what is substantially the true meaning of rental charge to be accounted for.

I agree therefore that this appeal should be allowed.

Appeal allowed.

Solicitors, for appellants, *H. J. Brown & Mitchell*, Newcastle, by *Andrews, Moseley & Manning.*

Solicitors, for the defendants, *W. H. Baker*, Newcastle, by *Mackenzie & Mackenzie.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

MARY HART . . . . . APPELLANT; DEFENDANT,

AND

CHARLES ARTHUR MACDONALD . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Contract—Construction—Implied term—Performance—Reasonable time—Written contract—Evidence of surrounding circumstances.

The plaintiff entered into a written contract to erect a dairy plant and butter factory upon the defendant's land, situate in the western district of New South Wales. The contract provided that the plant should be paid for out of the proceeds of butter produced by the defendant's cows, and manufactured within the factory, and contained a statement that there was no agreement or understanding between the parties which was not embodied in the written contract. In an action by the plaintiff to recover the price of the plant which the plaintiff had erected, evidence was given for the plaintiff that, if the conditions existing at the date of the contract had continued, a reason-

H. C. OF A. 1910.

HART v. MACDONALD.

able time would have elapsed for the production of sufficient butter to pay for the plant, but it also appeared that, after the erection of the plant, by reason of a drought, there was not sufficient feed to enable the defendant's cows to produce butter.

Held, that notwithstanding the negativing of any agreement not embodied in the written contract, the language of that contract properly construed imported a promise by the defendant that she would produce sufficient butter to pay for the plant within a reasonable time, and that evidence as to the conditions existing at the date of the contract was admissible on this point. But *held*, also, that the onus was upon the plaintiff to prove what were the conditions existing after the plant was erected, and to show that under these conditions a reasonable time had elapsed for the production of sufficient butter to pay for the plant; and *held*, on the evidence, that he had failed to discharge this onus.

Decision of the Supreme Court: (*McDonald* v. *Hart*, 9 S.R. (N.S.W.), 463; 26 W.N. (N.S.W.), 105), reversed on different grounds.

APPEAL by the defendant from the decision of the Supreme Court of New South Wales refusing an application by the defendant to set aside a verdict found for the plaintiff, or to enter a nonsuit, or verdict for the defendant, or in the alternative to grant a new trial, upon the grounds (1) that the plaintiff should have been nonsuited, as there was no evidence to support either of the counts of the declaration; (2) That evidence of the circumstances surrounding the making of the contract, the subject-matter of the action, was wrongly admitted; (3) That the verdict was against evidence.

The facts are sufficiently stated in the judgment of *Griffith* C.J.

Wise K.C. and *Boyce*, for the appellant. The written contract does not support the contract as alleged in the declaration. The contract expressly provides that there is no agreement or understanding not embodied in the tender. But assuming that there is an implied obligation upon the defendant to use reasonable efforts to produce butter for payment of the purchase money, it was impossible to perform the contract by reason of the drought, and both parties were exonerated from their liability under the contract: *Krell* v. *Henry* (1). If it is not a case of impossibility of performance, the evidence shows that at the date of the action

(1) (1903) 2 K.B., 740.

a reasonable time had not elapsed for the fulfilment of the contract. The onus is on the plaintiff to prove that the delay in commencing to manufacture butter was due to the defendant's default. The plaintiff must prove what the conditions were, and that under these conditions the defendant could by reasonable efforts have produced sufficient butter to pay for the plant: *Appleby* v. *Myers* (1); *Howell* v. *Coupland* (2); *Laws of England*, vol. VII., p. 430.

The jury were no doubt entitled to disbelieve the defendant's evidence, but that would not entitle them to find a verdict for the plaintiff if he had not proved the defendant's default: *Cohen* v. *Slade* (3). The evidence as to the conversation between the parties at the date of the contract and the subsequent correspondence was not relevant upon this point, and was wrongly admitted.

