away, and as we are not bound to say that such an objection is good on general demurrer, we will not do so.

Judgment for the defendant.

Potter v. Rankin.

Commission to take Evidence—Cost of Professional Assistance

[L. J. Nov. 23, 1868.]

This was a rule calling on the plaintiff to show cause why the master's taxation should not be reviewed, because he had, in taxing the costs as respects a commission to take evidence at Calcutta, refused to allow the expenses (on the defendant's side) of legal assistance to the Commissioners, who had employed attorneys to put the verbal questions for the plaintiff and the defendant.

The Court held that there was no absolute right to have such assistance, that it was a matter of discretion whether it was proper to allow it, that the master had exercised his discretion, and that as there was nothing to induce the Court to take a contrary view they would not interfere.

UNITED STATES REPORTS.

SUPREME COURT OF PENNSYLVANIA.

Baum & Co. v. Dilworth.

(*Pittsburgh Legal Journal.*)

Any alteration of a specialty by parole, makes the whole contract parole.

Where an action of assumpsit lies and the amount which the plaintiff seeks to recover appears by a writing under seal, such writing is admissible.

The question of the extension of a contract, is one of fact for the jury.

Error to the Court of Common Pleas of Allegheny County.

Lucas for plaintiff in error.

Melton contra.

Sharswood, J.—The first error assigned is to the admission in evidence of the agreement of February 27, 1862. This agreement was under seal, and purported to be executed by one of the members of a firm. The action was assumpsit, and both in the original and the amended declaration the agreement in question was set out, not as the cause of action, but as inducement to a parole promise by the defendants to the plaintiff. Any alteration of a specialty by parole makes the whole contract parole; covenant cannot be maintained upon it; the terms of the speciality are in effect adopted, and become a part of the parole agreement: *Vicary* v. *Moore*, 2 Watts 451; *Vaughn* v. *Ferris*, 2 W. & S. 46. It follows *ex necessitat* that the agreement under seal was admissible, to be followed, as it was, by evidence of an extension or alteration by parole: *Charles* v. *Scott*, 1 S & R. 294. Where an action of assumpsit lies, and the amount which the plaintiff seeks to recover appears by a writing under seal, said writing is admissible: *Mehaffy* v. *Share*, 2 Penna Rep. 361. If there was a new contract by parole within the scope of the partnership, which was a subsequent and distinct question in the cause, it mattered not whether the agreement as originally executed bound the firm or not.

The second error assigned is in admitting evidence of the price of timber in April, 1863. This was objected to, because the breach of the agreement occured, if at all, as early as June 1, 1862; and that should therefore be the time at which the difference between the contract and the market price should be ascertained. But Graham Scott had testified that "during the spring of 1863, about April 1, Baum called at Dilworth's office. Plaintiff asked him what about the six rafts to fill out the contract. He stated he had them coming down, and would deliver them. Dilworth was satisfied with that. These six rafts were to be paid for, same as original contract, in four months from delivery." This certainly was evidence for the jury that there had been a parole alteration and extension of the original agreement, which was by its terms to be performed June 1, 1862. The mutual promises of the parties, the one to deliver and the other to accept and pay, were ample consideration to sustain it as a new contract. The learned judge would, therefore, have erred if he had ru'ed out this evidence.

The third error assigned is to the answer to the defendant's first point, "that the contract given in evidence in this case being executed by Baum alone, is not the covenant of John Carrier." It is unnecessary to consider whether the answer is right, as the point itself was immaterial and might have been declined. The answer did the plaintiff in error no injury. The learned judge himself, after expressing his opinion on the point presented, remarked that the suit was not on the contract under seal, but on a separate and distinct agreement by word of mouth by Baum, one of the firm, to deliver at a subsequent day the rafts which had not been delivered under the original contract, at the price therein agreed on. Whether that contract was bin ing as within the scope of the partnership business, was another and different question.

Neither can the fourth assignment of error be sustained. The contract declared on was not under seal, but parole, though it referred to and incorporated with it a sealed writing. The action of assumpsit could therefore be maintained.

The fifth assignment is to the instruction that the jury must find from the evidence when the time limited in the contract for delivery of the timber expired. This may be considered in connection with the sixth assignment, that there was error in submitting to the jury whether there had been an extension of the contract, without evidence. I have already referred to the testimony of Graham Scott, and to one of the objections made to this testimony that it showed no consideration. As to the remaining exception taken to it, that it did not refer to the timber included in the written agreement, but to another lot, that surely was a pure question of fact to be responded to by the jurors, and not by the court.

The seventh error is disposed of by what has already been said on the second, and the eighth was to the refusal of the court to answer a point as to the sufficiency of the declaration, which had clearly nothing to do with the trial of the issue; *Halderman* v. *Martin*, 10 Barr 369.

Judgment affirmed.