costs of the appeal. The appellants to be at liberty to add their costs to their respective securities so far as they are not recovered from the respondent Green. The appellants to pay the costs of appeal of the trustees of the will and recover them from the respondent Green, and to be at liberty to add them to their respective securities as far as they are not recovered from him. The trustees' costs to be taxed as between solicitor and client.

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AUSTRALIAN MUTUAL PROVIDENT SOCIETY v. GREGORY.

Griffith C.J.

*Appeal allowed.*

Solicitors, for appellants, *J. B. Walker, Wolfhagen & Walch*; *Nicholls & Stops.*

Solicitors for respondents, *Perkins & Dear.*

B. L.

Appl *Cook v Saroukos* 97 FLR 33

Appl *ABC v XIVth Commonwealth Games Ltd* (1988) 18 NSWLR 540

Foll *Ratto v Trifid Pty Ltd* (1985) 56 LGRA 22

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[HIGH COURT OF AUSTRALIA.]

BARRIER WHARFS LIMITED . . . APPELLANTS; PLAINTIFFS,

AND

W. SCOTT FELL & COMPANY LIMITED . RESPONDENTS. DEFENDANTS,

H. C. OF A. 1907.

ON APPEAL FROM A JUSTICE OF THE HIGH COURT.

MELBOURNE, *August* 19, 20, 21, 22; *September* 2.

*Contract—Absence of formal contract—Contract contained in letters—Subsequent correspondence, effect of.*

Higgins J.

1908.

The plaintiffs, who were wharf owners, were negotiating with the defendants, who were shipowners, for the use by the defendants' ships of the plaintiffs' wharf. The plaintiffs wrote:—"I beg to state that I am prepared to find accommodation for your steamers at our wharf, you to be charged sixpence per ton on all coal and coke landed there, provided you undertake to do all your business other than that with the B. Co. with us. I understand your coal contracts provide for approximately 50,000 tons exclusive of the B. Co. Tonnage dues as per printed schedule handed you to be charged. I undertake to provide a berth for your steamers at all times on the understanding

MELBOURNE, *March* 18, 19, 20.

Griffith C.J., Barton, O'Connor and Isaacs JJ.

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that reasonable notice, say two days, be given to our manager at Port Pirie of expected arrivals. If this arrangement is acceptable to you I suggest that it be for a term of two years from 1st March next." The defendants replied :—"We are anxious to do business with you if possible, and will endeavour to come to your figure provided you agree to waive tonnage dues on all our steamers loading and discharging at your wharf." Plaintiffs replied :—"I hope we shall be able to fix up our wharfage arrangements . . . . I could not entertain the suggestion to waive the tonnage dues on your steamers visiting our wharf . . . . . Of course you are aware that a steamer paying at one wharf has not to pay at another ; this could all be arranged to your satisfaction, I am sure." Defendants replied :—"We are willing to conclude with you for wharfage on the basis of sixpence per ton and will be glad if you will make a contract for our approval and signature." Plaintiffs replied :—"I note with pleasure that you have decided to accept the wharfage rate of sixpence per ton as per correspondence which has passed, and I will arrange a contract accordingly."

*Held*, that these letters did not constitute a binding contract between the parties.

*Held*, also, that, if the letters could be construed on their face as a contract, the subsequent correspondence and conduct of the parties showed that no binding contract was intended.

Judgment of *Higgins* J. affirmed.

APPEAL from judgment of *Higgins* J.

An action was brought in the High Court by the Barrier Wharfs Limited, a Victorian company owning a wharf at Port Pirie, South Australia, known as the Barrier Wharf, against W. Scott Fell & Co. Ltd., a New South Wales company carrying on business there as shipowners and merchants, claiming £2,540 damages for breach of contract. Paragraph 4 of the statement of claim was as follows :—"By a contract made between the plaintiffs and the defendants about the month of February 1906 (which said contract is partly verbal and partly contained in letters passing between the plaintiffs and the defendants dated respectively 24th January 1906, 25th January 1906, 29th January 1906, 31st January 1906, 2nd February 1906, 6th February 1906) it was agreed as follows :—

"That the plaintiffs find accommodation and berthing for the defendants' steamers at the said Barrier Wharf at all times on the understanding that reasonable notice, say two days, be given to the plaintiffs' manager at Port Pirie of expected arrivals ; that

the defendants do all their business at Port Pirie with the plaintiffs other than business with the Broken Hill Proprietary Co. Ltd.; that the defendants pay the plaintiffs for such accommodation and berthing sixpence per ton on all coal and coke landed at the said wharf and also tonnage dues as per printed schedule of tonnage dues payable at wharves at Port Pirie; that the said agreement be for a term of two years from 1st March 1906."

The main defences were that no contract was entered into between the parties, and a contention that as a matter of law the letters and verbal communications referred to did not constitute the contract alleged or any binding contract between the parties, inasmuch as no final agreement is thereby arrived at between the parties.

The facts and the correspondence between the parties, so far as material, are set out in the judgments hereunder.

The action was heard before *Higgins* J.

*Starke*, for the plaintiffs.

*Coldham* and *Kilpatrick*, for the defendants.

September 2, 1907.

HIGGINS J. read the following judgment. This is an action for breach of contract. The plaintiff company has a wharf at Port Pirie in South Australia. The defendants, shipowners and merchants of Sydney, had secured contracts with seven mining companies of Broken Hill for the supply of coal to them, for two years from 1st March 1906. The plaintiffs allege that there was about February 1906 a contract, partly verbal, partly contained in letters dated 24th, 25th, 29th, 31st January, and 2nd and 6th February to this effect—that the plaintiffs find accommodation and berthing for the defendants' steamers at the said Barrier Wharf at all times, on the understanding that reasonable notice, say two days, be given to the plaintiffs' manager at Port Pirie of expected arrivals,—that the defendants do all their business at Port Pirie with the plaintiffs, other than business with the Broken Hill Proprietary Co. Ltd. That the defendants pay to the plaintiffs for such accommodation and berthing sixpence per ton on all coal and coke landed at the said wharf, and also tonnage dues as

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per printed schedule of tonnage dues payable at wharves at Port Pirie. That the said agreement be for the term of two years from 1st March 1906. It is admitted that, if there were such a contract, it has not been carried out by the defendants, who have berthed and discharged steamers at other wharves. The question is, was there such a contract?

