Reversed by PC -
22 CLR 307

[HIGH COURT OF AUSTRALIA.]

PURCELL . . . . . APPELLANT;
DEFENDANT,

AND

BACON . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *April* 27, 28. SYDNEY, *Dec.* 9, 10, 11, 19.

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

Contract—Sale of cattle—Delivery—Time for delivery—Principal and agent—Authority of agent to vary contract—Severability of contract—Sale of Goods Act 1896 (*Qd.*) (60 *Vict. No.* 6), *sec.* 14 (3).

By an agreement in writing the plaintiff agreed to sell, and O. as agent for the defendant agreed to purchase, "the following stock, viz.:—About 1,500 mixed cattle (more or less) now depasturing on Lake Dunn with 100 branded cattle and all unbranded cattle given in price £2 per head delivery on or before 26th April 1912 on terms £500 deposit to credit" of plaintiff "balance cash on delivery of stock also about 700 mixed cattle (more or less) now depasturing on Ballyneety being the whole of the herd with all unbranded cattle given in price £2 15s. per head. Delivery and conditions of sale same as above." Lake Dunn and Ballyneety were adjoining pastoral properties, one being enclosed and the other unenclosed. It was afterwards mutually agreed in writing that 26th April should be the date of delivery of both lots of cattle and the same place was agreed to for delivery of both. Before 26th April it was arranged between the plaintiff and O., who was the defendant's agent to take delivery, that the collection of the Lake Dunn cattle for delivery should stand over until completion of delivery of the Ballyneety cattle. The Ballyneety cattle were delivered to O. as agent for the defendant on 26th April. The defendant refused to take delivery of the Lake Dunn cattle. In an action by the plaintiff against the defendant to recover damages for refusal to take delivery of the Lake Dunn cattle,

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Held, by *Isaacs*, *Gavan Duffy* and *Rich* JJ. (*Griffith* C.J. and *Barton* J. dissenting), on the evidence, (1) that O. had no actual or apparent authority to vary the written contract by substituting a later date for delivery of part of the cattle than that specified by the contract; (2) that the defendant had not ratified any agreement made by his agent O. to accept delivery on a later day; (3) that O. as such agent had no authority to make any arrangement short of a variation of the contract, by which the plaintiff would be exonerated from delivery according to the contract; and (4) that the contract as to the Lake Dunn cattle was separate and distinct from that as to the Ballyneety cattle, so that the acceptance of the latter cattle did not debar the defendant from any right to reject the former cattle.

Held, therefore, by *Isaacs*, *Gavan Duffy* and *Rich* JJ. (*Griffith* C.J. and *Barton* J. dissenting), that the defendant was entitled to judgment in the action, and, on a counterclaim by him for breach of the contract to deliver the Lake Dunn cattle, to judgment for nominal damages.

Decision of the Full Court of Queensland: *Bacon* v. *Purcell*, (1913) S.R. (Qd.), 259, reversed.

APPEAL from the Supreme Court of Queensland.

An action was brought in the Supreme Court by Edwin Charles Bacon against Thomas Purcell, in which the statement of claim was as follows:—

"1. By an agreement in writing bearing date 22nd March 1912 the plaintiff agreed to sell and the defendant agreed to purchase certain stock viz. about 1,500 mixed cattle (more or less) then depasturing on Lake Dunn with 100 branded cattle and all unbranded cattle given in at the price of £2 per head, and also about 700 mixed cattle (more or less) then depasturing on Ballyneety being the whole of the herd with all unbranded cattle given in at the price of £2 15s. per head. Delivery on or before 26th April 1912. Terms: £500 deposit to credit of plaintiff with Messrs. Edkins Marsh & Co., Longreach; balance cash on delivery of stock.

"2. On the said 26th April 1912 and at all material times the plaintiff was ready and willing to deliver the stock agreed to be purchased as aforesaid by the defendant, and on 26th and 27th April 1912 the defendant received and accepted and subsequently drove away part of the stock agreed to be purchased as aforesaid, but the defendant then refused and has at all times since refused to accept the balance of the said stock (being in number 1,214 branded cattle) or any part thereof.

"3. By reason of the defendant's refusal as aforesaid the plaintiff was unable to sell the balance of the said stock until 7th November 1912 and lost the profits which he would have made and was compelled to drove and tend the said stock at great expense until the said 7th November 1912 and has also lost the price which he would have received from the defendant for the said stock and interest thereon and has suffered other loss and damage."

The plaintiff claimed £2,000.

The defence was as follows:—

"1. The defendant denies the allegations in pars. 2 and 3 of the statement of claim.

"2. The defendant says that by the agreement in writing referred to in par. 1 of the statement of claim it was mutually agreed between the plaintiff and the defendant that delivery of both lots of cattle mentioned in the said agreement should be given on 26th April 1912.

"3. In the alternative the defendant says that immediately after the making of the agreement mentioned in par. 1 of the statement of claim it was agreed in writing between the plaintiff and defendant that in consideration of the plaintiff agreeing to give delivery of both lots of cattle mentioned in the said agreement on 26th April 1912 the defendant should take delivery thereof on the said 26th April.

"4. On the said 26th April 1912 and at all material times the defendant was ready and willing to take delivery of the aforesaid cattle and to perform all the terms of the said agreement on his part but the plaintiff was not ready or willing to give delivery of the said cattle as required by the terms of the said agreement and neglected and refused to give such delivery.

"5. The defendant on or about 28th April 1912 voluntarily and without consideration accepted delivery of about 705 head of branded cattle, comprising all those which had been depasturing on Ballyneety, without waiving his rights with regard to the delivery of the cattle mentioned in the agreement which had been depastured on Lake Dunn.

"6. The defendant duly paid the plaintiff the price of £2 15s. per head for the above-mentioned 705 head of cattle, being the

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price mentioned in the agreement between the plaintiff and defendant.

"7. The plaintiff was not ready or willing on 26th or 28th April or at any material time to give delivery of the balance of the said cattle comprising those which had been depastured on Lake Dunn, and neglected and refused to give delivery thereof."

