[HIGH COURT OF AUSTRALIA.]

FRIEDLANDER . . . . . APPELLANT;
DEFENDANT,

AND

THE BANK OF AUSTRALASIA . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 22, 23, 24, 25, 26; *March* 1, 2, 4.

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

Contract—Banker and customer—Letter of credit—Acceptance of drafts—Condition precedent—Performance rendered impossible—Part performance, acceptance of benefits of.

The appellant, who carried on business in Australia, agreed to buy from a merchant in Buenos Ayres a cargo of wheat for delivery at a named Australian port, payment to be "by London banker's acceptance of seller's drafts at 90 days sight under confirmed credit with documents attached as usual which are to be given up on acceptance. Seller to give policies and/or certificates of insurance for 2 per cent. over invoice value." For the purpose of carrying out the provision as to payment the appellant by letter requested the respondent bank to issue to him a credit authorizing the seller to draw on London at 90 days' sight for the value of the wheat. The letter continued:—"Insurance to be effected by shippers. Drafts to be accompanied by bills of lading, policy of insurance, merchant's certificate of weight and quality. Separate documents for each 100 tons of wheat and the certificate of your agents at Buenos Ayres that the conditions of the credit have been complied with." The defendant then undertook that in consideration of the bank issuing such credit he would provide funds by purchasing the bank's drafts on London at the exchange of the day to retire all bills drawn under the credit in time to meet the bills before maturity. On the same day respondents at appellant's instance sent to their London house a cable message summarizing the request. A credit was subsequently opened by the bank in London under which the seller drew certain drafts on the bank in London and negotiated them in Buenos Ayres. The drafts were subsequently accepted by the bank in London, but there were not then attached to them policies of insurance,

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and the policies were not delivered to the bank until a fortnight afterwards. Prior to his requesting the bank to issue the credit the appellant had sold the wheat by a contract by which he bound himself to deliver with the wheat separate policies of insurance for each 100 tons, and this fact was communicated to the bank in London before the issue of the credit. It appeared that under these circumstances the separate policies could only be issued in London, and would not be issued until after the arrival of the bills of lading. When the wheat arrived in Melbourne the appellant refused to accept delivery of the wheat. In an action by the bank against the appellant to enforce his liability in respect of the drafts:

Held, on the construction of the documents and the facts (*Isaacs* J. dissenting) that it was not a condition precedent to the contract between the bank and the appellant that the drafts should at the time of presentment for acceptance be accompanied by policies of insurance, and that, if it was, the appellant had rendered its performance impossible and so had excused the bank from performance of it.

Held, also, *per totam curiam*, on the evidence, that, if the bank by accepting the drafts unaccompanied by policies of insurance had failed to perform a condition precedent of the contract, the defendant by his conduct after the arrival of the wheat in Australia had elected to take advantage of the acceptance of the drafts and was therefore liable to provide for them.

Decision of the Supreme Court (*Hodges* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

The Bank of Australasia Ltd. brought an action in the Supreme Court of Victoria against Hugo Friedlander, trading as Friedlander & Co., claiming £9,976 11s. 10d. for money lent by the plaintiffs to the defendant at his request, for work done and materials provided by the plaintiffs as bankers for the defendant, and for interest upon money due from the defendant to the plaintiffs and forborne at interest by the plaintiffs to the defendant at his request. The plaintiffs alternatively said that by agreements in writing dated respectively 12th February 1903 and 19th February 1903, made between the plaintiffs and the defendant, in consideration of the plaintiffs issuing to the defendant credit for £28,000 and £6,000 authorizing one Scott Robson to draw upon the plaintiff to the said amounts of £28,000 and £6,000, the defendant undertook to provide funds by purchasing the plaintiffs' drafts on London at the exchange of the day to retire all bills drawn under the same credit in time to meet the bills before their maturity in London, and the defendant agreed to pay

interest on the amount of such credit at the colonial rate of interest here; and the plaintiffs said that the defendant only provided portion of the funds necessary to take up the plaintiffs' drafts on London, and refused to pay or provide the balance and to pay interest as provided in the agreements. As a further alternative the plaintiffs said that the defendant entered into contracts dated 28th January 1903 and 16th February 1903 with one Scott Robson for the purchase of certain wheat whereunder the defendant became and was liable to the said Scott Robson in the sum of £31,556 12s. 8d., and the plaintiffs paid that sum to Scott Robson in satisfaction and discharge of the defendant's liability to Scott Robson under the said contracts, and the defendant by such payment was discharged and freed from the obligation he was under by virtue of the said contracts, and the defendant accepted and received the benefit of the said payment so made by the plaintiffs to Scott Robson, and the plaintiffs claimed repayment of the same from the defendant with interest and exchange.

By his defence the defendant alleged that it was a condition of the contracts between him and the plaintiffs that the drafts drawn by Scott Robson on the plaintiffs should be accompanied by policies of insurance, and that there should be separate documents for each 100 tons of wheat; that the plaintiffs issued a credit authorizing Scott Robson to draw on London, but did not make it a condition of the credit that the drafts should be accompanied by separate policies of insurance for each 100 tons of wheat; and that the plaintiffs, without authority from the defendant, accepted drafts drawn by Scott Robson, which were not accompanied by separate policies of insurance for each 100 tons of wheat. The defendant also counterclaimed for damages for breach of the contract, either in having so accepted the drafts, or, alternatively, in not having forwarded policies of insurance in respect of the wheat so as to be available for the defendant in Australia before or immediately after the wheat arrived there.

The facts are sufficiently set out in the judgments hereunder.

The action was heard by *Hodges* J., who gave judgment for the plaintiffs on the claim for £11,174 0s. 7d., and on the counterclaim.

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From this decision the defendant now appealed to the High Court.

Irvine K.C. and *McArthur*, for the appellant. The provision in the contract of 12th February 1903 between the appellant and the respondents that the drafts were to be accompanied by policies of insurance was a condition precedent to the appellant providing funds to meet the drafts. The intention expressed in the contract was that the respondents were not to accept the drafts unless when presented to the respondents for acceptance they were accompanied by policies of insurance. That is clearly expressed to be a condition going to the root of the contract. It may be that originally the parties contemplated the policies accompanying the drafts when they were negotiated in Buenos Ayres, but if so, the appellant, by agreeing to the policies being taken out in London, might have to that extent agreed to an alteration of the contract. But the appellant never agreed to any alteration of the condition at all. The respondents knew of the importance of this condition, for they knew that the appellant had sold the wheat to Joseph & Rickard with a similar condition attached. When the respondents accepted the drafts as they did the property in the wheat, as between Scott Robson and the appellant, vested in the appellant, but as between the respondents and the appellant the latter could on the arrival of the wheat here have refused to have anything to do with it. What happened here after the wheat arrived did not amount to waiver, or adoption or ratification by the appellant. The parties agreed that they would leave for future determination their rights between themselves, and to do the best they could to realize the wheat for their joint benefit. They referred to *Benjamin on Sales*, 5th ed., p. 746; *Sanders* v. *Maclean* (1); *Earl of Darnley* v. *London, Chatham and Dover Railway* (2); *Bentsen* v. *Taylor, Sons & Co.* (*No.* 2) (3); *Mirabita* v. *Imperial Ottoman Bank* (4); *Leake on Contracts*, 4th ed., p. 457.

