[HIGH COURT OF AUSTRALIA.]

MARTIN AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

HOGAN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 23, 26, 27, 28; *Dec.* 20.

Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

Contract—Sale of goods—Construction—"F.o.b."—Price payable on delivery of documents—Bill of lading—Shipping receipt—Tender of documents—Recovery of price—Damages—Passing of property—Pleadings—Amendment—New point raised on appeal to High Court—Sale of Goods Act 1893 (56 & 57 *Vict. c.* 71), *secs.* 1, 16, 18, 49, 50, 55.

The plaintiff and the defendants in Sydney entered into a contract whereby the plaintiff agreed to sell and the defendants to buy 50 tons of chaff at £6 5s. per ton, f.o.b., shipped in New Zealand during June or July 1915 as freight was available. The terms as to payment were "cash against documents," and as to insurance "buyers instruct." An action was brought in the Supreme Court of New South Wales by the plaintiff against the defendants seeking to recover the price of the chaff. In one count of the declaration the terms of the contract were set out, and it was alleged that the chaff was duly shipped in accordance with the contract, that the plaintiff had tendered to the defendants the documents mentioned in the contract, and that all things had happened and all times had elapsed necessary to entitle the plaintiff to maintain the action, yet the defendants did not and would not pay the plaintiff for the chaff and the price remained wholly due to the plaintiff and unpaid. To this count the defendants pleaded that it was a term of the agreement that the plaintiff should deliver to the defendants the bill of lading and other documents relating to the chaff and that the plaintiff did not tender or deliver the bill of lading or any of the other documents. At the trial before a jury evidence was given that a parcel of chaff, which had been shipped in New Zealand within

the time specified in the contract by F. & R. consigned to Sydney to their own order, and there sold to C. & McF., had been purchased by the plaintiff from C. & McF., and that in performance of his contract with the defendants he tendered to them certain documents relating to this chaff including a shipping receipt called on its face a bill of lading. At the close of the plaintiff's case the defendants moved for a nonsuit on the ground that the document last mentioned was not in fact a bill of lading and that the contract required a tender of a bill of lading. The plaintiff's case was then reopened and evidence was given to show that a document in the form of the shipping receipt was usual in the trade instead of a bill of lading. The defendants then moved for a nonsuit on the ground that the plaintiff's only remedy was in damages, but the Judge refused to nonsuit. The jury found in answer to specific questions that a document in the form of the shipping receipt was usual in the trade, and they returned a general verdict for the plaintiff for the price of the chaff. A motion for a new trial was dismissed by the Full Court, the only grounds taken being those taken on the motions for a nonsuit. On appeal to the High Court,

Per Barton, Gavan Duffy and *Powers* JJ. (*contra, per Isaacs, Higgins* and *Rich* JJ.): On the pleadings and in view of the conduct of the case the plaintiff was entitled to hold the verdict.

Decision of the Supreme Court of New South Wales: *Hogan* v. *Martin & Co.*, 16 S.R. (N.S.W.), 68, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court by John Hogan, who carried on business as John Hogan & Co., against Vipont Edward Martin and Walter August Buhmeyer, who carried on business as Kershaw, Martin & Co., in which the writ was specially indorsed as follows:—

1915 August 6	1542 bags of wheat and straw chaff, weight 50 tons 5 cwts. at £6 5s. per ton	£314	1	3
	Bill of lading and exchange on same ..	1	4	0
	Insurance on same	1	4	0
	Total	£316	9	3

Per s.s. *Waitemata.*

The declaration contained two counts. The first was "For goods bargained and sold by the plaintiff to the defendants and for money paid by the plaintiff for the defendants at their request and for money found to be due from the defendants to the plaintiff on

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accounts stated between them." The second was as follows: "And the plaintiff also sues the defendants for that it was agreed between the plaintiff and the defendants that the plaintiff should sell to the defendants and the defendants should buy from the plaintiff fifty tons of good sound wheaten straw chaff in sound shipping bags at six pounds five shillings per ton f.o.b. s.i. New Zealand main ports, New Zealand Government Inspector's certificate of weight and quality to be final and to be shipped from New Zealand to Sydney during the month of June and/or July one thousand nine hundred and fifteen as freight was available and to be paid for by the defendants to the plaintiff by cash against documents subject to a brokerage of two shillings and sixpence (2/6) per ton and subject to certain terms and conditions as to insurance and the said chaff was duly shipped in accordance with the said agreement and the plaintiff tendered the said documents to the defendants and all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to maintain this action for the breaches hereinafter alleged yet the defendants did not nor would pay the plaintiff for the said chaff in accordance with the said agreement or at all and the said price still remains wholly due to the plaintiff and unpaid."