The defendant then counterclaimed for £712 damages for breach of the contract to give him delivery of the Lake Dunn cattle.

By his reply the plaintiff alleged that if it was a condition of the contract that delivery of the cattle should be given on 26th April 1912, the defendant had waived that condition and had also accepted and retained 659 cattle as being part of the cattle agreed to be sold. He also alleged that on or about 28th March 1912 the defendant had deposited £500 with the plaintiff's agents at Longreach in accordance with the terms of the contract, and after accepting 705 of the cattle gave those agents a further sum of £1,438 15s. which the agents accepted without prejudice to the plaintiff's rights under the contract.

The action was heard at Rockhampton before *Lukin* J. and a jury, and, the jury having answered certain questions put to them by the learned Judge, he entered judgment for the plaintiff for £1,579 10s. 10d. with costs. On a motion by the defendant by way of appeal for judgment for him or a new trial, the Full Court dismissed the appeal with costs: *Bacon* v. *Purcell* (1).

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

The case was twice argued, first in Brisbane and now in Sydney.

The material facts are stated in the judgments hereunder.

Ryan (with him *Mahoney*), for the appellant.

Blacket K.C. and *Macgregor* for the respondent.

During argument reference was made to *Reuter* v. *Sala* (2); *Jackson* v. *Rotax Motor and Cycle Co.* (3); *Romberg* v. *Gilbert* (4); *Hynes* v. *Byrne* (5); *Brandt* v. *Lawrence* (6); *Johnson* v.

(1) (1913) S.R. (Qd.), 259.
(2) 4 C.P.D., 239.
(3) (1910) 2 K.B., 937.
(4) 11 Q.L.J., 96.
(5) 9 Q.L.J., 154.
(6) 1 Q.B.D., 344.

Johnson (1); *Shipton* v. *Casson* (2); *Russo-Chinese Bank* v. *Li Yau Sam* (3); *Charrington & Co. Ltd.* v. *Wooder* (4); *Inglis* v. *Buttery* (5); *Baldey* v. *Parker* (6); *Wilkinson* v. *Clements* (7); *Bigg* v. *Whisking* (8); *Elliott* v. *Thomas* (9); *Hickman* v. *Haynes* (10); *Benjamin on Sales*, 5th ed., pp. 197, 434, 711; *Leake on Contracts*, 6th ed., p. 322.

Cur. adv. vult.

The following judgments were read:—

Dec. 19.

GRIFFITH C.J. This is an action brought by the respondent, plaintiff, against the appellant, defendant, to recover damages for refusal to accept cattle agreed to be bought by the defendant from the plaintiff under a contract in writing, dated 22nd March 1912, and afterwards varied, also by writing.

Shortly before the date of the contract the plaintiff had bought a herd of cattle, consisting of about 1,800 head, depasturing on a tract of land called Lake Dunn, of an area of about 100 square miles, situated in a remote part of Central Queensland, from Messrs. Tamblyn and Briggs, who occupied the land under lease or licence from the Crown. He had taken delivery of them on 5th February, but the cattle remained on Lake Dunn on agistment until he could remove them or dispose of them. About the same time he had bought from one McAuliffe a herd of about 700 cattle depasturing on an adjoining pastoral holding called Ballyneety, containing about 32 square miles, of which he was to take delivery on 12th April. Shortly afterwards plaintiff had agreed to sell to one Armstrong 300 of the Lake Dunn cattle, to be selected by the purchaser and delivered on 26th April. Ballyneety was enclosed. Lake Dunn was not. The locality is a region which is called "the desert country," a term well known and understood in Central Queensland as designating a dry tract of land on the western slopes of the Great Coast Range that was at one time thought to be useless for any purpose, but

(1) 3 B. & P., 162.
(2) 5 B. & C., 378.
(3) (1910) A.C., 174.
(4) (1914) A.C., 71.
(5) 3 App. Cas., 552, at p. 577.
(6) 2 B. & C., 37.
(7) L.R. 8 Ch., 96.
(8) 14 C.B., 195.
(9) 3 M. & W., 170.
(10) L.R. 10 C.P., 598.

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is now found to be available for pastoral purposes during a portion of the year in favourable seasons. At all the relevant times it was common knowledge that it would be necessary to remove the cattle in question from Lake Dunn and Ballyneety as soon as practicable, as water was fast drying up not only on the land but on the route over which they would have to travel. In order to remove them, it would be necessary to provide a sufficient number of drovers, with horses and other plant. If they were sold, it would be necessary for the vendor to provide a sufficient number of men to collect the cattle together in drafts of convenient size, in which they could be counted before being handed over to the custody of the purchaser. In this part of the country men and horses cannot be provided at a day's notice, so that some time must necessarily be allowed for preparations on both sides for the delivery of so large a number of cattle roaming at large over an extensive tract of land. The necessary operations to be undertaken by the vendor would necessarily comprise three separate stages: first—collecting or mustering the cattle in drafts or mobs of convenient size in the vicinity of water, if there should be any; second—keeping together, or, as it is called, "holding," the drafts so collected until the time of actual delivery; and third—driving them to the agreed place of delivery, and there counting and delivering them to the purchaser. These operations would require the employment of many stockmen and horses, and would occupy a considerable time, so that the preparations for delivery would have to be begun some time before that appointed for formal delivery. It was expressly found by the jury that there was a usage obtaining in the business of cattle selling and buying whereby the date fixed for delivery is taken to be the day on which the delivery commences, and not the day on which it is completed. It is, of course, practicable for the vendor's stockmen and the purchaser's drovers to co-operate by mutual consent in all these operations, although, strictly speaking, one part of them is the duty of the vendor alone.

What I have said is sufficient to show that the case does not altogether depend upon such considerations as would be applicable

to a sale of two lots of milch cows depasturing in adjoining meadows.

In February 1912 the plaintiff offered the two lots of cattle together for sale through agents. On 12th March agents for defendant (not disclosing their principal) asked for a fortnight's offer at prices named, stating that they had a certain buyer. Telegraphic correspondence ensued, in which the cattle were described as the "Lake Dunn and Ballyneety cattle" and were always treated as a single subject of negotiation.

