[HIGH COURT OF AUSTRALIA.]

HARRINGTON . . . . . APPELLANT;
DEFENDANT,

AND

BROWNE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *Aug.* 2, 3, 11.

Barton, Isaacs and Rich JJ.

Contract—Performance—Sale of sheep—Date of delivery—Evidence as to alteration—Finding by jury—Delivery "on or before" a specified date—Time of the essence of the contract—Sale of Goods Act 1896 (*Qd.*) (60 *Vict. No.* 6), *secs.* 13, 14 (2), 31, 61 (2).

Where the parties to a contract for the sale and purchase of live-stock depasturing on a station have therein specified a date on or before which the delivery of the same is to be taken, time is of the essence of the contract unless the contract has something in its terms which renders time unessential or unless the circumstances of the country deprive it of its normal character.

The defendant in an action for breach of contract had, by a contract in writing dated 31st July 1916, agreed to sell and the plaintiff had agreed to purchase sheep on the defendant's station, and it was stipulated in the contract that *pro formâ* delivery was to be given and taken, and that the sheep should be counted, at the defendant's station on or before 21st August. The plaintiff did not attend or claim delivery till 22nd August, when the defendant refused to give it as being applied for too late. The jury having found that the date of delivery had not been altered to the 22nd,

Held, that the defendant was entitled to judgment.

Observations as to the duty of a purchaser of live-stock to notify the seller distinctly of the day on which the purchaser requires delivery, where by the contract delivery is to be taken "on or before" a certain date.

Decision of the Full Court of the Supreme Court of Queensland: *Browne* v. *Harrington*, (1917) S.R. (Qd.), 172, reversed, and decision of *Shand* J. affirmed.

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APPEAL from the Supreme Court of Queensland.

In an action brought in the Supreme Court by Clarence Lindsey Browne against William James Harrington, the plaintiff claimed damages for breach of contract relating to the sale of certain sheep to him by the defendant, and in his defence the defendant denied the breach. The action was tried before *Shand* J. with a special jury. The jury having found that prior to 21st August 1916 it was not verbally agreed by and between the plaintiff and the defendant that the *pro formâ* delivery of the sheep mentioned in a written contract between the parties, dated 31st July 1916, should be given and taken, and that such sheep should be counted, at Villa Dale on 22nd August, instead of on or before 21st August, judgment was entered for the defendant on the claim with costs. Thereupon the plaintiff appealed to the Full Court on the grounds that on the admitted facts he was entitled to judgment on his claim for damages, and that the verdict was against the evidence and the weight of the evidence. The Full Court allowed the appeal and set aside the judgment appealed from, and ordered that interlocutory judgment be entered for the plaintiff and that his damages be assessed: *Browne* v. *Harrington* (1).

From this decision the defendant now, by special leave, appealed to the High Court.

Other material facts appear from the judgments hereunder.

Macgregor, for the appellant. The onus is upon the respondent to show that on the facts of the case no reasonable jury could have come to the conclusion at which the jury arrived here (*Middleton* v. *Melbourne Tramway and Omnibus Company Ltd.* (2); *Prentice* v. *Victorian Railways Commissioners* (3)). Even assuming that the respondent was ready and willing to accept delivery on 13th August, the non-delivery on that date did not entitle him to say that he was no longer restricted to the time specified in the contract, but could demand delivery at any reasonable time after the 13th, and that if the appellant was not ready and willing to deliver on the 22nd, he was guilty of a breach of the contract (*Bacon's Abridgement*, vol. VII., p. 529; *Hawley* v. *Simpson* (4); *Allen* v. *Andrews*

(1) (1917) S.R. (Qd.), 172.
(2) 16 C.L.R., 572.
(3) 18 C.L.R., 526.
(4) 1 Cro., 14.

(1); *Harman* v. *Owden* (2); *Startup* v. *Macdonald* (3)). The stipulation as to time goes in this case to the essence of the contract (*Reuter* v. *Sala* (4); *Sale of Goods Act of* 1896, secs. 13, 14 (2), 31, 61 (2)).

Stumm K.C. (with him *Walsh*), for the respondent. The stipulation as to time is a warranty, and not a condition (*Francis* v. *Lyon* (5); *Purcell* v. *Bacon* (6); *Sale of Goods Act of* 1896, sec. 14 (2)). If time of delivery was not of the essence, then respondent's readiness on the 13th entitled him to maintain an action for non-delivery on the 22nd.