The pleas were as follows :—

"The defendants as to the first count of the declaration say that they never were indebted as alleged.

"2. And for a second plea the defendants as to the second count of the declaration say that it was a term of the said agreement that the plaintiff should tender and deliver to the defendants the bill of lading and other documents relating to the said chaff and the defendants say that the plaintiff did not tender or deliver to the defendants the said bill of lading and the said other documents or any of them.

"3. And for a third plea the defendants as to the said second count say that it was a term of the said agreement that the plaintiff should within a reasonable time after the shipment of the said chaff tender to the defendants the bill of lading and other documents relating to the said chaff and the defendants say that the plaintiff did not within such reasonable time tender to the defendants the said bill of lading

and other documents or any of them whereupon the defendants refused to accept them.

"4. And for a fourth plea the defendants as to the said second count say that it was a term of the said agreement that the plaintiff should procure and produce to the defendants a New Zealand Government Inspector's certificate that the said chaff was good and sound and the defendants say that the plaintiff did not procure and produce to the defendants a New Zealand Government Inspector's certificate that the said chaff was good and sound.

"5. And for a fifth plea the defendants as to the said second count as to so much thereof as alleges that the plaintiff tendered to the defendants the bill of lading relating to the said chaff say that after the execution of and before tender of the said bill of lading the plaintiff without the consent of the defendants procured the said bill of lading to be altered in a material and essential particular."

The replication was as follows :—

"The plaintiff joins issue upon all the defendants' pleas.

"2. And for a second replication the plaintiff as to the defendants' fifth plea says that the said bill of lading apart from the conditions exceptions and stipulations thereto which are not material to be herein set forth was in the words and figures following that is to say :—'Union Steam Ship Company of New Zealand Limited, Port of Lyttleton, 23rd July 1915. Received for shipment per S.S. *Waihemo* or other vessel subject to the exceptions and stipulations indorsed hereon the undernoted packages from Field & Royds to be forwarded to Sydney, via intermediate ports, consigned to order. Freight payable at destination. Marks, Nos., &c., K.Z. Description of packages 1542 sacks chaff, not accountable for marks weights or bursting of bags' ; and the plaintiff says that by a clerical error the name *Waihemo* was inserted in the said bill of lading in lieu of *Waitemata* ; and the said Union Steam Ship Company of New Zealand Limited signed the said bill of lading and the said Field and Royds indorsed the said bill of lading and delivered the same to the plaintiff and afterwards the said Union Steam Ship Company of New Zealand Limited with the consent of the said Field and Royds and of the plaintiff as holder thereof amended the said bill of lading

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by striking out the name *Waihemo* and inserting the name *Waitemata* which is the alleged alteration."

The defendants by their rejoinder joined issue upon the plaintiff's second replication to the defendants' fifth plea.

The action was tried before *Ferguson* J. with a jury. Evidence was given of the following facts :—

On 18th June 1915 the plaintiff and the defendants through a broker entered into a contract of which the following is the contract note :—

"Messrs. Kershaw, Martin & Co. Sydney buy and Messrs. John Hogan & Co. Newcastle sell the undernoted goods at the prices and on the terms and conditions mentioned below Fifty (50) tons of good sound wheaten straw chaff, in sound shipping bags, at six pounds five shillings (£6 5s.) per ton f.o.b. s.i. N.Z. main ports. N.Z. Government Inspector's certificate of weight and quality final. Delivery.—To be shipped from N.Z. to Sydney during the month of June and/or July 1915, as freight is available. Terms.—'Cash against documents.' Sellers not responsible for any loss or delay caused by circumstances beyond their control. Insurance.—Buyers instruct. Brokerage.—2/6 per ton." (The letters "s.i." meant "sacks included.")

During July 1915 Messrs. Field & Royds in New Zealand shipped a parcel of chaff on board the s.s. *Waitemata* of the Union Steamship Co. of New Zealand Ltd. consigned to Sydney, and received from that company a document (hereinafter called a "shipping receipt," and referred to in the judgments hereunder as "Exhibit C"), in the following terms so far as is material :—

"Union Steamship Co. of New Zealand Ltd.—Port of Lyttleton, 23rd July 1915.—Received for shipment per S.S. *Waihemo* (or other vessel) subject to the exceptions and stipulations indorsed hereon the undernoted packages from Field & Royds to be forwarded to Sydney via Intermediate Ports. Consigned to order. Freight payable at destination.

Marks, Nos., &c.	Description of Packages.
K. Z.	
1542	Sacks Chaff.

This bill of lading is issued on the conditions following, viz. :—"
(The conditions are not material to this report).