On 14th March plaintiff's agents were informed that one Oliffe would proceed to the locality to inspect the cattle on behalf of defendant, and had authority to "close" if they were as represented. Letters of introduction of the same date, written by defendant's agents and addressed to the managers at Lake Dunn and Ballyneety, introducing Oliffe, and stating that he had "power to deal," were given to the latter. Oliffe in his evidence said that before this the defendant had shown him, *i.e.*, on a stock list, "a particular line of cattle: it was Ballyneety and Lake Dunn," and asked him to go up and inspect these cattle. Oliffe accordingly went to the locality, joining the plaintiff on the journey. On 22nd March an agreement was drawn up and signed, by plaintiff and by Oliffe as agent for the defendant, in the following terms:—

I, E. C. Bacon of Warwick, agree to sell and I, G. H. Oliffe, Brisbane, agree to purchase on behalf of T. Purcell of Galway Downs the following stock viz.:—About fifteen hundred (1500) mixed cattle (more or less) now depasturing on Lake Dunn with one hundred (100) branded cattle and all unbranded cattle given in price two pounds (£2) per head delivery on or before 26th April 12 on terms five hundred pounds (£500) deposit to credit E. C. Bacon with Edkins Marsh Longreach balance cash on delivery of stock also about seven hundred (700) mixed cattle (more or less) now depasturing on Ballyneety being the whole of the herd with all unbranded cattle given in price two pounds fifteen shillings (£2 15s.) per head. Delivery and conditions of sale same as above."

The words "delivery on or before 26th April" left the exact date or dates for delivery a matter for future arrangement. It

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was at first arranged between plaintiff and Oliffe that the Ballyneety herd should be delivered on 12th April, the day on which they were to be delivered to plaintiff by his vendor, and the Lake Dunn cattle on the 26th, and Oliffe so informed plaintiff by telegram of 22nd March, asking whether he could have "plant about 30 horses there in time." The plaintiff replied to Oliffe on the same day by telegram, which was shown to defendant, "try get delivery both lots about 26th to 30th dates closer together."

A day or two after this the following memorandum was indorsed upon defendant's copy of the agreement and signed by the plaintiff and Oliffe:—"We have mutually agreed that the delivery of the both lots of cattle mentioned on opposite side shall be 26th April 12."

The actual place of delivery would necessarily be some suitable spot in the open country, to be mutually agreed upon, and in ordinary course the delivery of the whole of the cattle would be as far as possible continuous.

On 26th April the plaintiff was ready to begin actual transfer of possession of the Ballyneety cattle to Oliffe, but, for reasons known to Oliffe and for which he was, indeed, personally responsible, as I shall have occasion to show in dealing with another part of the case, the plaintiff was not, and would not for a few days be, ready to begin actual transfer of possession of the Lake Dunn cattle. With this knowledge Oliffe elected to take the Ballyneety cattle, and defendant ratified his action, if that fact is material. Oliffe then refused to take the Lake Dunn cattle. Hence this action.

The defence to the action is that the plaintiff was not on 26th April ready and willing to deliver the cattle which the defendant refused to accept. The plaintiff, in answer to this defence, relies in the first place on sec. 14 of the *Sale of Goods Act of* 1896 (Qd.), which is a transcript of sec. 11 of the Act 56 & 57 Vict. c. 71. The third paragraph of that section, so far as material, provides that where a contract of sale is not severable and the buyer has accepted the goods or part thereof the breach of any condition on the part of the seller can only be treated as breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the

contract expressed or implied to that effect. The plaintiff contends that, in view of all the circumstances of the case, even if the stipulation as to date of delivery contained in the contract of 22nd March is a condition and not a mere warranty, which he disputes, the contract is not severable. The general rule applicable to such a case is, in my opinion, that stated by *Mellish* L.J. in *Wilkinson* v. *Clemens* (1): "As a general rule all agreements must be considered as entire. Generally speaking, the consideration for the performance of the whole and each part of an agreement by one party to it is the performance of the whole of it by the other." In the application of the rule regard must be had, as in other cases of contract, to the subject matter and the surrounding circumstances. In the present case, although the subject matter of the contract was in one sense two lots of cattle, they had always in the course of negotiation been treated as a single subject, they were grazing, if not in actual company, yet practically in the same place, and that place was of such a nature that for the purposes of delivery both parties would have to make special preparations. The purchaser would have to provide men, horses (about 30) and plant, *i.e.*, vehicles for the carriage of provisions for the anticipated journey, which was one of about 300 miles. The vendor also would have to provide men and horses for mustering and "holding" the cattle ready for delivery. A single deposit of £500 was paid in respect of the whole contract. Finally, the delivery was to begin on the same day at the same place, but it was not contemplated that the delivery of both lots of cattle should begin on that day. In substance, therefore, the contract was for the sale of 2,200 cattle which had been treated in the course of the negotiations as a single subject matter, to be delivered on the same day, at the same place, under natural conditions which, in the expressed opinion of the purchaser, made it highly desirable that the delivery of the whole number should be, as nearly as possible, contemporaneous, and which, apart from his opinion, would render any other course unnecessarily expensive and undesirable for both parties. The question of severability is one of construction, and it is the duty of the Court to ascertain and give effect

(1) L.R. 8 Ch., 96, at p. 110.

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to the intention of the parties as expressed by what they have said, as applied to the subject matter and having regard to the surrounding facts. The principle is exactly the same as in the case of an implied promise or implied covenant. The Court will imply whatever it clearly appears that the parties must have meant, and nothing else.

Applying these principles, I cannot see any ground for departing from the general rule as stated by *Mellish* L.J. I think that the proper inference to be drawn is that the agreement for the sale of the two lots of cattle was in law, as well as in the contemplation of the parties, a single and entire agreement for the purchase of 2,200 cattle, so that the vendor was not entitled to call upon the purchaser to accept one lot without the other, and the purchaser was not entitled to demand the delivery of one lot only and refuse to take the other. It follows that the defendant, having accepted part of the goods, knowing that he would not get the rest until a few days later, can only treat the failure to begin delivery of the Lake Dunn cattle on 26th April as a breach of warranty, and not as a breach of condition affording a defence to the action. The defendant in his pleadings seems, indeed, to have accepted that view of the case.

