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And similarity of legislation in other parts of Australia adds to the desirability of authoritatively declaring the law.

In my opinion, the motion to rescind the leave should be refused, and the appeal should be allowed.

GRIFFITH C.J. In order to remove any impression that any injustice has been done in this case, which might perhaps arise from what has been said by my brother *Isaacs*, I think it right to say that at least a statutory majority of the Court take a very different view of the facts from that stated by him, and a different view of the law applicable to them.

Special leave to appeal rescinded.

Solicitor, for the appellant, *J. W. Abigail.*

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

B. L.

[HIGH COURT OF AUSTRALIA.]

GOLDSBROUGH, MORT & CO. LTD. . . APPELLANTS; DEFENDANTS,

AND

CARTER . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 27, 30; *Dec.* 1, 16.

Griffith C.J., Barton and Isaacs JJ.

Contract—Breach—Sale of sheep—Specific goods—Estimate of number—Delivery of lesser number—Warranty of number—"More or less"—"About."

By a contract in writing dated 26th June 1912 the defendants by their agents sold to the plaintiff "the undermentioned stock, more or less, namely,

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about 1,600 Canonbar bred ewes six years off shears 1912, about 2,400 Canonbar bred ewes seven years off shears 1912, now depasturing on Canonbar Station, being the stock recently inspected for the purchaser by self" at 5s. 6d. per head for the six-year-old ewes and 5s. per head for the seven-year-old ewes, the plaintiff being allowed 5 per cent. rejection. The defendants then agreed to deliver and the plaintiff to count and take delivery on a date to be mutually arranged (and which was afterwards fixed at 28th October), unless the manager of Canonbar should have previously notified that that date was impracticable for mustering, having regard to the weather and the state of the country, in which event the count and delivery should take place on a subsequent day to be fixed by the manager, after which date the sheep should be at the risk and expense of the purchaser. The contract then proceeded: "If on delivery being completed as aforesaid there shall be less than 1,600 and 2,400 = 4,000 of the said ewes or more than that number up to 4,500 the purchaser shall pay for the actual number so delivered at the rate above mentioned, and such variation of numbers shall not affect or vitiate this contract." Sheep of the above-mentioned descriptions, the numbers of which were not known but were estimated from the station books, were at the date of the contract depasturing on Canonbar, which comprised from 200,000 to 300,000 acres, mingled with several thousands of other sheep. At that date there had for some time been a severe drought in that part of New South Wales, which shortly before that date was succeeded by cold winter rains, and it was known that before the end of the drought many of the sheep had died, and that many others were dying in July and August. When the sheep were mustered for delivery on 28th October only 932 of the sheep could be found in existence, of which the plaintiff rejected 42 and the balance of 890 were delivered to him. In an action by the plaintiff to recover damages for the deficiency,

Held, by *Griffith* C.J. and *Barton* J. (*Isaacs* J. dissenting), that having regard to the surrounding circumstances the contract was one for the sale of specific sheep and only applied to such sheep of the particular descriptions (not exceeding 4,500) as were actually in existence at the date of the contract, and that the jury having found that, whatever the number then was, all of them which were not delivered had died in the interval, the defendants were not liable for non-delivery, and, further, that there was no warranty by the defendants that the specified number of sheep were in existence at the date of the contract or would be in existence at the date of delivery.

Decision of the Supreme Court of New South Wales: *Carter* v. *Goldsbrough, Mort & Co.*, 13 S.R. (N.S.W.), 696, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by Alexander Hunter Carter against Goldsbrough, Mort & Co. Ltd., whereby the plaintiff by the first count of his declaration alleged a contract for the sale by the defendants to him of a certain number

of sheep of certain descriptions, and a breach of it by the defendants in not delivering the whole of the sheep but only a portion thereof. The second count alleged a representation, false to the knowledge of the defendants, that they had at the date of the contract sheep of the descriptions and numbers stated. The third count was for breach of a warranty by the defendants that they had at the date of the contract sheep of the descriptions and of about the number specified depasturing on a station called Canonbar, and that they would deliver, and the plaintiff could count and take delivery of, the whole of the said sheep at Canonbar at a date to be mutually arranged. The plaintiff claimed £300. The contract sued upon was in the following terms:—

"Goldsbrough, Mort & Co. Ltd. (hereinafter called the vendor), by its agents, Smith & Holmes, have this day sold to A. H. Carter of Coreen (hereinafter called the purchaser) the undermentioned stock, more or less, namely, about one thousand six hundred (1,600) Canonbar bred ewes six years off shears 1912, about two thousand four hundred (2,400) Canonbar bred ewes, seven years off shears 1912, now depasturing on Canonbar Station, being the stock recently inspected for the purchaser by self at the price per head of six years five shillings and sixpence, seven years five shillings, upon the following terms and conditions, viz.:—Purchase money, clear of exchange, shall be paid in cash, or by banker's cheque, or by cheque guaranteed by banker at Nyngan at or before time of taking delivery of the said stock.

"The vendor or its agent will deliver, and the purchaser or his agent will count and take delivery of, the whole of the above-mentioned stock at Canonbar Station, on a date in September or October 1912 to be mutually arranged. Five per cent. (5 per cent.) rejection allowed, unless the manager of Canonbar Station shall have previously notified the purchaser or his agent that that date is impracticable for mustering (regard being had to the weather and the state of the country), in which event such count and delivery shall take place on the first day thereafter that the said manager shall notify as practicable for such count and delivery, after which date the said stock shall be at the risk and expense of the purchaser.

