the exact words for three or four years. If Byers was not paid for the wood when the contract was completed, that he was the owner of the wood; the wood was his security.

Upon the faith of this agreement the appellant went on and cut the wood and hauled it to Sewell station in fulfilment of this contract.

On the 4th January, 1883, Andrews assigned his right under the contract to one Stephenson who on the same day made a similar assignment to the firm of Woodworth & Rouncefell, who subsequently by two formal bills of sale dated respectively the 13th of August, and 26th September, 1883, transferred their rights to the present respondents.

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The wood remained at the railway station in the possession of the appellant until after the 20th March, 1883, the day fixed by the memorandum of agreement for completion and until some time in October, 1883, when the appellant not having been paid the full amount due to him for the cutting caused three cars to be loaded with wood which he designed to send forward to a market for sale, when the respondent on the 2nd of November, 1883, issued the writ of replevin in this action.

The appellant's pleas were, 1st, *Non cepit*; 2nd, that the goods were his and not the respondent's, and 3rd, not guilty.

The cause coming on for trial before Mr. Justice Dubuc, it was objected that the parol evidence of the appellant and Andrews already set forth was not admissible to establish the appellant's right to security on the wood. The learned judge, however, over-ruled the objection and admitted the evidence, which he held to be worthy of credit and sufficient to establish the agreement for a lien. He also held that the execution of the written agreement by the appellant constituted a sufficient consideration for the supplementary verbal agreement, and gave judgment accordingly for the defendant.

From this judgment an appeal was taken to the Court of Queen's Bench, which reversed the decision of the trial judge and ordered judgment to be entered for the plaintiffs. The defendant has now appealed to this court.

The judgment of the Court of Queen's Bench proceeds upon two distinct grounds. First, it is said that the parol evidence was inadmissible, being excluded by the written agreement; and, secondly, that there was no consideration for the collateral agreement for a lien. I am of opinion that the court was wrong on both points.

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No difficulty arises as to the law of lien for it is beyond all doubt or question that a party to an agreement for the performance of work such as that undertaken by the appellant may stipulate for a lien on the products of his labor. And it is equally clear that subject to the applicability of any objection based on the rule of evidence invoked by the respondents that such an agreement may at common law be made orally and without writing (1). Further, no objection to such a stipulation being made without writing can be founded either on the Statute of Frauds or on the Chattel Mortgage Act. The Statute of Frauds does not in any of its provisions apply to agreements for liens, and the Chattel Mortgage Act is out of the question since the possession was to be retained by the appellant as it clearly was in fact according to the evidence.

That Mr. Justice Dubuc was warranted by the evidence in finding that this verbal agreement was actually concluded between the parties and that upon the faith of it the appellant signed the written memorandum provided he gave credit to the witnesses, cannot admit of dispute, and as regards the credibility of the witnesses his finding must be held conclusive. I am also of opinion that the learned judge rightly construed the evidence as shewing an agreement for a lien with a right of sale, and not as a conditional agreement for an absolute sale of the wood to the appellant in the event of non-payment. The parties had no professional assistance in the transaction and we must not therefore assume that they understood the technical meaning of the language in which they expressed themselves. Both Andrews and the appellant say that the collateral arrangement was for the object of providing security for the appellant. Andrews distinctly says, "the bargain was when he talked about security and I told him the wood

(1) See Smith's Mercantile Law (ed. 9) p. 561 and cases there cited.

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was all the security he needed that he could hold the wood until he was paid for it," and again, "if Byers was not paid for the wood when the contract was completed that he was the owner of the wood, the wood was his security."

It is apparent from the context that by the ownership of the wood here spoken of what was meant was ownership by way of security, the parties not discriminating between absolute ownership and special ownership by way of lien or pledge.

There remains therefore as the only point in the case the question as to the admissibility of the evidence, and upon this I confess I see little room to doubt the correctness of the ruling of Mr. Justice Dubuc.

The cases between landlord and tenant in which parol evidence of stipulations as to repairs and other incidental matters, and as to keeping down and dealing with the game on the demised premises, has been held admissible, although there was a written lease, *Erskine* v. *Adeane* (1); *Morgan* v. *Griffith* (2); *Lindley* v. *Lacey* (3), afford illustrations of the rule in question by the terms of which any agreement collateral or supplementary to the written agreement may be established by parol evidence, provided it is one which as an independent agreement could be made without writing, and that it is not in any way inconsistent with or contradictory of the written agreement.