So far I have assumed that the stipulation for delivery is a condition, and that it means that the delivery shall continue without interruption until the whole of both lots have been delivered. This also is a matter of construction. If it is a condition in the sense contended for by the appellant, he would have been entitled, in the event of the inability of the vendor to begin delivery on the exact day, to treat the contract as repudiated by the vendor, although all the expense had been incurred on both sides in making preparations for performance, and the vendor was anxious and would be ready on the following day to begin delivery and go on to its completion. If it were necessary to decide the point, I should hesitate long before agreeing that the Court would be bound to hold that that was the intention of the parties. But, even if it was, the argument does not extend to an interruption in delivery. The appellant's case now made is that the stipulation for delivery must be construed as meaning that delivery of both lots should begin on 26th April and be

continued without interruption until all the cattle had been delivered. The obligation so far as it relates to freedom from interruption is not expressed, and its existence must depend upon the necessity for implying it. I can see excellent reasons for implying it as a warranty, but none for implying it as a condition. It is, in my opinion, nothing short of absurd to construe the contract as expressing an intention that the purchaser should be entitled to treat an interruption in the course of delivery, or *à fortiori*, a notification of the necessity for a temporary interruption, as a repudiation of the contract by the vendor.

It was suggested that if the stipulation as to freedom from interruption were not treated as a condition the vendor could protract delivery indefinitely. This is an entire misapprehension. If the obligation to deliver on the specified day is to be regarded either originally, or by reason of the purchaser's conduct, as a warranty, the obligation to deliver in fact remains unimpaired, and an inability to deliver or refusal to deliver within a reasonable time may be treated by the purchaser as a repudiation of the contract by the vendor. The jury found as a fact that the plaintiff was ready and willing to begin a complete delivery within a reasonable time.

I pass to the second branch of the case, which is based upon the contention that the contract should be construed as two distinct contracts relating to two distinct subject matters, with two separate and distinct conditions for delivery on 26th April. I have already said that the plaintiff was not ready to begin delivery of the Lake Dunn cattle on 26th April, and will now state the other relevant facts. A few days before that date plaintiff had made an arrangement with Oliffe for their mutual convenience, by which Oliffe's men were to take provisional charge of the Lake Dunn cattle as they were mustered, and "hold" them until final and formal delivery could be made after counting. In consequence of this arrangement plaintiff had not provided any stockmen of his own for the purpose of "holding." The defendant contends that this arrangement, which was found by the jury to have been made in fact, was a variation of the contract, so far as it regarded the Lake Dunn cattle, which Oliffe

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had no authority to make, and that he is therefore not bound by it, and that Oliffe as his agent was entitled to repudiate the arrangement which he had made, and treat the inability of the plaintiff, who had acted on the faith of it, as a repudiation of the contract so far as it related to the Lake Dunn cattle.

The plaintiff contends, on the other hand, that this arrangement, although spoken of for convenience as "an agreement," was not a variation of the contract, but a mere conventional adjustment of the details of performance, which he contends was within the authority necessarily implied in an agent appointed to take delivery of such a number of cattle at such a place and under such circumstances. He further contends that the express authority conferred on Oliffe to negotiate, to close, and to vary the contract after it was made as to time of delivery, and finally to take delivery, was sufficient to cover any incidental variation as to the time and mode of delivery.

The material facts, as believed by the jury, were substantially as follows:—Shortly after the contract was signed plaintiff made arrangements with his immediate vendors, Messrs. Tamblyn and Briggs, for the performance of what I have called the first stage of the necessary operations, *i.e.*, mustering the cattle, and had also, to Oliffe's knowledge, made provisional arrangements with one Purves to provide men and horses for the "holding" stage. On 13th April he met Oliffe at the town of Barcaldine, and told him that he had done so, but that Tamblyn's men could not "hold" them, and asked Oliffe whether he could "hold" them. This was, in effect, asking him whether he would take provisional delivery of the cattle as they were mustered, subject to subsequent counting and examination of brands before taking final and formal delivery. Oliffe replied: "I have plenty of men and horses, I will hold them." Plaintiff and Oliffe then went together to the town of Aramac, where, in Oliffe's presence, plaintiff countermanded his provisional arrangement with Purves. They remained in Aramac from the 13th to the 19th, expecting Oliffe's "plant" (that is, the equipment of men, horses, and vehicles necessary for taking delivery of and droving such a number of cattle) to arrive. About the 17th plaintiff, who was becoming uneasy at the plant not arriving, spoke to Oliffe of his uneasiness.

Oliffe replied: "What does it matter about the date? I suppose you have got the cattle there, and I will take them anyhow." Oliffe then went to the town of Longreach, 40 or 50 miles away, by motor car, returning to Aramac on the same day. On his return he told plaintiff that he had seen the plant and the man in charge, and had told them to hurry. Oliffe was also endeavouring to engage men at Aramac.

Plaintiff arrived at Lake Dunn on 22nd April, and Oliffe on the evening of the 24th. On the same evening his plant arrived.

On the 25th plaintiff's vendor mustered the greater part of the stock on Ballyneety, and on the 26th they were taken to an agreed place, where plaintiff delivered them to Oliffe, whose men took possession of them. Oliffe, who then knew that the Lake Dunn stock had not been mustered, helped in the mustering. On the 27th the mustering of the Ballyneety cattle was completed with Oliffe's assistance, and the residue were delivered to him on the 28th. On the 27th plaintiff asked Oliffe in Tamblyn's presence when he would be ready to start on the Lake Dunn herd, to which Oliffe replied, "We ought to finish the Ballyneety to-morrow and we can start then," which I understand, and which the jury could understand, to mean that he would then send his men to hold the different mobs of cattle as they were mustered, as he had previously promised to do. Tamblyn said that that would suit him, and on the same day sent his men out on the Lake Dunn property to start mustering on the 29th.

