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also, of independent responsible action in the assertion of its powers, in the carrying on the work of the Trust, and in the protection of the property which the Statute has vested in it. Although its revenues become part of the Consolidated Revenue Fund and its expenditure is defrayed entirely by parliamentary grants, it is set up by the Statute as the agent of the Government, but with an independent responsibility which impliedly constitutes it an agent, empowered to sue, and liable to be sued, in its corporate name in respect of all causes of actions arising out of the discharge of its duties. This implication, in my opinion, necessarily arises from the whole scheme of the Act, and its clearly expressed objects. I agree, therefore, that the learned Judges of the Supreme Court came to a right conclusion, and that the appeal must be dismissed.

Appeal dismissed.

Solicitor, for appellants, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors, for respondent, *Sly & Russell.*

C. E. W.

HIGH COURT OF AUSTRALIA.]

HASELL . . . . . APPELLANT;
PLAINTIFF,

AND

BAGOT, SHAKES & LEWIS, LTD. AND OTHERS . . . . . } RESPONDENTS.
DEFENDANTS.

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ADELAIDE, *Nov.* 6, 7.

SYDNEY, *Nov.* 24.

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

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Contract — Breach — Purchase of goods — Measure of damages — Non-delivery — Quantity to be delivered — Purchase of other goods by purchaser — No market in place of delivery — Reasonable conduct of purchaser.

By a written contract dated 2nd June 1909 made in Adelaide between appellant and respondents, who both carried on business there, the appellant agreed to sell to the respondents and they agreed to purchase from him "5000 tons of Japanese superphosphates ten per cent. more or less" of specified quality at the price of 71/6 per ton gross weight, if delivered in double sacks, and 72/- per ton if in single sacks. The delivery was to be from ship's slings at Port Adelaide. The shipment was to be made by steamer or steamers from Japan during late in December 1909 and/or January 1910 as freight opportunities might offer and the quantity of each shipment was to be advised by cable to the purchaser on shipment. Up to the end of January the appellant had not notified to the respondents the shipment of any superphosphates and had not in fact procured any in Japan. The respondents thereupon, after notifying their intention to the appellant, bought from D., an agent in Australia of a Japanese firm, 3000 tons of Japanese superphosphates of the quality specified in the agreement of 2nd June at the price of 78/- per ton delivered in Port Adelaide. It appeared that at that time superphosphates could have been bought in Japan for delivery at Port Adelaide at about 72/10 per ton. The respondents also agreed to purchase 2000 tons of British superphosphates from the appellant in part performance of his contract, without prejudice to their rights "for non-shipment and delivery of the other 3000 tons contracted to be delivered." The 2000 tons were duly delivered, but the respondents retained from the price the sum of £975 for damages alleged to have been sustained from the appellant's breach of the contract of 2nd June. In an action by the appellant to recover from the respondents that sum of £975, the respondents counterclaimed for damages for breach of the contract of 2nd June.

Held, that the damages were properly assessed as upon a failure to deliver 3000 tons.

Held, also, there being no market in Port Adelaide at which the goods might be bought, that the measure of damages was the amount that a reasonable man, acting sensibly and on his own behalf and at his own risk, would be willing to pay in order to get the goods at the place and time stipulated; that that amount should be ascertained by taking the price at the place of manufacture or other source, the cost of carriage and a reasonable sum for the risk and profit of the importer; and, therefore, no contest having been raised as to the amount of the importer's profit, the amount paid to D. for the superphosphates was properly taken as the measure of damages.

Decision of the Supreme Court of South Australia affirmed.

APPEAL from the Supreme Court of South Australia.

An action was brought in the Supreme Court of South Australia by Arthur Henry Hasell against Bagot, Shakes & Lewis Ltd., and Thomas Grose and Henry Thomas, trading as William Thomas & Co., to recover £975, being the balance of the purchase

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money for 2,000 tons of superphosphates. The defendants by their defence alleged a breach by the plaintiff of a contract made on 2nd June 1909 by which the plaintiff agreed to sell to the defendants 5,000 tons of Japanese superphosphates, and they counterclaimed for £1,300 damages for such breach.

The facts are fully set out in the judgments hereunder.

The action was heard before *Homburg* J., who ordered that the plaintiff should recover £975 on his claim, and that the defendants should recover £1,052 10s., on their counterclaim and directed that judgment should be entered for the defendants for £77 10s., the balance in their favour.