Macgregor, in reply.

Cur. adv. vult.

The following judgments were read :—

Aug. 11.

BARTON J. This appeal arises out of an action brought by the plaintiff (now respondent) against the defendant (now appellant) on a contract for the sale of sheep. The plaintiff and the defendant are both graziers, the former residing and carrying on business at Eldorado, near Stamford, and the latter residing and carrying on business at Villa Dale near Hughenden. The defendant on 31st July 1916 agreed in writing to sell the plaintiff about 1,600 wethers, about 1,400 ewes, and about 40 rams, all then depasturing on Villa Dale:—"(*a*) Rejections: two per cent. over and above lame, blind and diseased. (*b*) Price: wethers 16s., ewes 18s. 6d. and rams £2 per head. The two per cent. rejections to be taken at 12s. per head. (*c*) Terms: cash on delivery. (*d*) Payable at Queensland National Bank, Richmond. (*e*) Delivery: *pro formâ* delivery to be given and taken and the above-mentioned stock to be counted at Villa Dale on or before 21st August 1916 next ensuing. (*f*) Such delivery shall be considered actual delivery (without another count being made) when payment is being completed, but not before, and further until such payment is made, the purchaser to hold the above-mentioned stock as agent only and in trust for the vendor as continuing owner

(1) 1 Cro., 73.
(2) 1 Ld. Raym., 620.
(3) 6 Man. & G., 593, at pp. 611, 622, 623.
(4) 4 C.P.D., 239, at p. 249.
(5) 4 C.L.R., 1023, at p. 1033.
(6) 22 C.L.R., 307; 19 C.L.R., 241.

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of the said stock." The plaintiff in his claim alleges that he was ready and willing and offered to take *pro formâ* delivery on or before 21st August, but that the defendant was not then ready or willing to deliver, and that thereupon the plaintiff at the defendant's request agreed with him to postpone delivery to 22nd August. The plaintiff further alleges that on 22nd August he attended at Villa Dale and requested *pro formâ* delivery " pursuant to the provisions of the said agreement " but that the defendant did not deliver and refused to deliver any of the stock, although the plaintiff was at all times ready and willing to accept delivery.

The written agreement was not disputed ; but the defendant in his defence denies the other material allegations of fact, and says that the plaintiff was not ready and willing to take delivery on or before 21st August 1916, and the defendant thereupon treated the written agreement as repudiated. He alleges that he was at all times ready and willing to give delivery in accordance with the terms of the written agreement. The defendant also counterclaims on a verbal agreement of the plaintiff to employ the defendant to drive the sheep in question from Villa Dale to Eldorado for £25 a week during the period of driving, alleging that the plaintiff did not employ the defendant as agreed. But it is important to observe throughout that the plaintiff's claim is based entirely on the written agreement for sale.

The evidence shows that the plaintiff did not attend or claim delivery on 21st August, and that, on his seeking it on the 22nd, the defendant refused it, alleging that the demand was too late. At the trial the jury, in answer to a specific question put to them by *Shand* J., before whom the trial took place, found that it was not verbally agreed between the parties prior to 21st August that the *pro formâ* delivery of the stock should be given and taken, and that the stock should be counted at Villa Dale, on 22nd August instead of on or before 21st August.

There was much direct conflict of evidence, and the jury, in coming to their conclusion, whether their finding settles the matter or not, have evidently preferred the defendant's account, and I agree with *Lukin* J. in thinking that under the circumstances of this case we

must accept the jury's view if it is such as reasonable men properly applying their minds might form.

Judgment having been given by *Shand* J. for the defendant after the finding stated, the plaintiff appealed to the Supreme Court of Queensland, who unanimously set aside the judgment, entered judgment for the plaintiff on the claim and the counter-claim, and sent the action down for assessment of damages.

The written agreement, in which Edmund Cox & Co. describe themselves as agents for William J. Harrington, was signed by them "for the vendor." But they appear to have acted as an intermediary between the parties in the subsequent written and verbal communications. It appears that the verbal agreement for droving alleged by the defendant was in fact entered into.