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"If on delivery being completed as aforesaid there shall be less than 1,600 and 2,400 = 4,000 of the said ewes or more than that number up to four thousand five hundred (4,500) the purchaser shall pay for the actual number so delivered at the rate above mentioned, and such variation of numbers shall not affect or vitiate this contract.

"Should any other dispute arise between the vendor and the purchaser, such dispute shall not vitiate the sale, but the matter shall be settled by arbitration in the usual way.

"Goldsbrough, Mort & Co. Ltd.

"By its Agents

"Smith & Holmes, Vendor.

"Dated this twenty-sixth day of June 1912.

"I hereby agree to purchase the above stock on the foregoing terms and conditions.

"A. H. Carter.

"Dated at Nyngan this fourteenth day of July 1912."

The action was tried by *Street* J. and a jury. The learned Judge asked the jury the following questions, to which they gave the following answers:—

"1. What was the market price on 29th October 1912 of Canonbar bred ewes six and seven years old? Answer: 8s.

"2. Did the defendants on 29th October 1912 offer to deliver to the plaintiff all the Canonbar bred ewes six and seven years old which were depasturing on Canonbar on 26th June 1912 other than such as had died in the intervening period? Answer: Yes.

"3. Assuming that the defendants' obligation under the contract was to deliver about 1,600, more or less, Canonbar bred ewes six years old and about 2,400, more or less, Canonbar bred ewes about seven years old, was the number of ewes actually delivered a reasonable fulfilment of the contract as to numbers in the circumstances? Answer: No.

"4. If not, what damage has the plaintiff sustained by reason of the defendants' breach of their contract? Answer: £260 8s. on seven-year-old ewes and £133 on six-year-old ewes.

"5. Outside anything contained in the contract, did the defendants at the time of entering into it represent to the plaintiff

that in fact they had then depasturing on Canonbar about 1,600, more or less, Canonbar bred ewes six years old and about 2,400 Canonbar bred ewes seven years old? Answer: Yes.

"6. If so, did the defendants at the time of making such representation know that in fact they had a much smaller number? Answer: No.

"7. If such representation was in fact made, was the plaintiff induced by it to enter into the contract? Answer: Yes.

"8. Were there about 1,600, more or less, Canonbar bred ewes six years old and about 2,400, more or less, Canonbar bred ewes depasturing on Canonbar at the time the contract was entered into? Answer: We think there were less.

"9. If so, was the short delivery under the contract caused by drought? Answer: Partly.

"10. Assuming that the contract contained a warranty as alleged in the third count, what do you assess the damages at? Answer: £393 8s."

Thereupon a verdict was entered for the plaintiff upon the first and third counts for £393 8s., and for the defendants upon the second count.

The defendants then moved to set aside the verdict for the plaintiff and to enter a nonsuit or a verdict for the defendants or for a new trial. This motion was dismissed by the Full Court: *Carter* v. *Goldsbrough, Mort & Co.* (1).

From that decision the defendants now appealed to the High Court.

The other material facts and the nature of the arguments appear in the judgments hereunder.

Lamb K.C. (with him *Pitt*), for the appellants.

Ralston K.C. (with him *Sanders*), for the respondent.

During argument reference was made to *Couturier* v. *Hastie* (2); *Taylor* v. *Caldwell* (3); *Hart* v. *MacDonald* (4); *Nickoll & Knight* v. *Ashton, Edridge & Co.* (5); *Francis* v. *Lyon* (6);

(1) 13 S.R. (N.S.W.), 696.
(2) 5 H.L.C., 673.
(3) 3 B. & S., 826, at p. 833.
(4) 10 C.L.R., 417, at p. 427.
(5) (1900) 2 Q.B., 298, at p. 302; (1901) 2 K.B., 126, at p. 131.
(6) 4 C.L.R., 1023.

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McConnell v. *Murphy* (1); *Gwillim* v. *Daniell* (2); *Reilly* v. *Finlay* (3); *Charrington & Co. Ltd.* v. *Wooder* (4); *Howell* v. *Coupland* (5); *Scott* v. *Coulson* (6); *Heilbut, Symons & Co.* v. *Buckleton* (7); *Varawa* v. *Howard Smith Co. Ltd.* (8); *Krell* v. *Henry* (9); *Mack* v. *McPhillamy* (10); *Ashmore & Son* v. *C. S. Cox & Co.* (11); *Ashcroft* v. *Crow Orchard Colliery Co.* (12); *The Moorcock* (13); *Lowe* v. *Josephson* (14); *Hickey* v. *Tooth* (15); *Seivl* v. *Brown* (16); *Holmes* v. *Jones* (17); *Gorrissen* v. *Perrin* (18); *Behn* v. *Burness* (19); *Corkling* v. *Massey* (20).

Cur. adv. vult.

Dec. 16.