[ISAACS J. referred to *Tamvaco* v. *Lucas* (5); *Ryan* v. *Ridley & Co.* (6).]

(1) 11 Q.B.D., 327.
(2) L.R. 2 H.L., 43.
(3) (1893) 2 Q.B., 274, at p. 283.
(4) 3 Ex. D., 164.
(5) 1 B. & S., 185.
(6) 19 T.L.R., 45.

Mitchell K.C. (with him *Pigott*), for the respondents. That the policies of insurance should accompany the drafts when accepted was not a condition precedent to the contract as to the letter of credit, and was not even a term of it. It required the policies to be attached to the drafts at the time of negotiation in Buenos Ayres. The appellant made that condition impossible by the arrangement he made with Berry, Barclay and Co. so that the respondents were excused from the condition, and, when the drafts were presented for acceptance unaccompanied by the policies, they could not refuse to accept them. What the appellant did when the wheat arrived in Melbourne amounted to a ratification of what the respondents had done. The agreement of 30th November 1903 between the appellant and the respondents as to the realization of the wheat without prejudice to the rights of the parties did not cover the previous acts of the appellant, such as the tender of the wheat to Joseph and Rickard, which amounted to a ratification. He referred to *Sanders* v. *Maclean* (1); *Simpson* v. *Eggington* (2); *Belshaw* v. *Bush* (3); *Walter* v. *James* (4); *Bristow* v. *Whitmore* (5); *Cornwal* v. *Wilson* (6); *Prince* v. *Clark* (7); *Reid* v. *Rigby & Co.* (8); *Bowstead on Agency* 3rd ed. pp. 55, 57, 59.

[ISAACS J. referred to *Roberts* v. *Brett* (9).]

Irvine K.C. in reply referred to *Bettini* v. *Gye* (10).

[ISAACS J. referred to *Bank of China, Japan and the Straits Ltd.* v. *American Trading Co.* (11).]

Cur. adv. vult.

March 4.

The following judgments were read :—

GRIFFITH C.J. The relevant facts in this case, when disentangled from the great mass of irrelevant matter with which they have been overlaid, lie in a small compass.

By a written contract, drawn up in London by brokers for both parties, and dated 28th January 1903, the appellant, who

(1) 11 Q.B.D., 327, at p. 336.
(2) 10 Ex., 845.
(3) 11 C.B., 191 ; 22 L.J.C.P., 24.
(4) L.R. 6 Ex., 124.
(5) 9 H.L.C., 391.
(6) 1 Ves. Sen., 509.
(7) 1 B. & C., 186.
(8) (1894) 2 Q.B., 40.
(9) 11 H.L.C., 337.
(10) 1 Q.B.D., 183.
(11) (1894) A.C., 266.

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carried on business in Melbourne, agreed to buy from one Scott Robson of Buenos Ayres a cargo of 4,000 tons of wheat, to be shipped from that port by the ship "Andorinha" to named Australian ports. The cargo was to be loaded under the supervision of a gentleman named, whose certificate was to be final as regards quality and condition, and the bills of lading were to be dated not later than 20th March. As to payment the contract contained the following clause:—"Payment by London banker's acceptance of seller's drafts at ninety days' sight under confirmed credit with documents attached as usual, which are to be given up on acceptance. Seller to give policies and/or certificates of insurance, duly stamped, for 2 per cent. over the invoice amount." A few days later another contract was entered into in similar terms for an additional quantity of wheat, but the case may be, and has been, treated as if there had been only one contract.

It sufficiently appears from the nature of the transaction (apart from the express evidence on the point) that the stipulation as to payment was to be performed by the purchaser procuring the opening of a credit with some banking institution at Buenos Ayres in favour of the seller, under which the seller would be able to negotiate, that is, obtain money in exchange for, drafts drawn by him on a London banker with the usual documents, *i.e.*, bills of lading, certificates and policies or certificates of insurance, attached.

By a cable message dated 29th January the London brokers asked the appellant whether they required separate policies of insurance for each parcel of 100 tons. On the following day the appellant replied in the affirmative, and asked who were to be the underwriters. On the same day the brokers replied that they had insured at Lloyds' (*i.e.*, the well known London institution of that name), and added "Open a credit in favour of Scott Robson." On 4th February appellant wrote to the brokers a letter in which he said, "We note the sellers have effected the insurance at Lloyds'. As written you some time since we decidedly object to Lloyds' policies, but as the insurance was evidently declared before you received our letter we suppose we must allow the transaction to stand." In the same letter he said that he had sold the cargo to arrive, and that the bargain required separate

documents for each 100 tons. This approval was, of course, a ratification of the brokers' action, the effect of which was to alter the contract of 28th January to this extent—that the insurance was to be effected in London and not in Buenos Ayres. It followed that it was manifestly impossible that the drafts when negotiated by Scott Robson in Buenos Ayres should have the policies attached to them. It thereupon became the duty of the appellant to provide a credit for Scott Robson on the new terms, that is, to obtain an undertaking from some London banker to accept his drafts, having attached to them the other specified shipping documents, but without policies or certificates of insurance.

In discharge of this duty appellant applied in Melbourne to the respondents (who were his Australian bankers, and who have a London office) by letter dated 12th February 1903, which, so far as material, is as follows:—

"To the Manager, Bank of Australasia, Melbourne.

"Sir,—I/we have to request that you will issue to me/us Credit for £28,000 authorizing H. Scott Robson Buenos Ayres to draw on London at 90 days' sight not later than 10th March for full invoice of value wheat shipped to Sydney and/or Newcastle by ship 'Andorinha' shipping documents of which are to be hypothecated to you or your agents.

"Insurance to be effected by shippers.