The cases referred to as instances in which the rule of exclusion has been held not applicable are all fully stated and considered in the judgments of the court below and need not here be more particularly referred to.

These cases (particularly *Erskine* v. *Adeane* which was a judgment of the Court of Appeal) appear

(1) 8 Ch. App. 764. (2) L. R. 6 Ex. 70.
(3) 17 C. B. (N. S.) 578.

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to be all stronger decisions than that which the appellant calls upon us to make in the present case, for it is difficult to see how an agreement, that one who in writing had undertaken by his labor to produce a chattel which is to become the property of another shall have a lien on such product for the money to be paid as the reward of his labor, in any way derogates from the contemporaneous or prior writing. By such a stipulation no term or provision of the writing is varied or in the slightest degree infringed upon; both agreements can well stand together; the writing provides for the performance of the contract, and the consideration to be paid for it, and the parol agreement merely adds something respecting security for payment of the price to these terms. Surely it would be competent to the parties, either contemporaneously with the written memorandum or subsequently to it, to have stipulated by parol that the appellant should have had as security for payment a lien or pledge upon some chattel belonging to Andrews other than the wood then delivered to him or already in his possession, and if such an agreement would not have been obnoxious to the rule of evidence in question it is hard to see how the circumstance that the lien was to be on chattels to be brought into existence under the agreement can make any difference.

On the whole I am of opinion that the cases cited are indistinguishable and amply support the appellant's contention, and that the judgment of the Court of Queen's Bench must be reversed. I regard the question of consideration concluded by the finding of Mr. Justice Dubuc; there was not only ample circumstantial evidence warranting the inference that the appellant signed the written memorandum on the faith of having the security stipulated for by him, but there is direct evidence to that effect to be found in the deposition of the appellant whose testi-

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mony was fully accredited by the learned judge. The Court of Queen's Bench seems to have overlooked this evidence for it is said there was no consideration for the verbal agreement other than that given for the written contract.

In the view I take, I do not feel called upon to consider the other questions which were raised and I avoid expressing any opinion upon those points.

The appeal must be allowed with costs and judgment in the action entered for the appellant with costs.

FOURNIER J.—Concurs.

HENRY J.—The determination of the issues in this case depends on the right of the appellant to change the legal effect of the following agreement under seal entered into by him and one George R. Andrew, which is as follows:

(His Lordship read the agreement.)

The wood to be cut and hauled was the property of Andrews, and Byers was therefore only his employee or servant for the purpose of cutting and transporting it to the railway station at Sewell, owned by the Canadian Pacific Railway Co. When so placed the appellant had by law under the above agreement no lien on the wood whatever. Any possession he had of it was only to enable him to fulfill his contract, and even that qualified possession was at an end when, in pursuance of his contract, he placed it upon property not belonging to himself nor under his control, but upon the property of the Canadian Pacific Railway Co. His doing so would destroy any lien if any he had on it. The property in the wood therefore remained in Andrew. He, however, assigned over his property therein to one E. F. Stephenson who subsequently

assigned the same to Messrs. Woodworth & Rowncefell, of Brandon, who before the beginning of the present action assigned to the respondents.

On the part of the appellant it is contended that a parol contract in relation to the wood in question was entered into between him and Andrews which, as may be stated substantially, was to give to the appellant the ownership of the wood, or at least a lien upon it, for the amount due him under the contract or until his account for cutting and hauling was paid. It is well laid down in Taylor on evidence, (1) as follows:—

> The first general rule which it will be necessary to notice respecting the admissibility of extrinsic evidence to affect what is in writing is that parol testimony cannot be received to contradict, vary, add to or substract from the terms of a valid written instrument, and that * * * applies to every document which contains the terms of a contract between different parties; and is designed to be the repository and evidence of their final intention.

He then proceeds at p. 966:

> Having thus pointed out the class of written instruments to which the rule applies it may next be observed that the rule does not prevent parties to a written contract from proving that either contemporaneously or as a preliminary measure they had entered into a distinct oral agreement on some collateral matters. Still less * * * does the rule exclude evidence of an oral agreement, which constitutes a condition on which the performance of the written agreement is to depend.