From this decision the plaintiff now appealed to the High Court on the ground that the assessment of damages on the defendants' counterclaim was excessive and erroneous in point of law in that the Judge adopted a wrong measure of damages.

Paris Nesbit K.C. (with him *Gordon*), for the appellant. The contract being for the sale of 5,000 tons "ten per cent. more or less," the option was with the appellant as to how much he would deliver. He never declared his election to deliver more than 4,500 tons, and therefore he was not bound to deliver more than 4,500 tons: *Benjamin on Sales*, 5th ed., 342; *Reed* v. *Kilburn Co-operative Society* (1); *Price* v. *Nixon* (2); *Stroud's Judicial Dictionary*, 2nd ed., vol. II., p. 349. The damages should therefore have been assessed on the basis that the appellant failed to deliver 2,500 tons. The respondents, being entitled to buy superphosphates to take the place of those which the appellant failed to deliver, were under a duty to the appellant to minimize the loss on the contract: *Halsbury's Laws of England*, vol. X., p. 311; *Grant* v. *Owners of ss. Egyptian* (3); *Erie County Natural Gas and Fuel Co. Ltd.* v. *Carroll* (4); *Le Blanche* v. *London and North Western Railway Co.* (5); *O'Hanlan* v. *Great Western Railway Co.* (6); *Hamlin* v. *Great Northern Railway Co.* (7). They should therefore have tried to buy superphosphates in Japan.

Sir Josiah Symon K.C. (with him *Evan*), for the respondents.

(1) L.R. 10 Q.B., 26.
(2) 5 Taunt., 338.
(3) (1910) A.C., 400.
(4) (1911) A.C., 105, at p. 116.
(5) 1 C.P.D., 286, at p. 313.
(6) 6 B. & S., 484; 34 L.J.Q.B., 154.
(7) 26 L.J. Ex. 20; 1 H. & N., 408.

At the time the respondents bought the 3,000 tons from Doyle they were in any view entitled to buy that quantity. The subsequent purchase of 2,000 tons from the appellant did not affect that right, or the further right to recover damages in respect of the 3,000 tons. The proposition that where a seller has failed to deliver goods it is the duty of the purchaser to minimize the loss is not supported by the only authority cited in support of it, *Irving* v. *Greenwood* (1). The only duty of the purchaser is to act as a reasonable man would: *Dunkirk Colliery Co.* v. *Lever* (2); *Rodocanachi, Sons & Co.* v. *Milburn Brothers* (3); *Hinde* v. *Liddell* (4); *Mayne on Damages*, 8th ed., p. 207. The respondents were entitled to purchase in the ordinary course of business as they did. The terms of Doyle's purchase of the superphosphates in Japan were irrelevant. Even if they were relevant, and assuming that he purchased at what was then the market price in Japan, there was no evidence that his profit was unreasonable, and the onus was on the appellant to prove that it was.

Gordon, in reply, referred to *Roth & Co.* v. *Taysen, Townsend & Co.* (5); *Nickoll & Knight* v. *Ashton, Edridge & Co.* (6).

Cur. adv. vult.

The following judgments were read:—

GRIFFITH C.J. The questions for determination in this appeal arise upon a contract, dated 2nd June 1909, and made in Adelaide, between the appellant and the respondents, both of whom carry on business in that city, by which the appellant agreed to sell to the respondents and they agreed to purchase from him "5,000 tons of Japanese superphosphates (ten per cent. more or less)" of specified quality, at a price of 71s. 6d. per ton gross weight if delivered in double sacks and 72s. per ton if in single sacks. The delivery was to be from ship's slings at Port Adelaide. In the event of dispute as to quality the dispute was to be referred to the South Australian Inspector of Fertilisers, whose decision was

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(1) 1 C. & P., 350.
(2) 41 L.T., 633.
(3) 18 Q.B.D., 67, at pp. 76, 78.
(4) L.R. 10 Q.B., 265.
(5) 73 L.T., 628, at p. 629.
(6) (1900) 2 Q.B., 293, at p. 305.

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to be final. If the superphosphates should arrive in bad order the vendor was to be at liberty to land them and treat them in his factory and to claim an additional price of 3s. per ton, which was to cover landing charges, treatment and delivery as directed. Subject to this condition the purchaser might reject any superphosphates which did not comply with the agreement. The shipment was to be made by steamer or steamers from Japan during late in December 1909 and/or January 1910 as freight opportunities might offer, and the quantity of each shipment was to be advised by cable to the purchaser on shipment. The vendor was not to be liable for non-delivery or late delivery if occasioned by unavoidable causes beyond his control, and the usual strike clause was to be deemed to be inserted in the agreement. The vendor agreed that he would not sell or either directly or indirectly procure or be interested in the sale of any Japanese superphosphates beyond "the said quantity of 5,000 tons ten per cent. more or less to be delivered prior to the month of May 1910," to any person or company in South Australia other than the purchasers.