"Drafts to be accompanied by B/L, policy of insurance merchant's certificate of weight and quality. Separate documents for each hundred tons of wheat and the certificate of your agents at Buenos Ayres that the conditions of the credit have been complied with . . . . .

"In consideration of your issuing credit as above I/we lodge as further collateral security as arranged at Ashburton N.Z. and undertake to provide funds by purchasing your drafts on London at the exchange of the day to retire all bills drawn under the credit of which you may from time to time be advised to mature in time to meet the bills before their maturity in London. . . . .

"The drafts under the credit are to be sold to the Bank's agents provided as favourable a rate of exchange can be obtained from them as elsewhere, but in the event of drafts not being negotiated

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through them I/we agree to pay any charge made by them not exceeding ¼ per cent. for the visé of the credit."

The amount was afterwards increased to £34,000, and the limit of time for drawing was extended to 20th March.

On the same day the respondents, at the written request of the appellant, sent to their London offices a cable message in these words: "Cable credit on London in favour of H. Scott Robson, Buenos Ayres, £28,000 draft at 90 days' sight against 4,000 tons wheat per 'Andorhina' to Sydney and/or Newcastle before 15th March. Bill of lading insurance policy and invoice and certificate of weight and quality. Separate documents each hundred tons. One set of documents by vessel."

Immediately after the receipt of this telegram by the respondents' London branch, and before any action had been taken under it, the brokers who had negotiated the contract between the appellant and Scott Robson informed the bank in London of the change in the terms of the sale contracts. In my opinion this information was given in discharge of their duty to the appellant, and, apart from duty, the giving of it was entirely within their authority, established both by the nature of the transaction itself and by subsequent ratification by acquiesence, as will afterwards appear.

On the same 12th February the plaintiffs' London office wrote to the London and River Plate Bank Limited at London as follows:—

"Dear Sirs,—I shall be obliged by your authorizing your Buenos Ayres branch by telegram to negotiate the drafts at 90 days' sight of H. Scott Robson upon this office to the extent of £28,000 (twenty eight thousand pounds) against documents for a shipment (before 10th March) of 4,000 tons of wheat per 'Andorhina' to Sydney and/or Newcastle. The documents to comprise bills of lading invoices and certificates as to weights and quality(ies) separate documents for each 100 tons—and one set thereof is to be forwarded by the vessel to our Sydney or Newcastle branch a certificate stating that this has been done to accompany the drafts. The remaining copies of the documents also to accompany the drafts.

"Insurance is cared for in London.

"We hereby undertake to honour upon presentation drafts drawn in terms of the above credit."

This was afterwards extended to cover the appellant's additional purchase.

The London and River Plate Bank accordingly issued a credit in favour of Scott Robson, in pursuance of which Scott Robson on 17th March drew on the plaintiffs' London office for a sum of upwards of £31,000. The drafts were purchased by the London and River Plate Bank's branch at Buenos Ayres, and had attached to them the stipulated shipping documents, but no policies or certificates of insurance.

On 16th April the drafts with the same documents attached were presented to the respondents' London office for acceptance, and were accepted. Before acceptance the bank were informed by the brokers that the goods were "covered" by insurance, and the cover note was handed to them on the following day. It appeared by undisputed evidence that, when a large number of policies is to be issued in respect of the various parcels of a single cargo, the policies cannot be prepared until the arrival of the bills of lading, and that some time is required for their preparation. The policies, 75 in number, were not in fact handed to the respondents in London until 1st May. This delay was sworn to be reasonable under the circumstances.

Advice of the acceptance of Scott Robson's drafts reached Melbourne on 20th May, and on the same day was communicated to appellant, who was also informed that the policies had not been received by the London Bank at the time of acceptance. The "Andorinha" arrived on 26th May.

On 31st January the appellant had sold the cargo (to arrive) to a Sydney firm called S. A. Joseph & Rickard at an advanced price under a contract by which he bound himself to deliver with the wheat separate policies of insurance for each parcel of 100 tons, effected at Lloyds', for a sum equal to the price on the re-sale with 10 per cent. added. This amount was different from, and larger than, the amount for which the policies to be supplied by Scott Robson were to be effected. The appellant had not, however, taken out any such policies.

The market was falling, and the sub-purchasers refused to

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accept the cargo, giving as a reason or excuse the absence of the stipulated policies.

Difficulties thereupon arose, and finally the wheat was disposed of at a loss of several thousand pounds. I will refer afterwards to the relevant facts bearing on this part of the case.

Scott Robson's drafts, accepted by the respondents' London office, were paid in due course, and the respondents brought this action against the appellant to recover the amount of the payment. The appellant disputed his liability, and set up that it was a condition precedent of his liability that the drafts should, when accepted by the respondents, have been accompanied by policies of insurance. He also counterclaimed for damages for loss sustained by him by reason of the drafts not being then accompanied by separate policies for each parcel of 100 tons.

The validity of the defence depends primarily upon the construction of the contract evidenced by the appellant's letters of 12th February.

That contract was not a contract of agency. The subject matter of it was the granting of a credit to Scott Robson at Buenos Ayres, under which he would be able, if he so desired, to obtain payment for his wheat immediately on shipment. In order that this purpose might be effected it was essential that the conditions on which he was to be enabled to obtain that benefit should be expressed, so that any person invited by him to negotiate drafts drawn under the credit might rest assured that they would be accepted on presentment in London. One, and the most important, of these conditions was that the drafts should be accompanied by the specified shipping documents, including policies of insurance. The words "Drafts to be accompanied," &c., may therefore be read as equivalent to "The credit must provide that the drafts shall be accompanied," &c. I will assume (though I think it very doubtful) that this was a condition precedent to any obligation upon the appellant to retire drafts drawn under the credit and accepted by the bank. If this condition had been attached to the credit, and Scott Robson had negotiated drafts not accompanied by the policies, the bank would not have been bound to accept them. It was, of course, necessary, in order to give effect to the contract, that the bank

should bind themselves to accept drafts drawn in accordance with the conditions of the credit. It follows that the words "Drafts to be accompanied," &c., in the letter of 12th February imposed a condition to be embodied in the credit itself, and consequently relate to the time when the credit was to be acted upon by Scott Robson. The same considerations apply to the telegram of 12th February.

Whether any and what effect should be given to those words as applied to a state of facts not contemplated, and which did not happen, namely, if Scott Robson had not taken advantage of the credit, but had himself presented drafts for acceptance, is a different question, which has nothing to do with that which I am now discussing.

