Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Bank of New Zealand v. *Simpson, from the Supreme Court of New South Wales; delivered 17th February* 1900.

Present at the Hearing:

LORD DAVEY.
LORD ROBERTSON.
SIR RICHARD COUCH.

[*Delivered by Lord Davey.*]

The Respondent is an engineer who was employed by the Appellants the Bank of New Zealand to superintend on their behalf the construction of a railway from Rosehill to Pennant's Hills. He sues the Bank for extra commission alleged to be due to him from them under the agreement between them. The Appeal is from an Order of the Supreme Court of New South Wales dated the 18th November 1898 setting aside the verdict of a jury in favour of the Appellants and directing a new trial. The question between the parties is exclusively one of the admissibility of certain evidence.

On the 22nd January 1894 an interview took place between the Respondent and Mr. Chapman, the manager of the Bank. On the following day the Respondent wrote to Mr. Chapman as follows:—

"113, Phillip St.,
"Sydney, N.S.W.,
"To I. Chapman, Esq., "January 23rd, 1894.
"Manager of the Bank of N. Zealand Estates Coy., Ltd.,
"Pitt Street, Sydney.

"Dear Sir,

"In reply to your inquiry as to the engineering ex-
"penses of the construction of the first section of the Pennant
"Hills and Dural Railway, I beg to inform you that I am

"prepared to undertake the work on the following terms, "which shall include the payment of all necessary professional "assistants and inspectors :—

"For contract specification and drawings 2½ per cent. on "35,000*l.*

"For supervision of work, 5 per cent. on ditto.

"For measurement of work, 1 per cent. on ditto.

"Provided I should be allowed another 1½ per cent. on the "estimate of 35,000*l.*, in the event of my being able to reduce "the total cost of the works below 30,000*l.* I propose to effect "this saving by extra labour in making comparative drawings "of works for the sake of economy and not by sacrificing the "character of the work and for this reason I do not recommend "the adoption of any rail under 71½ lbs.

"I shall be glad to hear from you in reply to the terms "contained herein.

"Yours very truly,
"(Signed) B. C. SIMPSON."

No reply to this letter was written, but the offer contained in it was verbally accepted on behalf of the Bank and it admittedly expresses the terms of the Contract between the parties.

The works were proceeded with under the Respondent's supervision and the railway was completed. The cost of constructing the railway exclusive of the purchase of land was 28,116*l.* 16*s.* 4*d.* The cost of the land purchased was 5,774*l.* 12*s.* 11*d.* The amount of the Respondent's commission at 8½ per cent. on 35,000*l.* was 2,975*l.* There were further fees paid to the Respondent in connection with the purchases of land and other expenses bringing the total up to 43,174*l.* 19*s.* 5*d.* If therefore "the total cost of the works" referred to in the letter of the 2nd January 1894 included the cost of the land and the Respondent's commission of 8½ per cent, or either of those sums he did not succeed in reducing the cost below 30,000*l.* and the Respondent was not entitled to his extra commission of 1½ per cent.

The Respondent contended that according to the true meaning of the agreement the estimate of 35,000*l.* did not include the cost of the land

purchased or the amount of his commission and on the 22nd February 1898 he commenced an action to recover 525*l.* the amount of the extra 1½ per cent.

The action was tried by Mr. Justice Cohen with a jury. The Respondent gave evidence and stated his version of what took place at the interview of the 22nd January 1894 and of the intention of the parties. Mr. Chapman was called by the Bank and gave his version of what had taken place between the Respondent and himself and the Respondent was called in reply. Chapman's evidence was objected to by the Respondent's Counsel but admitted by the learned Judge. The Appellant's Counsel also tendered a certain circular which had been prepared by the Respondent and issued by him with the concurrence of the Bank before the date of the agreement and certain correspondence between the parties which it was said tended to support the view of the Appellants. This evidence was also objected to by the Respondent's Counsel but admitted by the learned Judge.

The circular in question stated that the "estimated cost of the line" (meaning the line in question) was 35,000*l.* but that by economy in works it would probably be constructed for less and after giving figures showing an estimated net revenue of 1,913*l.* proceeded thus: "Assuming that the cost will be 35,000*l.* the "net revenue will yield a dividend of 5½ per "cent. on the capital."

At the close of the trial (after the jury had retired) Respondent's Counsel asked the learned Judge to construe the letter of the 23rd January and direct a verdict for the Respondent. The learned Judge declined and the jury gave a verdict for the Appellants.