In order to perform this contract it was necessary for the appellant, the vendor, to procure superphosphates in Japan and to arrange for their shipment in December or January. Up to the end of January 1910 he had not notified to the respondents the shipment of any superphosphates, and had not in fact procured any in Japan. The respondents thereupon, after notifying their intention to the appellant, entered into an agreement, dated 8th February 1910, with one Doyle of Sydney, who was the representative in Australia of a Japanese firm, for the purchase of 3,000 tons of Japanese superphosphates of the quality specified in the agreement of 2nd June at the price of 78s. per ton delivered at Port Adelaide. The other terms of the contract were not materially different from those of the contract of 2nd June. They also agreed to take from appellant 2,000 tons of British superphosphates in part performance of his contract. The 2,000 tons were duly delivered, but the respondents retained from the price a sum of £975 for damages alleged to have been sustained from the appellant's breach of the contract of 2nd June, and upon his suing them for that sum they counterclaimed for

damages. In reply to the counterclaim the appellant set up a case which the learned Judge of first instance decided against him. He assessed the damages on the counterclaim at £1,032 10s., of which £975 represented the difference between the price of 3,000 tons payable under the contract of 2nd June and the price for the same quantity payable under the contract with Doyle. The other £77 10s. represented a loss sustained by the late arrival of the superphosphates purchased from Doyle. No question is raised as to this amount.

Upon these facts two points are raised by the appellant. First, he contends that under the contract of 2nd June he had an option to deliver any quantity between 4,500 and 5,500 tons, and was not under any circumstances bound to deliver more than the smaller quantity, and that, as the 2,000 tons of British superphosphates were delivered and accepted in part performance of that obligation, the damages can only be assessed upon 2,500 tons; or, to put it in another way, he says that the respondents did not sustain any loss in respect of 2,000 tons part of the 4,500.

The form of contract "ten per cent. more or less" seems unusual, but the same or similar terms are found in Doyle's contract of 8th February, and also in a previous contract made by respondents with him on 25th May 1909. They would appear therefore to be not uncommon in the trade. The words "more or less" are ordinarily used with reference to specific goods which are the subject of a contract of sale, and not with reference to unascertained goods to be acquired by a vendor and supplied to the purchaser, and they are generally understood to cover small and accidental discrepancies in weight or quantity. But their meaning may vary with the subject matter or context. The subject matter of the contract now in question was a large quantity of mineral to be procured in, and shipped from, a foreign country, where it might or might not be practicable to procure and provide for the shipment of the exact quantity of 5,000 tons within the prescribed period, except perhaps at a great and unreasonable expense. Moreover, the weight of the mineral on arrival might be increased or diminished according to

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its condition as to moisture, and some of it might be rejected by the Inspector of Fertilizers.

I am disposed to think that the words in question were inserted from this point of view, with the intention that the purchaser should not be entitled to make any claim in respect of a deficiency of 500 tons, or to refuse to accept an excess of 500 tons beyond the stipulated 5,000, if the deficiency or excess arose in an honest attempt to perform the contract. But I am not prepared to hold that they can be invoked by a vendor who, instead of attempting to perform his contract, refuses to do so *simpliciter*.

There is, however, another answer to the argument founded on the construction contended for. On 31st January the appellant's breach of contract to ship the superphosphates before that date was complete, whether his obligation was to ship 4,500 or 5,000 tons, and the respondents were entitled on that day to buy for their own protection up to the agreed quantity, whatever that was. They were, therefore, entitled to contract with Doyle for the 3,000 tons on 8th February, and the subsequent acceptance from the appellant of the 2,000 tons cannot make their doing so any the less reasonable or proper. Moreover, when on 17th February the respondents accepted the 2,000 tons of British superphosphates in part performance of the Japanese contract, they did so expressly without prejudice to their rights "for non-shipment and delivery of the other 3,000 tons contracted to be delivered."

For these reasons I am of opinion that the damages were properly assessed as upon a failure to deliver 3,000 tons.