Now, the burden of proof lies, of course, on the plaintiffs. If there was not a complete contract, the plaintiffs must fail. The law knows no gradations in the contractual relation. It knows nothing of virtual agreements, or honourable understandings. Even if the defendants were shown to have disappointed the legitimate expectations of the plaintiffs for some unworthy reason—to have meanly backed out of almost completed negotiations—the action must fail. There is no contract unless the two parties mutually consented to be bound one to the other by one agreement. Moreover—though it ought to be superfluous to say it—it is one thing for two parties to settle what are to be the terms of an agreement, if it should be made; and quite another thing to make the agreement. I have found, in my experience, that the two processes are frequently confounded; and, if I may judge from some of the cases to which I have been referred by Mr. *Starke*, the confusion has not always been avoided even in the Courts.

The conversations on which the plaintiffs rely took place in or near Adelaide and Port Pirie between Mr. Howard, managing director of the plaintiff company, and Mr. Scott Fell, managing director of the defendant company. It is not disputed that these gentlemen had each authority to bind his company. The objection as to the want of a seal is abandoned by Mr. *Coldham*. No objection has been raised by the defendants on the ground of the want of a writing sufficient to satisfy the *Statute of Frauds* (sec. 4). There is a conflict of evidence as between Fell on the one side, and Howard on the other. In one point Howard is corroborated by his brother—the wharfinger. Both the Howards say that the schedule of rates for Port Pirie wharves with regulations attached was handed to Fell. I accept their statement. I think that Fell must be mistaken, especially as the handing of the schedule is referred to in the plaintiffs' first letter,

and is not denied. But I see no reason for disbelieving Mr. Fell on other points, or for even giving the palm for accuracy to Mr. Howard—as I find that he made mistakes also, as hereinafter mentioned. So far as the conversations are concerned, in January 1906 I find that the berthing of steamers at the plaintiffs' wharf was keenly discussed; that Howard offered finally to berth them at sixpence per ton; that Fell said he was ready to give the plaintiffs the preference at sixpence, all things being equal, if he eventually decided to make a contract; and that he added in effect—"Whatever you have to propose, place it in writing so that I may submit it to my Board on my return to Sydney." I should add that, even on Howard's version, the contract now alleged by the plaintiffs was not concluded when the conversations ceased. I am all the more inclined to treat Mr. Fell's account as the more accurate, when I find that it accords with Mr. Howard's account to the secretary of this company, and to his brother, in the letters of the 19th of January 1906—written when the facts were fresh in his memory, and when no dispute had occurred.

"The Secretary, 19th January 1906.

Melbourne.

Port Pirie. I returned here this morning after having been at Port Pirie and Broken Hill. I had a battle royal with Mr. Fell extending over most of two days, and do not think that I ever had such a task before. However, I consider I beat him in the end, and I have fixed up with him to do his business at the rate allowed me by the committee of the Combination—sixpence. I tried very hard to do better than this, but I think that we have got an excellent arrangement. The matter is not finally closed up because I have to write him the terms that I intend to propose, but the thing is virtually settled." Howard writes to the same effect to his brother on the same date, and says—"This is not absolutely definitely settled, but I think there is no fear of the business not being completed." I prefer to accept the evidence of these contemporaneous letters to Mr. Howard's present statement from memory—that the matter was absolutely concluded before Fell left—that, so far as agreement was concerned, the thing was absolutely concluded—absolutely definitely settled.

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All the evidence points to the fact that the main matter—the wharfage rate—was practically arranged; but that the defendants' directors were to have all the terms, minor as well as major, put before them, so as to enable them to decide as to accepting or rejecting a contract of a rather delicate and complex nature.

Now, as to the correspondence in which the contract is said to have been "partly contained." The defendants wrote a letter on 24th January 1906 from Sydney; and this crossed a letter from the plaintiffs of 25th January from Adelaide. The defendants' letter says:—"Referring to the writer's interview with you in connection with the wharfage at Port Pirie, kindly let us have, as promised, your lowest quotation for wharfage on coal, landed over your wharves, which we understand will not exceed sixpence per ton. In your offer it will be necessary to stipulate that the wharf will be available when required by us, and if you will allow our steamers to be free of tonnage dues, we will endeavour to meet you to the extent of sixpence per ton. Your prompt reply will be appreciated."

This letter bears no indication of a completed agreement. The plaintiffs' letter of 25th January 1906 says:—"Referring to our recent interviews on the subject of wharfage at Port Pirie, I beg to state that I am prepared to find accommodation for your steamers at our wharf, you to be charged sixpence (6d.) per ton on all coal and coke landed there, provided you undertake to do all your business other than that with the Broken Hill Proprietary Co. with us—I understand your coal contracts provide for approximately 50,000 tons exclusive of the Proprietary Company. Tonnage dues as per printed schedule handed you to be charged. I undertake to provide a berth for your steamers at all times on the understanding that reasonable notice, say two days, be given to our manager at Port Pirie of expected arrivals. If this arrangement is acceptable to you I suggest that it be for a term of two years from 1st March next. Every facility will be given your business on our wharf so that quick despatch may be obtained."

So far as form is concerned, this is an offer; notice of arrival is for the first time mentioned; and the term of two years from 1st March is merely suggested, "if this arrangement is acceptable."

The question now is, has the offer contained in that letter of 25th January 1906 been accepted? The next letter of the defendants is dated 29th January 1906.