Knox K.C. and *Pitt*, for the respondent. The defendant is not entitled to a nonsuit. The plaintiff gave evidence that 18 months was a reasonable time for payment under ordinary conditions. It was then for the defendant to show that the conditions were so unusual that under the circumstances as they actually existed a reasonable time had not elapsed. In other words, after the plaintiff's evidence the defendant had to offer an excuse for non-performance, and it was quite competent for the jury to disbelieve the defendant's evidence: *Postlethwaite* v. *Freeland* (4); *Ardan S.S. Co.* v. *Andrew Weir & Co.* (5). The evidence as to the conversation between the parties at the time of the contract and as to the subsequent correspondence was relevant on the question of reasonable time: *Ellis* v. *Thompson* (6).

[GRIFFITH C.J. referred to *Gordon* v. *Macgregor* (7).]

In any case the defendant could have paid some part of the contract price. In fact nothing has been paid. The defendant must show that the time had not arrived for payment to begin.

Wise K.C., in reply.

Cur. adv. vult.

(1) L.R. 2 C.P., 651.
(2) L.R. 9 Q.B., 462.
(3) 12 S.C.R. (N.S.W.), 88, at p. 95.
(4) 5 App. Cas., 599, at p. 614.
(5) (1905) A.C., 501.
(6) 3 M. & W., 445.
(7) 8 C.L.R., 316, at p. 321.

H. C. OF A. 1910.

HART v. MACDONALD.

April 20.

GRIFFITH C.J. This action was brought by the respondent against the appellant to recover the price of a dairy plant supplied by him to her at a property situated some 200 miles west of Sydney in a part of the country where, as in other parts of Australia, there is sometimes an absence of rain for very long periods. The contract for the supply of the dairy plant was in the form of a written tender accepted by the appellant, and dated 20th April 1906. By the terms of the contract the plant was to be erected by the plaintiff on the land of the defendant.

The stipulation relating to the terms of payment provided that "the price of the machine shall be £766 10s., payable to me as follows:—You to consign all butter produced by your own cows, and manufactured within the factory, to an approved agent in Sydney, you giving authority in writing to hand proceeds of sales to me, less 10 per cent. for working expenses. Interest at the rate of 6 per cent. per annum to be paid on unpaid balance after factory has been started six months." The following term was also embodied in the contract:—"It is to be understood that there is no agreement or understanding between us not embodied in this tender and your acceptance thereof."

The plaintiff accordingly erected the plant, which was not completed until July 1907, but the delay was found by the jury to have been acquiesced in by both parties. No payment having been made, the plaintiff issued the writ in this action on 8th January 1909, claiming to recover the contract price, and also some other sums of money alleged to be owing to him. The first count of the declaration alleged a promise by the defendant to commence the business of dairying upon the erection of the plant, and to carry on that business until the plaintiff should have received payment, and to manufacture butter in sufficient quantity to pay the plaintiff the price of the plant within a reasonable time of its erection. The breach alleged was that the defendant "did not commence the business of dairying upon the erection of the said plant, and did not carry on the said business until the plaintiff had received payment as aforesaid, and did not manufacture butter in sufficient quantity to pay the plaintiff the price of the said plant within a reasonable time." There was also the common count for money due for interest on the price of the

plant and some other alleged debts. The defendant denied the agreement and the alleged breaches, and to the common count pleaded never indebted. There was no plea that a reasonable time had not elapsed for the defendant to comply with her promise to pay for the plant, but the case was treated by both parties as if that was the substantial point in issue. The case must, therefore, be considered as if the performance of the condition precedent had been formally denied. This is, indeed, perhaps involved in the denial of the alleged breaches, having regard to the form in which they were stated.

At the trial the defendant contended that under the terms of the contract there was no obligation upon her to pay for the plant unless sufficient butter was in fact produced. The learned Judge very properly overruled this contention. There is no doubt that in a contract such as this there is an implied stipulation that the purchaser will on his part do all that is necessary to put himself in a position to pay. As was said by *Bowen* L.J. in *Oriental Steamship Co.* v. *Tylor* (1):—"The case comes within the well-known rule that when the contract as expressed in writing would be futile, and would not carry out the intention of the parties, the law will imply any term obviously intended by the parties which is necessary to make the contract effectual."