This being the contract between the parties, the London brokers, as already stated, informed the bank before the actual issue of the credit that appellant and Scott Robson had agreed that the insurance should be effected in London. In order, therefore, to give effect to this altered state of things it became necessary that the conditions of the credit should be correspondingly altered, and that they should be such as to bind the bank to accept Scott Robson's drafts coming from Buenos Ayres although not accompanied by the policies, which (by reason of the change of place of insurance) would not be there. The credit was accordingly issued in such terms as would give effect to the contract as it then stood. Under these circumstances it cannot, in my opinion, be disputed that the appellant before breach waived the (assumed) condition embodied in the contract evidenced by the letter and telegram of 12th February that the credit should require the drafts to be accompanied by policies. The issue of the credit in the terms already stated was, therefore, in accordance with the existing obligations under the contract between the appellant and the respondents as modified by the waiver, and the bank were bound to accept the drafts drawn in accordance with their terms.

I have already shown that the obligation to insist on the drafts being accompanied by policies related to something to be done at the time of issuing the drafts in Buenos Ayres if they should be issued there as contemplated. Before that event could happen

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the performance of that obligation by the bank had, as already shown, been excused, so that no defence could be founded on a breach of it. It follows, also, since the respondents were bound to accept the drafts accompanied by the other shipping documents without policies, that it was no longer (if it ever had been) a condition precedent to the acceptance of the drafts that they should be accompanied by the policies on presentment. It also follows that the condition set up did not relate to the time of acceptance at all. The defence therefore wholly fails.

I will, however, consider the case upon the assumption that the contract imposed some sort of contractual obligation, express or implied, upon the bank to see that the drafts were accompanied by policies at the time of presentment for acceptance. The case of Scott Robson himself presenting them need not be considered, since it did not happen. To this contention there appear to me to be several answers. If there was such an obligation, its performance was not a condition precedent to the obligation to accept. The rules for determining whether a particular stipulation in a contract is a condition precedent are too well known to need elaborate statement. It is sufficient to say that it is a recognized rule that, in the absence of expressed intention to the contrary, a stipulation which does not go to the substance of the contract (or, as it has been called, the root of the matter), but merely affects it incidentally, and a breach of which may be compensated for in damages, is not a condition precedent. It is manifest that the stipulation as to the policies was introduced for the protection of the appellant, and that he would be equally well protected whether the policies were attached to the drafts at the moment of presentment or handed to the bank on the following day. And there is no expressed intention to the contrary.

Another answer is that, even if there was originally such a stipulation, and if it was a condition precedent, the appellant excused the respondents from performance of it. This appears conclusively from the evidence, which establishes that where, as in this case, several policies are to be issued in respect of different parcels of a cargo, the policies cannot be prepared until after the arrival of the bills of lading, and consequently cannot be attached

to them on arrival. The appellant had, therefore, by his own action made it impossible that such a condition should be literally complied with, unless, indeed, he was entitled to say that the acceptance of the drafts and the concurrent delivery of the bills of lading should be deferred until the policies had been made out, and this in a fluctuating market, and under a contract in which early shipment was stipulated for. There is, moreover, abundant evidence that under such circumstances the immediate acceptance of the drafts pending the preparation of the policies was in accordance with the usual course of business in London. These facts are abundantly sufficient to establish excuse for non-performance of the supposed condition.

Apart from these answers to the defence, the respondents rely upon the doctrine that if, notwithstanding failure by one party to a contract to perform a condition precedent, the other party accepts the benefit of a partial or imperfect performance, a new contract will be implied to pay for the benefits which he has actually received. As already stated, the appellant was informed by the bank on 20th May that the bills of lading for the cargo had arrived in Melbourne, and that the drafts had not been accompanied by policies when accepted. On the 26th, on which day the "Andorinha" arrived in Sydney, the appellant sent to his sub-purchasers, S. A. Joseph & Rickard, an invoice for the cargo, and drew upon them through the respondents for the contract price. In my judgment this act on his part establishes an unequivocal election by the appellant, with full knowledge of the absence of the policies at the time of presentment of the drafts, to accept the benefit of the respondents' action in accepting them, whether it was or was not in breach of their contract with him. Further, S. A. Joseph & Rickard having, as already stated, refused to accept the cargo on the ground of the absence of the policies stipulated for in their contract with appellant, he on 4th June entered into a new contract with them for the sale of 2,500 tons, part of the cargo. This also is, in my judgment, proof of an unequivocal election by the appellant to take advantage of the bank's acceptance of the drafts, and so *Hodges* J. held. A large quantity of correspondence afterwards passed between the parties, most of which was without prejudice to their respective rights

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and claims against each other, but none of which, in my opinion, qualified the effect of the two transactions to which I have just referred. Moreover, it was, throughout the whole correspondence, tacitly agreed that Scott Robson should be treated as having been paid under their contract. This being so, the property in the wheat passed to the appellant, so that he had the full benefit of the acceptances. His claim, therefore, if any, against the respondents can only be for damages for breach of their supposed obligation not to accept the drafts without the simultaneous production of the policies. On this point it is sufficient to say that he was unable to establish the relation of cause and effect between the supposed breach of duty and the loss which was in fact sustained upon the realization of the cargo.

Many other points were discussed in argument upon which I do not think it necessary to express any opinion.

In my judgment the appeal fails on all points, and must be dismissed.

BARTON J. It was my intention to deliver a separate judgment in this case. But on a perusal of the judgment of the Chief Justice, just delivered, it appeared to me that, when extricated from the heap of unnecessary matter with which they had been overlaid, the relevant facts required merely the lucid statement which his Honor has made to render obvious the legal conclusions to be drawn from them. Agreeing as I do with his Honor in the conclusions which he has expressed, and which in my opinion necessarily follow, I have not considered a separate judgment necessary to emphasize them. I therefore content myself with saying that in my opinion the judgment of *Hodges* J. for the plaintiffs, now respondents, must stand, and the appeal must be dismissed.

O'CONNOR J. I agree that this appeal cannot be sustained. The whole defence was based upon the fact admitted at the trial that Scott Robson's bills were not at the time of acceptance by the respondent bank accompanied by the policies of insurance mentioned in the agreement of 12th February 1903. The respondents presented that fact in two aspects; first, as the

failure to comply with a condition precedent of the contract thus disentitling the respondents from recovering anything. Secondly, as a breach of a term of the contract, not being a condition precedent, the moneys payable in respect of which breach must either be applied in reduction of the plaintiffs' claim or awarded as damages under the counterclaim. The latter aspect need not now be considered because it became evident during the argument that the appellant could not point to any damage which had accrued from the bank's failure to observe the condition relied on. The rights of the parties on this appeal must, therefore, depend entirely upon how the following questions are to be answered:—(1) Was it a condition precedent to the bank's right to recover the moneys paid by them in pursuance of their acceptance of Scott Robson's bills that the bills should be accompanied at the time of presentation for acceptance by the policies of insurance? (2) If that was a condition precedent, has its performance been waived by the appellant?