"We are in receipt of your letter of the 25th inst., which has evidently crossed ours in reference to the same subject. We are anxious to do business with you if possible, and will endeavour to come to your figure, provided you agree to waive tonnage dues on all our steamers loading and discharging at your wharf. Please let us have an early reply, as the representative of this office leaves for Port Pirie in a few days should necessity for so doing then exist."

It will be noticed that in this letter no reference is made to any of the terms mentioned in the letter of 25th January 1906 except the wharfage rate and tonnage dues. The defendants are merely anxious to do business with the plaintiffs and inclined to consent to the wharfage rate (not necessarily to conclude the agreement) if tonnage dues are waived. I cannot find, so far, any definite agreement, or anything but commercial higgling as to tonnage dues before deciding as to making the proposed contract.

On 31st January 1906, the plaintiffs write to the defendants:—"I have to thank you for your favour of the 29th inst. duly received, and I note all you say. I hope we shall be able to fix up our wharfage arrangements, and I shall be happy to see your representative as he comes through on his way to Port Pirie. If I can be of any assistance please command me. I could not entertain the suggestion to waive the tonnage dues on your steamers visiting our wharf. It would be quite contrary to the wharf agreement and the custom. Of course you are aware that a steamer paying at one wharf has not to pay at another; this could all be arranged to your satisfaction I feel sure."

At this stage the plaintiffs have declined to waive the tonnage dues; and the defendants have said nothing with regard to any of the proposed stipulations except as to wharfage rates and dues; have said nothing as to accepting or rejecting the contract. Then comes the defendants' letter of the 2nd February, on which Mr *Starke* has so much relied for the plaintiffs. "We thank you for your favour of the 31st ulto. contents of which are noted. We are willing to conclude with you for wharfage

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on the basis of sixpence per ton and will be glad if you will make a contract for our approval and signature. We must have permission to store what necessary plant we may have for use in connection with working while alongside your wharf, free of charge. We take it you will grant us this as customary, and as offered by others. We thank you for your kind offer of assistance should we require any in Adelaide, and we will not fail to avail ourselves of such should an opportunity occur."

To my mind this letter merely expresses contentment with sixpence per ton as wharfage, a willingness to conclude on that basis; and a request for a contract to be submitted for approval as well as signature—approval, not of solicitors, but of the Board of Directors. In effect, the defendants say: "The rate for wharfage is the central factor. Now that we have settled that, let us see the whole proposal in the form of a contract, so that we may decide whether we will yield on the minor question of tonnage dues. We have not consented to pay tonnage dues; but we may consent when we see that all the other terms are satisfactory." There are cases in which silence gives consent; but I cannot infer consent from the silence of the letter. Indeed, the plaintiffs seem to me to have come to the same conclusion, for on the 6th of February Howard writes the following letter:—

"I am obliged for your favour of the 2nd inst. to hand this morning, and I note with pleasure that you have decided to accept the wharfage rate of sixpence per ton as per correspondence which has passed, and I will arrange a contract accordingly. We will arrange to store your plant on the wharf free of charge."

Howard does not say in that letter that the defendants have decided to accept his offer as detailed in the letter of 25th January, but that the defendants have decided to accept the wharfage rate of 6d. per ton; and he will proceed to "arrange a contract accordingly."

There is now a pause in the correspondence. The letter of 6th February is the last of the letters on which the plaintiffs rely as containing the alleged contract. So far, I am clearly of opinion that no contract has been shown. But the plaintiffs also rely on the subsequent correspondence and acts of the parties as evidence that there was a concluded contract in the conversation and

letters up to 6th February. I shall assume—as there is no argument to the contrary—that this position is open to the plaintiffs notwithstanding the pleadings and particulars delivered. Mr. Fell left for Europe about the middle of February; 1st March came, and the defendants' steamers began to come with their coal for the mines at Port Pirie, and berthed at other wharves. The plaintiffs knew of this fact from the first, and made no complaint to the defendants. Mr. Howard happened to be in Sydney on other business, and called on Mr. Dawson, a director of the defendant company, at their office on about 15th March. If I have to decide between the account of the conversation given by Mr. Howard, and the account given by Mr. Dawson, I should accept the latter. It is more circumstantial and probable; and it agrees with what was written by the plaintiffs shortly afterwards. Howard was a director of the Broken Hill South Mining Co.; and he expressed to Dawson his anxiety to get the stock of coal increased for that company. Dawson said he had sent 500 tons by the Pocohontas. Howard asked—incidentally—"When are you going to send your steamers to our wharf? We are all ready for you." Dawson said "I am waiting for the promised agreement." Howard, "Haven't you got that yet? I will send it along." Howard, on cross-examination, says he does not recollect any arrangement to send the draft agreement to Dawson—says he thought it had been sent; and yet, on 21st March, he writes to the defendants:—"You will receive by this mail from the Barrier Wharf Company's solicitors in Melbourne a draft form of agreement as arranged by myself with you last week, which I trust will be found in order."

The plaintiffs' solicitors, Messrs Bruce and Robinson, sent the draft agreement on 23rd March. This draft went beyond what the plaintiffs can claim on their own evidence; for it purports to bind the defendants as to all vessels loading or unloading at Port Pirie—even vessels loading for export. It should have been confined to vessels with coal or coke. It also purports to bind the defendants by all the numerous rules and regulations in the schedule—an obligation which had not previously been suggested. These variances and others of a minor character tend to show that the parties were not yet *ad idem*; although I

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do not treat such variances as conclusive, for it is not uncommon for solicitors in drawing formal agreements to try to vary and improve informal agreements in the interests of their principals. On 28th March the defendants write to the plaintiffs acknowledging the draft agreement and adding :—

"We would like, however, to have a little further information in reference to the proposed agreement, as now that we have had the actual working with several steamers we see very grave difficulties presenting themselves. As you are doubtless aware, all the coal from our vessels is now being discharged at the Proprietary Wharf, as under the old conditions the lead is also loaded there. We understand all concentrates and ore are or will be loaded at the Barrier Wharf; it seems apparent to us that if we agree to the conditions of the agreement now under consideration, it will mean that we shall have to discharge part of our inward coal cargo at the Proprietary Wharf, shift berths to the Barrier Wharf to discharge the balance, and return to the Proprietary Wharf to load the lead. These operations will necessarily be attended with the loss of time and much expense. In addition to this it will entail the erection of a separate discharging plant, entailing an additional outlay of at least £1,000. We shall, however, be pleased to have your views on this matter, and we can assure you that we are willing to enter into any contract for the benefit of our mutual interests, provided that we are not asked to make any agreement that will operate against us, and we feel sure that you would not ask nor expect us to do this. We are perfectly willing to discharge any vessels at your wharf that have no cargo on board for the Broken Hill Proprietary (conditionally that your plant is used), but we see many obstacles if we are expected to move from wharf to wharf."