The other point is that the damages awarded by the learned Judge were excessive. The only note which we have of his reasons on this part of the case is as follows:—"This led to the defendants buying the second parcel of 3,000 tons from Mr. Doyle under the contract of the 8th February 1910, at a price 6s. 6d. per ton above the price agreed to be paid to the plaintiff. This difference in price, amounting to £975, the defendants deducted from the price payable by them in respect of the last portion of the *Kyleness* cargo of 2,000 tons delivered to them on 17th and 18th February by Hasell in part satisfaction of the 5,000 tons sold to them by plaintiff under the contract of 2nd June 1909. The

defendants now claim this difference in price by way of damages, and I have no doubt that they are entitled to that amount. The additional £975 so paid for the remaining 3,000 tons of superphosphates was payable under a contract with Doyle containing similar terms and conditions as their contract with Hasell. The suggestion that it was the defendant's duty to go to Japan to effect the purchase is too bold."

The appellant contends that the learned Judge proceeded upon the assumption that whatever amount the respondents actually paid for the substituted superphosphates must be taken as the basis of assessment, and that he therefore misdirected himself as to the measure of damages. We are informed, however, that the question of the quantum of damages was strenuously argued for the appellant, and that, although the case of *O'Hanlan* v. *Great Western Railway Co.* (1) was not cited, the rule laid down in that case was substantially presented to him as the true basis of assessment. Under these circumstances I think that our duty as a Court of Appeal is to inquire whether upon the evidence the learned Judge could properly come to the conclusion that the price paid to Doyle was reasonable under the circumstance.

The rule as to the measure of damages recoverable upon a breach of contract to deliver goods is well settled. If there is a market to which the disappointed purchaser can resort, no difficulty arises. But if there is no market, that is, if the goods of the kind which were to be delivered at the specified place are not on sale at that place (which is the present case), the rule laid down in *O'Hanlan's Case* (2) is applicable, and the Court must ascertain what a reasonable man, acting sensibly on his own behalf and at his own risk, would be willing to pay in order to get the goods at the place and at the time stipulated. The amount is to be ascertained by taking the price at the place of manufacture or other source, together with the cost of carriage and a reasonable sum for the profit of the importer.

In the present case the only source of supply was Japan. I agree with the learned Judge in thinking that the disappointed purchasers were not bound to go to Japan either personally or by agent, but were entitled to deal with an Australian importer if

(1) 6 B. & S., 434; 34 L.J.Q.B., 154. (2) 6 B. & S., 484.

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they could find one, not, however, paying him an unreasonable sum for his profit. Doyle said in cross-examination that in the first days of February 1910 the market price for Japanese superphosphates in Japan was about 72s. 10d. c.i.f., that is, that they could have been bought to be delivered at Port Adelaide at that price. The price given to Doyle allowed a profit of about 6⅓ per cent. on this price. Was this unreasonable? The importer certainly incurred substantial risks under his contract, as *e.g.*, if the goods on arrival had proved to be liable to rejection for imperfection in quality.

It does not appear that the attention of the learned Judge was directly invited to the question of the amount of the importer's profit. If it had been, evidence might have been called on both sides, to show, *e.g.*, what is an importer's usual charge in Adelaide for commission or profit, and what rate the appellant himself expected to gain on his contract. In the absence of any such evidence I think that the parties must be taken to have left the matter at large to the learned Judge, and I am not prepared to substitute my own opinion (whatever it might be) for his on a matter as to which knowledge of local circumstances makes his opinion more valuable than mine. If the learned Judge had thought that he was bound to allow whatever was actually paid to Doyle, I should have thought that he had misdirected himself, and should have had to apply my own mind to the subject, unaffected by his opinion. But not being able to come to that conclusion I am also unable to say that his conclusion was wrong.

I think, therefore, that the appeal must be dismissed.

BARTON J. On the first point I think the question resolves itself into this: Whether the respondents were entitled to buy against the appellant as much as 3,000 tons at the date of the breach of the contract, 31st January, or whether they were only entitled to buy 2,500 tons. If they were entitled to buy 3,000 tons, they were so entitled on 8th February, the date of their purchase from Doyle. At the time of breach the minimum obligation of the appellant was to supply 4,500 tons of Japanese superphosphates, even if we adopt the appellant's view of the phrase "5,000 tons, 10 per cent. more or less." On breach there-

