[HIGH COURT OF AUSTRALIA.]

MAINE AND ANOTHER . . . . APPELLANTS;
PLAINTIFFS,

AND

LYONS . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1913.

HOBART, *Feb.* 19, 20.

Griffith C.J., Barton and Isaacs JJ.

Practice—High Court—Appeal from Supreme Court of State—Security for costs—Time for giving—Rules of the High Court 1911, *Part II., Sec. III., r.* 12.

Contract—Sale of goods—Power of rescission—Condition subsequent—Impossibility of performance—Act of State—Sale of Goods Act 1896 (*Tas.*) (60 *Vict. No.* 14), *sec.* 22.

Security for costs of an appeal was lodged in the proper office of the High Court on the last day prescribed by the *Appeal Rules*, Sec. III., r. 12, for giving the same, but after the usual time for closing the office.

Held, that the rule had been complied with.

A contract for the sale of goods was subject to a power of rescission which was itself subject to a condition, the performance of which was rendered impossible by an event for which neither of the parties was responsible, viz., an act of State.

Held, that the contract was absolute.

Potatoes were purchased and delivered in Tasmania under a contract which provided that the acceptance of them was to be subject to their being passed by the Tasmanian inspector, and, if exported, by the inspector of the State of import, and that if there was a rejection of the whole or any part of the potatoes, notice thereof was to be given by the purchasers to the seller, and the sale as to such potatoes as were rejected was to be void. Disease was

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then prevalent in Tasmanian potatoes. The purchasers, after obtaining the approval of the Tasmanian inspector, exported the potatoes to Victoria, but before they could be submitted to the inspector there, a proclamation by the Governor in Council of Victoria absolutely prohibited the importation of Tasmanian potatoes.

Held, that the purchasers were not entitled to avoid the sale.

Decision of the Supreme Court of Tasmania (*Dodds* C.J.), affirmed.

APPEAL from the Supreme Court of Tasmania.

The respondent entered into a contract with the appellants for the sale to them of certain potatoes. Under the contract the acceptance of the potatoes by the appellants was to be subject to their being passed by the Government inspector of the State of Tasmania and by the inspector of the State to which they were exported; and there was a clause in the contract, which, so far as material, is hereinafter set out, dealing with the avoidance of the sale in respect of potatoes that were rejected. At that time Irish blight was prevalent in Tasmania. The respondent delivered the potatoes to the appellants, and they were passed by the Tasmanian inspector and shipped to Melbourne. Before inspection by the Victorian inspector, the Government of that State issued a proclamation forbidding the importation of any Tasmanian potatoes. The potatoes were thereupon re-shipped to Tasmania and sold. The proceeds of the sale not being sufficient to repay what the appellants had paid the respondent for the potatoes, and their expenses in connection therewith, they brought an action in the Court of Requests to recover the balance, and the Commissioner decided in favour of the plaintiffs. On appeal to the Supreme Court (*Dodds* C.J.) the Commissioners decision was reversed.

From the decision of the Supreme Court the plaintiffs now, by special leave, appealed to the High Court.

Clarke, for the respondent. There is a preliminary objection. The security was not given within the time prescribed by the *Rules of the High Court* 1911, Part II., Sec. III., r. 12. It was not lodged until after the usual time for closing the office on the last day for giving it. The fact that an officer of the Court who was then present in the office, accepted the security on that

day, does not affect the matter, as the giving of it after office hours is too late: See *E. Ryan & Sons Ltd.* v. *Rounsevell* (1).

Waterhouse, for the appellants. An officer of the Court having accepted it within the time allowed for giving it, the security was duly lodged.

THE COURT overruled the objection.

Waterhouse, for the appellants. The act of the Government of Victoria done through the Governor in Council, has the same effect as if they had acted through an inspector, and entitled the appellants to rescind the contract. There was evidence to show that the respondent knew that the potatoes were for sale in Victoria. The condition that the potatoes were to be passed by the Victorian inspector had not been fulfilled. This was a sale upon a condition or an agreement for sale. The *Sale of Goods Act* 1896 distinguishes between an absolute sale and an agreement to sell. There has been no default on the appellants' part here. The respondent had notice of the appellants' intention to sell, after re-shipment of the potatoes, and impliedly gave the appellants authority to do so.