The following judgments were read:—

GRIFFITH C.J. The contract sued upon in this case, which was dated 26th June 1912, was in the form of a memorandum of sale. It begins with a statement that the appellants (by their agents) "have this day sold" to the respondent "the undermentioned stock, more or less, namely, about 1,600 Canonbar bred ewes six years off shears 1912, about 2,400 Canonbar bred ewes seven years off shears 1912, now depasturing on Canonbar Station, being the stock recently inspected for the purchaser by self at the price per head of six years 5s. 6d., seven years 5s." The vendor undertook to deliver and the purchaser to count and take delivery of "the whole of the above-mentioned stock" at Canonbar on a date in September or October 1912 to be mutually arranged, with "five per cent. (5 per cent.) rejection allowed." The document proceeded: "unless the manager of Canonbar Station shall have previously notified the purchaser or his agent that that date is impracticable for mustering (regard being had to the weather and the state of the country), in which event such count and delivery shall take place on the first day thereafter that the said manager shall notify as practicable for such count

(1) L.R. 5 P.C., 203, at pp. 215, 218.
(2) 2 C. M. & R., 61.
(3) 21 N.S.W.L.R., 100, at p. 103.
(4) (1914) A.C., 71.
(5) L.R. 9 Q.B., 462; 1 Q.B.D., 258.
(6) (1903) 2 Ch., 249, at p. 253.
(7) (1913) A.C., 30.
(8) 13 C.L.R., 35, at p. 60.
(9) (1903) 2 K.B., 740.
(10) 10 N.S.W.L.R., 187.
(11) (1899) 1 Q.B., 436.
(12) L.R. 9 Q.B., 540.
(13) 14 P.D., 64.
(14) 6 S.C.R. (N.S.W.), 132.
(15) 4 S.C.R. (N.S.W.), 194.
(16) 5 N.S.W.L.R., 289.
(17) 4 C.L.R., 1692, at p. 1699.
(18) 2 C.B. (N.S.), 681.
(19) 3 B & S., 751.
(20) L.R. 8 C.P., 395.

and delivery, after which date the said stock shall be at the risk and expense of the purchaser. If on delivery being completed as aforesaid there shall be less than 1,600 and 2,400 = 4,000 of the said ewes or more than that number up to 4,500 the purchaser shall pay for the actual number so delivered at the rate above mentioned, and such variation of numbers shall not affect or vitiate this contract."

In order to construe this contract regard must be had to the subject matter and the surrounding circumstances. The relevant facts are that the stock in question were at the date of the contract depasturing on Canonbar Station, a property of from two to three hundred thousand acres, not as an isolated flock or flocks but mingled with scores of thousands of other sheep; that there had been for some time a severe drought in that part of New South Wales, the rainfall for the first five months of the year not having exceeded half an inch; that under such circumstances it was impossible to assemble or muster the sheep for the purpose of counting them; and that the only means, therefore, of estimating their number was by the station records, commonly called "Book Muster," which would show how many sheep had been shorn, how many disposed of, how many were known to have died, and so on. The result would be an estimate, more or less accurate, according to the climatic conditions, which might have increased or reduced the natural death rate. It also appeared that in June, shortly before the date of the contract, the drought had been succeeded by cold winter rains. It is common knowledge that both during such a drought and after its breaking up the rate of mortality is likely to be very large, especially amongst sheep of the class in question. It appeared further that before the end of the drought many of the sheep were known to have died, and many others were dying in July and August. The sheep appeared by the station books to be about 5,000 in number, and were at first offered for sale as being of about that number, but before the making of the contract the number of 4,000 was substituted.

The 28th of October was arranged as the date for delivery. On that date only 932 of the sheep could be found in existence, of which the plaintiff rejected 42, leaving a balance of 890.

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The action was brought to recover damages for the deficiency. The declaration contained three counts. The first count alleged a contract that the defendants should sell and the plaintiff should buy 1,600 and 2,400 sheep described as in the contract, and alleged as a breach that the defendants did not deliver the whole of the sheep but only a small portion thereof. The second count alleged a representation, false to the knowledge of the defendants, that they had at the date of the contract sheep of the description and of the numbers stated in the contract. The third count was for breach of a warranty by the defendants that they had at the date of the contract sheep of the description and of about the numbers specified in it depasturing at Canonbar, and that they would deliver, and that the plaintiff could count and take delivery of, the whole of the said sheep at Canonbar at a date to be mutually arranged.

The defendants pleaded that the contract was for the sale of specific sheep and that the deficiency was made up of sheep which had either perished before the date of the contract or perished afterwards without any fault on their part.

The jury found, in answer to questions left to them by the trial Judge, that the defendants delivered to the plaintiff at the agreed date all the sheep described in the contract other than such as had died in the intervening period. As to the second count they found that the defendants outside the contract itself made the representation alleged but that the defendants did not know it to be untrue. In answer to a question whether there were depasturing on Canonbar at the date of the contract sheep of about the numbers specified, they said: "We think there were less." As to the third count the learned Judge merely asked the jury to assess damages on the assumption that the warranty alleged was proved, which damages he said would be the same as on the first count.

The Full Court dismissed a motion to enter a nonsuit or verdict for the defendants, or for a new trial.

The first question is whether the contract was for the sale of unspecified sheep or for the sale of specific chattels.

Having regard to the facts already stated, I think it is plain that the contract was for the sale of the specific sheep comprising

the two lots described. I do not use the word "flock," which would suggest that the sheep in question were collected together and separated from others, which was not the case. But the subject matter was nevertheless the specific sheep described, which were roaming over the wide extent of Canonbar, with a proviso that the purchaser should not be bound to take more than 4,500. The law governing the case is, therefore, that applicable to contracts for the sale of specific chattels. It is an implied condition of such a contract that at the time of making the contract or before the time of performance the chattels are or will be in existence (*Couturier* v. *Hastie* (1)), and, further, that they shall still be existing when the time comes for performance (*Howell* v. *Coupland* (2)). The contract of 26th June, therefore, only applied to such sheep as were then actually in existence. It was impossible, from the nature of the case, to prove how many were then alive. The jury said: "We think there were less," *i.e.*, less than about 4,000 more or less. I understand their answer to mean that they thought that the number had probably been already reduced by deaths below 4,000, which, indeed, was a most reasonable, if not the only reasonable, inference from the undisputed facts. Whatever the number was, the sheep then in existence were the only sheep to which the contract applied, and the jury found that all of them which were not tendered for delivery had died in the interval. It was not suggested that the defendants had disposed of any of them, or that the failure to deliver arose from other than natural causes.