The shipping receipt was indorsed by Messrs. Field and Royds in blank. The consignment of chaff, which arrived in Sydney on 5th August 1915, was sold by Messrs. Field & Royds to Messrs. Cameron & McFadyen, grain and produce merchants, Sydney, and was by them sold to the plaintiff. Shortly afterwards there were tendered by the plaintiff to the defendants in pursuance of their contract three documents, viz., the shipping receipt, an invoice of the chaff, and the New Zealand Government Graders' certificate, but the defendants refused to accept them or to pay the price of the chaff.

Other facts are stated in the judgments hereunder.

The jury having found a verdict for the plaintiff for £315 5s. 3d., the defendants moved the Supreme Court by way of appeal to set aside the verdict and to enter a nonsuit or a verdict for the defendants or to grant a new trial. The motion was dismissed by the Full Court: *Hogan* v. *Martin & Co.* (1).

From that decision the defendants appealed to the High Court.

The appeal was first heard on 28th, 29th and 30th November 1916, before *Griffith* C.J., *Barton*, *Isaacs* and *Rich* JJ., and, having been directed to be reargued before a Full Bench, now came on for argument before *Barton*, *Isaacs*, *Higgins*, *Gavan Duffy*, *Powers* and *Rich* JJ.

Leverrier K.C. (with him *Delohery*), for the appellants. A contract such as that between the plaintiff and the defendants requires the vendor to deal with the goods in such a way as to appropriate them to the contract at the time of shipment so that the buyer will from that time have an insurable interest. Here the chaff remained at the disposal of the shippers, Field & Royds, until it arrived in Sydney. For that reason the property in the chaff never passed to the defendants. The term "f.o.b." means that the seller is to put the goods on board ship at his own expense on account of the buyer, and the goods are at the buyer's risk from the time when they are so put on board (*Benjamin on Sale*, 5th ed., p. 683; *Wimble, Sons & Co.* v. *Rosenberg & Sons* (2)). It is not sufficient that the

(1) 16 S.R. (N.S.W.), 68.
(2) (1913) 1 K.B., 279, at p. 282; (1913) 3 K.B., 743.

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vendor should acquire goods that have been shipped by someone else. There are only two cases in which a seller of goods can recover the price, first, where the property in them has passed to the buyer, and, secondly, where the price is payable on a day certain irrespective of delivery, that is, on a definite day fixed by the parties (*Sale of Goods Act* 1893 (56 & 57 Vict. c. 71), sec. 49; *Wimble, Sons & Co.* v. *Rosenberg & Sons* (1); *Stein Forbes & Co.* v. *County Tailoring Co.* (2); *Dunlop* v. *Grote* (3)). The documents tendered not having been accepted by the defendants, the plaintiff cannot recover the price, but his only remedy is in damages. The finding of the jury as to the shipping receipt is only as to its form. As to how it should be filled in there is no finding, and no evidence. This contract is one for the sale of goods and not for the sale of documents (*Arnhold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (4)), and, being a contract for the sale of goods, the price cannot be recovered unless the property has passed. See secs. 16 to 20 of the *Sale of Goods Act* 1893. There has been no appropriation of the goods to the contract sufficient to entitle the plaintiff to recover the price, for such an appropriation must be unconditional and must be by the assent of both parties (*Benjamin on Sale*, 5th ed., p. 344; *Mirabita* v. *Imperial Ottoman Bank* (5); *Ogg* v. *Shuter* (6); *Shepherd* v. *Harrison* (7); *Stein Forbes & Co.* v. *County Tailoring Co.* (2)). [Counsel also referred to *Orient Co. Ltd.* v. *Brekke & Howlid* (8).]

Monahan, for the respondent. In order to carry out this contract it was not necessary for the plaintiff to ship the chaff, but it was sufficient for the plaintiff to procure chaff which had been shipped in accordance with the contract (*Inglis* v. *Stock* (9); *Biddell Bros.* v. *E. Clemens Horst Co.* (10)).

[*Leverrier* K.C. referred to *Healy* v. *Howlett & Sons* (11).]