On 9th August Edmund Cox & Co. wrote to the defendant a letter in the following terms:—"We have been advised by Mr. Browne that he wishes his sheep shorn at Carrah, and we find the only dates we can get are the 18th and 28th, and to shear on the 18th the sheep will require to start from your place about the 13th; if you can do this we will arrange to lift them on that date. If this is not suitable to you, can you hold them and lift about the 22nd to fit in with the 28th for shearing? Kindly reply by bearer."

Cox & Co. had, according to the plaintiff, arranged for him the dates for shearing at Carrah. The plaintiff says:—"I learnt through Cox & Co. that 13th August would not suit defendant, then I arranged to take delivery on the 23rd; afterwards I learned that defendant had fixed 22nd August. Then I went out to defendant's place and arrived at about 2 p.m. on August 22nd." Then he relates the refusal to deliver. The defendant, whose account the jury accepted, denies any arrangement to take delivery on the 23rd, and also denies that he ever fixed the 22nd.

To return to the letter of 9th August. It was received by the defendant at his place on the 10th. He had a discussion that day with Mr. Tate of Cox & Co. He told him that he had received the letter "with reference to the droving." There was conversation about the possibility of getting by the 13th a couple of men for that purpose, and the defendant was to ring Tate up the following morning to make sure of his coming with the men. On the following morning

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the defendant called Tate on the telephone, and asked him if he had got the men. Finding that he had not succeeded in doing so, the defendant told him it would be impossible for him to go to town and get the men to "lift" on the 13th, and he says:—"It was then arranged we couldn't lift them on the 13th. I told Tate that would not affect the sale delivery, but that Mr. Browne could come out and take the delivery mentioned in the contract. Tate said he did not think Browne would do that—take delivery and let them go again, as some might get lost. I told him if Mr. Browne consented I could go to town and make my own arrangements for drovers, and would lift them on 22nd August to shear on the 28th at Carrah. That would give me plenty of time to make my own arrangements. *I had no more word.* Nothing was said on 10th or 11th August about an alteration in the date of delivery. The conversations referred to the date of lifting—the droving contract."

The plaintiff's counsel rely on this letter of 9th August to show the plaintiff's readiness and willingness to take delivery on 13th August, or at any rate on the 22nd of the same month. As to the second date they say that their readiness to accept delivery on the 22nd was on their part a substantial compliance with the contract, or a mere breach of warranty for which they were at most answerable in damages.

I take a wholly different view of this letter. In the first place it appears to be purely tentative. If it deals with the delivery, it was not a demand of delivery on the 13th, but only a proposal to bring about an arrangement for the purpose. But I do not think it deals primarily with the delivery at all. The droving agreement was no alteration of the written contract. The terms as to delivery, even *pro formâ* delivery, were independent of the droving to which in reality the letter relates. The making of the separate verbal agreement for droving shows that delivery did not include "lifting." If the defendant delivered the sheep at Villa Dale at any time within this contract his liability under it would have ended there, apart from the droving. But the plaintiff, having made the droving arrangement, on which he was dependent, felt that he could not come and take delivery unless he could have the sheep driven for him after delivery, and consequently he makes inquiry through Cox & Co. whether

"about the 13th" is "suitable" to the defendant as a date for droving. He does not attempt to dictate any date at all. He only says that if his sheep are to be shorn on the 18th at Carrah, the sheep will require to start from Villa Dale about the 13th, on which date he wants them "lifted," and, as I have said, that cannot be construed as a demand for delivery on that date. It is obvious that unless he could have the droving done for him within a reasonably short time after delivery on any particular date he could not want delivery on that date: because without the droving the delivery of the sheep would have been not only useless but injurious to him. As to the second branch of the letter it is quite compatible with delivery on the 21st, according to contract, and the letter seems to point to this by the inquiry "Can you hold them and lift about the 22nd?" If they were mustered and counted to the plaintiff on the 21st and the droving started about the 22nd, both the written and verbal contracts would have been performed.

That the second part of the letter was understood in this sense is shown by the defendant's evidence as to the conversation on the telephone with Mr. Tate on 11th August, already referred to. When, therefore, the jury found that there was no verbal agreement for *pro formâ* delivery on 22nd instead of 21st August, they were amply warranted by evidence and were very probably right, and, as I think I have shown, the first part of the letter referring to 13th August cannot well be construed as a demand for delivery to be given on that date.

