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YOUNG v. AUSTIN.

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him to have the said bill renewed, according to the said agreement, yet the plaintiff did not renew the said bill; but wholly refused so to do, and commenced the action contrary to the terms of the said agreement and condition. Demurrer, and joinder in demurrer.

*Finlay*, in support of the demurrer.—As the contemporaneous agreement is not stated to be in writing the plea is bad on general demurrer: *Flight v. Gray*, 3 C. B. N. S. 320; *Kearns v. Durrell*, 6 C. B. 596; *Gillett v. Whitmarsh*, 8 Q. B. 966; *Abbott v. Hendricks*, 1 M. & G. 791; *Adams v. Wordley*, 1 M. & W. 374; *Forquet v. Moore*, 22 L. J. Ex. 35.

*MacKellar*, in support of the plea.—The bill was given as an escrow: *Byles on Bills*, 9th ed. p. 96; *Pym v. Campbell*, 4 W. R. 528, 6 El. & B. 370; *Wallis v. Little*, 10 W. R. 192; 2 Taylor on Evidence, ed 1868, ss. 980, 1058, 1038; *Lindley v. Lacey*, 13 W. R. 80; *Bell v. Lord Ingestre*, 19 L. J. Q. R. 71; *Storey on Bills of Ex.* edit. par. 239, p. 242; *Foster v. Jolley*, 1 C. M. & R. 703. It is not necessary to state that the agreement was in writing: *Byles on Bills*, 9th ed. p. 97; *Salmon v. Webb*, 3 Ho. of Lds. 510; *The Thames Haven Dock & Railway Company v. Brymer*, 5 Ex. 696.

*Finlay*, in reply, cited 1 Wms. Saund. 276, n. 1 & 2, 211 B. n. i.; *Stephenson Pleading*, 401, 4th ed.; *Anon.* 1 Salk. 519; *Bullen on Pleading*, 283; *Case v. Barber*, Sir T. Raymond's Rep. 590; *Taylor v. Hillary*, 1 Gale Rep. 22; *Villiere v. Hanley*, 2 Wilson, 49.

BOVILL, C. J.—It has been stated that the bill must be treated as an escrow. There is nothing to show in the pleading that it ever was accepted as an escrow. It appears that there was a bill, which was accepted by the defendant, and that on the bill there was an absolute agreement to pay in two months. But at the time the bill was accepted there was an agreement entered into between the plaintiff and the defendant, that the plaintiff should renew the bill at the expiration of the two months for a further term of two months if the defendant should not receive payment of a certain sum of money from a third party. This is an action between immediate parties. There is no doubt a defendant may prove in such an action that there has been no consideration at all, or a total failure of consideration. There is no question of that sort here. The plea states nothing in that nature—it assumes that there has been a good consideration, but that the note was not to be paid on account of another agreement. The defendant is not at liberty to set up a contradictory parol agreement opposed to the express written contract stated in the bill; but it is clear that he is at liberty to set up another written agreement, in which the whole rights and liabilities of the parties are stated. That being so, the question arises, whether in a plea it is necessary to state that such an agreement was in writing. If the agreement is by parol, it is bad, and if it is written, it is good. It is stated in *Byles on Bills*, 9th ed. p. 97, "though it be necessary that the agreement affecting the operation of the bill should be in writing, it is not necessary to aver that it is in writing," and the rule is there correctly

laid down in the case of *Adams v. Wordley*, 1 M. & W. 374. There the objection was taken by special demurrer, but it was stated in argument that although that was the case, yet if there is a special demurrer any point could be taken advantage of—any point that could be raised by general demurrer. Special demurrers are done away with, and therefore the case only proves that such an objection was good on special demurrer. The case of *The Thames Haven Dock v. Brymer* was also cited. This was an action of covenant upon a deed against the assignees of B. by which B. agreed to sell, and the company to purchase, certain lands. In the declaration there was the averment that B. and his assignees were ready to have deduced a good title, but that the company discharged B. and the plaintiffs from so doing, and from the execution of a conveyance. It was contended on behalf of the company that this averment was insufficient, inasmuch as it is not shown that the discharge was by deed. This objection is not pointed out as a special cause of demurrer. It is conceded that the discharge would not be good unless it were by deed; but it is said that if the averment had been traversed it could not be proved otherwise than by production and proof of a deed, and so he contended that on general demurrer it must be taken to be by deed, the only way in which it can be good; and so it was decided in the Court of Exchequer. We think that the Court of Exchequer was right in holding the averment sufficient upon general demurrer. It is the same point in this case, and the rule laid down by *Byles, J.*, is correct. It was then argued that *Forquet v. Moore*, 22 L. J. Ex. 35, required that there should be an averment that the agreement was in writing: if not the plea was bad on general demurrer. This case was decided before the passing of the Common Law Procedure Act, 1852. Baron Parke only said that such a plea was demurrable, for not alleging the agreement to have been in writing; but it is questionable whether it might not have been good after verdict. He did not go on to say that it was bad on general demurrer, which the plaintiff here is required to show in order to make us decide that the plea is bad. There is no hardship done to the other side in deciding that it is not necessary to make the averment, for if at the trial it turns out that the agreement was not in writing he would not be able to give it in evidence of it.

KEATING, J.—The judgment must be for the defendant. The only point in the case is whether the want of the statement in the plea, that the agreement was in writing, makes the plea bad. The omission does not make the plea bad on general demurrer.

BRETT, J.—If the agreement stated in the plea was in writing, and made at the same time as the bill, it formed part of the same contract, and is therefore binding on the parties. The more proper course would have been to have stated in the plea that the agreement was in writing. It is not, however, a good objection to the plea now that special demurrers are done away with. Mr. Finlay omitted to show that such a plea had ever been held bad on general demurrer. Now that special demurrers are done