The difficulties indicated in this letter would strike one as genuine; but, whether they were genuine or not, the defendants write as being unconscious of having made any agreement yet. The letter speaks of "the proposed agreement," and of willingness to enter into any contract for the parties' mutual interests, and of perfect willingness to discharge vessels at the plaintiffs' wharf if there be no cargo on board for the Broken Hill Proprietary. The reply of the plaintiffs dated 2nd April is significant.

The plaintiffs do not assert: "But the agreement is actually made, it is not merely proposed." The plaintiffs minimise the alleged difficulties; suggest that, with so much business, the vessels with coal for the Proprietary could be kept separate from the vessels with coal for the other companies; and speak of the agreement as "suggested." The letter winds up with vague expressions of hope and good will, thus:—"I hope that you can see your way to arrange for your steamers to come to our wharf at an as early date as possible, and I can assure you on our part that we are ready and willing to carry out our part of the contract to facilitate your business in every way."

Mr *Starke* has laid great stress on the use of the word "contract" as showing that the contract alleged in the statement of claim had been made. I cannot so read the letter. The words which follow indicate, to my mind, that the words "our part of the contract" are used in the loose popular sense, and refer to some friendly understanding as to helping the defendants in the business. For the defendants were not in the coal ring or in the shipping ring, and might need friendly assistance. On 6th April, the defendants write that the matter is being placed before the Board of Directors. "Meanwhile we have to thank you sincerely for your kind offers of assistance to facilitate our business in connection with the carrying out of the contract. As before explained there are several matters in connection with the subject under discussion that require serious consideration, meantime we can assure you that it is our desire to work in with you as much as possible; and we shall feel obliged if you will inform us, in the event of our being able to arrange as you suggest for some of the steamers to discharge the whole of the cargoes (outside the Broken Hill Proprietary Co.) at your wharf at what price you would be prepared to do the stevedoring, that is, the discharging of the coal and the loading of the concentrates."

This letter clearly treats the agreement as not yet made. It seeks information as to the price of stevedoring "in the event of our being able to arrange as you suggest for some of the steamers to discharge the whole of the cargoes (outside the Broken Hill Proprietary Co.)" at the plaintiffs' wharf. It echoes, but inaccurately, the phraseology of the final clause of the letter of

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2nd April:—"Your kind offers of assistance to facilitate our business in connection with the carrying out of the contract." Here again the word "contract" is used; but, if it refer to the alleged contract between the plaintiffs and the defendants, the sentence is almost unmeaning. I rather think that the defendants refer to the seven contracts to supply the Broken Hill mines, all of which were in the same terms and covering the same period, under the name "the contract." But even if it refer to a contract between the plaintiffs and the defendants, it is clear from the rest of the letter that it must mean the contract projected, not the contract made. In any case, nothing was further from the defendants' mind than to admit that there was a binding contract as now alleged; for the letter speaks of the sending of vessels to the plaintiffs' wharf as if it were a matter contingent, not obligatory. The defendants then make inquiries as to stevedoring, and on 11th April the defendants telegraph:—"If can arrange steamer your wharf what rate can you discharge her coal only you find plant." The plaintiffs telegraph "Fourteen pence stevedoring, but company hope give us lower quote when secretary returns from Pirie," and defendants telegraph on 12th April, "Have instructed Pirie office discharge Pocohontas Barrier Wharf you find necessary plant sails eighteenth give us best rate possible."

On the 17th April the defendants write to the plaintiffs:—"A suitable opportunity presented itself in the case of the S.S. Pocohontas which could have been discharged at your wharf, as she had no coal outside of the Proprietary Co." (evidently a mistake for "no coal for the Proprietary Co.") and we wired you accordingly. We are in receipt of a telegram from our Port Pirie office this morning informing us that you were unable to accommodate this vessel. We shall not fail to advise you when arrangements will permit of us sending vessels to your wharf, and we regret that you were unable to avail yourself of the opportunity in the case of the Pocohontas."

This letter obviously treats the defendants as still free to send or not to send their vessels to the plaintiffs' wharf. It shows an intention to experiment as to the plaintiffs' wharf in the case of vessels not containing any cargo for the Proprietary. It

certainly shows no consciousness of an obligation dating back to 1st March, such as the plaintiffs claim to exist. The plaintiffs' explain that the defendants' agent at Port Pirie has misinformed the defendants, and the Pocohontas is therefore discharged at the plaintiffs' wharf and pays sixpence per ton wharfage, and the usual tonnage dues. On 23rd April the defendants write:—"We cannot quite reconcile the difference of opinion that apparently exists concerning the adaptability of your wharf for the discharge of this vessel's cargo, but as we have your assurance that everything is in order, we have instructed our Port Pirie office that our arrangements with you must be respected and the vessel must discharge there. Please have your wharfinger wire us when work is commenced, when we shall instruct him whether it is necessary to incur any overtime."