fore the respondents were beyond question entitled to buy against the appellant up to 4,500 tons in self-defence. They bought 3,000 tons, and, if the price which they paid was in the circumstances reasonable, they are entitled under their counter-claim to have the difference in price between 71s. 6d. and 78s. a ton as damages in respect of the whole of a purchase, which clearly might have been at least half as large again had they chosen to make it so, and had they succeeded in obtaining the further quantity. They did not lose this right later in the same month when they consented to take the 2,000 tons of British superphosphates in lieu of an equal quantity of Japanese, for even if the appellant was entitled to refuse to give them more than 1,500 tons, he did not refuse and he cannot now claim any advantage because he gave them 2,000 tons. Further, the letters and telegrams which passed between the parties after the purchase from Doyle show that they agreed that the subsequent acceptance from the appellant of the 2,000 tons of British was not to prejudice the rights of the respondents for the failure to deliver "the other 3,000 tons contracted to be delivered" in January, the non-delivery of which had caused them to buy from Doyle.

I do not wish to be considered as holding that the appellant would not have been entitled under his contract to restrict his deliveries to 4,500 tons in all of Japanese superphosphates. But I do not think that question is material in the course which events have taken. Its consideration would have been necessary if he had delivered that quantity under his contract (instead of failing to deliver any) and had then defended an action brought against him for having failed to deliver 500 tons more. But that is not the present case. What has happened is that he broke his contract entirely, and that after breach and after the purchase, known to him, of 3,000 tons against him, he has been allowed to supply 2,000 tons of another kind of superphosphates in satisfaction of his liability beyond the 3,000 tons. That does not modify his liability as to that number of tons.

I am of opinion therefore that the respondents are entitled to have their damage assessed upon 3,000 tons.

The point that the damages are excessive relates wholly to the

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price which the respondents gave for the 3,000 tons bought from Doyle. The appellant contends that the price was excessive, and that the principle on which the measure of damages depends was not considered by the learned Judge who tried the case. It is not denied that the matter was fully argued below, or that the appellant impressed upon His Honor that the true course was to ascertain the value at the place of manufacture at the time of breach, and to add the cost of carriage and a reasonable profit for the importer. It is true that the learned Judge did not state this rule in his judgment, but certainly he does not seem to have said anything which would entitle us to say that he ignored it. The judgment which he delivered is consistent with his having borne it in mind, and we cannot come to the conclusion that he failed to do so in the absence of any expression tending to that conclusion. I think, therefore, we may fairly treat the question which His Honor decided as being whether the margin between the contract price and the price of the purchase from Doyle was unreasonably large. In considering whether he rightly decided that question in the negative, we must have regard to the principles laid down in the case of *O'Hanlan* v. *Great Western Railway Co.* (1), which are very succinctly stated in the judgment of *Shee* J. (2). The expression used in some other cases that a plaintiff buying against a defendant (and the respondents were in the position of plaintiffs *quoad* the counterclaim) is bound to "minimize" his loss, is nothing more than to say that he must act as reasonably as a man would if buying for himself. The jury, or the Judge trying a case without a jury, would do rightly in arriving at the value of the goods at the place of manufacture, and adding to that the cost of their carriage to the place at which the original contract was to be performed by delivery, together with a reasonable profit to an importer. In the present case the price paid by the respondents gave the importer, Doyle, a profit of $6\frac{1}{3}$ per cent. Personally, I should hesitate to affirm that this was an unreasonably large profit. The respondents were not themselves importers, nor do they appear to have had any business connections in Japan which would enable them to arrange there for the purchase and shipment of a large consignment of superphosphates. Their

(1) 34 L.J.Q.B., 154. (2) 34 L.J.Q.B., 154, at p. 159.

dealings were purely local. It was reasonable for them to resort to the import trade in Australia. As it happened, there was apparently no one to whom they could resort but Doyle, and unless they had dealt with him they would probably have lost the season, to their own much greater loss and the detriment of the farmers with whom they carried on a distributing business. Looking at the position into which they were forced by the appellant's breach of contract, I should not have been disposed to think that they could justly be charged with any disregard of the appellant's rights. But be that as it may, it seems to me that the learned Judge at any rate must have been of the opinion that they did not pay an excessive price in view of all the relevant circumstances, and that there is no evidence on which we can say that he was wrong in that opinion, for no criterion is afforded to us on which we can rest such a conclusion.

I am therefore of opinion that the appeal fails on the second as well as on the first point, and must be dismissed.