The first question depends entirely upon the construction of the credit agreement of 12th February 1903. The second involves a consideration of the relevant facts and documents to be found in the mass of material which goes to make up the transcript. In determining whether a term of a written agreement is or is not a condition precedent, there is only one guide—the intention of the parties to be gathered from the document itself. Any stipulation which the parties chose to expressly declare a condition precedent thereby becomes so. Where there is no such express declaration the weight and bearing of the stipulation in relation to the whole contract must be taken into consideration. In *Bettini* v. *Gye* (1), *Blackburn* J. clearly states the position in these words: "And in the absence of such an express declaration," (that is a declaration in the contract itself that the stipulation is intended to be a condition precedent) "we think that we are to look to the whole contract, and applying the rule stated by *Parke* B., to be acknowledged in *Graves* v. *Legg* (2), see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different

(1) 1 Q.B.D., 183, at p. 188. (2) 9 Ex., 709, at p. 716; 23 L.J. Ex., 228.

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in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages. Accordingly, as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent."

I agree with my learned brother the Chief Justice that the contract as drawn and cabled on 12th February contemplates on the face of it that the bills shall be accompanied by the policies at the time of their first issue in Buenos Ayres. It is clear that that condition was before presentation of the bills in London waived and dispensed with by the respondents. I shall, however, for the purpose of considering the appellant's contention, assume that it continued to be a binding stipulation that the bills when presented for acceptance in London should be accompanied by the policies. When the policies were all prepared in conjunction with the contract it appears that there were 75 of them. Now, the appellant's contention amounts to this, that the absence of one of these policies from the documents accompanying the bills at the moment of presentation for acceptance, although it might come to the bank's hands next day, would be a breach entitling the appellant to disclaim all liability to reimburse the bank in respect of the ordinary consequences of acceptance. Such a contention tested by the criterion laid down by *Blackburn* J. will not bear examination. Can it be urged with any show of reason that the obtaining of the policies on the day after acceptance instead of at the moment of acceptance was a matter of substance, or that it affected the interests of the parties in such a way as, using the words of *Blackburn* J. (1) to "render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for." The price agreed upon in the appellant's contract with Scott Robson included the cost of insurance, and the plaintiffs were entitled on payment of the price to have possession of the policies together with the indicia of property enabling them to deal with the wheat. The bank in advancing money in payment of the price were bound under the necessary implication of such a contract to protect the interest of the appellant as well as their

(1) 1 Q.B.D., 183, at p. 188.

own, and to take care that the policies were duly handed over with the other indicia of property within reasonable time to enable him to deal with the wheat in the market. That was the substance of the matter. The failure to obtain some or one of the documents until an hour, a day or a week later than the acceptance might perhaps under certain circumstances give rise to a claim for damages, but it could not possibly affect the substance of the contract under which the bank undertook to finance the wheat transaction for the appellant. In my opinion, therefore, the term of the contract relied on by the appellant was not a condition precedent, and the failure to perform it was no answer to the respondents' claim.

But that does not exhaust the strength of the respondents' position. Assuming that the condition relied on by the appellant was a condition precedent on the true construction of the letter of 12th February 1903. It is conceded that the bank failed to perform it. But we must now look at the facts and documents and inquire why they so failed and what was the conduct of the appellant after he knew of the failure. The evidence establishes that before 12th February Berry, Barclay & Co., of London, brokers for both parties in the transaction between the appellant and Scott Robson, had insured the wheat at Lloyds' in London and the appellant had approved of the insurance. On the very day when the bank received the cable of that date concluding the agreement now sued on, Berry, Barclay & Co., being then as it appears to me agents of the appellant for that purpose, communicated the facts as to the London insurance to the bank. That change made the carrying out of the contract as originally drawn commercially impossible. And the bank, in arranging as they did for the negotiation of Scott Robson's bills in Buenos Ayres, on presentation of shipping documents, not including policies of insurance, carried out the transaction of financing payment of the wheat in the only way in which it could be carried out under the conditions so altered by the appellant's consent and notified to the bank by his agents. Under these circumstances the respondent bank have to my mind clearly established the position that, before the breach complained of, they were exonerated and discharged from the performance of the condition on which the appellant is now relying.

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The respondent bank's further answer to the defence which I am considering is that with knowledge of all the facts the appellant has so acted as to make it impossible for him now to repudiate the bank's payment on his behalf. I agree with the conclusions of the learned Judge in the Court below on this part of the case. But it seems to me that the real strength of the bank's position lies in the adoption by the appellant of the benefit conferred by the bank's advances. About 17th March 1903 the River Plate bank under agreement with the respondents discounted Scott Robson's bills and paid him cash for the wheat in exchange for the bills of lading and other indicia of property. The respondent bank accepted the bills on presentation by the River Plate bank, and met their acceptances at maturity. The appellant became aware of these matters before 26th May of the same year. The payment to Scott Robson and the acceptance of the bills vested the wheat in the appellant and discharged his liability to Scott Robson. That payment has never been repudiated. The appellant has retained the benefit which it conferred, and afterwards dealt as owner of the wheat in selling a portion of it to Joseph & Rickard in a modified performance of his contract with that firm. In all subsequent dealings with the balance of the wheat up to 30th November 1903, when the agreement was come to between the appellant and the respondents that the balance of the wheat should be realized without prejudice to their respective rights, the appellant dealt with the wheat as owner. The very basis of the agreement of 30th November 1903 was that the payment to Scott Robson should stand good, and no attempt has ever been made to notify that firm that the payment to them at Buenos Ayres five years ago is now to be disavowed. The arrangement of 30th November 1903 has no bearing on that condition of facts, and cannot affect the legal position in which the appellant's adoption of the bank's payment of Scott Robson has placed him. Under such circumstances the law is clear that the appellant, having taken advantage of the benefit which the bank's payment on his account has conferred on him, cannot be allowed to repudiate his liability to reimburse the bank in respect of that payment. Where, as it is assumed in this case, the payment is made

in pursuance of the contract, though not in compliance with its terms, the law will imply from facts such as exist here a new contract to reimburse the bank to the extent of the value of the benefit obtained, and for the purpose of ascertaining that value will permit the appellant to deduct from the amount actually paid by the bank the amount, if any, by which the benefit to the appellant under the contract has been lessened by the bank's failure to act in accordance with its terms. But, as I have before pointed out, the appellant has failed in showing any damage by which the amount of the respondents' claim can be cut down, or by which the benefit conferred by the payment has been lessened in value, therefore the bank would be entitled under such new implied contract to the full amount of their present claim.