It appears from the facts which I have stated, and which the jury accepted as proved, that the plaintiff's inability to begin delivery of the Lake Dunn cattle on the 26th was the direct result of his reliance on Oliffe's promise, continued up to the 27th, and again on the 28th, as will directly appear, to "hold" them as and when mustered by Tamblyn's men, and Oliffe's failure to bring his men to the locality in sufficient time. Anyone familiar, as a Rockhampton jury would be, with the conditions of "the desert country" would know that the holding of mobs or drafts of wild cattle without the aid of fences or yards, and with a scanty supply of grass and water, cannot be long continued, so that the processes of mustering, holding, and delivering to the

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purchaser must practically go on in continuous succession. Plaintiff said that in fact the whole process would occupy ten or eleven days.

Oliffe made no complaint of plaintiff's unreadiness until the morning of the 28th, when he said to plaintiff, "I am not going on with the Lake Dunn business," and, in reply to plaintiff's inquiry, gave as his reason that plaintiff had not had all the cattle mustered on the 26th. After some argument he said, "I can't go on until I get some night horses" (that is, horses for "holding" the cattle at night), "my horses are about done up." Plaintiff then made arrangements with one Thompson to provide Oliffe with horses, and Oliffe said, "All right, get them here to-morrow night, and I will go on holding the Lake Dunns."

Later in the same day Oliffe said that he would not go on with the Lake Dunn muster, giving as his reason that his cook was dissatisfied. On the morning of the 29th Oliffe came to plaintiff and said he would not leave any men at all, but would "clear out" with the cattle he had already got. Plaintiff said he would not deliver a portion only. Oliffe said he would take them and plaintiff could do what he liked. Oliffe then took the whole of the Ballyneety cattle away, but refused to take any of the Lake Dunn cattle. The defendant afterwards confirmed this refusal.

The plaintiff then brought this action, alleging refusal of the defendant, after part delivery of the cattle sold, to accept the remainder. The defendant pleaded that the plaintiff was not ready and willing to deliver on 26th April, to which plaintiff replied setting up a waiver of the alleged condition to deliver on that day. The pleadings are no doubt informal, and the alleged waiver or excuse should have been set up by way of amendment instead of by way of reply, but at the trial the case was dealt with upon its substantial merits. The jury were asked to say whether the plaintiff and defendant mutually agreed to dispense with the actual delivery on 26th April and to give and take delivery within a reasonable time after that date, and answered the question in the affirmative. If that finding can be supported the effect was that, if the stipulation for delivery on the 26th was originally a condition of the contract, it was waived or excused,

and could no longer be insisted on as a condition but became a warranty only.

The defendant's contention before us was, as I have said, that the agreement found by the jury was an agreement to alter the original written agreement of 22nd March as varied by indorsement, and that Oliffe had no authority, express or implied, to make such an alteration. The question of Oliffe's authority to do what he did was clearly left to the jury, and it must be taken that they found it as a fact. In my opinion much may be said in favour of the view that he had authority to vary the contract itself as to time of delivery, but I do not find it necessary to express a final opinion upon it, for in my opinion the actual arrangements between the plaintiff and Oliffe, to which I have referred at length, although called an "agreement" in the question put to the jury, were not in substance an alteration of the terms of the contract of 22nd March, but a mere adjustment of the details of the manner in which it was to be performed. From the nature of the case many questions were bound to arise as to the details of delivery, which it would be necessary to settle on the spot, in order that the cattle might be collected and held together and the custody of them transferred from the plaintiff's servants to those of the defendant's. The only question before this Court is whether there was evidence upon which reasonable men could act to support a finding that Oliffe's authority to take delivery of such a herd, at such a place, and under the known circumstances, implied authority to adjust such matters of detail and to do what he did. What he did was in substance to promise to take provisional delivery or custody as soon as the cattle were mustered, and to provide men for that purpose, so that there should be no need on plaintiff's part to muster until Oliffe's men were ready to assume the custody. In the events which happened, Oliffe said, in effect, that he was not ready and would not be ready until after the 26th to take such provisional delivery. The plaintiff might probably have accepted this statement as an intimation that the defendant would not be ready on the 26th and as a refusal to take delivery on that date, and if the contract was not severable, and the stipulation as to delivery was a condition, he might have refused to make any delivery at

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all under it, but he did not do so, and in my opinion could not have done so.

Under the circumstances I have stated I think that there was abundant evidence for the jury that Oliffe had authority to do what he did, and that the defence founded on his want of authority fails. I confess that I am unable to reconcile a defence based upon such facts as appeared in this case with my notions of common honesty, and I am glad that I do not find myself constrained either by any "plain enactment or strong authority" —to use the words of *Lindley* J. in the very similar case of *Hickman* v. *Haynes* (1)—to give effect to it. The learned trial Judge was apparently of the same opinion.

In my judgment the appeal should be dismissed.

BARTON J. The Chief Justice has fully stated the circumstances under which the written contract was made, including the facts known to both parties as to the nature of the country, the course of the seasons up to and including the time of the agreement, and the operations which the performance of a contract made under such circumstances involves in the preparations for delivery and acceptance, the plant necessary for such purposes, and the manner of completion on each side.

In answer to questions the jury found upon the evidence that there was "a usage obtaining in the business of cattle selling and buying whereby the fixing of a date for delivery is taken to be the day on which the delivery commences and not the day on which it is to be completed." I take the answer to refer to contracts for delivery of mobs of cattle too large for the parties to deal with by way of delivery and acceptance on one day. They also found that though the plaintiff was not ready to complete delivery on 26th April (which, according to their finding first mentioned, was not the delivery contracted for) he was nevertheless ready and willing to deliver "starting on 26th April 1912 and completing same within a reasonable time thereafter." This is, of course, on the assumption that the contract was one and entire. Further, the jury found that the defendant was not ready and willing to accept delivery either if it were completed

(1) L.R. 10 C.P., 598, at p. 603.

on 26th April, or if it started on 26th April and finished within a reasonable time thereafter. They also found that the plaintiff was not agreeable to the defendant taking away on 29th April the Ballyneety cattle without also taking away the Lake Dunn cattle.