O'CONNOR J. The general facts of the case have been fully referred to by my brother the Chief Justice. I propose to state those only which are material on the question of damages. The subject matter of the action in the Court below was an agreement between the appellant and the respondents whereby the former undertook to import from Japan and supply to the latter within a stated time Japanese superphosphates of the kind and quality described. The quantity to be imported and supplied was stated in the agreement to be ". . . 5,000 tons . . . (ten per cent. more or less)." The appellant failed to supply any Japanese superphosphates to the respondents; but, after the time limited for the supply had elapsed and the breach of agreement was complete, negotiations were entered upon between the parties for a further agreement in the nature of accord and satisfaction as to part, by which the appellant was to deliver and the respondents to accept 2,000 tons of certain British superphosphates in substitution for 2,000 tons out of the total quantity of Japanese superphosphates which the appellant had bound himself to deliver. During the pendency of these negotiations the respondents, seeking as far as possible to mitigate the loss to themselves

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which the breach necessarily entailed, made a contract with one Doyle, an importer, for the importation from Japan and the supply to the respondents at Port Adelaide of 3,000 tons of substantially the same kind and quality of Japanese superphosphates as those covered by the original agreement. Doyle, acting on behalf of a Sydney firm, carried on the business of importing, amongst other things, Japanese superphosphates, just as the appellant did, and the terms of the contract were in all substantial respects similar to those embodied in the original agreement with the appellant. The only important difference was in the price per ton of the superphosphates. In the original agreement with the appellant it was 71s. 6d. per ton if delivered in double sacks and 72s. if delivered in single sacks c.i.f. In Doyle's contract it was 78s. per ton c.i.f.e. The contract with Doyle is dated 8th February 1910. Before entering into it the respondents duly advised the appellant that they intended to buy against him in order to reduce the damage entailed upon them by his breach. After the contract was complete they informed him of what they had done by letter of 11th February 1910 in which they also stated that they were looking for another 2,000 tons to complete their requirements. A renewal of negotiations as to the 2,000 tons of British superphosphates seems to have immediately followed. The appellant by telegram repeated his offer, and the respondents on 15th February 1910 telegraphed that they were willing to accept the substitution of 2,000 tons British for 2,000 tons Japanese proposed without prejudice to their position as to the 3,000 tons already bought against the appellant. After the exchange of a few more communications between the parties it was finally agreed on 18th February 1910 that the appellant should deliver and the respondents should accept 2,000 tons British superphosphates *ex Kyleness* in substitution for that quantity of the Japanese superphosphates deliverable under the original agreement. The respondents subsequently in due course obtained delivery of the 3,000 tons of Japanese superphosphates under Doyle's contract and of the 2,000 tons of British superphosphates under their special agreement with the appellant. In paying the appellant for the 2,000 tons British the respondents kept back a balance of £975 to cover the loss

occasioned by the extra price they had been obliged to pay Doyle for the 3,000 tons Japanese supplied by him. The appellant disputed the respondents' right to take that course and sued them for that balance. The respondents counterclaimed for their loss under the Doyle contract. On the appellant's claim the learned Judge found for the appellant in the sum of £975 the full amount. No question is now raised as to the propriety of that finding. But the learned Judge at the same time found for the respondents on the counterclaim in the sum of £1052 10s. A deduction of one from the other leaves an amount of £77 10s., judgment for which now stands in the respondents' favour. Of the items which go to make up the £1052 10s. one is not now questioned, namely the item of £77 10s. for special damage. The sum remaining represents the difference between the price per ton paid by the respondents under Doyle's contract and that stipulated for in their original agreement with the appellant. That is the sum, and the only sum, now in controversy. The appellant challenges it in two ways. First, he says that the difference in price, supposing it to be recoverable, is to be calculated on 2,500 tons, not on 3,000 tons, reasoning as follows: The appellant's agreement was to supply 5,000 tons or, at his option, 10 per cent. more or less than 5,000 tons; he was not bound to supply more than, 4,500 tons in all. Of that quantity 2,000 tons was covered by the British superphosphates supplied under the agreement which I have described as being in accord and satisfaction as to part. That left a balance of 2,500 tons for the supply of which the appellant was responsible. The respondents were not entitled to buy against him more than was sufficient to cover that balance. The contention raises the question of how the words "5,000 tons 10 per cent. more or less" in the original agreement are to be construed. Upon that I do not think it necessary to express an opinion because, in the events that have happened, the question has not really arisen and indeed cannot arise. Assuming that the appellant's construction of the agreement is right, that in carrying out his contract he was not bound to supply more than 4,500 tons, it is plain that at the time when the respondents bought against the appellant to the extent of 3,000 tons by their contract with Doyle no portion of the