The application of that rule is not affected by the inclusion in the contract of the term I have read, that it is to be understood that there is no agreement or understanding not embodied in the tender. A contract to the effect stated in the first count of the declaration arises by necessary implication upon a proper construction of the express words. The question is whether there has been a breach of that contract by the defendant.

It was a condition precedent to the plaintiff's right to recover that a reasonable time should have elapsed to enable the defendant to produce butter from the proceeds of which payment could be made for the plant, and on this issue the onus of proof was on the plaintiff. The question whether it had or had not elapsed was a question of fact depending on the particular circumstances of the case. In the case of some contracts mere lapse of time might be sufficient proof. The circumstances of

(1) (1893) 2 K.B., 518, at p. 527.

H. C. OF A. 1910.

HART v. MACDONALD.

Griffith C.J.

each case must be considered. The material circumstances in this case were that the defendant intended to embark upon the enterprise of dairying in a part of New South Wales which is subject to droughts. It was in the contemplation of both parties, when the contract was entered into, that dairying should be carried on by means of the natural grasses. Different considerations might apply to a contract couched in similar terms with reference to a well watered part of England. The material conditions which actually prevailed are another element to be regarded in determining whether a reasonable time had elapsed for the fulfilment of the contract. The burden being upon the plaintiff to prove what these conditions were, he endeavoured to discharge it. The only oral evidence which he offered relevant to this point was of a conversation that took place between a witness for the plaintiff named Anderson and the defendant and her husband before the contract was made. At this conversation Anderson said that he thought that a pound of butter per cow per day would be a fair average yield, and that his estimate would be twelve and a quarter boxes per week for 100 cows. Hart said, turning to the defendant, "You can safely make it fourteen boxes." Anderson said: "On that basis they could have paid for the plant in 8 to 9 months." That is said to be some evidence that 8 or 9 months would have been a reasonable time for payment. Very likely it was, if that was all that had to be considered. But that assumed an average season. It is suggested by the plaintiff that an ordinary good season should be assumed to have continued unless the contrary is shown, but I am not at all sure that that is so. The plaintiff also tendered a batch of correspondence that passed between the parties, from which it appeared that the defendant had continually informed the plaintiff that in consequence of drought it had been impossible to do any dairying, and that there was not sufficient natural feed to allow the cows to produce milk, and that the plaintiff never disputed the truth of these statements. This correspondence continued up to a week or two before the action was brought. I will refer briefly to some passages in the letters. On 1st February 1907, about five months before the plant was erected, the defendant's husband wrote to the plaintiff: "Never in the history of white

man was ever such a season seen in these parts." That was a sanguine hope expressed before the plant was erected, but the hope was disappointed. On 11th April 1907 the defendant wrote, "I regret to say for the last few weeks we have been getting a very bad and dry time, but with us we get a spring at any time we get rain, so that even a day may change our condition. . . . It is dry here at present, and we cannot milk till it rains." Everybody who knows the conditions of that part of the country knows that the statement that "we cannot milk till it rains" was probably true.