The consideration for which the money was paid to the respondent has wholly failed, and the appellants paid freight, and incurred expense in selling the potatoes. The proceeds of the sale not being sufficient to cover the amount paid by them, they are entitled to obtain the balance from the respondent.

Clarke. The effect of this contract was to vest the property in the purchasers, with a right to rescind the contract in case the potatoes were rejected within fourteen days and notice thereof given to the seller. To entitle the purchasers to throw the potatoes back on the seller's hands, there must have been a rejection of them within the terms of the contract. The onus of proving such a rejection was upon the appellants. Not only were the potatoes not, as a fact, rejected by the Victorian inspector, but the appellants did not submit them to him for inspection. The fact that they could not do so does not affect their position.

(1) 10 C.L.R., 176.

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There was no impossibility in the way of the purchasers carrying out the contract. They could have sent the potatoes to another State when the Victorian market became closed to them.

The leave to appeal should be rescinded as the matter is not of sufficient importance and the amount involved is small.

Waterhouse, in reply.

GRIFFITH C.J. The contract in question, which was for the sale of potatoes, was made on 12th August 1912. The receipt given for them was issued subject to conditions printed on a slip attached to the receipt. The first condition was as follows:— "The acceptance of potatoes to be subject to their being passed by the inspectors of the Tasmanian and other Australian Governments."

Stopping there, it was evidently contemplated by the parties that the potatoes should be submitted to a Tasmanian inspector before export, and should also be submitted to an inspector of the State of import, which was assumed to have a law by which potatoes would be refused admission if they were not passed by the inspector. It appears that at that time admission could only be refused on the ground of disease in the potatoes. Still stopping there, it is clear that the submission of the potatoes for inspection in the State of import would be the act of the purchaser; and, if there were no more in the case, I think it would be clear that the condition would imply that the submission for inspection should be made within a reasonable time. It is absurd to suppose that the purchaser could wait for an indefinite time before submitting them.

The second clause of the slip was as follows:—"If a rejection of such potatoes or any part is made within fourteen days after date of delivery and notice of such rejection be given by the buyer to the seller within forty-eight hours of the time when such buyer receives notice of rejection either by posting such notice or otherwise then the following consequences will ensue. The sale as to such part rejected or the whole of the potatoes if rejected shall be void." I need not read the rest.

It is all one document, and the two clauses must be read

together. So reading them, it is impossible to doubt that the intention of the parties was that the submission for inspection was to be made within fourteen days, and not within an indefinite but reasonable time. This was a privilege conferred upon the purchaser—a condition upon which the sale might be avoided. But it was a condition subsequent. If that condition was not fulfilled the contract was absolute. Now, in the present case, the purchasers, the plaintiffs, had obtained the approval of the Tasmanian inspector, and had exported the potatoes to Melbourne, where they desired to submit them to the Victorian inspector. But in the meantime the Victorian Government by an act of State had absolutely prohibited the import of potatoes from Tasmania, so that the purchasers were unable to submit the potatoes to the Victorian inspector for inspection. The performance of the condition had therefore become impossible in fact, for a foreign law or act of State is regarded as a fact. The impossibility had arisen from something for which neither the vendor nor the purchasers were responsible. Such an impossibility might have arisen in several other ways, as, for instance, if the potatoes had been destroyed in transit. In that case no one would suggest that the contract was avoided. When a right is to accrue on the happening of a condition, and the performance of that condition becomes impossible, the right never accrues. That is the position of the purchasers. They failed from no fault of their own to perform the only condition on which they could avoid the contract. Such an impossibility was not, of course, contemplated, and the actual result was probably not intended by the parties when they made the contract, but that always happens when the performance of a condition becomes impossible.

For these reasons I think that the plaintiffs' case fails.

We have not had the advantage of knowing what were the reasons which induced the learned Chief Justice to come to the same conclusion.