This objection is not open on the pleadings, and should not be allowed to be taken for the first time in this Court (*Rowe* v. *Aus-*

(1) (1913) 1 K.B., at p. 282; (1913) 3 K.B., 743.
(2) 115 L.T., 215.
(3) 2 Car. & K., 153.
(4) (1916) 1 K.B., 495, at pp. 510, 514.
(5) 3 Ex. D., 164, at pp. 170, 172.
(6) 1 C.P.D., 47.
(7) L.R. 5 H.L., 116.
(8) (1913) 1 K.B., 531, at p. 535.
(9) 12 Q.B.D., 564; 10 App. Cas., 263.
(10) (1911) 1 K.B., 214, at p. 220.
(11) (1917) 1 K.B., 337.

tralian United Steam Navigation Co. Ltd. (1); *Martin* v. *Great Northern Railway Co.* (2)). If it had been taken at the trial, evidence might have been given that there was a custom under which what was done was a compliance with the contract. As to the necessity for shipment by the seller, there is no difference between an f.o.b. contract and a c.i.f. contract (*C. Groom Ltd.* v. *Barber* (3); *Landauer & Co.* v. *Craven & Speeding Bros.* (4); *Cox, McEuen & Co.* v. *Malcolm & Co.* (5)). It is a sufficient compliance with either contract that the seller tenders documents which show that the goods have been shipped in accordance with the terms of the contract. The term f.o.b. in this contract only applies to the price, and the only provision as to delivery is that the goods shall be shipped in New Zealand within the specified time. The plaintiff was entitled to recover the price of the chaff, because the contract was to pay on a day certain. A day is certain if it is a day on which a specified event is to happen (*Workman, Clark & Co. Ltd.* v. *Lloyd Brazileño* (6)).

[ISAACS J. referred to *Staunton* v. *Wood* (7).]

There is nothing to prevent the parties to a contract agreeing that payment of the price shall be made on the happening of a certain event, such as the tender of certain documents, and then if the documents are tendered the other party is bound to pay the price (see *Bullen & Leake's Precedents of Pleading*, 3rd ed., p. 36; *Calcutta and Burmah Steam Navigation Co. Ltd.* v. *De Mattos* (8)). On the tender of the documents in this case the property in the chaff passed to the defendants; the plaintiff had then done everything which he was bound under the contract to do to entitle him to recover the price (see *Biddell Bros.* v. *E. Clemens Horst Co.* (9)). This is not a case of the seller keeping the goods and getting the price of them as well, because as soon as the price is tendered or paid, whether voluntarily or by compulsion of law, the goods become the buyer's. [Counsel referred to *Polenghi Bros.* v. *Dried Milk Co. Ltd.* (10); *Bowden Bros. & Co. Ltd.* v. *Little* (11).] If the plaintiff was willing to hand over

(1) 9 C.L.R., 1, at p. 22.
(2) 16 C.B., 179.
(3) (1915) 1 K.B., 316, at p. 323.
(4) (1912) 2 K.B., 94.
(5) (1912) 2 K.B., 107 (note).
(6) (1908) 1 K.B., 968.
(7) 16 Q.B., 638.
(8) 32 L.J.Q.B., 322, at p. 328.
(9) (1911) 1 K.B., 934, at p. 958.
(10) 92 L.T., 64.
(11) 4 C.L.R., 1364, at pp. 1389, 1393.

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the documents, he was in the same position as if the documents were delivered, and the property then passed. Where there are concurrent conditions and the seller is ready and willing to perform the condition on his part, he is entitled to recover the price.

[BARTON J. referred to *Duthie* v. *Hilton* (1).]

The contract was satisfied by the plaintiff procuring chaff which accorded with the description and which had been shipped in New Zealand at the prescribed time and tendering the documents in Sydney. The position is the same as if the plaintiff had sent the documents by post; the defendants could not have got out of their obligation by immediately returning them. From the nature of the contract the defendants gave the plaintiff authority to appropriate the chaff to the contract, and no further assent to the appropriation by the defendants is required. They were bound by the appropriation, and if the chaff did not comply with the contract they could refuse to accept it, and could then recover the purchase money. The tender of the documents was unconditional. There was no condition imposed on it by the plaintiff and no reservation by him which could make the tender conditional. (See *Benjamin on Sale*, 5th ed., pp. 400, 401; *Key* v. *Cotesworth* (2); *Ex parte Banner*; *In re Tappenbeck* (3); *Stein Forbes & Co.* v. *County Tailoring Co.* (4).)

Leverrier K.C., in reply. The contract contemplated a bill of lading which would show that the plaintiff or his agent was the shipper. That point is clearly open on the pleadings. The second plea goes beyond tender, and covers a plea that the document tendered was not a document appropriate to the contract. The contract shows that the chaff was intended to be at the risk of the defendants from the time of shipment, and is to be read as an ordinary f.o.b. contract. The finding of the jury means that the contract was an ordinary f.o.b. contract, except that instead of a bill of lading there was to be a document in the form of the shipping receipt. The defendants should be allowed to amend if necessary. In the case of unascertained goods, until there has been assent

(1) L.R. 4 C.P., 138.
(2) 7 Ex., 595, at p. 607.
(3) 2 Ch. D., 278.
(4) 115 L.T., at p. 216.

to the appropriation by the buyer the property does not pass. See *Sale of Goods Act* 1893, sec. 18, rule 5 (1).