I do not think, therefore, that this letter shakes the finding of the jury, or that it proves the issue of readiness and willingness in the plaintiff's favour. But there is one thing which appears from it which is very material, and that is that if the letter represents Mr. Browne's views, as his counsel have practically insisted, then, failing arrangements about droving on the 13th, there was no date "on or before" the 21st on which he was ready and willing to attend and take the sheep. If he cannot have them "lifted," *i.e.*, driven away, on the 13th, he is not ready to have them so treated until the 22nd.

Whether the plaintiff had any cause of action on the ground of any failure of the defendant in respect of the droving contract, it is not necessary to consider.

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As to delivery, the defendant's evidence with regard to the telephone conversations on Sunday, 20th August, shows that he repudiated the notion of delivery on 23rd August, but was perfectly ready to deliver in accordance with his contract. On the other hand, Tate calls Browne up in the defendant's presence. The defendant hears him say, "Harrington is here now, with reference to the delivery. . . . Harrington says the 21st. He wants to talk to you over the 'phone." Tate then turns to the defendant and says, "Mr. Browne won't go into conversation with you over the 'phone, but will see you to-morrow personally"—which the defendant took to mean Monday the 21st; and later on he says, in his cross-examination, "The message I got eventually was, 'Browne will see you to-morrow when he is taking delivery.'"

It seems to me that if time was of the essence of the contract, that is, if the plaintiff's attendance on the 21st to accept delivery was a condition precedent to delivery, the plaintiff cannot well say that his letter of 9th August proves the readiness and willingness he alleges, and, if that is so, then the finding of the jury should not be disturbed.

Was time then of the essence of the written agreement? No exception can be taken to the authorities quoted by the Court below. The most important of them, and it tells strongly in favour of the affirmative view, is the passage from the judgment of *Cotton* L.J. in *Reuter* v. *Sala* (1), in which he says that to apply to mercantile contracts the rule of equity, which enforced certain contracts though the time fixed therein for completion had passed, "would be dangerous and unreasonable." Lord *Blackburn*, in his treatise on *Contract of Sale* (3rd ed., p. 244), cites this passage as an authority for his own statement that "in mercantile contracts, stipulations as to time (except as regards time of payment) are usually of the essence of the contract." The learned author fully cites a number of decisions for this rule.

As the legal position is thus undeniably stated, and as the written agreement is a mercantile contract, it follows that attendance to accept delivery at a date later than 21st August is no performance of his part by the plaintiff, unless it can be shown that a mercantile

(1) 4 C.P.D.. 239, at p. 249.

contract in this special instance has something in its terms which renders time unessential, or unless the circumstances of the country deprive it of its normal character. Certainly there is nothing in the Sale of Goods Code which imports any new element into it. Readiness to accept delivery after the 21st is no performance of an agreement to accept it on or before that date. As this mercantile contract would normally carry a specified time of delivery as of its essence it must be so interpreted unless something in its terms can be pointed to which shows that the specified term is unessential. I have listened in vain for any such term to be pointed out.

Nor can the circumstances of this country be adduced as having such an effect. Rather the contrary. Transactions in live stock are so frequent and depend so much on fluctuations of price as inducements to their inception, and those fluctuations are notoriously so numerous and so rapid, that it would tend to grave unsettlement if the doctrine of reasonable time were unduly imported to qualify engagements of this character where parties have specified dates of delivery for themselves. There are many contracts which may be satisfied by performance within a reasonable time, and many contracts in which there are terms which, not being essential to the main bargain, may be the subject of an action against those who are nevertheless entitled to the fulfilment of the prime engagement. But I cannot think that such matters as the time for performance in a contract for purchase and sale of flocks and herds in our vast country, where long distances must often be travelled and where musterings of station stock spread over great areas must often take place, are in general subject to relaxations in respect of time specified within which delivery or acceptance must be made. Of course, there are cases in which the special terms lead to a different construction, but in a contract such as this I see nothing to lead to such a difference.

The final clause of the writing, relating to arbitration, was not the subject of argument either at the trial or before the Full Court. It was mentioned by my learned brother *Isaacs* towards the end of the argument before us. It is not proper that we should allow it to affect our decision at this late stage, and I express no opinion upon it.

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I am of opinion that the order of the Full Court cannot be sustained, and that the appeal must be allowed, and the judgment of *Shand* J. restored.