When Oliffe went up in March for the defendant he was empowered to close if the cattle were as represented. He did close by making the agreement in evidence, with its addendum fixing the delivery of the cattle for the 26th April, not "on or before" that date as in the body of the agreement. The addendum was made with the defendant's authority. When Oliffe went up again for the defendant in April he had authority to take delivery on the 26th, an authority which, in my view, must be read in accordance with the usage found by the jury.

With the exception of a few head—some 45—Oliffe took delivery of all the Ballyneety portion of the cattle—659 in number—on the 26th April. He accepted the 45 on the 27th; thus he had 704 head out of the total, and the defendant ratified his acceptance of these. Oliffe refused to take the remainder, and the defendant bore him out in this refusal, out of which the action has arisen. Thus the question arises whether the acceptance of the part was a completion of one of two separate contracts, or only the part performance of an indivisible agreement.

When Oliffe took delivery of the 704 cattle from Ballyneety he knew that the plaintiff was not ready to begin delivery of the remainder, the Lake Dunn cattle. On this absence of readiness and willingness, coupled with a statement, negatived by the jury, that on the 26th and at all material times the defendant was ready and willing to take delivery and to perform all his part of the agreement, the statement of defence is founded.

The *Sale of Goods Act* (Qd.) provides in sec. 14, sub-sec. 3, as follows:—"When a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or when the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated,

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unless there is a term in the contract, express or implied, to that effect."

The plaintiff, in answer to the statement of defence, sets up this sub-section, arguing that the contract is not severable, that the buyer has accepted part of the subject matter sold, and that if the term as to delivery on 26th April is a condition, which he does not admit, the defendant cannot treat the breach of it as more than a breach of warranty, in view of the part acceptance with knowledge; hence he argues that the defendant cannot repudiate the contract altogether, and that the defence therefore fails, although the defendant may possibly have an action for breach of warranty. If this position taken by the defendant is sound, it is not necessary to decide whether the term as to date of delivery is on the construction of the contract itself more than a warranty.

On the facts stated the plaintiff's contention is sound if the contract is entire. In my opinion it is entire. Not only do I think the contract so, but I think that if the plaintiff has suffered any loss his only remedy is an action for breach of warranty. He might have great difficulty in the proof of damage in such an action, as, upon the facts which are before us, a jury might think that with the plant he furnished he would not have been able to take the remainder, and, as *Lukin* J. put it to the jury, "really did not want them in view of having to go over all these dry stages," seeing that "at this time it was very difficult to travel."

Reverting to the question of the singleness of the contract, I think the test may be put this way. Assuming all things to have turned out favourably for delivery and acceptance if respectively required, could the plaintiff have called upon the purchaser to accept the 704 only and to leave the rest, or could the defendant have insisted on the delivery of the 704 only and rejected the rest? These questions in my view admit of only a negative answer.

Therefore, as the defendant took over and kept the 704 knowing that the remainder of the beasts were not deliverable for some days, the 14th section of the *Sale of Goods Act*, sub-sec. 3, deprives him of the defence which he sets up, and he can only treat the inability of the plaintiff to begin the delivery of the

balance on the 26th, if he was bound to begin delivering then, as a breach of warranty. He did not at the date for performance treat the agreement of the plaintiff as repudiated by him, but as in part performance by him. I desire not to be taken as implying that the plaintiff did repudiate his contract.

The above considerations entitle the plaintiff, in my opinion, to hold his judgment, and I therefore do not think it necessary to deal with the question of Oliffe's authority to make what one side calls a variation of the contract, and the other side calls an adjustment of detail, as to delivery. There is no doubt that Oliffe's words and conduct as to the time and method of delivery amount either to a waiver or to the variation or adjustment, whichever it is right to call it. The plaintiff's allegation of waiver in his reply would have been a departure under the old system of pleading, but in the conduct of the case up to the end it has been treated as if properly pleaded. Unquestionably the plaintiff was led by Oliffe's assurances and acts into a position which rendered him unable to begin delivery of the Lake Dunn cattle as soon as the Ballyneety cattle had been taken over, and the reading of the transcript convinces one that the defence in this case rests on grounds rather of technicality than of justice. The discretion assumed by Oliffe as to the time and course of delivery was such as passes without objection from the principal in probably a large majority of instances. Still it may be that authority for its use is not necessarily to be implied, and I am not at all sure that there is not a good deal to be said for Mr. *Ryan's* argument. I do not decide that question, because I think upon the other considerations the appeal must be dismissed.

The judgment of ISAACS, GAVAN DUFFY and RICH JJ. was read by

ISAACS J. Five grounds are put forward by the respondent as entitling him to retain the judgment: (1) that there was evidence upon which the jury might find that Oliffe had actual authority from Purcell to vary the written contract by substituting a later delivery date for the date specified in the contract; (2) that Oliffe had such apparent authority, and no notice of any limitation

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was brought to the knowledge of Bacon; (3) that Purcell ratified Oliffe's agreement; (4) that Oliffe had power at all events to make an "arrangement" short of a variation of the contract, by which Bacon was exonerated from delivering according to the contract; (5) that in any case the contract was entire, and as the Ballyneety cattle were retained it was not competent for Purcell to refuse acceptance of the Lake Dunn cattle ten or eleven days after the agreed date. These grounds are dealt with in order.

(1) The actual authority asserted has been suggested in various ways.

First, express.—It was urged that Purcell was ignorant as a buyer of cattle, and Oliffe was an experienced drover. Therefore, it was said a jury might infer from the probability of the situation that Purcell did in fact expressly authorize his drover to alter the written contract if he thought fit. But that, at best, would be substituting mere conjecture for reasonable inference. The facts, however, show that Purcell was not ignorant. He is now a Queensland grazier, and has had some experience of delivery of cattle there. But he has been a grazier since 1883 in New South Wales, and has had, as he says, a very fair experience in the buying and selling of cattle.