These considerations dispose of the case except so far as it depends on the third count of the declaration.

The warranty alleged in that count is twofold, (1) that the number of sheep specified were then in existence, and (2) that the plaintiff should or would be able to take delivery of them on the date to be appointed for delivery. It is said to arise by necessary implication from the words "the undermentioned stock, more or less, namely, about." The test for determining whether a term is to be implied in a contract is whether it must have been in the contemplation of both parties to the transaction that the asserted obligation should be undertaken: *The Moorcock* (3).

(1) 5 H.L.C., 673. (2) 1 Q.B.D., 258. (3) 14 P.D., 64.

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In order to apply this test all the circumstances must be taken into consideration. There is no doubt that words of description may and often do amount to a warranty; but why? Because from the nature of the transaction both parties must have so intended. A statement of a number with the words "about" or "more or less," or both, may, in my opinion, in some cases operate as a warranty, especially if the price is a lump sum. In the present case both parties were aware that the number stated was a mere estimate (and, as the jury found, an honest estimate) made by the vendors upon such materials as were available. The price to be paid was at *per* head. Can it then be inferred that a vendor who informs his purchaser that he does not know, and that it is impossible to know, how many of the sheep are actually in existence, and who expressly stipulates that if the number delivered is less than 4,000 the purchaser shall pay for the number delivered, and that such variation of numbers shall not affect or vitiate the contract, must have intended to warrant that about 4,000 more or less were in existence? In my opinion it is impossible to make such an implication. It is equally impossible to imply a warranty that the sheep should continue in existence until the date of delivery. Such a warranty would be no more than an implied promise to deliver the sheep, super-imposed upon the provision to deliver already contained in the operative words of the contract. Such a promise is, *primâ facie*, out of place in a sale of specific goods, and certainly cannot be implied in substitution for the condition as to the continued existence of the specific chattels sold which is implied by the general law.

For these reasons I am of opinion that there was no evidence to support the third count. If there were, the plaintiff would still be faced by serious difficulties. I will say no more about the second branch of the alleged warranty, and will deal with the first branch, that the sheep were in existence at the date of the contract. In the summing up of the learned Judge the two branches were treated as one, and the damages were assessed on that basis. It is, however, obvious that the measure of damages for breach of the first branch would be very different from that of the damages recoverable for breach of the second. The true measure in the first case is such a sum as would put the plaintiff

in the same position as if the warranty had not been broken, *i.e.*, in the same position as if about 4,000 sheep, more or less, of the kinds described had been in existence at the date of the contract. In the first place, there was no evidence as to the extent of the deficiency then existing, if any. The jury thought there was some deficiency. In order to assess the damages for a breach it would be necessary to find, first, the extent of the deficiency, and, secondly, how many of those deficient would, if they had then been living, have probably survived to the date arranged for delivery. These questions were not left to the jury, so that the best the plaintiff could hope for would be a new trial to find the facts. I doubt very much whether, having regard to the conduct of the case at the trial, when no distinction was taken by the plaintiff between the two branches of the alleged warranty, he would be entitled to a new trial to set up what is practically a new case, under which he could not hope to recover more than a trivial sum for damages. At any rate, he ought not to be allowed to do so except upon stringent terms as to the costs of the last trial. But, for the reasons already given, I think that no warranty at all was established, and that the defendants are entitled to judgment on the whole record.

The appeal must therefore be allowed.

BARTON J. I am of opinion that the contract was for the sale of two specific lots of sheep, and that the words relating to the numbers were not a warranty, but merely estimates in the sense in which that term is used in *McConnell* v. *Murphy* (1). Both of the lots were to consist of Canonbar bred ewes, the one lot being six years old and the other seven years. They were described as being "now," that is, on 26th June 1912, depasturing on Canonbar Station, and as being the stock recently inspected for the purchaser by himself, though it appeared in evidence that the inspection had only been partial. The purchase price was 5s. 6d. for the six-year-old ewes and 5s. for the seven-year-old ewes. The vendor was to deliver, and the purchaser was to count and take delivery of, "the whole of the above-mentioned stock" at Canonbar Station on a date in September or October 1912 to be mutually arranged.

(1) L.R. 5 P.C., 203.

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That the contract was not one for the sale merely of a certain number of sheep is, I think, made plainer by the following words in the agreement:—"If on delivery being completed as aforesaid there shall be less than 1,600 and 2,400 = 4,000 of the said ewes or more than that number up to 4,500, the purchaser shall pay for the actual number so delivered at the rate above mentioned, and such variation of numbers shall not affect or vitiate this contract."