The statement here, that "arrangements with you must be respected," does not show that the contract proposed had been made. Arrangements had been made to have the Pocohontas discharged at the plaintiffs' wharf, and these "arrangements" must be carried out. Meanwhile, the draft agreement was not returned by the defendants, and on 29th May Messrs. Bruce and Robinson write for it to Sydney. Mr. Dawson was at Broken Hill at the time; and Mr. Fell was still away from Australia. The latter returned in August 1906; and on 27th August Messrs. Bruce and Robinson write again complaining of the delay. The expressions used are significant: "As you are aware the *preliminary arrangements* were made by letter in February last and on 23rd March a draft of the *proposed* formal contract was sent to you for perusal . . . At the same time we have also to point out that the contract is not being complied with inasmuch as certain business which should have been transacted with our client has been done elsewhere." This is the first indication of an assertion on the part of the plaintiffs of anything of the nature of breach of contract; and it comes from the solicitors, not from the plaintiffs or Howard. It seems to be rather inconsistent also with treating the letters of February as mere "preliminary arrangements." But probably the explanation is that the contract was to come into operation as from 1st March; and if it should be signed, the obligation would have to relate back

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to that date. The defendants promise that Mr. Fell will go into the matter. All this time the defendants' vessels are coming to Port Pirie, and discharging at the Proprietary wharf; but in December the defendants write, as to the Cape Corrientes, that the defendant company "are endeavouring to make arrangements to discharge the whole of her coal cargo at your wharf"; and ask for bedrock quotation for stevedoring. The defendants add:—"It is our intention as far as possible to send these steamers to your wharf when the occasion will permit." The plaintiffs do not write insisting that the carrying out of this intention "when the occasion will permit" is not a satisfaction of the alleged contract; but make arrangements for prompt discharge at 13d. per ton. On 7th February 1907 Messrs. Bruce and Robinson again demand the return of the agreement, and claim damages for breach. On 11th February the defendants write denying knowledge of any contract.

I am of opinion that there was no contract concluded in the conversations and letters referred to in par. 4 of the statement of claim, and in the particulars given thereunder; and that the subsequent facts and correspondence in no way establish the fact that there was such a contract. It is true that the schedule rate for wharfage was 9d. per ton; and that the defendants paid, in respect of the Pocohontas and the Cape Corrientes, only 6d. per ton—being the rate specified in the proposed agreement. But, in my opinion, this reduced rate was accepted in the hope that the contract would be made, which was not made. The business which the defendants could bring to the Port Pirie wharves was so considerable that the plaintiffs were only too glad to take the defendants' steamers at the lower rate—a rate which, according to the evidence, was the same as that payable by the defendants at the Proprietary wharf. Moreover this is not an action for short payment of wharfage rates—not an action for the difference between sixpence and ninepence per ton.

I have been referred to a multitude of cases on the question of contract or no contract; but I think the law, so far as applicable to this case, is clearly enough settled. The difficulty lies in firmly grasping the essential facts, and in applying well known legal principles thereto. Was there a "final mutual assent" of

the parties to this alleged agreement? This is the phrase used by Lord *Westbury* L.C. in *Chinnock* v. *Marchioness of Ely* (1), and adopted by Lord *Cairns* L.C. in *Rossiter* v. *Miller* (2). I was much impressed at first with the candid admission of Mr. Fell, in answer to a question put by myself, as to the letter of the 2nd February 1906. He said that, unless that letter leaves open the question of tonnage dues, there is nothing left to be settled (leaving aside the question of a written contract). But, on examining closely that letter, one sees that it says neither yes nor no to the small item of the tonnage dues. It leaves that matter open until the board of the defendant company could see all the conditions of the proposed contract set forth in one document. From first to last there is nothing to indicate acceptance of any of the terms of the proposed agreement, except that as to the wharfage rate; and there is nothing to indicate that the defendants at any time gave their final assent to the terms proposed in the letter of 25th January. This is not the case of an acceptance coupled with the request for a formal document—not such a case as that referred to in *Rossiter* v. *Miller* (3) or in *Crossley* v. *Maycock* (4). This is a case in which there has been no acceptance of the proposed terms at all. No one disputes, of course, that parties may make a binding contract by letters or otherwise, although they intend to have a complete formal agreement drawn up. It is all a question of intention; and in this case I find that the defendants did not mean to bind themselves until they had an opportunity of considering the whole of the terms in a formal agreement. It is also significant that the first suggestion that there was already a binding agreement came to the defendants, not from the plaintiffs, but from the plaintiffs' solicitors, after the letters had been submitted to the ingenious scrutiny of lawyers. It was urged strongly on me that the silence of the defendants in the letter of 2nd February with regard to the tonnage dues, and indeed with regard to the other terms proposed, was evidence of assent to all the terms; and reference was made to some remarks by Lord *Esher* M.R. in *Wiedemann* v. *Walpole* (5). But there is no such legal principle

(1) 4 D.J. & S., 638, at p. 645.
(2) 3 App. Cas., 1124, at p. 1139.
(3) 3 App. Cas., 1124.
(4) L.R. 18 Eq., 180.
(5) (1891) 2 Q.B., 534, at pp. 537, 538.

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as to silence. In each the inference from silence, if any, must depend on the facts of the case and on common sense. As *Kay* L.J. puts it (1):—"The only fair way of stating the rule of law is that in every case you must look at all the circumstances under which the letter was written, and you must determine for yourself whether the circumstances are such that the refusal to reply alone amounts to an admission." In other words, there is no rule of law on the subject at all. In this case the defendants merely express willingness to conclude a contract "*on the basis*" of 6d. wharfage, and a desire to see a contract with all the terms. But even if the letters from that of 24th January to that of 2nd February inclusive could be treated as sufficient, if there were nothing else, to show a contract, the defendants are entitled to have the whole of the correspondence, and the whole of the facts examined: *Hussey* v. *Horne-Payne* (2); and when these are examined, it is, to my mind, clear that there was not any contract. It is a case in which, as *Lindley* L.J. said in *May* v. *Thomson* (3):—"the parties corresponded intending to come to an agreement, fully expecting that they would come to an agreement, knowing perfectly well that the subject-matter of the sale was such that a formal agreement was absolutely essential, and that certain things of very great importance in matters of this kind . . . would have to be discussed and finally settled when they signed the final contract." In that case it was held that there was no agreement, although "the parties thought that they had agreed to all the more material terms"; as they did not intend to be bound until the final agreement was signed.