On 7th August, after the plant had been erected, the plaintiff wrote to the defendant: "I want you to let me have some definite information as to the number of cows you intend milking, say, by the end of the year. When do you anticipate making butter in sufficient quantities to consign to Sydney? You are conversant with the terms of payment and I hope before the end of the year that you will have made a good start, as naturally I am anxious to receive a payment on account." In reply to this letter the defendant wrote on 13th August: "I have to say that I hope to have in milk about the end of the year, say 100 cows. We are not milking any cows at present as the grass is not good enough. I will consign all butter made by me from my own cows as soon as the grass or season permits, and no one is more sorry than I am that the season has been so unfavourable and late for big stock as I fully wrote you on the prospects yesterday." On the previous day the defendant had written that there had been a good fall of rain, "and this if frosts keep off will give us good grass for milking about end of October or sooner if more rain falls, but the frosts have been the worst ever known in these parts, prevents the grass from growing, and keeps the stock back so much. But I look forward to good times ahead . . . . . Trusting that the season will soon be such that I shall be able to send you some good consignments of butter," &c. On 28th August the plaintiff acknowledged receipt of these letters, and said: "I am surprised at your information regarding the number of cows that you expect to have by the end of the year. It is indelibly impressed upon my memory that you represented by the time the butter factory was an established fact you would be

H. C. OF A. 1910.

HART v. MACDONALD.

Griffith C.J.

milking at least from 300 to 500 cows, and of course to a certain extent it was upon such statement that I agreed to the terms of payment as per contract." That is relied on by the plaintiff as evidence that the defendant had represented that this number of cows would be milked. But, unfortunately for the plaintiff, one of his own witnesses had said that the defendant's representation was that the probable number of cows would be 80 to 100. If the statement in the defendant's letter were any evidence of such a representation by the defendant, the plaintiff disproved it by his own evidence.

On 2nd September the defendant wrote in reply to this letter: "Any statement made by me was in accordance with prospects of season, and surely it does not need me to mention again the condition of things of late, as I feel sure you know them as well as I do. . . . You know the season does not justify the milking of a single cow."

The correspondence after this date was almost entirely devoted to an attempt by the defendant to raise money on mortgage to enable her to pay the plaintiff. In a letter of 25th November the defendant said: "The agent says he will get me the loan, but says what is telling against him is the very dry spell the State is passing through. . . . What is telling against me is the very dry time." In 1908 the conditions were apparently worse. On 7th April 1908 the defendant wrote: "Mr. Kilgour was to have visited me to make a valuation this week, but owing to the dry time we are passing through, suggests through agent that it will be best to wait for the first rain before making valuation." Plaintiff replied on 11th April: "I quite recognize that it would be a mistake for Mr. Kilgour to go there during the drought, as it would compel him to give recommendations based on adverse conditions. . . . I think you will admit I have done my best to meet you under the unfortunate conditions that have prevailed." On 20th May plaintiff wrote: "I hope that there will soon be a more plentiful rain, ensuring that prosperity which has forsaken your district for some considerable time." On 25th May the defendant replied: "I am grieved to say this is the worst drought ever seen in these parts, worse than 1902. But while waiting for rain I am making every possible improvement, so

that the full measure of my project shall be assured when the rain does come." She added: "We have plenty of currajong scrub to keep our stock from perishing." That means that it was just possible to keep the stock alive by feeding them on the leaves of scrub trees. If that was true, it was quite impossible to start a dairy without the use of purchased fodder, which was admittedly not in the contemplation of the parties. In a letter of 24th June 1908 the plaintiff said: "I have had great pleasure in reading yours of the 19th to the effect that you have had a plentiful rain, which I hope terminates the longest drought you have ever experienced. Eighteen months of dry weather is more than any country can stand, but we have had further rains within the last 48 hours, and I am glad to see that a little more has reached your district." On 8th July he wrote: "When you contracted for the machinery you were then in the midst of a drought, and must have known whether you were in a position to carry out your portion of the contract or not." On 7th November the defendant wrote: "I regret the tone of your letter, as I feel that you must know that from first to date the season has blocked the idea of progress, and now when the change must be at hand or nearly so, you write, doubting or ignoring previous correspondence. On further consideration I hope you will see the folly of urgent or hasty actions, and feel assured that every action hoped, or asked for, will be gone into in our mutual interest, and note that it is only the season is a temporary block."

There was nothing to suggest that the actual facts as to the weather were not as stated in the correspondence.