The Respondent moved for and obtained a *rule nisi* for a new trial on grounds which fully

raised the questions between the parties and need not be stated at length. The rule was made absolute. The learned Chief Justice in his judgment held that according to the true construction of the letter "the total cost of the "works" meant the cost of the actual construction of the railway and could not with legal certainty be applicable to both the total cost of the works (alone) and also to the cost of the works plus the cost of the land plus the engineer's commission and that therefore the extrinsic evidence objected to ought to have been rejected. The Chief Justice added that they could not understand any person receiving the letter after due consideration being misled by its contents. Their Lordships cannot agree with the views so expressed.

The Respondent admitted in his evidence (as indeed is plain without his admission) that what was proposed to be reduced was the 35,000*l.* to below 30,000*l.* or (in other words) that the two sums are coextensive. It is not therefore a mere question of the meaning of the words "the total "cost of the works" standing alone but the meaning of "the estimate of 35,000*l.*" has also to be considered. These words point to something which was known to and in the contemplation of both parties to the contract and with reference to which they contracted and in order to construe and apply the contract you must ascertain what was included in "the estimate of 35,000*l.*" on the reduction of which the contract depended. Extrinsic evidence is always admissible not to contradict or vary the contract but to apply it to the facts which the parties had in their minds and were negotiating about.

The rule is thus stated in Taylor on Evidence (8th edition, vol. 2, sec. 1194) "It may be laid "down as a broad and distinct rule of law that "*extrinsic evidence* of every *material fact* which "will enable the Court to *ascertain the nature*

" *and qualities* of the subject-matter of the " instrument or in other words *to identify the* " *persons and things* to which the instrument " refers must of necessity be received." In *Grant* v. *Grant* (L. R. 5 C. P. 727 at p. 728) Mr. Justice Blackburn quoted judicially the following passage from his valuable work on Contract of Sale (p. 49) :—

" The general rule seems to be that all facts " are admissible which tend to show the sense " the words bear with reference to the sur- " rounding circumstances of and concerning " which the words were used but that such facts " as only tend to shew that the writer intended " to use words bearing a particular sense are to " be rejected."

Various cases may be cited in which these principles have been applied. In *Ogilvie* v. *Foljambe* (3 Mer. 53) Sir William Grant says :— " The Defendant speaks of ' Mr. Ogilvie's House ' " and agrees ' to give 14,000*l.* for *the premises* ' " and parol evidence has always been admitted " in such a case to shew to what house and to " what premises the treaty related." In *Macdonald* v. *Longbottom* (1 E. & E. 977) Lord Campbell says " This was an offer made to the " Plaintiffs and accepted by them of 16*s.* per " stone for ' your wool ' to be delivered in Liver- " pool. The only question therefore is what " was the subject-matter of the contract described " as ' your wool ' ? I am of opinion that when " there is a contract for the sale of a specific " subject-matter oral evidence may be received " for the purpose of shewing what that subject " matter was of every fact within the knowledge " of the parties before and at the time of the " contract. Now Stewart the Defendant's agent " had a conversation before the contract with " one of the Plaintiffs who stated what wool he " had on his own farm and what he had bought

" from other farms. The two together constituted " 'his wool' and with the knowledge of these " facts the Defendant contracts to buy 'your " wool.' There cannot be the slightest objection " to the admission of evidence of this previous " conversation which neither alters nor adds to " the written contract but merely enables us to " ascertain what was the subject matter referred " to therein." And in *Smith* v. *Thompson* (8 C.B. 44) evidence was admitted of previous letters to show that a sum of money transmitted by an employer to his clerk for "business " purposes" was properly applied by the clerk in payment of his own salary.

Of course if the words in question have a fixed meaning not susceptible of explanation parol evidence is not admissible to shew that the parties meant something different from what they have said. That is not so in the present case. Their Lordships think that "the total " cost of the works" may mean the cost to the owner of the completed railway and they think that any person receiving the letter with a knowledge of the previous circular and of the conversation of the previous day according to Chapman's version (which the jury evidently believed) might and would have so understood it.

Their Lordships are therefore of opinion that the evidence objected to was admissible and the learned Judge was right in the course which he took at the trial of declining to construe the contract without the assistance of the jury. The weight and import of the evidence were for the jury to consider and their verdict in favour of the present Appellants is decisive of the view they took as to the effect of it. In the opinion of their Lordships there are no sufficient grounds for disturbing the verdict of the jury even if they dissented from it which they are far from doing.

Their Lordships will therefore humbly advise Her Majesty that the order of the Supreme Court be reversed and instead thereof it be ordered that the *rule nisi* and the rule absolute therein referred to be discharged with costs to be paid by the Respondent. The Respondent will also pay the costs of this Appeal.