I accept also the view put by Lord *Cranworth* in the case of *Ridgway* v. *Wharton* (4) that the fact of the parties contemplating a subsequent document of agreement is strong evidence to show that they did not intend the previous negotiations to amount to an agreement.

As for the question of damages, I was disposed to make an assessment so as to save the parties the expense of a new trial in the event of my decision being reversed. But I do not think that I have proper material for a satisfactory assessment; and it

(1) (1891) 2 Q.B., 534, at p. 541.
(2) 4 App. Cas., 311, at p. 316.
(3) 20 Ch. D., 705, at p. 722.
(4) 6 H.L. C., 238, at pp. 263, 268.

seems better that I should leave the question of damages open for further consideration, if necessary, of both parties, and probably for further evidence.

I direct judgment for the defendants, with costs. Certify for discovery.

From this judgment the plaintiffs now appealed to the Full Court.

March 18, 1908.

*Starke*, for the appellants. The appellants do not now rely on any verbal negotiations as forming part of the contract. By the letters ending with that of 6th February 1906 there was a concluded contract. The drawing up of a formal contract was not intended to be a condition precedent to the parties being bound. Such an intention must be shown by distinct words: *Bonnewell* v. *Jenkins* (1). The mere expression of a desire to have the arrangement put into formal terms where there has been an acceptance of an offer does not prevent there being a binding contract: *Crossley* v. *Maycock* (2); *Fry on Specific Performance* 4th ed., pp. 122, 227.

[BARTON J. referred to *Lewis* v. *Brass* (3).

ISAACS J. referred to *Pollock on Contracts*, 7th ed., p. 40. The sending of a document to a solicitor is cogent evidence that the parties did not intend to be bound until a formal contract is signed: *Ridgeway* v. *Wharton* (4).]

If a formal document is drawn up and signed it may be concluded that the preceding transactions were negotiations leading up to the contract. There is a great difference between contracts for the sale of land and ordinary mercantile contracts. In the former case it is the usual thing to have a formal contract drawn up, but in the latter case it is quite exceptional.

[GRIFFITH C.J.—The surrounding circumstances, including the subsequent conduct of the parties, may be looked at to see whether the parties intended to be bound: *Howard Smith & Co. Ltd.* v. *Varawa* (5).

(1) 8 Ch. D., 70.
(2) L.R., 18 Eq., 180, at p. 181.
(3) 3 Q.B.D., 667.
(4) 6 H.L.C., 238.
(5) 5 C.L.R., 68.

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ISAACS J.—Where there are a number of important details left to be discussed and agreed upon the parties will not be held to be bound: *Page* v. *Norfolk* (1).]

There were no essentials which had not been agreed upon on 6th February.

[ISAACS J.—After a contract has apparently been made the parties may go on negotiating. Then neither of them can go back and say a contract has been made: *Brauer* v. *Shaw* (2).]

There would then be a re-opening of the matter, but it has never been pleaded or contended that that happened here. There is nothing ambiguous in the contract, and therefore the subsequent correspondence cannot be looked at to see what the parties thought the contract meant: *Marshall* v. *Berridge* (3). Unless there is something in the subsequent correspondence which breaks down the *primâ facie* agreement, that agreement stands: *Hussey* v. *Horne-Payne* (4). Where there is a clear contract by letters, a subsequent proposal to add a new term does not affect the existence of the contract: *Bristol, Cardiff, and Swansea Aërated Bread Co.* v. *Maggs* (5); *Bellamy* v. *Debenham* (6).

*Schutt* (*Coldham* with him), for the respondents. Up to 6th February all the terms of the contract had not been agreed upon. There were many other and important matters to be arranged for besides those mentioned up to that time. See *Brogden* v. *Metropolitan Railway Co.* (7). The parties intended not to be bound until a formal contract was entered into, and their subsequent conduct shows that they were waiting for that formal contract to be prepared. Even if the letters taken together did settle the terms of the contract, they were never intended to be operative as they stood.

[He also referred to *May* v. *Thomson* (8).]

*Starke* in reply referred to *Austin* v. *Austin* (9); *Bruner* v. *Moore* (10); *May* v. *Thomson* (11); *Wiedemann* v. *Walpole* (12).

(1) 70 L.T., 781.
(2) 168 Mass., 198.
(3) 19 Ch. D., 233, at p. 241.
(4) 4 App. Cas., 311, at p. 317.
(5) 44 Ch. D., 616, at p. 625.
(6) 45 Ch. D., 481, at p. 486.
(7) 2 App. Cas., 666, at p. 674.
(8) 20 Ch. D., 705, at p 716.
(9) (1905), V.L.R. 564; 27 A.L.T., 43.
(10) (1904), 1 Ch., 305, at p. 312.
(11) 20 Ch. D., 705, at p. 723.
(12) (1891), 2 Q.B., 534.