On that evidence the defendant's counsel moved for a nonsuit. He mainly relied on the contention that no implied obligation could be held to exist under the express terms of the contract. The application for a nonsuit was refused. I think that this was an instance of how insistence on an unsound argument may distract attention from a sound one. The defendant then adduced evidence the effect of which, if believed, was to show conclusively that under the actual conditions it was quite impossible to start a dairy except by adopting extraordinary means which were never in the contemplation of the parties to the

H. C. OF A. 1910.

HART v. MACDONALD.

Griffith C.J.

contract. Upon the plaintiff's own evidence, then, which was strongly corroborated by the evidence for the defence, it appeared that at the date of commencing the action a reasonable time for payment had not elapsed. The jury found a verdict for the plaintiff for £793 0s. 4d., and found specially that a reasonable time had elapsed for the defendant to have produced sufficient butter to pay for the plant. The defendant applied for a new trial upon the grounds—1. That the plaintiff should have been nonsuited as there was no evidence to support either of the counts of the declaration; 2. That evidence of the circumstances surrounding the making of the contract outside of the contract was wrongly admitted (the evidence objected to included the correspondence); 3. That the verdict was against the evidence. The Full Court discharged the rule *nisi*. In their judgments as reported the learned Judges dealt with two points only. They rejected the contention that there was no such implied obligation as was alleged by the plaintiff in the declaration, and held that the evidence objected to was properly admitted. That evidence was clearly relevant to the question of what was a reasonable time for fulfilment of the contract. But they did not deal with the point that the verdict was against the evidence. Again, I think, an unsound argument prevented attention to a sound one. On the evidence the plaintiff had failed to make any case against the defendant on the first count. Therefore, while I agree with the opinions of the learned Judges on the points with which they dealt, I think that the defendant was nevertheless entitled to succeed.

The plaintiff also contended that, even if he could not recover the price of the plant, he was entitled to a verdict for something under the common count. But, excluding the amount claimed for interest on the price of the plant, it is admitted that the defendant is entitled to set off a larger sum than the plaintiff claims. The contract provided that interest should be payable on the unpaid balance of the price of the plant after the factory had been started six months, and it is suggested that the interest on the contract price ran from the expiration of six months from the completion of the plant by the plaintiff. But there could be no unpaid balance until the time for beginning payment had

arrived. Interest therefore never began to run. It follows that the appeal must be allowed.

O'CONNOR J. I am of the same opinion. The determination of this appeal must turn upon the question whether the plaintiff has sufficiently discharged the onus of proof cast upon him by the first count of the declaration. With regard to the verdict on the common counts, if the sum allowed the plaintiff for interest is not recoverable, the amount of credit to which the defendant is entitled is more than sufficient to cover the other items. It is quite clear from the clause in the contract relating to payment that interest cannot begin to run until the factory has been going for six months. As the factory never started that condition has not been fulfilled and interest is not recoverable. We are, therefore, thrown back on the question involved in the first count. The central condition of the contract is that relating to payments which are to be made out of the proceeds of sale of butter. Although there is no express undertaking on the part of the defendant to open and carry on the factory, such a promise on her part must be implied. Where in a contract of this kind a term is to be performed by one of the parties, which is not reasonably possible of performance unless something is done by the other party, the law will imply a promise by that other party to do that something.

That implication arises whether there is a condition such as that at the end of this contract or not. Every implication which the law makes is embodied in the contract just as effectively as if it were written therein in express language. The plaintiff's cause of action, as alleged in the first count of the declaration, seems to me to be established by the terms of the contract itself, reading into it a condition which the law will imply. The principle upon which the condition is to be implied is well stated in the judgment of *Vaughan Williams* L.J. in *Krell* v. *Henry* (1). That was the case of a contract made in anticipation of the procession at the King's coronation which did not take place on the date as first arranged. *Vaughan Williams* L.J. says (2):—"I think that you have first to ascertain, not neces-

(1) (1903) 2 K.B., 740.

(2) (1903) 2 K.B., 740, at p. 749.