The respondent must pay the costs of the appeal.

ISAACS J. It is of the highest importance for the understanding of this case to bear in mind that there were two distinct and independent contracts between the parties. The appellant had, by contract in writing, sold the sheep on his station, Villa Dale, to the respondent at a certain price and on certain terms set out in the contract. He had also by a separate oral contract, based on an entirely new consideration, agreed to drove those sheep for the respondent after they should become the respondent's property, and also some other sheep in contemplation of purchase by the respondent from a third person.

From a practical standpoint the two contracts were part and parcel of the respondent's one scheme for dealing with the sheep, but the legal obligations of the parties under those agreements were distinct and different. It is the failure to distinguish between and to keep separate those obligations that has led to the difficulty in this case.

Under the sale contract the property in the sheep was not intended to pass until after payment, which was to follow "formal delivery" but was to be not later than what the parties described as "actual delivery," and the property was not to pass until payment was completed. The action, therefore, was brought for damages for breach of contract to deliver. Whether appellants refusal to deliver on 22nd August was such a breach depends on the effect of secs. 13, 29, 31 and 61 (2) of the *Sale of Goods Act of* 1896.

Sec. 29 provides that "it is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale." This means simply that the seller's duty with regard to delivery depends upon the construction of the contract. Every contract, as was said by the Privy Council in *Bacon* v. *Purcell* (1), "must be construed in relation to the subject matter with which it deals and in the light of

(1) 22 C.L.R., 307, at p. 309.

the circumstances by which it is surrounded." But it must be remembered that there can be only one construction given to a contract. Lord *Chelmsford* L.C. said in *Scott* v. *Liverpool Corporation* (1):—" There is no equitable construction of an agreement distinct from its legal construction. To construe is nothing more than to arrive at the meaning of the parties to an agreement, and this must be the aim and end of all Courts which are called upon to enforce any rights created by and growing out of contract." And Lord *Parker's* judgment in *Stickney* v. *Keeble* (2) shows that Courts of law always held parties to their bargains, and that even since the *Judicature Act* the same result must follow except where prior to the Act equity would under the existing circumstances have granted specific performance or restrained the action. That cannot be said of the present case and so the rights of the parties must depend on the strict construction of the contract itself.

Under sec. 31, as applied to this contract, the place of delivery was the appellant's station, Villa Dale.

By force of sec. 61 (2) applying the rules of the common law, the seller's duty as to time " in accordance with the terms of the contract of sale "—repeating the words of sec. 29—was to deliver the sheep to the respondent, when so requested by him, on or before 21st August. I agree with the respondent's contention that he had the choice of any day between the making of the contract of sale of 31st July and 21st August. This elasticity in respect of date, it must be assumed from the terms of the contract, the locality of the transaction and the well known circumstances that ordinarily surround such a bargain, was for the benefit of the buyer. It was to enable him to make arrangements for moving the stock and for their destination. But while it is for his benefit, and gives him the choice of the day of delivery, it necessarily imposes upon him the duty of requesting delivery before he can complain of failure to deliver. " The first act," as it is called (*Halling's Case* (3)), must be done by him. The principle is thus stated by *Coleridge* J. in *Armitage* v. *Insole* (4): " Where circumstances, left uncertain by the contract, are

(1) 3 DeG. & J., 334, at p. 360.
(2) (1915) A.C., 386, at pp. 415 *et seqq.*
(3) 5 Co. Rep., 22b.
(4) 14 Q.B., 728, at p. 731.

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of such a nature that one party cannot perform his part of the contract until they are fixed, the other party, insisting on the contract, ought to fix those particulars." That case and the case of *Sutherland* v. *Allhusen* (1), in which it was applied, show that it was the duty of the respondent to notify the appellant distinctly of the day he required delivery of the sheep. On the authority of those cases, and of the later case of *Davies* v. *McLean* (2), the respondent's allegation that he was ready and willing to accept delivery must fail unless he proves such a notice.

The letter of 9th August, when read by the light of the dual relationship referred to, was not such a notice. It mingled the two positions, and made the request for delivery on the 13th under the sale contract conditional on the suitability of that date or thereabouts to the appellant under the droving contract. And as to the alternative date, that was equally left as an interrogation and not as a specific notification or request for delivery.