On these various grounds I am of opinion that the appellant's position is quite untenable. He has had the benefit of the payments and credit of the bank; he cannot escape from paying for that benefit the amount which he contracted to pay and which the learned Judge in the Court below has found to be due. For these reasons I agree that the appeal must be dismissed.

Isaacs J. The first question argued was whether the bank, by accepting the drafts without the specified policies of insurance, exceeded the authority given to them by the defendant. In my opinion they did. The contrary contention rests upon a foundation which, so far as I can see, has no existence in fact or in law.

It is this: That Scott Robson by his contract with Friedlander & Co. had a right to have his drafts negotiated by the bank in Buenos Ayres; that consequently his contract contemplated the policies of insurance being issued there and there only; that the defendant altered that contract by subsequent arrangement with him; and notwithstanding his written agreement with the bank, authorized Berry, Barclay & Co. to request the bank to accept the drafts without the Buenos Ayres policies, and therefore without any.

Every one of those links is essential to the contention, but, so far as I can perceive, not one of them can be sustained.

The contract of 28th January between Scott Robson and

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Friedlander was in a form quite common. It provided "Payment by London banker's acceptance of seller's drafts at 90 days' sight under confirmed credit with documents attached as usual, which are to be given up on acceptance."

Stopping there for a moment, the legal position hardly admits of doubt. The seller was to draw on some bank at London at 90 days' sight, attaching the specific shipping documents, not necessarily physically fastening them together, but sending them in such connection as to show that the shipping documents and the drafts were associated with the same goods and with each other. On presentation the drafts and the shipping documents would part company, the seller holding the accepted drafts, the bank retaining the documents, the symbols of the property—in law the property itself—and also the protection against loss during the voyage—by means of the insurance policies. The price covered the insurance as much as the goods themselves, and was indivisible. Why should it be paid except on delivery of the article purchased? What right did this contract give the seller? His accepted drafts would doubtless be a valuable means of raising money—he could get the then present worth of the bills—but that was optional with himself, and no more a part of the bargain with Friedlander than the resale of the wheat, which was placed within the power of the buyers, was any concern of the seller.

But it was said that the words "under confirmed credit" involved the duty of Friedlander to see to the negotiation, that is, the discounting, of the drafts before their acceptance. I cannot so read those words. The situation was plain. The Buenos Ayres merchant desired something more than the mere promise of an Australian buyer that he would duly accept and pay for the wheat, the property in which was to be transferred on acceptance. The transfer of the indicia of the property and of its protection against loss was to be an act concurrent with the payment—that is, by a 90 days' acceptance. (See *Sanders* v. *Maclean* (1); and *Shepherd* v. *Harrison* (2)). In the latter case, which was afterwards affirmed by the House of Lords, *Cockburn* C.J. speaking of a cases sufficiently similar, said (3):—"The handing over the bill of

(1) 11 Q.B.D., 327, at p. 341. (2) L.R. 4 Q.B., 196, at p. 203; 493, at p. 496.
(3) L.R. 4 Q.B., 196, at p. 203.

lading and the acceptance of the bill or bills of exchange should be *concurrent parts of one and the same transaction.*" In the Exchequer Chamber *Kelly* C.B. said practically the same thing. See also *Bank of China, Japan and the Straits* v. *American Trading Co.* (1). Consequently it was all important for Scott Robson to have some business certainty that they would be paid if they parted with their goods. Friedlander would have to get a credit issued to him by a London bank in favour of Scott Robson whereby the purchase money would be assured, and this credit was to take the form of a promise by the bank to accept the drafts. But an assurance by the buyer that such credit had been obtained would not be sufficient, the seller would still be trusting to the buyer's word: and so the fact that the credit was obtained must be "confirmed"—that is, confirmed by the bank. Of course, that credit was only to last until the acceptance, because once the drafts were accepted by the bank they spoke for themselves and Scott Robson was safe. Now that is the whole position under the original contract of sale and purchase—except the detailed stipulations about the insurance policies. Those are only of importance in view of the argument. As I read them—so far as material to this matter—the seller had the option of selecting the underwriter, provided he was English or Continental, and was "approved"—that is, one to whom no reasonable objection could be made, and paid losses in England and on a gold basis and on Lloyds' conditions, the seller, however, not being responsible for his solvency. The seller was not restricted as to the place of insurance—it might be England or the Continent, or Buenos Ayres, provided the other conditions were satisfied, and provided, of course, the goods were covered throughout the risk. Scott Robson could at his discretion have waited for the formal policies until the drafts and bills of lading reached England, or have arranged by cable to give sufficient information to have them prepared in advance. But all that was at his option. He was to have the right to present the drafts in London together with the requisite documents and have them accepted. That was all that Friedlander undertook. Now what happened?

On 29th January Berry, Barclay & Co. cable to Friedlander &

(1) (1894) A.C., 266.

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Co. asking if they require separate policies of insurance. Next day Friedlander answers "Yes, who are the underwriters; prefer Commercial Union Association, Fire Life Marine." Berry, Barclay & Co. reply the same day "Have insured at Lloyd's. Open a credit in favour of Scott Robson." It is important to remember that this was not done by any agreement with Friedlander. The company they suggested was not selected. The underwriter selected was chosen without their concurrence. They were merely informed of the fact, on the footing that the seller had done what he had a right to do—as indeed he had; and Friedlander was requested to open the stipulated credit.

The action of the seller, through Berry, Barclay & Co. in insuring the goods, was evidenced also by the cover note dated 9th February 1903. On 12th February 1903 Friedlander obtains the necessary credit from the bank. Looking at the document of that date Ex. No. 135, the letter of request, acceded to by the bank, and therefore constituting the contract, and regarding its language apart from outside circumstances, I see no difficulty in ascertaining its terms.

They may be summarized thus :—

1. The bank were to issue to Friedlander a credit for £28,000.

2. That credit was to authorize Scott Robson of Buenos Ayres to draw on London at 90 days' sight not later than 10th March, a date afterwards extended to 20th March.

3. The drafts were to be against the shipping documents, to be hypothecated to the bank or their agents.

4. Among those shipping documents insurance was included because that was to be effected by shipper.

5. The drafts were to be accompanied by the bill of lading, policy of insurance, merchants' certificate of weight and quality.