Another way in which it was attempted to support the point of actual authority was that Oliffe, as a drover authorized to take delivery, had implied power to vary arrangements if the situation appeared to him to require it. No evidence of any recognized usage or practice of trade permitting so extraordinary a power was established. The learned Judges of the Supreme Court do not suggest that any such usage or practice is judicially known to them. Their views rest upon considerations pre-supposing the absence of any such usage or practice. We know of no such usage or practice, nor of any special understandings applying to this case by reason of locality or otherwise. A drover is not a general agent; he is a particular agent. In *Cox* v. *Midland Counties Railway Co.* (1) *Parke* B. said:—"The employer of an agent for a particular purpose gives only the authority necessary for that agency under ordinary circumstances. . . . The employment of an agent gives also the powers *usually* exercised

(1) 3 Ex., 268, at pp. 277-278.

by similar agents." The application of those principles to such a case as was then before the Court has been questioned in *Walker* v. *Great Western Railway Co.* (1); the principles themselves are undoubted.

But so far as the argument is confined to actual authority the express evidence of the appellant is decisive. He says :—" I saw Oliffe in Brisbane before he left for Jericho in April. I arranged with Oliffe in Brisbane for him to take delivery for me after he returned from Brisbane and after the closing of the deal. I asked Oliffe if he could take delivery according to the agreement. He said ' Yes.' I said nothing more. I told him to go up to Lake Dunn and Ballyneety and take the delivery of the cattle according to that agreement."

Yet another argument was advanced as to actual authority. It was that as Oliffe was the same person who was originally empowered to deal in making the contract, the identity of personality continued the original full power of bargaining. But that is impossible. Oliffe had exhausted his original authority when the contract was finally closed. From that moment Oliffe ceased to be Purcell's agent, and became an entire stranger to him, *quoad* making a contract as to these cattle. Any further capacity in Oliffe so to bind Purcell must spring from a new employment. *Woodin* v. *Burford* (2) is an example.

(2) As to apparent authority.—The earlier documents antecedent to the making of the contract giving Oliffe " power to deal " were relied on also in this aspect, as holding him out as a person trusted to " deal " respecting the cattle, even after the contract was closed. Added to this were the circumstances of place, distance, and difficulties of transit. But the answer is plain. Oliffe was never held out as anything but a drover to take delivery in accordance with the contract. Place, distance, and difficulties of transit must be taken to have been all considered in arriving at the concluded terms of the contract. Substantial performance of those terms as they stood was what each party was entitled to from the other. The presence of the drover and his plant was manifestly merely for the purpose of obtaining and accepting delivery, and in accordance with those terms. In the absence of

(1) L.R. 2 Ex., 228. (2) 2 Cr. & M., 391.

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any active holding out of a more extensive authority, none can be imputed. *Story* says (*Agency*, sec. 87) "an implied agency is never construed to extend beyond the obvious purposes for which it is apparently created." But, in addition, distinct intimation of limited authority was in fact given by letter—Bridge & Co. to Edkins Marsh & Co. (11th April 1912)—that Oliffe's mission was to take delivery "on 26th instant." A question had arisen as to whether he could take them before that date, and the letter settled that in the negative. No question ever arose as to taking delivery after the fixed date.

(3) Ratification.—That was deduced from the fact that Purcell had retained the Ballyneety cattle with knowledge that the Lake Dunn cattle had not been delivered according to contract. But in the first place that is useless unless he also knew that Oliffe had made the agreement to vary.

Ratification depends on adoption "either with full knowledge of the character of the act to be adopted, or with intention to adopt it at all events and under whatever circumstances" (*Phosphate of Lime Co.* v. *Green* (1), and see *La Banque Jacques-Cartier* v. *La Banque d'Epargne de Montreal* (2)). But Purcell's knowledge of the fact that Oliffe had so agreed, as to which the onus is on the respondent, is not only not shown, but is positively denied.

This may be added: that if even such knowledge had been shown it would not have affected the situation in the slightest. If the contract is entire in the necessary sense, ratification of the alleged agreement to vary is needless; if it is not, then the two lots of cattle are separate for this purpose, and Purcell adopted no act of Oliffe's relative to the Lake Dunn cattle except his refusal to take them because out of time, which can scarcely be regarded as an adoption of an agreement to accept them notwithstanding the failure as to time of delivery. So that ratification is really beside the question.

(4) Oliffe's "arrangement" as distinguished from a variation of the contract.—No doubt, if Purcell had himself requested Bacon to defer delivery for ten or eleven days, and Bacon had consented to do so, Purcell could not have treated Bacon's compliance as a

(1) L.R. 7 C.P., 43, at p. 57. (2) 13 App. Cas., 111.

breach of contract or the arrangement as a new term (*Hickman* v. *Haynes* (1)). The rule is very clearly stated in *Plevins* v. *Downing* (2) in terms which are fatal to the plaintiff's case. *Brett* J. (for the Court) said:—"Where the vendor, being ready to deliver within the agreed time, is shown to have withheld his offer to deliver till after the agreed time in consequence of a request to him to do so made by the vendee before the expiration of the agreed time, and where after the expiration of the agreed time, and within a reasonable time, the vendor proposes to deliver and the vendee refuses to accept, the vendor can recover damages. He can properly aver and prove that he was ready and willing to deliver according to the terms of the original contract."

Now, here Bacon was not ready and willing to deliver within the agreed time (see *Reuter* v. *Sala* (3)), and the request for delay came from him, not Purcell. The position is this. Delivery was to take place on the 26th. Mustering and holding are no part of delivery, but are necessary acts preparatory to delivery, and are within the vendor's part of performance. Unless Oliffe had Purcell's authority to undertake mustering and holding, or either of these acts, whatever engagement he entered into with respect to them is his own, not Purcell's. Bacon may have thought he could take the risk of employing Oliffe, but it was a risk. Bacon was not a station owner; he had no plant of his own; he was a mere speculator buying cattle on other persons' runs, and selling them to third persons to be taken from those runs, and taking his chance as to what arrangements he might at the proper moment be able to make in order to enable him to perform his engagements. It is quite understandable how he thought he could economize in effort, and perhaps cost, in getting Oliffe with the plant at his disposal—Purcell's plant—to personally promise to make one job of it. But, after all, what Oliffe promised to do was to "hold," after Tamblyn had mustered. That was at Barcaldine on the 13th. Then on the 16th Bacon said the date of delivery was getting near—showing that he was still under the belief that the 26th was the crucial date. Oliffe,

(1) L.R. 10 C.P., 598.
(2) 1 C.P.D. 220, at p. 225.
(3) 4 C.P.D. 239, at p. 249.