BARTON J. I am of the same opinion. The case is one of a condition subsequent. It was for the plaintiffs, to whom the potatoes were delivered, to submit them to the inspectors to be passed or rejected, and though the final acceptance was to be sub-

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ject to their being passed, that involved the submission of them by the plaintiffs for inspection. If on such submission all or any of them were not passed within a specified time by the inspectors both of Tasmania and of any State to which they might be exported, then, on giving notice of their rejection within forty-eight hours of its becoming known to them, the plaintiffs were to be entitled to a refund of the whole price or of a part proportioned to the quantity rejected. But all this was obviously conditional on the plaintiffs doing their part by submitting the potatoes for the judgment of the inspectors. So far as the Tasmanian inspection was concerned, they did their part and the potatoes were passed. But the plaintiffs failed to procure their submission to the inspection of the proper officer of the State to which they were exported, Victoria. This failure arose from the issue by the Government of that State of a prohibition of the importation of any potatoes from Tasmania.

Under these circumstances the event on which the plaintiffs were to be entitled to a refund never took place; there was no submission for inspection, and consequently no rejection within the terms of the contract. That was the misfortune of the plaintiffs, but it was obviously not the fault of the defendant.

The right to a refund was conditional on an event which never happened, and the position of the contract upon the failure by the plaintiffs on their part is the same as it would be if the condition as to refund upon rejection had never been inserted. The plaintiffs paid for the potatoes, and the potatoes became theirs. They have turned out not to be worth much to them. But they cannot rescind or avoid the whole contract because that which they were to do has not been done, and because the result is a loss to them. The contract, therefore, remains as an unconditional contract of purchase and sale, and the plaintiffs cannot under these circumstances recover.

ISAACS J. I am of the same opinion.

The *Sale of Goods Act* 1896, sec. 22, provides:—

"(1.) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

"(2.) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case."

Now "the circumstances of the case" involve what are commonly called "the surrounding circumstances in which the parties have bargained."

Reference has been made to the Coronation Cases, but I will refer to one of that class, *Elliott* v. *Crutchley* (1), for the sake of some observations of Lord *Halsbury*. The Lord Chancellor said:—"The question we have to determine is what is the real business meaning of the contract which has been made by the parties?" and, later: "if one looks at the situation of the parties —at what they were dealing with and the contingency which they both contemplated, namely, the possibility of the review going off—there is no room for doubt as to what they meant."

Applying these general considerations to the present case, we have here a business transaction between merchants buying potatoes and a farmer selling them.

The terms of the contract have been referred to; and a very material portion of the surrounding circumstances are, that at that time the contingency to be provided for as then present to the minds of the parties, was that the potatoes were likely to be refused or rejected by the other States if they were in a diseased condition. One of the plaintiffs swears that the only reason for rejection contemplated by him was on account of disease. That statement, though of course not directly affecting the construction of the contract, is very strong to show what was in their contemplation as business men in the situation of the plaintiffs.

At that time there was no proclamation such as was made a little later. That proclamation was by the State of Victoria rejecting *en bloc* all potatoes coming from Tasmania. It was then not a question of examination or of actual condition of the potatoes. Inspectors as such had nothing to do with their condition, and could not pass or reject. If only the potatoes came from Tasmania they were not to be allowed into Victoria. And for this reason these potatoes were refused admission, not by an inspector, but by superior authorities.

(1) (1906) A.C., 7, at p. 9.

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On the terms between these parties the buyer need not have sent them to Victoria or any other State in particular. He could have sold them in Tasmania if he had so desired, and then no question would have arisen. But there was in the contract what I would call a reservation in the merchants' favour, namely, that if they did export them to another State, they would have to be passed, that is, they must not be rejected, that is on account of disease. But reading the contract as a whole, that reservation was qualified or limited by certain conditions: firstly, that the rejection must take place within fourteen days from delivery, and secondly, that within forty-eight hours of the plaintiff's hearing of the rejection they should communicate the fact to the defendant.

I will not trouble to deal with the effect of failing to give notice of rejection, although I think it would be fatal. There was, in fact, no submission for inspection, because that was impossible in Victoria owing to the proclamation; and there was no rejection on account of disease.

For these reasons I think that the reservation, as I have called it, in favour of the purchasers does not help them in this case as there was no fulfilment of the conditions upon which it would operate in their favour. The acceptance therefore became absolute, and the defendant ought to succeed.

The verbal direction to sell was, as the Commissioner found, a recognition of liability—that is of supposed liability—under the special contract, and as that liability did not exist, the verbal direction has no effect.

Appeal dismissed with costs.

Solicitors, for appellants, *Nicholls & Stops*, Hobart.
Solicitor for respondent, *M. J. Clarke*, Launceston.

N. McG.