H. C. OF A. 1910.

HART v. MACDONALD.

O'Connor J.

sarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited."

It may be conceded that it is physically possible to carry on dairying, so long as it is physically possible to obtain feed for the cows, if the commercial aspect of the transaction is disregarded. It may be that if these parties had in contemplation the erection of a dairying plant in some populous suburb of Sydney, for instance, the considerations which are now strongly in favour of the defendant would not arise. But the contract must be construed with reference to the circumstances and conditions in the contemplation of the parties at the time they enter into it. Here both parties were dealing with one another on the basis of what would be the method adopted of producing butter by an ordinarily prudent competent farmer in that part of the country, and it was stipulated that the machinery should be paid for out of the proceeds of butter so produced. One necessary foundation for a contract of that kind is that the country is in such a condition as to produce sufficient grass for dairying to be carried on in the ordinary way, by using the natural growth of grass. If after the dairy began working a dry time came, there might be imposed on the defendant an obligation to make some special effort to keep things going. But the obligation to start the dairy must be based on the assumption that the country is in such a condition that an ordinarily prudent man would be justified in starting the dairy with some reasonable prospects of producing marketable butter on a business footing. It is clear that the onus was upon the plaintiff to prove the contract, and that a breach had been committed by the defendant. The breach alleged was that under the circumstances then existing

the defendant did not commence and carry on the business of dairying. But she was not bound to commence or carry on the dairy unless under the conditions then existing dairying could be reasonably carried on. In order, therefore, to establish a breach the plaintiff was bound to prove that conditions existed under which dairying could be reasonably carried on. It may be that mere *primâ facie* evidence of that fact would change the onus, and cast upon the defendant the burden of excusing herself, but in order to constitute a *primâ facie* case the plaintiff must give some evidence to show that the defendant in not starting the dairy has acted unreasonably.

Two classes of evidence were relied on by the plaintiff. First, there was the conversation between Anderson and the defendant and her husband before the contract was signed. That was no doubt admissible upon the well known principle referred to in the judgment of *Alderson* B. in *Ellis* v. *Thompson* (1), cited by Mr. *Knox*. But the whole conversation on the face of it assumed that weather conditions suitable for carrying on a dairy would exist. That is the basis upon which the parties were discussing the question. Secondly, there was the correspondence put in evidence. I was at first much impressed by the argument founded on the statement by the defendant's husband in his letter of 1st February 1907. I quote the words, "Never in the history of white man was ever such a season seen in these parts." That was put forward as *primâ facie* evidence that the conditions were such that some preparations for at least starting the dairy might reasonably have been made. But that is one expression only in a large mass of correspondence, and its true relation to the matter to be determined becomes apparent when we observe that the factory was not ready to start until July 1907. This letter was therefore merely a somewhat rosy anticipation written some time before of what might be expected to be the existing conditions when the time arrived for actually starting the factory. As against that the whole of the correspondence points inevitably but to one conclusion, that the country was in such a condition of drought that it was impossible to produce butter, and that stock could only be kept alive by feeding them on

(1) 3 M. & W., 445.

H. C. OF A. 1910.

HART v. MACDONALD.

O'Connor J.

Currajong leaves. The existence of these conditions was so far recognized by the plaintiff that he was actually endeavouring to help the defendant to raise money on mortgage so as to pay him in some other way than by the production of butter, which had then become impossible. Upon this evidence it would not have been possible for the jury to legally come to any other conclusion than that it would have been unreasonable to expect the defendant to start the dairy or attempt to carry it on under the conditions then existing. Such being the evidence, it was the duty of the learned Judge to have nonsuited the plaintiff. He did not do so, but left the case to the jury. The result is that this Court must now make the order which the Judge should have made at the trial, and direct that the plaintiff should be nonsuited.