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4,500 tons had been supplied and the respondents were well within the mark in buying to cover 3,000 tons out of the quantity to be supplied. The agreement for the substitution of 2,000 tons British came afterwards, besides which the respondents in giving their assent to it notified the appellant that they did so without prejudice to their rights as to the 3,000 tons covered by Doyle's contract. If the appellant's reading of the agreement is right he was not then bound to provide the respondents with more than another 1,500 tons. But, as it was open to him if he thought fit to exercise his option by supplying 5,000 tons in carrying out the agreement, it was also open to him to take that as the quantity for the supply of which he was responsible when the agreement had been broken and to arrange for the substitution of the British superphosphates on that basis. Apparently that is what he did when he voluntarily arranged to supply the 2,000 tons British superphosphates with full knowledge that the respondents had before then arranged to buy against him the 3,000 tons to be supplied by Doyle. Having so acted the appellant, it seems to me, cannot now rely on the construction of the agreement for which his counsel is contending, and cannot thus by retrospective action abridge the right which the respondents undoubtedly had to buy 3,000 tons against him at the time when they made their contract with Doyle.

The other ground of attack is that the respondents in entering into the contract with Doyle acted unreasonably in arranging the supply of superphosphates under Doyle's contract at the price of 78s. per ton, and thereby failed in their duty to minimize in so far as was reasonably possible their loss from the appellant's breach of agreement.

There is no question that it is one of the principles on which damages are assessed that a party to an agreement suffering injury from the other party's breach of its terms is bound to exercise reasonable care in mitigating the injurious consequences of the breach, and is not entitled to recover from the party in default any damage which the exercise of reasonable care on his part would have prevented from arising. Before, however, applying the principle to the facts of this case it will be useful to

note the language in which it has been stated and illustrated in some of the authorities cited during the argument.

Lord *Atkinson*, in delivering the judgment of the Privy Council in *Erie County Natural Gas and Fuel Co. Ltd.* v. *Carroll* (1), after referring to the fact that the plaintiffs had, on the defendants' failure to perform their contract, performed it in a reasonable way for them by obtaining from an independent source a sufficient quantity of gas similar as near as might be in character and quality to that which they were entitled to receive, goes on to say:—"In such cases it is well established that the measure of damages is the cost of procuring the substituted article, not at all the price at which the substituted article when procured could have been sold by the person who procured it. In *Hamlin* v. *Great Northern Railway Co.* (2) *Alderson* B. thus lays down the law applicable to these cases: 'The principle is, that if the party does not perform his contract, the other may do so for him as near as may be and charge him for the expense in so doing.' In *Le Blanche* v. *London and North Western Railway Co.* (3) Lord *Esher* (then *Brett* J.) thus expresses himself: 'We think it may properly be said that, if the party bound to perform a contract does not perform it, the other party may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing,' but whether the thing done was a reasonable thing to do must be determined having regard to all the circumstances. *James*, *Mellish* and *Baggallay* L.JJ., expressly approve of the principle laid down by *Alderson* B., with this qualification, however, that the second party must not take a course which as regards the party in default would be unreasonable or oppressive. This principle appears to be generally accepted and applied: *Sedgwick on Damages*, 8th ed., vol. I., pp. 322-325."

In *Dunkirk Colliery Co.* v. *Lever* (4), the defendant had refused to take delivery of certain coal to be supplied under a contract. The plaintiffs then sought and obtained another purchaser, but at a lower price, and claimed the difference against the defendant as damages. The question to be determined was whether in so doing the plaintiffs had acted reasonably. *Baggallay* L.J. (5)

(1) (1911) A.C., 105, at p. 117.
(2) 26 L J. Ex., 20, at p. 23.
(3) 1 C.P.D., 286, at p. 302.
(4) 41 L.T., 633.
(5) 41 L.T., 633, at p. 635.

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tests the reasonableness of the plaintiffs' action as follows:—"But, after a full consideration of the evidence in this case, I come to the same conclusion as the Master of the Rolls has come to, that the plaintiffs have not omitted to do anything which reasonable men, acting on their own behalf under similar circumstances, would do; and, on the other hand, it is to be borne in mind, they are not called upon because they are realizing the produce of the coal, and the defendants may be affected by the price realized, to do otherwise than as reasonable men would do under similar circumstances."