There are many cases where parol evidence may be received to show a written contract void, but the principles affecting them are not necessary to be considered in this case.

There is no doubt that where there is a written contract a parol agreement on some *collateral* matter may be enforced, and that the operation of a written agreement may be limited to the happening of a particular event or otherwise. The rule in regard to the latter position will, however, have no effect on the construction and effect of the written document when once operative.

(1) 8th Ed. p. 963 *et. seq.*

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If a man by writing leases a house and premises to another and the writing contains all that is necessary as to the holding, rent, &c., but makes no reference to the house as being finished or not, and the lessor makes a parol independent contract for a consideration *dehors* the written contract for the finishing of one or more rooms, that would be what might be considered as a collateral matter, although to some extent improving the house and rendering it more desirable as a residence. I have considered the decisions referred to by the learned judge who tried this action and consider them clearly distinguishable from the present case. It is true that in *Lindlay* v. *Lacey* (1) evidence of a previous oral agreement was admitted, but the case shows it to have been so admitted solely on the ground that it was specially made a condition of the execution of the written agreement, such execution being considered a sufficient consideration to bind the parol contract. That consideration was expressly proved and admitted, but it was not, as I shall hereafter show, in this case. *Mann* v. *Nunn* (2) has been cited but in that case the agreement by parol was entered into some days before the agreement for lease and the court held that it was independent of the terms of the lease which was silent as to the subject matter of the parol agreement, and that the execution of the lease was the necessary result of the previous parol contract and the consideration for executing it. That however is not the case here.

In *Angell* v. *Duke* (3) the result of *Mann* v. *Nunn* (2) was at least questioned and it was virtually overruled. Lord Cockburn C.J. said:

I agree with the cases which have been cited to this extent that there may be instances of collateral parol agreements which would be admissible but this is not the case here—something passes between the parties during the negotiations but afterwards the plain-

(1) 17 C. B. N. S. 578. (2) 30 L. T. N. S. 526.
(3) 32 L. T. N. S. 320.

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tiff enters into a written agreement to take the house and the furniture in the house which is specified. Having once executed that without making the terms of the alleged parol agreement a part of it, he cannot afterwards set up the parol agreement. Mellor and Field, Justices, concurred, as did also Lord Blackburn who said, "It is a most important rule that where there is a contract in writing it should not be added to if the written contract is intended to be the record of all the terms agreed upon between the parties; where there is a collateral contract the written contract does not contain the whole of the terms. As to the cases which have been cited I should decide *Morgan* v. *Griffith* (1) the same way. The decision in *Mann* v. *Nunn* I am inclined to think wrong but it is unnecessary to say how that may be. Here the lease expresses the whole of the terms—the defendant agrees to let and the plaintiff to take the house and furniture at a certain rent—there is said to have been an arrangement made beforehand during the negotiation that the defendant should let the plaintiff have more furniture for the same rent—How is this collateral? I cannot perceive that it is."

That decision was founded on the fact that the written agreement provided for the rent to be paid for the house and the furniture described in it. The parol agreement if admitted would have made the same rent payable for the house and furniture mentioned in the lease with the addition of the extra furniture referred to in the parol agreement. The parol agreement would therefore be contradictory to the lease. So in this case if as I have shown the property in the wood in question when deposited at the railway station would under the written contract remain in Andrews and his assignees, the result of the admission of the parol agreement would be to deprive him of that property, and the legal effect of the written agreement would be wholly destroyed and the right to property transferred by a parol agreement wholly inconsistent with and opposed to the terms of the written agreement. By the written agreement the property in the wood would be in Andrews and his assignees, by the parol agreement it would be in the appellant. Can there be a doubt as to which should

(1) 23 L. T. N. S. 783.

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prevail? And how can the parol agreement be considered as an independent collateral one?

See also *Evans* v. *Roe* (1); *Abrey* v. *Crux* (2); *Mason* v. *Scott* (3); In this latter case it was held:—

That a verbal stipulation and agreement by a lessor as to improvements to be constructed by him upon demised premises could not be established by parol, so as to add to or vary the lease, although it was proved that without such verbal promise and agreement the lease would not have been accepted.