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as found by the jury, used the words supposed to alter that date. But these words were not a request even by Oliffe to a man ready and willing to perform on the proper date to postpone the date of performance. It was, at most, a promise to Bacon that if Bacon were *not* ready to perform on that date, he would accept performance later.

Bacon acted on that, but he knew Purcell himself had not authorized the promise, because it grew out of circumstances of Bacon's own creation since Oliffe had been despatched to get delivery. And he could easily have communicated with Purcell by telephone or telegram, though from a legal standpoint that is not a necessary consideration to absolve Purcell. And so, when the Ballyneety cattle had been fully delivered, and the moment arrived for delivery of the Lake Dunn cattle, Oliffe, representing Purcell, was not only ready and willing to receive them, but insisted on them. It was Bacon who refused; he was not ready and willing to deliver for ten to twelve days at least.

But Purcell was not bound to wait ten or twelve days, and to go on holding in the meantime the Ballyneety cattle, unless he had authorized an arrangement which had prejudiced Bacon to that extent. Morally there is no ground of complaint against him; the only question is whether Bacon can insist on acceptance notwithstanding his own default.

Consequently, it again comes back to the question of that authority, and the attempted distinction between "arrangement" and "variation" is immaterial for the purposes of this case.

(5) The last point on the respondent's claim is as to the entirety of the contract. In one sense it is one contract. That is, the agreement of the parties in respect of all the stipulations was reached at one time, the stipulations were written on one piece of material, and it might even be assumed in Bacon's favour that he would not have sold one lot of cattle on the terms stated with respect to that lot without a simultaneous sale of the other lot upon the terms fixed with regard to them. But the same might be said of a contract by which A agrees (1) to sell his house in Sydney to B for £1,000; (2) to buy from B a cargo of wheat on the ocean for £2,000; (3) to rent from B a villa in Brisbane for three years at a stated rent. It might well be that B would

have asked a higher price for the wheat if A had not been willing to enter into the other stipulations, or that he would not have rented his villa unless he had succeeded in purchasing A's house.

But these are inducing motives only, and do not settle the question of divisibility of the various stipulations. That depends on the intention of the parties, ascertainable from the construction of the written contract where, as here, it is in writing. Any words or expressions if unequivocal speak for themselves; if they are words of doubtful or double signification, that may be settled, where necessary, by first ascertaining the circumstances in reference to which they are used (*Charrington & Co. Ltd.* v. *Wooder* (1)), which is simply finding the appropriate business dictionary where their meaning is given. When, however, the true meaning of the words themselves is ascertained, and the subject matter settled in reference to which they are used, the intention of the parties must be gathered by construing their own words as they stand, applying them to the given subject matter. For those preparatory purposes the Court places itself in the position of the parties. But it cannot place itself in their position for the purpose of finding what words they intended to use and have not used. That would be making a contract for them, and surrounding circumstances are not admissible for any such purpose: *Inglis* v. *Buttery* (2), and reference has been made to this and similar cases in *Swan* v. *Rawsthorne* (3) and *Horsfall* v. *Braye* (4).

We know the circumstances, and we know the meaning of every word; these are common ground. What, then, do those words mean? They must mean the same whether the case is tried at Rockhampton or Brisbane, or in the locality. Do they mean that the two lots of cattle are inseparably bound together so that Bacon would not be compellable to deliver, or Purcell compellable to accept, one lot if for any cause not his fault—say, death of the other lot—complete performance was impossible? We are clearly of opinion the two lots are kept separate and distinct.

All the mutual obligations relative to the Lake Dunn cattle are set out in terms which are strictly applicable to them alone,

(1) (1914) A.C., 71.
(2) 3 App. Cas., 552, at p. 577.
(3) 5 C.L.R., 765, at p. 781.
(4) 7 C.L.R., 629, at p. 657.

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and as if the Ballyneety cattle did not exist. Delivery of the Lake Dunn cattle was to be on Lake Dunn station. Then a distinct sale is introduced by the word "also," which has the effect of repeating all the previous words of the document down to the *videlicet*.

From that point an independent sale begins, requiring an independent statement of terms. So far as those terms are different they are expressly stated; so far as they are to be similar to or identical with those of the Lake Dunn sale they are shortly stated by the words "Delivery and conditions of sale same as above." Delivery here, it must be noted, would necessarily be on Ballyneety station, a distinct place, and as the word "same" meant within the stated limits of time the delivery might, until fixation of one date for both lots, have been on a date entirely separated by days from the other delivery.

In our opinion the respondent fails, on all points, on his claim, and the appeal should succeed as to that.

With respect to the counterclaim, the appellant succeeds technically: he has established a breach of contract, but no substantial damage. There was evidence sufficient to sustain the verdict as to this. He is therefore entitled to one shilling damages, but no more.

We are thus in entire accord with *Real* J., and also in agreement with *Shand* J. on all but one point, on which his Honor hesitates. The appeal should, in our opinion, be allowed with costs, the order of the Full Court discharged with costs, the judgment of *Lukin* J. discharged, and judgment entered for the appellant on the claim, and for one shilling on the counterclaim, with costs of action.

Appeal allowed. Judgment appealed from discharged with costs. Judgment for the defendant, with costs of action, and for one shilling damages on counterclaim. Respondent to pay costs of appeal.

Solicitor, for the appellant, *Daniel P. Carey*, Rockhampton, by *McGrath & Hunter*.

Solicitors, for the respondent, *Cannan & Peterson*.

B. L.