As to the amount of skill and diligence which it is the duty of the party wronged to exercise in mitigating the consequences of the breach the words of *James* L.J. in the same case (1), must be kept in mind. After stating that the measure of damages was the actual loss that the parties had sustained, he says:—"The loss must not have been increased by any act which the plaintiffs ought not to have done, or by the omission to do any act which the plaintiffs ought to have done. That seems to me to be the utmost duty imposed on a man who is suffering from a wrong, and I think that the wrongdoer has no right to expect from the man whom he has wronged the utmost amount of diligence, the utmost amount of skill, and the most accurate conclusion in a matter of judgment, which he might have arrived at in order to diminish the loss. The plaintiffs here say: 'You would not take the coal, and at last, after some efforts to dealt with it, we sold it to the Manchester Corporation by a contract exactly the same as the contract we made with you, a forward contract, and we sold it for the best price we could get for it at that time; that is what we got, and we really did all we could and what we thought was the best thing for us to do, acting in our own interests.'"

Thesiger L.J., after approving a statement of *James* L.J., when the matter was before the Court of Appeal on another occasion, says (1):—"The principles laid down for our guidance in this case are these: we have to see what has been the amount of damage really sustained, and we are bound according to that ruling to hold that the plaintiffs are entitled to that amount of damage, unless it appears that they have acted in this matter

(1) 41 L.T., 633, at p. 636.

otherwise than they ought to have acted as reasonable men, bearing in mind that they are only bound to act according to their ordinary course of business."

Applying these principles to the facts of the present case, it was for the learned Judge of first instance to determine, first, what was the actual loss which the respondents had suffered by reason of the appellant's breach of agreement. That is a mere matter of arithmetic. The further and important issue for his determination was whether any portion of that loss, and if so how much, was due to the respondents' failure to take such steps for mitigating the amount of loss as a prudent business man might be reasonably expected to take in the ordinary conduct of his own business. The learned Judge has not in form expressed his conclusion on the latter issue, but I am satisfied that he had it under consideration and his judgment necessarily involves that he found it in the respondents' favour. This Court has now to decide whether any ground has been shown for disturbing that finding. In my opinion none has been shown. The chief objection against the defendants' conduct was that they had contracted to pay Doyle a price that was unreasonably high, higher than a prudent business man would have contracted to pay in the ordinary course of his business. It was further objected that they were not justified in employing an intermediary to whom a profit would have to be paid, that they ought to have dealt directly with suppliers in Japan, and further that, assuming it was reasonable to make use of an intermediary, the profit which the price paid by the respondents enabled Doyle to make on the transaction was unreasonably large. In my opinion a consideration of the circumstances in which the respondents were placed by the appellant's breach of agreement furnishes a complete answer to these objections. It was of vital importance to the respondents' retail business to obtain the goods in time for the season and of the kind and quality they had been in the habit of supplying to their customers. There was no local market in South Australia in which superphosphates of that kind and quality could be bought, and the respondents had no business relations with the Japanese manufacturers. The usual, and speaking generally, the only way in which retailers in Adelaide such as the defendants

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could obtain their supplies was by means of an agreement with an importer carrying on the business of importing such goods from Japan. When the respondents found themselves driven by the appellant's breach of agreement to obtain their season's supplies in the best way they could, they merely followed the usual course of business in employing Doyle, who carried on a business similar to the appellant's, to fulfil their requirements, and they employed him on substantially the same terms as are embodied in their agreement with the appellant. Doyle's evidence is that the price charged was fair and that Japanese superphosphates could not have been bought at a less price in Australia. As against that he admits that in February 1910 the market price was 72s. 10d. c.i.f., but that he managed to make his contract with the respondents for 78s. c.i.f.e. Making the necessary allowance for exchange, so that a fair comparison may be drawn between these prices, that would give Doyle a profit of about $6\frac{1}{3}$ per cent. on the transaction. It must be taken that the learned Judge of first instance came to the conclusion that, having regard to the amount of Doyle's capital involved and the risks he incurred in the performance of the contract, the profit was not so excessive as to render the price which enabled him to make that profit an unreasonable price for the respondents to pay under all the circumstances. Taking all the facts into consideration I can see no ground for disturbing that conclusion. On the whole case, therefore, I am of opinion that the judgment of the Court below should be affirmed and the appeal dismissed.

Appeal dismissed with costs.

Solicitors, for the appellant, *Anderson & Gordon.*
Solicitor, for the respondents, *G. M. Evan.*

B. L.