In the conclusion of his judgment in that case Harrison C.J. very properly says:—

To allow the respondents contention in this case to prevail would, in my opinion, be to fritter away, if not to destroy the plain terms of an old and well established rule of evidence, which is or ought be common alike to courts of law and equity.

Mr. Justice Moss in that case said:—

But even if this agreement were collateral or independent in the same manner as the agreements enforced in some of the modern cases it may be excluded by the universally recognized limitation that the parol agreement cannot be proved if it conflicts with the written document.

I have already shown that the parol agreement in this case is in no wise collateral to the written one but wholly negatives the legal effect of it, inasmuch as it transfers the right of property from Andrews to the appellant. I will hereafter refer to the proof of the parol agreement as shown by the testimony of the appellant and Andrews. I agree with the learned judge who tried the action that it was a rather unlikely one, but being so, it should be received, as it was by him, with a good deal of doubt. I have examined that testimony and it is anything but satisfactory. To permit oral evidence to contradict a deed would be a violation of one of the fundamental principles of evidence, but it is alleged that such is not asked for here. It is, however, asked to be permitted to add to it and show either an antecedent or contemporaneous collateral parol agreement. If that does

(1) L. R. 7 C. P. 138. (2) L. R. 5 C. P. 37.

(3) 22 Gr. 592.

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not affect the written agreement, it may be admitted as collateral, but if it does, then it is not collateral and must be rejected. In some cases in Ontario verbal "warranties" have been admitted where there were written contracts of sale. These decisions are not at all binding on this court, nor, in my opinion, do they affect the general rule.

In *Morgan* v. *Griffiths* (1) it was decided that a collateral binding agreement had been proved. Kelly C. B. said:—

> The signature to the lease was a good and sufficient consideration. * * * I think the verbal agreement was entirely collateral to the lease, and was founded on a good consideration. The plaintiff, unless the promise to destroy the rabbits had been given, would not have signed the lease. Pigott B. said: "It was on the basis of its performance that the lease was signed by the plaintiff, and it does not appear to me to contain any terms which conflict with the written document."

It will appear from that case that the parol agreement was admitted because—first that it was made before the written document, and that the lessee refused to sign the latter unless under the terms of the previous parol agreement, and secondly, that it did not appear to contain any terms in conflict with the written document.

In reference to *Lindley* v. *Lacey* (2) a parol agreement was admitted, but it was because the promise was given in consideration of the purchasers signing the agreement, and it was in other respects an agreement altogether in respect of a collateral matter.

Erskine v. *Adeane* (3) was in regard to an excess of game complained of by the lessee, and he refused to sign the lease until the lessor undertook in a prescribed manner to lessen it which he did not do. The latter case was decided on the same legal principles as in *Morgan* v. *Griffith* (1).

The decisions in those cases do not affect the legal

(1) L. R. 3 Ex. 70.
(2) 17 C. B. N. S. 578.
(3) 8 Ch. App. 756.

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position of the parties in this. I have already shown that the two positions are required to be shown. The consideration for the signing of the agreement must be shown and the non-interference with the terms of the written document, which could not be shown in this case affecting as it does the right of property. According to the authorities quoted and cited it is necessary, as before shown, that the signing of the written contract was in consideration of the previous parol agreement, and so stipulated, and that the parol agreement did not affect or contradict the written one. Both are necessary. I have shown that in the latter respect that in this case the parol agreement would over-ride the written contract, and I will now consider the evidence as to the first.

To affect the operation of a solemn agreement, under seal as in this case, the most clear, decided and reliable evidence must be adduced. The appellant must show then that such evidence appears on the record. The evidence of the parol agreement was objected to on the trial by the counsel of the respondent and was received subject to the objection.

Turning then to the evidence of the appellant on the point in answer to this question from his counsel:—

You have told us that Mr. Andrews promised you some security. Will you tell me what he said.

To which he replied:—

When I spoke to him about security he said he did not see that I needed any more security than what I had, that was the wood—he said the wood was mine until he paid me in full for it.