ISAACS J. read the following judgment. This action is brought for breach of an implied contract to commence and carry on the manufacture of butter so as to pay for a dairying plant, which was agreed to be supplied under a written agreement consisting of a tender and an acceptance, and to recover the price of the plant. The agreement contains this provision: "It is to be understood that there is no agreement or understanding between us not embodied in this tender and your acceptance thereof." It was urged that this provision excluded implications. But that is not so. It excludes what is extraneous to the written contract: but it does not in terms exclude implications arising on a fair construction of the agreement itself, and in the absence of definite exclusion, an implication is as much a part of a contract as any term couched in express words.

As to what is implied, it is useless to look at other cases for that purpose. They are useful, as Lord *Esher* M.R. said in *Hamlyn & Co.* v. *Wood & Co.* (1), only for the purpose of ascertaining the rule of law as to implications, and applying it to the particular case in hand. The Master of the Rolls then stated the rule which covers the whole ground, positively and negatively, in the following way:— "The Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a

(1) (1891) 2 Q.B., 488, at p. 491.

reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense I have mentioned."

He then cites *Bowen* L.J. in *The Moorcock* (1) to the same effect. To imply less than the rule thus formulated requires, would be to restrict the indisputable intention of the parties; to imply more would be to make a new contract for them.

The question then in every case is, taking that rule in hand, to discover the proper implication.

One of the most important portions of the rule is that a writing dealing with a matter of business must be considered in "a reasonable and business manner." So too *per Halsbury* L.C. in *Elliott* v. *Crutchley* (2).

Thus reading the present agreement, it is plain the parties meant that there should not be an immediate out-and-out sale for a price instantly payable, but that the plant itself should assist the purchaser to pay for it. The factory was to be started, butter was to be manufactured from milk produced by the purchaser's cows, and the proceeds were to be appropriated to pay for the plant.

No doubt that necessarily involved an undertaking—on the principle above stated—that the purchaser would commence factory operations—but when and in what circumstances?

The fact that she was not expected to pay for the machine independently of the proceeds of the butter of course negatives any assumption that she was to do so in circumstances of drought, when no sane dairy farmer would think of operating. Consequently the reasonable time which the law interweaves into such an agreement necessitates an inquiry as to whether, after the erection of the plant, natural conditions were such as would not merely sustain the appellant's cows alive but enable them to produce milk. The necessity of establishing that fact must be borne in mind throughout. Of course, the respondent cannot prove the breach alleged without establishing that fact by some means.

Mr. *Knox* very adroitly built up his argument on the appel-

(1) 14 P.D., 64. (2) (1906) A.C., 7, at p. 9.

H. C. OF A. 1910.

HART v. MACDONALD.

Isaacs J.

lant's admission, respecting the quantity of land and the number of cows she possessed and as to the capacity of these cows to produce butter. I agree with him that this was admissible. These matters were relevant to prove the subject matter of the contract, which involved inquiry as to what were the appellant's own cows, their production of butter, the site of the factory and the quantity of land available for pasturage. Consequently they were elements proper to consider in determining what was a reasonable time for performance of her implied undertaking. *Ellis* v. *Thompson* (1) cited by Mr. *Knox* is clear authority for his position.

And to use the words of *Parke* B. in *Slatterie* v. *Pooley* (2):— "What a party himself admits to be true, may reasonably be presumed to be so. The weight and value of such testimony is quite another question. That will vary according to the circumstances, and it may be in some cases quite unsatisfactory to a jury. But it is enough for the present purpose to say, that the evidence is admissible."

The admission being admissible, we have to inquire how far it takes the respondent. It establishes that, in a season when there was sufficient grass to properly feed the cows, it was a reasonable calculation to estimate the factory production of butter at 14 boxes, each containing 56 lbs. This, it was sworn, would have paid for the plant in from eight to nine months. Mr. *Knox* then contended that, having proved so much, the burden of discharging herself thereupon lay on the appellant. If this were true I should be greatly pressed by his further argument that the jury had not accepted the testimony of her witnesses, and that there is sufficient reason in the correspondence and contradictions to leave them at liberty to do so. But it seems to me there is a flaw in the argument, and it is this. The admission does not cover the whole ground necessary to satisfy the *primâ facie* onus which rested on the respondent. It proves what would have been a reasonable time under favourable conditions. The admission is based on the future existence of these conditions— it did not and could not include an acknowledgment of their actual existence after the erection of the factory. I might here

(1) 3 M. & W., 445.