It might be argued that the contract, due regard being had to the words just quoted, was only for the sale of such of the sheep as it might be possible to muster for delivery, that the parties would naturally take into account the chances of such muster and delivery in view of the known climatic conditions and the past and anticipated seasons. But in any case, if the subject matter is specific, there are implications upon which in view of the evidence the appellants are justified in relying. On the evidence the area of Canonbar Station is 200,000 or 300,000 acres, on which there were some 80,000 or 90,000 sheep running. The ewes in question were not separated from the rest of the sheep at the time of the contract. From the beginning of the year till the end of May only a little over half an inch of rain had fallen. The impossibility of mustering the sheep at the time of the contract for the purpose of ascertaining their number was apparent. The station books were therefore the only guide, and they could not lead either buyer or seller to anything more than an estimate. The first considerable rain of that year was on the 9th and 10th June, on which dates just over two inches fell. These rains, falling near midwinter, were cold, as was the further rain of about one inch which fell on the 21st. Large mortality was certain during the rainless period, and in their weak condition owing to drought such mortality would necessarily be largely increased by these heavy winter downfalls, and it does not seem to be disputed that the mortality would be greatest amongst old sheep such as those the subject of the agreement. It was impossible, however, to estimate the number of deaths up to the end of October, the time which, in the words of the contract, was not "impracticable for mustering." But it could be and was then ascertained how many sheep of the

subject of the contract were available for delivery, and these must have been within a narrow margin the whole of the survivors. For it is not pretended that the appellants sold any out of the two lots in question, nor has any act of the appellants been suggested that could have diminished them. The respondent admits that the numbers given to him were merely "book numbers," and he knew that the old breeding ewes would suffer worse than the others in a drought. He says: "I anticipated there might be a discrepancy, but I did not think it would be so great." By the books the number appeared to be about 5,000, but Mr. MacLeod, the appellants' manager, would not contract for more than the estimated number of 4,000. The losses, however, exceeded all estimates of either party.

Street J., who tried the case, put certain questions to the jury, among which was this: "Did the defendants on 29th October 1912 offer to deliver to the plaintiff all the Canonbar bred ewes six and seven years old which were depasturing on Canonbar on 26th June 1912 other than such as had died in the intervening period?" The answer of the jury was in the affirmative, and in fact the number which the respondent subsequently accepted without prejudice to his legal rights amounted to 418 six-year-old ewes and 472 seven-year-old. Having the right to reject 5 per cent., he had exercised it to the extent of rejecting 40 ewes out of 930.

It is clear that the difference between the estimate of 4,000 and the offered delivery of 930 was in effect wholly owing to deaths, but under the conditions which existed it was impossible to say how many ewes had died before the date of the contract, and how many died from that date till 29th October. As to the losses up to and including 26th June, if it can be said to be proved that any had then occurred, the principle of *Couturier* v. *Hastie* (1) applies. The assent of the parties was founded on a mutual mistake of fact, that the estimated numbers were then still in existence, so that to the extent of the ewes that had perished at the date of the contract the subject matter failed. As to the losses between 26th June and 29th October, the principle which seems to apply is that which in *Taylor v. Caldwell* (2)

(1) 5 H.L.C., 673. (2) 3 B. & S., 826, at p. 833.

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Blackburn J., for the Court of Queen's Bench, stated thus:— "Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." See also *Krell* v. *Henry* (1). I think the contemplation of such continuing existence was the foundation of the contract here, and that the perishing in a very large measure of the subject matter happened without default on the part of the appellants.

The case most like the present is *Howell* v. *Coupland* (2). There the sale was of "200 tons of regent potatoes grown on the land belonging to defendant at W. at £3 10s. a ton." Delivery was to be in the following September and October. 68 acres had been appropriated at W. for growing these potatoes, and were more than sufficient to raise the 200 tons. 25 acres had been actually sown and the remaining 43 acres were ready for sowing. Afterwards, and before September, disease caused the crop to fail, and only a little over 79 tons could be delivered. The action was for non-delivery of the residue of 200 tons, and the defendant was held excused by the Court of Queen's Bench and by the Court of Appeal. *James* L.J. said (3): "Is it a contract for a certain quantity of potatoes of a particular sort, with a warranty that they shall be supplied; or is it a contract to deliver 200 tons of potatoes out of a specific crop? I am of opinion it is the latter; . . . . and the defendant is excused by reason of his being prevented by causes for which he is not answerable." See also *Reilly* v. *Finlay* (4) and *Nickoll & Knight* v. *Ashton, Edridge & Co.* (5).

(1) (1903) 2 K.B., 740.
(2) L.R. 9 Q.B., 462; 1 Q.B.D., 258.
(3) 1 Q.B.D., 252, at p. 262.
(4) 21 N.S.W.L.R., 100.
(5) (1901) 2 K.B., 126, at p. 133.

If, then, there is no warranty such as is contained in the third count, the appellants are in my view excused by delivery of such part of the subject matter, being a specific subject matter, as they were able to deliver on 29th October, the perishing of the remainder of the subject matter not being chargeable to their default.

Was there then such a warranty as the respondent set up in the third count of the declaration? In *Behn* v. *Burness* (1) *Williams* J., delivering the judgment of the Exchequer Chamber, said:—"With respect to statements in a contract, descriptive of the subject matter of it, or of some material incident thereof, the true doctrine, established by principle as well as by authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty." His Lordship proceeded to distinguish between warranties available as conditions and warranties in the narrower sense of stipulations for the breach of which compensation must be sought in damages. We need not pursue this distinction here, since the warranty alleged is of the latter class. On this question, again, *Reilly* v. *Finlay* (2) is in point in favour of the appellants. There similar words as to numbers were held to be words of estimate or expectation only. *Darley* C.J. referred to *Gwillim* v. *Daniell* (3). There it was agreed to manufacture a quantity of naphtha, and to supply it, "say 1,000 to 1,200 gallons per month." These words were held by the Court of Exchequer not to amount to a warranty that the manufacturer would supply 1,000 to 1,200 gallons per month, but only to an assertion as to his belief that that was the quantity he would be able to supply. A similar construction was placed by the Judicial Committee of the Privy Council on the words "say about 600 red pine spars" in *McConnell* v. *Murphy* (4), already cited. In *Reilly* v. *Finlay* (2) the principle to be followed in arriving at the intention of the parties was succinctly stated by *Owen* J. in the first paragraph of his judgment, at p. 101.

