COURT OF REVIEW.

MONTREAL, September 19, 1883.

DORION, C. J., MONK, RAMSAY, CROSS and BABY, JJ.

DOMINION OIL CLOTH Co. (deft. below), Appellant, and MARTIN (plff. below), Respondent.

Evidence—Variation of written contract by parole.

Testimony cannot be received to vary the terms of a written instrument; hence where the defendant, by an agreement in writing, undertook to grind the green furnished by plaintiff in pure linseed oil, the defendant could not be allowed to prove by testimony that the plaintiff verbally requested him to use other materials.

The appeal was from the judgment of the Superior Court, Torrance, J., reported in 4 Legal News, p. 237.

RAMSAY, J. This action arises out of a contract passed on the 22nd February, 1877, between the company, appellant, and the respondent, by which, in effect, the respondent agreed to supply the company appellant with a dry green paint of a specified kind, and to allow the company, appellant, to use his registered trade-mark on the green paint manufactured by the company by grinding in oil. There were stipulations in the contract obliging the company to grind the best linseed oil, to supply appellant with the manufactured paint, and to render to respondent regular monthly accounts. The parties were to settle by bills at four months.

This arrangement was carried on for about two years, when the respondent was led to believe that the company, appellant, had not, and was not carrying out its bargain; that it had not accounted monthly; that it had adulterated the paint so as to injure seriously the value of respondent's trade-mark, and he prayed that the company, appellant, might be enjoined not to use any longer respondent's trade-mark, to remove it from all packages of adulterated paint, and that the company, appellant, should also be obliged to furnish an account or pay the balance due, amounting to $1,000, and also damages to the amountof $5,000.

The appellant, in effect, admitted the contract, but said they had received further directions from respondent, directing them to "mix together certain ingredients by him named, in certain proportions by him indicated, with the view of producing the said green, or an article similar thereto, which said directions of plaintiff were minutely followed," and alleged an account had been rendered by which it appeared that the company owed respondent $72.24, and that the respondent owed the company$127.50; that the company had not used the trade-mark since respondent's protest, and offering to give up any paint they might have on payment of cost of manufacture. The company prayed further compensation of$72.24 by so much of $127.50, and dismissal of the action.

There was also a *défense en fait.*

The Court below found that the company had failed to make monthly returns; that the company did adulterate and sell inferior paint, with respondent's trade-mark; that the company owed respondent a royalty of $72.24; that the respondent owed the company $110.52; that it was not satisfactorily proved that the green was adulterated by directions of the respondent. The judgment was rendered in conformity with these conclusions.

The pleadings admit some adulteration, if not to the extent pretended by respondent, and therefore the first question is to enquire whether there is any legal evidence of the alteration of the contract. By the judgment appealed from, the Court specifically rejects the evidence of Samuel Woods, to the effect that the green was adulterated by the directions of plaintiff. This decision appears to me to be correct. If we take it and the French rule of evidence, verbal evidence is not evidence to vary the terms of the contract if the instructions be looked upon as a contract, and, at any rate, verbal evidence is not admissible to vary the instructions without a *commencement de preuve par écrit.* If we look at it under the English law of evidence, the conditions of a contract connot be altered by parole evidence, without a consideration. Under no rational system could it be tolerated to allow a party to avoid a contract in writing in his own favour by simply saying, "the contract is as you stated, but you told me I might give you an inferior article."

But Mr. Wood's evidence goes beyond the question of adulteration by direction of plaintiff. He admits the adulteration, and says he does not doubt that it was carried to the extent disclosed by the analysis of Dr. Girdwood.

On referring to the plaintiff's exhibit paper 27 of the record, it will be found that the adulteration is from about 22 to 24 parts of the cheaper material, leaving out the calculation as to the oil, the admixture of which was legitimate whatever its value. In other words, there ought only to have been 48.7 parts of sulphate of barytes to 109.5 of the paint as ground in oil, while in reality there were 71.3 parts to 100. It is admitted on all hands that this diminishes the value and the cost of the paint, and that it has damaged the standing of the paint, and for all this the Court, without entering into the question of the smaller value from which it does not appear plaintiff suffered, but treating the whole thing as damages, allowed the plaintiff $250. I see no reason to change this judgment, and I would dismiss the appeal with costs, and also the cross appeal with costs.

Judgment confirmed.

Beique & McGoun for Appellant.
Robertson & Fleet for Respondent.