The reply given to Tate, the respondent's agent, by the appellant, as proved by him and accepted by the jury, was in effect that he could not perform the droving about the 13th as requested, but added: "I told Tate that would not affect the sale delivery that Mr. Browne could come out and take the delivery mentioned in the contract." He also said he was willing to arrange for the droving on the 22nd if Browne consented. He never heard from Browne on the matter.

If even the appellant were in default in respect of his obligation as drover—a matter as to which I offer no opinion—he clearly did not refuse or neglect to perform his duty as seller. He unequivocally offered to fulfil it, but at that stage Browne was unwilling to take the sheep because droving was impossible, or at least difficult. And even if the appellant were in default as to droving, that would form a cause of action not on the selling, but on the droving, contract.

Then on 20th August, according to the appellant's evidence, he unmistakably reminded the respondent that 21st August was the last day for delivery under the contract of sale, and the respondent promised to come on that day. The respondent failed to

(1) 14 L.T. (N.S.), 666. (2) 21 W.R., 264.

come till 22nd August, on which day he demanded the sheep under the written contract, and the appellant refused, claiming that it was too late, though offering as under a new bargain to carry out the same terms except the two per cent. rejection clause. This was refused, and hence the action.

The respondent's allegation that the time of delivery was extended by agreement to 22nd August was negatived by the jury, and it was plainly a matter for them to determine on the evidence. The conclusion arrived at by the Supreme Court that the jury could not as reasonable men negative that allegation is, with the greatest deference, founded on a misapprehension. It is said that the appellant's statement that he could not start the sheep at the time first suggested and as to making arrangements for doing so on the 22nd, was speaking in both capacities, that is, as seller and as drover.

But if his evidence is to be accepted—and it was accepted as truthful by the jury, whose decision as to that, in the circumstances, is final—the appellant was candid and careful. He said he could not start droving on or about the 13th, but was prepared to deliver as seller; and as to the later date suggested he was willing, if Browne consented, to prepare to drove on the 22nd, reminding him, however, that the delivery under the selling contract was to be on the 21st—the next day.

In the face of that evidence, the issue could not, in my opinion, be withdrawn from the jury, and their finding must stand.

The only question then is whether 21st August is to be regarded as an essential term of the bargain.

Sec. 13 provides that whether any stipulation as to time other than time of payment is of the essence of the contract or not depends on the terms of the contract.

So that it depends on a proper legal construction of the contract whether 21st August is the ultimate date. Again applying sec. 61 (2), the common law rule as to such a contract is that time of completion fixed by the parties is essential (*Reuter* v. *Sala* (1) and other authorities).

In the New Zealand Court of Appeal the late Sir *Joshua Williams*, in *Matthews* v. *Dampney Bros.* (2), said: "Now, in the sale of stock—at

(1) 4 C.P.D., 239.

(2) 19 N.Z.L.R., 557, at p. 561.

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least, where a large quantity is being sold—the time of delivery would be of the essence of the contract." Other learned Judges in the same case agreed with that. The *Sale of Goods Act* was in force there.

So far from there being anything in this contract to destroy the primary effect of fixing 21st August, the phrase "on or before" that date implies that no later date was intended to satisfy the bargain.

The appellant was therefore justified in law in refusing to deliver on the 22nd, when the respondent for the first time made a clear request for delivery.

The final clause in the agreement received no attention throughout the case from either of the parties. It is in these terms: "Should any dispute arise in regard to this contract, such dispute shall not vitiate the sale, but the matter in dispute shall be settled by arbitration in the usual way." It may be that such a clause would have application to a dispute as to the finality of date in any particular contract (see *Thorburn* v. *Barnes* (1)). But at this stage, and in view of the way that the case has been fought on both sides, it is impossible to consider its meaning and effect so as to influence the result of this appeal.

For the reasons I have stated, I am of opinion the appeal should be allowed, and the judgment of *Shand* J. should be restored.

RICH J. I agree with the order proposed by my brother *Barton*.

Appeal allowed. Order appealed from discharged with costs. Judgment of Shand J. restored. Respondent to pay costs of this appeal.

Solicitors for the appellant, *King & Gill* for *Marsland & Marsland*, Charters Towers.

Solicitors for the respondent, *Cannan & Peterson* for *W. B. MacDonald*, Hughenden.

(1) L.R. 2 C.P., 384, at p. 400.