This branch of the case seems to me to depend wholly on the

(1) 3 B. & S., 751, at p. 755.
(2) 21 N.S.W.L.R., 100.
(3) 2 C. M. & R., 61.
(4) L.R. 5 C.P., 203.

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question whether an intention to warrant can be deduced from the whole of the evidence (see *per* Lord *Moulton* in *Heilbut, Symons & Co.* v. *Buckleton* (1)). Before the appellants can be held to have warranted the number at all the *animus contrahendi* must be clearly and strictly shown. If, as I think, the words relating to numbers were words of estimate, expectation, or belief, those numbers were not contracted for upon the evidence in this case. I think, therefore, that the respondent has not proved his warranty.

I will not enter into the question of damages as the learned Chief Justice has done, because I think that upon the reasons I have given the appeal must be allowed.

ISAACS J. I am of opinion that the unanimous judgment of the Supreme Court was right.

The contract between these parties is, as we were told, a very usual one. So usual, indeed, that it is on a printed form, needing, as is seen on inspection, only the particulars necessarily special to each individual case to be inserted. *Francis* v. *Lyons* (2) indicates that in its essentials the same form extends to Queensland. *Lowe* v. *Josephson* (3) shows that this form of contract is of very long existence.

There is nothing in the contract that calls for the explanation of any word or expression. All the relevant words and phrases are of ordinary natural English signification, and have no secondary or double meaning. The subject matter is undisputed. No custom or usage has been pleaded or suggested.

Really nothing is needed for the construction of the contract but reading its actual terms. And this is, of course, the duty of the Court.

The circumstances, however, have been adverted to. So far as they can possibly be material they are these. The appellants owned Canonbar Station, and had sheep to sell, 5,000 sheep on the station. The respondent put himself into personal communication with the appellants' representatives, and asked with respect to the 5,000 sheep mentioned. He was told that as to the numbers,

(1) (1913) A.C., 30, at p. 47. (2) 4 C.L.R., 1023.
(3) 6 S.C.R. (N.S.W.), 132.

5,000 was only a book number, and that it could not be taken that the full number was actually there, but that there were 4,000, more or less. The jury found as a fact, and their finding is not disputed, that that distinct representation as to 4,000, more or less, was definitely made. The jury also found that the representation was not fraudulent.

I think the fact of the representation being made material only as going to evidence the personal ignorance of the respondent as to numbers, apart from what the appellants' agents told him, and that he was in a position of having to rely upon them as to numbers.

The respondent inspected some 300 of the sheep, in order to see their kind and quality. But his inspection did not extend to the whole of the sheep or to ascertaining their number.

The station is a very large one, and no one but those working it could pretend to anything like acquaintance with the number of sheep running upon it. The owners, however, getting their reports from their employees, and entering their gains and losses in books, have, or may be supposed to have, a fairly approximate knowledge of the condition of their own affairs. Allowing for all probable errors, the vendors here—instead of entering 5,000 in the contract, the book numbers, and stating it as a book number estimated only—took the course of selling "the undermentioned stock, more or less," that is, on a "more or less" basis, and as to numbers, fixed at "about" 4,000, making what they considered a sufficient deduction to provide for contingencies.

A buyer in the respondent's situation naturally wants to have some assurance as to numbers. He has his own business affairs, and, unless he has a minimum provided for the coming season, he has done nothing. On the other hand, if he has an unlimited maximum to provide cash for, he has embarked on a very unbusinesslike enterprise. Therefore "about" 4,000 meets both vendors' and purchaser's difficulties. But that basis is some assurance to the buyer as to numbers, and, with regard to the vendors, is without the rigidity of inelastic figures.

There was much controversy as to whether the sale was one of specific goods. They were specific in the sense that the contract could not be satisfied by the vendors, except by delivering

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Canonbar sheep that were there on 26th June. They were generic in the sense that if there were (say) 7,000 Canonbar sheep on 26th June, the particular "4,000, more or less," had not been appropriated, and 3,000 of them could in the meantime have been removed or sold to another person. See the observations in accordance with this in *Chalmers' Sale of Goods*, 7th ed., at pp. 146, 147. But no one could properly say that the whole supposed 7,000 sheep were unqualifiedly purchased by this contract, because the subject of the sale is "the undermentioned stock, more or less," and not simply the whole stock whatever it may be depasturing on Canonbar in June 1912. In other words (using that phrase as a compendious statement of the 1,600 and 2,400, separately mentioned), the numbers qualified by "about" or "more or less" are an essential part of the contract, not an estimate merely.

The case of *Brawley* v. *United States* (1) is a clear authority for the respondent. *Bradley* J. draws the distinction between the case where goods are identified by reference to independent circumstances, such as an entire lot deposited, manufactured or shipped, and the case where no such independent circumstances are referred to—that is, of course, so as to completely identify the goods. Now, here the second case applied because, independently of numbers, they are not identifiable, since the chattels sold are the "undermentioned stock, *more or less*, namely," and then follow the agreed on numbers, which are, of course, to be supplied out of the specific flock. Then *Brawley's Case* says that in such event the quantity specified is material and governs the contract, the words "more or less" or "about" providing against accidental variations arising from slight and unimportant excesses or deficiencies. *Brawley's Case* in this respect has been re-affirmed in *Moore* v. *United States* (2).