6. Separate document for each 100 tons.

7. Also the certificate of the bank's agents at Buenos Ayres that the conditions of the credit were complied with.

I omit some immaterial provisions.

Then came the statement of consideration.

1. To give collateral security.

2. To provide funds to meet drafts at due date by purchasing the bank's drafts.

3. To pay interest in case of delay.
4. To pay cash for the goods if they arrived before advice of negotiation of the bills.
5. The drafts under the credit to be *sold* to the bank's agents if the rate of exchange is favourable as can be got elsewhere, or else Friedlander to pay agents' charges up to ¼ per cent.

As to this Friedlander could not bind Scott Robson to dispose of his bills to the bank's agents, and I read this as merely providing that, unless he does so, Friedlander will satisfy the agents' charges up to ¼ per cent. A mere mode of indemnifying the bank in their relations with the agents.

6. £70 commission on the issue of the credit.

Again I see no indication of any bargain by the bank that they will negotiate or cause to be negotiated the unaccepted drafts of Scott Robson. Why should there be? The drawing is still to be in London, the acceptance to be there. The stipulation that unless the drafts were sold to the bank's agents, their charges were to be paid, appears to me altogether inconsistent with the idea that the agents were to discount them as an essential part of the contract. Towards the end of the letter of request the expression "your acceptance" is found a recognition of the duty undertaken by the bank. The insurance is left to the shippers. The drafts are to be "accompanied," &c. What does accompanied mean? I think it means accompanied for the purpose of the credit, that is, for the purpose of acceptance. In other words, the drafts when presented for acceptance are to be presented along with the specified documents so that the bank may get the property, and its protective insurance arrangements, at the same moment as they pay for it.

The agents' certificate is to be taken as true, and is to assure the bank that all has been done, including insurance, that is required for compliance with the credit.

At least they have to do so, so far as they can; and if the agents are satisfied of that, their certificate is to exonerate the bank. But as I have already pointed out, Scott Robson was, by the terms of his contract, at perfect liberty to effect the insurance in London and arrange to get the formal policies there in time to

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attach to or accompany (the terms are indifferent) the drafts when presented in London. He could select the method most calculated in his opinion to suit his business as to discount or otherwise, and he did. That did not affect Friedlander.

The contract having thus been made between the bank and Friedlander, it only remained to be carried out.

The first step towards this was taken on the same day. A cable from Melbourne to London was required, and its terms were settled in writing and are part of Ex. No. 135. Friedlander paid the bank to send it. It expressly names "insurance policy" on the same level as bill of lading, &c.; that is, obviously, as one of the documents to accompany the draft presented.

Here was an express direction, in relation to a special contract of employment, given personally and in writing and accepted as given.

When the cable in those terms reached the London office of the plaintiff bank, it became the duty of the bank, unless otherwise authorized by Friedlander, to comply with the terms, if they acted in the matter at all. But what did the London branch do?

It cabled the same day to Buenos Ayres to the bank's agents there, the London and River Plate Bank, "*negotiate* drafts of Scott Robson Bank of Australasia, London, *accompanied* by" certain documents excluding insurance policies.

I may stop to observe that the word "accompanied" in that cable strongly bears out the view already expressed as to the meaning of the word. The negotiation is to take place at Buenos Ayres, according to the cable, and "accompanied" must mean, not physically attached to, nor even in actual physical association all the way from Scott Robson's office to the London and River Plate Bank, but merely that the two things are presented together.

The moment of negotiation is the important point of time in that cable—just as the presentation for acceptance is in the documents to which I have referred, and to which Friedlander was a party.

Naturally once the drafts were negotiated without accompanying policies of insurance, the Bank of Australasia were bound, at least as against *their* agents the London and River Plate Bank,

to accept them. What the effect on Scott Robson might be I do not stop to inquire because all parties have acted on the basis that he at all events was to be treated as having performed his contract, leaving the bank and Friedlander to dispute between themselves.

But what was the justification for the bank departing from their explicit instructions? The departure was intentional—it could not well be otherwise. Mr. Lane, their London secretary, admitted so much. I read some of his evidence:—"Q. Did you intend to send to the River Plate a cablegram in the same terms as you received it from Melbourne? Is that what you intended to do? A. Not at all.

"Q. Did you intend to send it in different terms? A. I intended to send it the same as I did.

"Q. Are they the same or are they different? A. It all depends which way you read the telegram.

"Q. What is your view of it. Do you think they are the same, or do you think they are different? A. There would be two ways of opening credit of course.

"Q. Do you think these cablegrams agree in respect to insurance? A. No, not necessarily.

"Q. They either agree or they do not agree. Do they agree? A. I think they do in a sense. I cannot say more than that.

"Q. What do you mean by 'in a sense'? A. They agree because the bank are going to get the policy.

"Q. Then you did not make any alteration in the cable you sent to the River Plate because of something that Berry, Barclay & Co. told you. That did not weigh with you? A. Yes, of course it did.

"Q. You say 'of course it did'? A. It did.

"Q. Then you knew at the time you sent it that it did not agree with the cable you had received from Melbourne. If what Berry, Barclay & Co. told you weighed with you, you knew there was a difference between the two because they told you something different. That is so, is it not? A. You have got me up in a corner. I cannot answer.

"Q. I do not know why you should be in a corner, I only want to know. I want to get this quite clear. I put it to you now so

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that there may be no mistake about it at all. You knew that the cable which you sent to the River Plate differed from the cable which you had received from Melbourne, and you sent it in a different form because Berry, Barclay & Co. had told you that they would look after the insurance in London. That is a fact? A. That is so.

"Q. And the particular gentleman from Berry, Barclay & Co. who had told you that, I think you say was Mr. Cumming? A. That is so.

"Q. Now you had, I understand, mentioned that to Mr. Jeans, your manager? A. Yes.

"Q. And having mentioned that to Mr. Jeans, did he give you instructions to send the cable in the way you did? A. Yes."

Now the history of that information appears to be that for a day or two before 12th February Mr. Cumming had been inquiring at the bank whether the credit had been opened. He was told that it had not been, which was true so far. He happened to be there just when the cable to establish the credit was decided, and was informed of it. He then said that Berry, Barclay & Co. had attended to the insurance or would attend to it. He also asked for a copy of the credit. The manager Mr. Jeans was consulted, and a promise of the copy was given to Mr. Cumming, a promise which was performed.

Mr. Blogg is the London accountant of the plaintiff bank.