GRIFFITH C.J. The matter has been very fully discussed, and nothing would be gained by reserving our judgment. The plaintiffs are the owners of a wharf at Port Pirie, and the defendants are a company carrying on the business of coal carriers from New South Wales to Port Pirie. They carry a large quantity of coal to that port, and take away from it cargoes of ores and metals, and it appears that a very large portion of the coal they carry is for the Broken Hill Proprietary Co. Ltd. The defendants were anxious to make a contract with the plaintiffs for the use of the plaintiffs' wharf for discharging their cargoes. Negotiations took place between the representatives of the plaintiffs and the defendants with the view of arranging for berthing the defendants' ships at the plaintiffs' wharf, except when those ships were engaged in carrying coal solely for the Broken Hill Proprietary Co., that company's coal being delivered at its own wharf. In negotiating a contract of that kind many things must necessarily be taken into consideration, amongst others the price to be paid for the accommodation, and it appears that the price was discussed on the basis of a certain rate per ton on all coal landed. After some discussion the rate was fixed, more or less definitely, at sixpence per ton. The ordinary price at Port Pirie was ninepence per ton, although the defendants paid only sixpence to the Broken Hill Proprietary Co. After negotiations had gone on for some time the plaintiffs' manager was asked to make an offer in writing to be submitted to the board of directors of the defendant company, and on 25th January 1906 the plaintiffs' manager wrote to the defendants as follows:—"I beg to state that I am prepared to find accommodation for your steamers at our wharf, you to be charged sixpence (6d.) per ton on all coal and coke landed there, provided you undertake to do all your business other than that with the Broken Hill Proprietary Co. with us. I understand your coal contracts provide for approximately 50,000 tons exclusive of the Proprietary Co. Tonnage dues as per printed schedule handed you to be charged. I undertake to provide a berth for your steamers at all times on the understanding that reasonable notice, say two days, be given to our manager at Port Pirie of

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expected arrivals. If this arrangement is acceptable to you I suggest that it be for a term of two years from 1st March next."

That letter referred to five distinct conditions or terms of the proposed contract:—

(1) The price, sixpence per ton on all coal and coke landed at the wharf:

(2) That the defendants should undertake to do all their business other than that with the Proprietary Co. with the plaintiffs:

(3) Tonnage dues to be charged as per printed schedule handed to the defendants' manager:

(4) That a berth should be provided for the defendants' steamers at all times on reasonable notice, say two days, being given:

(5) That the arrangement should be for a term of two years.

I pause here to remark that, although those were the principal things to be determined in a contract of this kind, necessarily a great many other things had to be settled. When the ship is berthed alongside of the wharf, what is to be done there? Are the shipowners to provide their own trucks? Are they to be allowed to keep their coal on the wharf for an indefinite time? What other use may they make of the wharf? There are a great number of details incident to a contract of that sort, and it might be anticipated that the parties would come to some understanding about them before a formal agreement was entered into. They were matters of detail as to which there would probably be little or no difficulty, but still they were matters to be settled, and not left at large to be determined from time to time as occasion might arise. I mention this point because it is very relevant to the inquiry whether the matters referred to in the correspondence were regarded by the parties as the only matters to be dealt with in the contract. The learned Judge below pointed out—and I entirely adopt what he said—that "it is one thing for two parties to settle what are to be the terms of an agreement, if it should be made; and quite another thing to make the agreement."

The letter of 25th January 1906 was replied to by the defendants on 29th January as follows:—"We are anxious to do business with you if possible and will endeavour to come to your

figure provided you agree to waive tonnage dues on all our steamers loading and discharging at your wharf." That is the only one of the five terms to which any reference is made. In reply to that the plaintiffs' manager wrote on 31st January:— "I hope we shall be able to fix up our wharfage arrangements. . . . I could not entertain the suggestion to waive the tonnage dues on your steamers visiting our wharf. It would be quite contrary to the wharf agreement and the custom. Of course you are aware that a steamer paying at one wharf has not to pay at another; this could all be arranged to your satisfaction, I am sure." That, in my opinion, shows that there were then some conditions still to be arranged between the parties.

Then on 2nd February the defendants wrote a letter which the plaintiffs say amounts to an acceptance of a definite offer. They wrote:—"We are willing to conclude with you for wharfage on the basis of 6d. per ton and will be glad if you will make a contract for our approval and signature."

They then added another term, viz., that they must have permission to store their plant free of charge, to which the plaintiffs afterwards agreed. Do, then, the words I have quoted amount to the conclusion of an agreement on the terms mentioned in the letter of 25th January? I cannot see how those words can reasonably be held to have that meaning, especially when the matters referred to in the letter of 31st January had still to be arranged to the defendants' satisfaction. Sixpence per ton had been the basis of the discussion between the plaintiffs and the defendants, and the defendants were willing to enter into a contract on that basis. When the defendants said "we will be glad if you will make a contract for our approval and signature," they evidently intended a contract that would contain provisions for all that might be necessary in carrying out a bargain of that kind, including the terms that "could be arranged," and not a contract containing only the terms mentioned in the correspondence.

The plaintiffs replied on 6th February:—"I note with pleasure that you have decided to accept the wharfage rate of sixpence per ton as per correspondence which has passed, and I will arrange a contract accordingly." It appears to me that the words both of the letter of 2nd February and of that of 6th Febuary are

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words of futurity relating to a contract to be made thereafter in conformity with the terms which had been arranged preliminarily in the correspondence.

I agree, therefore, with the conclusion of the learned Judge below that up to that time there was no concluded contract. It appears to me that what the defendants did was to intimate their willingness to enter into a contract upon the basis of the terms as to which there had been a provisional agreement, but that a formal contract must be drawn up, which was to be approved by them, and that that approval was to be given before a concluded contract should come into existence.

It is said for the plaintiffs that, even if that were so *primâ facie*, yet the subsequent correspondence showed that in fact there was a contract entered into on 6th February; and that, if there was any ambiguity in the terms of that contract, the subsequent correspondence showed what the real intention of the parties was. For the defendants it is said that, even if the documents up to 6th February on their face disclosed *primâ facie* a concluded contract, the subsequent correspondence was in the nature of continued negotiation, and showed that a concluded contract had not been entered into. I do not think it is necessary to refer in detail to that correspondence. It is sufficient to refer to one or two of the letters. The plaintiffs prepared a draft agreement, in which were inserted various conditions certainly not to be found in the correspondence, and some of which are inconsistent with the correspondence. The defendants replied, pointing out objections to these proposals, and, amongst other things, they pointed out that, in the event of their carrying coal for the Broken Hill Proprietary Co. as well as for other companies, their ships would be obliged to go first to the Proprietary wharf to discharge the coal for that company, then to go to the plaintiffs' wharf to discharge the balance, and then go back to the Proprietary wharf to load ore. In reply to that the plaintiffs endeavoured to meet the arguments of the defendants and suggested a way in which that difficulty could be avoided. The plaintiffs further referred to what had taken place as "the agreement suggested," and spoke of the defendants' manager as having "agreed to enter into the contract with this company." The

defendants then pointed out that there were "several matters in connection with the subject under discussion that require serious consideration, meantime we can assure you that it is our desire to work in with you as much as possible, and we shall feel obliged if you will inform us, in the event of our being able to arrange as you suggest for some of the steamers to discharge the whole cargoes (outside the Broken Hill Proprietary) at your wharf, at what price you would be prepared to do the stevedoring." The plaintiffs' manager in reply writes: "I note that the matter of your business at Port Pirie is receiving the attention of your board." This, to my mind, negatives the idea of an existing concluded contract.