In my opinion the true meaning of the contract apart from the later qualifying provision, is that what the vendors sold and promised to deliver was the sheep which on 26th June 1912 were actually grazing on Canonbar Station, the vendor warranting, however, that the number on that date was 4,000, more or less,

(1) 96 U.S., 168, at p. 172.

(2) 196 U.S., 157, at p. 168.

and therefore that that was the number one side was bound to deliver and the other to take.

I arrive at that conclusion from applying the plain unequivocal words of the document to the known and equally unequivocal subject matter. In that state of things evidence can throw no light on the intention of the parties, which must be ascertained from the words they have used: *Charrington & Co. Ltd.* v. *Wooder* (1) and *Bowes* v. *Shand* (2). In *Lowe* v. *Josephson* (3) the Supreme Court of New South Wales laid down the law for contracts of this character in the way I have stated, and held the words "more or less" were included in a warranty. That decision never since being questioned, and being in my opinion absolutely right, the cases cited for the appellant, such as *McConnell* v. *Murphy* (4) and *Reilly* v. *Finlay* (5), are, I think, irrelevant.

Whether the conclusion I have arrived at is right or not depends on the legal meaning of warranty, because I think it wholly untenable to say the words relating to numbers were an estimate only. If they were, then, however few the sheep—even down to one,—apart from fraud the purchaser would have been not only without remedy, but would have had to accept whatever was offered. There would thus have been no need to provide later on that he should be bound to accept a diminished number, much less to add the guarded provision that that should not "affect or vitiate this contract."

So we are brought to consider the legal nature of a warranty. Lord *Abinger* defined it in *Chanter* v. *Hopkins* (6) in the following terms, that have ever since been approved of:—"A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet collateral to the express object of it."

The express object of the present contract was the sale of the Canonbar flock, "more or less"; that is, on a more or less basis. The statement of "about 4,000" is part of the contract, but collateral to the express object of it. Now, what is the real test

(1) (1914) A.C., 71, at pp. 77, 93.
(2) 2 App. Cas., 455, at p. 468.
(3) 6 S.C.R. (N.S.W.), 132.
(4) L.R. 5 P.C., 203.
(5) 21 N.S.W.L.R., 100.
(6) 4 M. & W., 399, at p. 404.

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of whether that statement is a warranty or not? I quote on this point the words of *A. L. Smith* M.R., in *De Lassalle* v. *Guildford* (1). The Master of the Rolls said:—"To create a warranty no special form of words is necessary. It must be a collateral undertaking forming part of the contract by agreement of the parties express or implied, and must be given during the course of the dealing which leads to the bargain, and should then enter into the bargain as part of it. It was laid down by *Buller* J. as long ago as 1789 in *Pasley* v. *Freeman* (2): 'It was rightly held by *Holt* C.J.,' in *Crosse* v. *Gardner* (3) and *Medina* v. *Stoughton* (4), 'and has been uniformly adopted ever since, that an affirmation at the time of sale is a warranty provided it appear on evidence to have been so intended.' In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case it is a warranty, in the latter not: see *Benjamin on Sales*, 3rd ed., p. 607, whose statement upon the law, in my judgment, is accurate." I have already indicated reasons why the purchaser must have relied on the statement as to number—approximate as it was—as the basis of his entering into the contract, and this, I think, settles the matter on the point of warranty. In *Schawel* v. *Reade* (5) the House of Lords had to deal with the question of warranty. The facts are immaterial, but the reaffirmation of principles is important. Lord *Atkinson* said as to a representation of the soundness of a horse:—"I think it is perfectly plain that the jury must have understood that that was part of the transaction, and meant to be the basis of the sale. If that was the intention of the man who made the statement, and if the person to whom it was addressed acted upon it, then that constitutes a warranty. A statement is made, it is acted upon, and it is made by the person who makes it for the purpose of the sale, that is, with the intention of bringing about

(1) (1901) 2 K.B., 215, at p. 221.
(2) 3 T.R., 51.
(3) Carth., 90; *sub nom. Cross* v. *Garnet*, 3 Mod., 261.
(4) Salk., 210; 1 Ld. Raym., 593.
(5) (1913) 2 I.R., 64, at p. 84.

the sale, ... I do not know what other ingredient is necessary to create a warranty."

I need not quote what Lord *Moulton* said, but, applying the effect of his observations to this case, the vendors here took the responsibility of stating the approximate number of sheep on the station, thereby relieving the purchaser from counting for himself, and so inducing him to accept that number, and enter into the contract. That constitutes a warranty.

Now, was that warranty broken ? The jury have found that it was. It is quite true, as Mr. *Lamb* said, that the plaintiff at the trial did not attempt to give any evidence as to what precise number was deficient on 26th June. One of the positions taken up by the plaintiff at the trial was that the warranty covered both 26th June and 29th October, and that on that ground alone the plaintiff could recover. I disagree as to any warranty of delivering. But the plaintiff's case was not confined to that: he also insisted on ordinary breach of contract to deliver, and in that connection his case was this. There was a warranty of number, as on 26th June, namely, about 4,000. If there were on that date less than a reasonable approximation to that number a breach occurred entitling him to damages. Only 930 were tendered on 29th October, and the defendants were bound to account for the difference, and to show as matter of excuse that they had perished without defendants' default.