He accepted the drafts on 16th April without having any insurance policies at all. It appears that on or about 12th February Mr. Jeans informed the accountant that Berry, Barclay & Co. were to give the policies, and, covered by the instructions of his superior officer, he accepted the drafts, having at the time a verbal undertaking from Berry, Barclay & Co. that the policies would be sent that day or the next, and having towards the end of February been informed by Mr. Cumming that the policies—a large number—were in course of preparation, and it would take a long time to get them together. He had also, apparently at the same time, seen the cover note of 9th February. He is pressed on the subject in cross-examination, and his evidence is given as follows:—

"Q. How Berry, Barclay & Co. came to insure you do not know? A. No.

"Q. And you did not trouble to inquire? A. It did not affect the matter.

"Q. It was sufficient for you that somebody of the name of Berry, Barclay & Co. gave a verbal undertaking that at some time or other they would hand you over policies of insurance? A. Yes.

"Q. Of course you know that it was desirable to send the policies with the bills of lading? A. I knew that was the customary course?

"Q. And as you had seen this telegram of 12th February, of course you knew that it was especially desirable in this case because it was the instructions? A. If it had not been the instructions.

"Q. You knew that was the instruction? A. Yes.

"Q. It is your ordinary practice, and in addition, in this particular instance, you had instructions to do it? A. Yes.

"Q. I do not understand it, I cannot understand, if that is the ordinary practice, and these were your instructions, why did you not do it? A. I did my utmost to get the policies as soon as I possibly could.

"Q. But you accepted the draft without them? A. But we had the undertaking which was quite as good as the actual policies.

"Q. Was the undertaking any use to send to Australia? A. No, not to send to Australia.

"Q. You wanted the policies to send to Australia? A. Yes.

"Q. Why did you not get the policies before you accepted the draft? What were you thinking about in this case? A. We could not get them. We tried to get them and could not, so we had to do the best we could, and had to take an undertaking.

"Q. What steps had you taken to try and get the policies? A. I had spoken to Berry, Barclay & Co. on more than one occasion, certainly once at their office, and I think once or twice in our office.

"Q. Are those all the steps you had taken to try to get them? A. Yes.

"Q. You pointed out to Berry, Barclay & Co. that if the drafts

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came forward and the bills of lading without the policies your bank would not accept them? A. I do not know that I told them that.

"Q. What had you said to them? A. I simply told them to expedite matters as much as possible, that I wanted the policies.

"Q. And that is all you said? A. Yes.

"Q. You think you said that more than once? A. Certainly."

This does not look as if the bank regarded themselves as relieved from the obligation as to the policies, but rather embarrassed by their own voluntary arrangements contrary to their instructions. And I would at this point add in view of one argument presented, that no number of departures from previous contracts could justify the breach of this.

Mr. Jean's evidence as to his looking on Berry, Barclay & Co. as agents for Friedlander is immaterial, because not only was no proof of any authority given, but Mr. Jeans admits he never was in personal communication with that firm on the subject.

On 17th April, Berry Barclay & Co. gave a written undertaking to get the policies—they lodged them with the bank on 1st May, and the bank forwarded towards the end of the month.

How can Friedlander be affected by the fact that the bank trusted to the undertaking of an eminent London firm to get the policies, and ultimately found when the drafts were presented that no policies existed and again took that firm's undertaking to get the policies? Plainly, undertaking or none, the bank, so far as the River Plate Bank were concerned, were bound when 16th April came and the drafts were presented by that bank, to honour them by acceptance. The initial trouble was that on 12th February Mr. Cumming's announcement led to one departure from instructions, viz., undertaking to accept apart from policies, and the bank's own method of doing business with their agent led to another, namely, negotiation before acceptance. I do not say that negotiation was wrong; it may have been perfectly right as an addition to the business authorized by Friedlander, and as part of the bank's own business, but it was quite outside Friedlander's authority. The facts therefore simply amount to this, that Berry, Barclay & Co. acting for the seller, select Lloyds' as underwriters and so inform the purchaser, who makes no

objection. The purchaser subsequently makes a distinct written contract with the bank who without communication with the purchaser depart from the terms of the contract, because they trust to an undertaking from Berry, Barclay & Co. given without any reference to Friedlander. It must have occurred to the bank's representatives in London as extraordinary, if they gave the matter a moment's thought, that Friedlander should have stipulated so clearly for the insurance policies on 12th February if he had as far back as 30th January agreed to pay without them. One would have at least expected some personal reference to their employer in a transaction of such magnitude.

If the authority actually given by Friedlander was impossible of performance by reason of Friedlander's act, that would have been a good reason for not performing it at all; but it is no reason whatever for doing on his behalf what he never authorized the bank to do. The receipt of the goods, as protected by insurance on one hand and accepting the drafts in payment on the other, were in the words of *Cockburn* C.J. (1) "concurrent parts of one and the same transaction." If the bank were not bound to see that the policies were in their possession before paying for the goods, I cannot see that they were under any obligation to procure them at any later period.

I am therefore of opinion that on 20th May, when De Beer learnt that the drafts were accepted without policies of insurance, Friedlander could have declined to recognize them, and have left the bank to bear the transaction.

But the plaintiffs claim to have got over the difficulty by Friedlander waiving any such objection and electing to adopt the goods notwithstanding the departure from the terms of the written contract. Now, the facts that amount in any given case to waiver, or adoption or election, depend on the actual circumstances. In a matter of this kind, particularly when attended with the fact of a falling market, a merchant in the position of Friedlander towards the bank should act promptly, and when he does act, he should act consistently. It would be most unreasonable to permit him to treasure up for future possible use a mere technical breach of instructions as this was (for no actual damage

(1) L.R. 4 Q.B., 196, at p. 204.

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resulted or could result from the error, and the bank acted quite *bona fide* and not unreasonably apart from their strict contractual obligation), and to experiment with the goods in the market, so as to take them if he could get a profit and throw them back if he saw a certain loss. I do not want to go into the details, they have been fully dealt with during the argument.

I entirely agree with what the learned Chief Justice has said as to the facts on this part of the case, and to allow the defendant, after all that has happened, to completely disavow responsibility for the bills, would be permitting him to approbate and reprobate.

Reducing the case to a mere question of damages for breach, it is evident none were proved in excess of the £50 paid into Court. I have therefore arrived on all points at the same conclusions as Mr. Justice *Hodges*, and agree that this appeal should be dismissed.

Appealed dismissed with costs.

Solicitors, for the appellant, *Blake & Riggall.*

Solicitors, for the respondents, *Moule, Hamilton & Kiddle.*

B. L.