He was asked again:—

Did he tell you anything else? Answer. Yes, he said it was agreed, that suppose he should not, when the contract was fulfilled on the 20th of March, if I was not paid for the wood according to the agreement, that I had a right to sell the wood. Did he say anything else? I don't remember anything further.

He is asked further:—

Was there anything said about your selling the wood before you actually put your names to the agreement. Did you sign your agreement first, then did he give you the right to sell the wood, or did he

give you the right first? Answer. I cannot remember that.

Again in answer to the leading question :—

Then that agreement was come to before you actually put your signature down there? Answer. Yes, I think it was.

Again by the significant pressure of his counsel in the question or statement :—

That took place before you signed it and this conversation took place while he was writing out this agreement? Answer. Yes, we talked about it. I cannot just remember now.

If, then, the appellant could not say at the trial whether the alleged parol agreement was made before or after he signed the written contract, he has certainly failed to give such evidence as would justify any court or jury in finding that it was before the signing of the written contract, and the case is not therefore within the rule laid down and acted on in the cases before referred to. I have read carefully the evidence of Andrews and although he corroborates the evidence of the appellant he does not appear to have been asked or to have stated whether it was before or after the signing of the written contract. There is, therefore, no evidence that it took place before and so this case is unaffected by the decisions in *Lindley* v. *Lacey* (1); *Morgan* v. *Griffith*(2); or in *Erskine* v. *Adeane* (3); upon which the learned judge of first instance relied.

The whole current of reliable authorities establish the rule of evidence laid down by Taylor before quoted, and I would not feel justified in aiding to fritter away one so long and beneficially established as must be the result if the parol agreement is permitted in this case to contradict or vary the terms of the valid written instrument.

I am, for the reasons given, of opinion that the appeal herein should be dismissed and the judgment of the court below affirmed with costs.

TASCHEREAU J.—I concur in the judgment prepared by Mr, Justice Gwynne.

(1) 17 C. B. N. S. 578.
(2) L. R. 6 Ex. 70.
(3) 8 Ch. App. 756.

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GWYNNE J.—I concur in the judgment of my brother Strong that this appeal should be allowed. The question seems to me to be reduced to this, namely, whether the agreement in virtue of which the defendant claimed a lien with a power of sale to indemnify himself in case Andrews should not pay for the wood in the terms of the written agreement, was or was not collateral to the written agreement, and I am of opinion that it clearly was; and that nothing said in *Angell* v. *Duke* on the motion for a nonsuit as reported (1) militates against this conclusion. The court in that case held that the matter there relied upon as being collateral to the lease constituted from its nature a qualification of the terms of the demise, and therefore could not be set up as part of those terms by parol against the written lease.

Blackburn J. there while disapproving of *Mann* v. *Nunn* (2), which was a case similar to *Angell* v. *Duke* (1) approved of *Morgan* v. *Griffiths* (3), and this latter case is sufficient for our present purpose, and, in my opinion, governs the present case. As a matter of fact it was established to the satisfaction of the learned judge, who tried the case without a jury, that but for the agreement as to the lien with power of sale the defendant never would have executed the written agreement which was merely in relation to the defendant cutting wood upon land in which Andrews had an interest under license from the Hudson Bay Company, at and for certain sums per cord to be paid by Andrews on delivery as provided in the written agreement.

Now, the contract for the lien and power of sale was made for the express purpose of taking effect only in the event of a breach being committed of his written agreement as to payment by Andrews; there can therefore, I think, be no doubt that a verbal agree-

(1) 32 L. T. N. S. 320. (2) 30 L. T. N. S. 526.
(3) L. R. 6 Ex. 70.

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ment which provides only for the event of a breach of the written agreement being committed by Andrews, an event which according to the terms of the written agreement was never to occur, is an agreement wholly collateral to and independent of the written agreement, and can therefore be proved by parol. Such a parol agreement is quite consistent with, and does not necessarily form part of, the terms that should have been expressed in the written agreement. The written agreement contemplated that it should be fulfilled in all its terms. The verbal agreement contemplated taking effect only in the event of a breach being committed in the written one, and is therefore, as I think, clearly collateral to it.

Appeal allowed with costs.

Solicitors for appellant: *Daly & Caldwell*

Solicitor for respondents: *J. W. E. Darby*