In my judgment the learned Judge below was right in his conclusion that there was no concluded contract in fact; that the letters did not on their face disclose a contract. I think further that, if *primâ facie* they disclosed a contract, the subsequent correspondence shows that it was not in the contemplation of either party that they were to be bound until all the essential preliminaries had been agreed to, nor until a formal contract had been drawn up embodying all the matters incidental to a transaction of such a nature.

BARTON J. Although this case presents some difficulties, I have come to the same conclusion, upon the ground that what was done by way of correspondence between the parties does not evidence their intention to make that correspondence the actual contract. It is not necessary to enter into any further analysis of the correspondence until we come to the letters of 2nd and 6th February 1906. If the plaintiffs' case is based upon the alleged offer and acceptance contained in those two letters, it is not clear to me that on those letters there was nothing further to be done and that the parties were to be finally bound. It may have been that each of them required for their own protection a formal contract, or that the desire for self protection was exclusively on the part of the defendants. All that is material is that there was to be no contract until the formal contract was approved and signed. The term "We are willing to conclude with you for wharfage" is in itself, perhaps, a little ambiguous. It may be

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that the writer did not intend to strike the bargain there and then, or it may be that the interpretation put on the expression by the letter of 6th February—"I note with pleasure that you have decided to accept the wharfage rate of sixpence per ton"—is the correct one, but that is not, I think, reasonably clear. "Wharfage on the basis of sixpence per ton" is a phrase which presents still further difficulty. What is meant by "the basis of sixpence per ton"? Does it mean that an agreement embodying the terms of the correspondence dealing with sixpence per ton is the whole matter to be dealt with as the subject of agreement? That, of course, cannot be entertained for a moment. It must be that there were other terms. If there were, are all those terms contained in the correspondence prior to 6th February? If they are, then does not the demand of a contract for approval and signature evidence that, even, though they appear to be so contained, there were other matters that would have to be included in the contract when it was fully expressive of the desire of the parties? It seems to me that would clearly be so when we look at the terms of the contract which was prepared by the plaintiffs themselves for the defendants' approval. Some of its terms are inconsistent with those in the correspondence, and others are new. The plaintiffs themselves by the draft contract which they tendered seem to admit that there were some other terms to be arranged before finality was reached. Then the expression in the plaintiffs' letter of 6th February, "I will arrange a contract accordingly," seems further to elucidate the matter. It seems a rather clear inference from the defendants' letter of 2nd February that the written document must be submitted for the approval by the defendants of its terms before it would be allowed to bind the defendants, and the answer "I will arrange a contract accordingly" contains no negation of that inference, but rather a more or less clear consent on the part of the plaintiffs to submit such a document, and they in fact did submit a draft of it.

On the whole, whatever opinion one may hold about the consensus on the terms contained in the correspondence, I think that the parties said for themselves that the binding contract must be contained in the final document. That document,

as submitted in draft, contained more than the terms mentioned in the correspondence.

Further, seeing that the final document was required by the defendants for their own protection, and that their desire for such a document was assented to by the plaintiffs, I think that it cannot be successfully contended that an action could be brought independently of a tender and final settlement of that document. For, after all, the request for a written contract and the fact that that request seemed to be assented to, must mean that the discussion was still open. I think that *Higgins* J. was right in holding that the plaintiffs had not made out their case, and therefore the appeal should be dismissed.

O'Connor J. I agree with the conclusion arrived at by the learned Judge of the Court below. I do not think it is necessary to add anything to what has already been said. I think the appeal should be dismissed.

Isaacs J. I am of the same opinion. I base my judgment upon the necessity for a written contract. The question whether such a contract is a condition precedent to the obligation arising depends upon the question whether the written contract was intended by the parties to be a mere record for their convenience and for future reference, or whether it was insisted upon as a *sine quâ non* of the obligation arising at all. In this case I think that, if the appellants' view were acceded to, it would give no meaning to some of the words in the letter of 2nd February. I take the second sentence of that letter to mean that the defendants intimated that they were prepared to enter into a bargain, and that they required for that purpose a contract to be made out for their approval and signature. Merely to say that formal reduction into writing of the arrangement already made was necessary would, I think, not give effect to the words "for our approval and signature." It was not a request to make out a contract which should represent the arrangements of the parties already expressed, but it was a request for a document which the defendants were to see and consider and approve and sign, as a condition of the obligation existing at all.

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I think this question may very fairly be put:—Suppose the document on being submitted to the defendants was not approved by them, did the parties mean that nevertheless a contractual obligation should exist? I do not think they did.

It is not necessary to go further and say that by the subsequent correspondence and by the terms of the draft agreement the precise conditions in the letters of 2nd and 6th February were departed from. If it were necessary, I think the conduct of the parties subsequent to 6th February shows that it was not understood that they were bound down contractually to the exact terms which had already been set out in the letters. Such a view would be inconsistent with the numerous departures from the terms in those letters. For these reasons I agree that the appeal should be dismissed.

*Appeal dismissed with costs.*

Solicitor, for the appellants, *Arthur Robinson.*

Solicitors, for the respondents, *Gillott, Bates & Moir.*

B. L.