The defendants, in whose exclusive knowledge the facts were, and who kept records, gave no evidence whatever as to the number that died. As *Ferguson* J. says, "No one was called to say that he had seen the dead body of one of the 4,000 Canonbar ewes."

The books, according to defendants' own manager, show nothing reliable on the point of losses. The estimates are mere inferences based on assumptions that previous entries are correct, and no care was apparently taken to protect Carter's interests, or to have any note taken of the real number on 26th June, or what happened to the sheep until delivery. The defendants' case on this point is all guesswork, and the plaintiff was not in a position to know. But not only is the defendants' case

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guesswork: the discrepancy, after allowing a liberal percentage for "about" and "more or less" between the number that ought to be on the station on 26th June and the number actually there on 29th October, was so great as to make it very questionable whether death accounted for them all. The plaintiff at first suggested certainly that some had been sold or taken away—because the suggested mortality was excessive on its face. This was disproved by MacLeod's evidence, and Mr. *Ralston* frankly withdrew it. But that only left the huge discrepancy still unaccounted for. And the jury took this view. They said, in effect, "We do not believe any of the sheep were taken away. We believe some died, but nothing like the number required to absolve the defendants, and as they neither counted the sheep as on 26th June nor watched their disappearance afterwards, and as they give no trustworthy account of numbers that died, and acknowledge their books to be unreliable, the conclusion we come to is that the numbers contracted for were not there on 26th June." That, especially having regard to the defendants' onus of proof to excuse themselves, is a natural business conclusion to arrive at.

So they said in answer to question 2, that all the ewes depasturing on Canonbar on 26th June were offered to plaintiff except such as had died in the meantime.

To question 3, that the number so offered was not a reasonable fulfilment of the contract as to numbers in the circumstances.

To question 8, that the numbers contracted for were not on the station at all on 26th June; and to question 9, that the short delivery—that is, the short delivery referred to in the answer to question 3—was "partly" caused by drought. That view reconciles every position. Whatever deaths took place arose from "drought," that is, directly or indirectly; but the bulk of the sheep were not there on 26th June to die. Then, that in the circumstances, which at the trial were taken by all to mean the whole circumstances down to time of delivery, the defendants' failure represented in money damages £393 8s.

Now, that is substantially the view taken by the jury at the trial, and I think put to them in substance by *Sly* J.; it is also

the way, in effect, in which all the three learned Judges of the Supreme Court dealt with the case. I agree with all those four Judges, and, so far as my province extends, with the view taken by the jury.

I have already adverted to the proviso compelling Carter to accept even the smallest number on delivery, and declaring that such variation of numbers shall not affect or vitiate this contract. I add to that, that the stipulation limiting the maximum to 4,500 showed, on the other hand, that the whole flock was not the subject of sale, and that even 500 excess was beyond the limit of "about" or "more or less." And the effect of the proviso is, as I expressed it during the argument, to indicate that the parties regarded the statement as to numbers, so far from being a mere estimate, as being in the nature of a condition, breach of which by the vendors would entitle the purchaser to refuse acceptance at all, and so it was stipulated that the reference to numbers might be departed from, wholly as to deficiency and within a fixed limit as to increase, without destroying the contract, but, of course, without affecting any right to complain of the departure. In short, it reduced what might have been regarded as a condition to a warranty.

Mr. *Lamb* stated very fairly that the question raised on the appeal was one of liability or no liability; and that if liability at all were established he did not wish to quarrel with the damages. I think that that was not only candid and fair, but it is the only course really open to the appellants, as the question was apparently not argued in the Supreme Court either. Therefore, whatever might otherwise be said as to any omission by the learned Judge at the trial with reference to damages is not open now, and, if it has been open, has been abandoned so far as the count for breach of contract to deliver is concerned, that is, apart from warranty.

In these circumstances, the judgment appealed from should, in my opinion, be affirmed, and the appeal dismissed. At the worst, if there is anything in the question of damages, judgment should not be entered for appellants, but a new trial directed on that point.

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Appeal allowed. Judgment appealed from discharged. Verdict set aside and verdict entered for the defendants with costs of action. Respondent to pay costs of appeal.

Solicitors, for the appellants, *Minter, Simpson & Co.*
Solicitors, for the respondent, *Shipway & Berne.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE AEOLIAN COMPANY . . . . APPELLANTS;

AND

STODDARD . . . . . RESPONDENT.

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MELBOURNE, *March* 18, 19.

Griffith C.J., Isaacs, Gavan Duffy, and Rich JJ.

Patent—Application—Want of novelty—Absence of invention—Prior user.

It was a matter of common knowledge that the perforations on note-sheets for player-pianos might be prolonged beyond the line of the commencement of the next following perforation or perforations so as to avoid producing a *staccato* effect, and that by lengthening the perforations the duration of the musical notes corresponding therewith was extended. An application was made for a patent for improvements in note-sheets whereby it was proposed to prolong those perforations corresponding to such musical notes as were in harmony with the succeeding notes to such a length as to allow the strings of the particular notes struck to vibrate as long as the succeeding notes were in harmony with them.

Held, by the Court, that the application should be refused:

By *Griffith* C.J., on the ground that there was no novelty;

By *Isaacs* and *Rich* JJ., on the ground that there was no invention.

APPEAL from the Commissioner of Patents.

Charles Fuller Stoddard applied for a patent for "Improvements in or relating to note-sheets for player-pianos and the