(2) 6 M. & W., 664, at p. 669.

with advantage quote a passage from the judgment of *Vaughan Williams* L.J. in *Nickoll and Knight* v. *Ashton, Edridge & Co.* (1). The learned Lord Justice dissented from the majority as to the nature of the implication to be drawn from a certain contract, but he was in agreement with them as to principles, and the passage from his judgment is very apposite to the present case. The learned Lord Justice said: "No doubt, where a contract is made with reference to certain anticipated circumstances, and where, without default of either party, it becomes wholly inapplicable to any such circumstances, it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made."

Therefore, in order to apply the terms of the admission at all, the respondent was bound to show that the state of things in which they would operate came into being.

That is where the present case differs from the case of *Postlethwaite* v. *Freeland* (2) cited in argument. There, the proper time for discharging the cargo was shown *primâ facie* to have been exceeded, and the merchants were called upon to show a sufficient cause for the delay. The undisputed facts showed that the ship brought up at the usual place of discharge and remained there for five weeks, with the captain and crew ready to do their part in discharging cargo, as soon as a lighter came alongside. No lighter came till the five weeks had elapsed. These circumstances, of course, raised a *primâ facie* case of delay on the part of the merchants. Here it is sought to apply a period of time with relation to a given state of circumstances without proving their existence. The merchants, &c. in *Postlethwaite's Case* (2) were called upon to prove circumstances of excuse; here the controversy as to the drought and its extent is not for the purpose of discharging or excusing the appellant from an obligation otherwise shown to exist, but for establishing or denying her primary liability to make the payments stipulated for: *Hick* v. *Raymond and Reid* (3) shows this most clearly.

Thus regarded, the whole onus always lay on the respondent. Has he discharged it? Substantially all the sworn testimony is

(1) (1901) 2 K.B., 126, at p. 137. (2) 5 App. Cas., 599.
(3) (1893) A.C., 22.

H. C. OF A. 1910.

HART v. MACDONALD.

Isaacs J.

opposed to him. I do not overlook the evidence as to agistment, but that covers a very small part of the time. There are some unsworn statements by and on behalf of the appellant—and therefore as admissions legally equivalent to sworn testimony—which, under some circumstances, might support the inference necessary for the respondent's case.

But looking at all that is favourable to the respondent in relation to the rest of the evidence, it is by no means sufficiently clear, cogent or decisive as to actually existing facts to be capable, in opposition to other and differing statements and to the direct testimony to the contrary, of sustaining his burden of proof. In the result therefore the jury had no evidence upon which they could reasonably find the verdict at which they arrived, and therefore as the time had not arrived to pay for the plant the appeal must be allowed.

Appeal allowed.

Solicitor, for appellant, *L. B. Bertram.*

Solicitors, for respondent, *Minter, Simpson & Co.*

C. E. W.

Appl *Lippe v Hedderwick* (1922) 31 CLR 148

[HIGH COURT OF AUSTRALIA.]

DANIEL McCAULEY . . . . . APPELLANT;
DEFENDANT,

AND

FREDERICK JAMES McCAULEY (PLAINTIFF) AND DESMOND CHARLES McCAULEY (DEFENDANT) . . . RESPONDENTS.

H. C. OF A. 1910.

SYDNEY, *May*, 2, 3, 4, 5, 6, 10.

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

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Will—Evidence of execution—Lost will—Presumption of revocation—Evidence to rebut presumption—Onus of proof—Probate suit—Costs out of estate—Wills Probate and Administration Act 1898 (*N.S. W.*) (*No.* 13 *of* 1898), *sec.* 153.