Cur adv. vult.

Dec. 20.

The following judgments were read :—

BARTON J. In this case the plaintiff sues for the price of certain chaff, and the defendants say that the price is not due to the plaintiff.

The pleadings are drawn on the old system as regulated by the Common Law Procedure Acts, and must be dealt with as that system requires.

There are two counts in the declaration. The first is an indebitatus count for the price of goods bargained and sold, and the plea to it is never indebted. The second is a special count which I ought to quote in full. It is in these words : " And the plaintiff also sues the defendants for that it was agreed between the plaintiff and the defendants that the plaintiff should sell to the defendants and the defendants should buy from the plaintiff fifty tons of good sound wheaten straw chaff in sound shipping bags at six pounds five shillings per ton f.o.b. s.i. New Zealand main ports, New Zealand Government Inspector's certificate of weight and quality to be final and to be shipped from New Zealand to Sydney during the month of June and/or July one thousand nine hundred and fifteen as freight was available and to be paid for by the defendants to the plaintiff by cash against documents subject to a brokerage of two shillings and sixpence (2/6) per ton and subject to certain terms and conditions as to insurance and the said chaff was duly shipped in accordance with the said agreement and the plaintiff tendered the said documents to the defendants and all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to maintain this action for the breaches hereinafter alleged yet the defendants did not nor would pay the plaintiff for the said chaff in accordance with the said agreement or at all and the said price still remains wholly due to the plaintiff and unpaid."

To the special count the defendants filed four pleas, that is, the second, third, fourth, and fifth. We are not concerned with the

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third plea, because the question of reasonable time was decided against the defendants by the jury, and that finding is not now challenged. The fourth plea has been abandoned. The fifth plea has never been seriously insisted on in this Court, although the case has been twice argued, and on this reargument counsel for the defendants, the appellants, practically abandoned it. In any case there is really no basis for it. The plaintiff joined issue on all the pleas.

The case apart from the indebitatus count is thus reduced to the position that it rests on the second count and the second plea, which is now the only defence to that count.

Now, to what do these two pleadings amount? The special count does not admit of the general issue. It depends on a performance of all conditions precedent. These are all taken to have been fulfilled save so far as the defendants deny any of them. Here they deny one of them, and one only, that is, the tender to the defendants of "the bill of lading and other documents relating to the said chaff." If they have failed there, they have failed altogether, for the special count remains in that event without a defence to it.

It should be added that as all the statements in the special count, except so much of the averment of conditions precedent as is excepted to by the second plea, are admitted on the record, it stands admitted that "the said chaff was duly shipped in accordance with the said agreement." The admission of the contract carries with it that the chaff was "to be paid for by the defendants to the plaintiff by cash against documents," so that if the right documents relating to the chaff were tendered the plaintiff's right to recover is complete.

The case went to trial before *Ferguson* J. and a jury. The plaintiff recovered £315 5s. 3d., which includes the price of the chaff. It may be mentioned, in passing, that the cause of the refusal of the defendants to pay became clear on the evidence. One of them stated it as the collapse of the market. That the defendants knew they had bought this chaff is further apparent from the request made by the same defendant to the plaintiff's manager: "Look, will you take it back yourself?" I mention these two pieces of evidence for a special purpose. The defendants have

throughout relied on a tissue of legal objections without reference to the merits in fact, which are all against them. Their attitude shows that if the strict law which they invoke brings about the failure of their defences, there will be no cause for regret—except on their part.

There is no question that the documents actually tendered were refused. They were refused more than once. (A duplicate invoice indeed had been sent on the previous day, and the defendants had accepted it.)

The documents tendered, which are all in Exhibit C, did not include the ordinary bill of lading. What they included in its place, together with the invoice and the required certificate, was a contract of carriage. It was called in the evidence a shipping receipt, and its purport was an acknowledgment by the carriers, the steamship owners, of the receipt of the goods mentioned in it for shipment subject to certain stipulations which are not here material. The document called itself a bill of lading. It was indorsed to order by Field & Royds, the New Zealand firm who had shipped the chaff. On the close of the case for the plaintiff, counsel for the defendants, moving for a nonsuit, argued that the document referred to, though called in the evidence a bill of lading, was not really one, and that an actual bill of lading ought to have been tendered, made out in favour of the defendants. Instead of that, Field & Royds, who were strangers to the contract, had the bill of lading made out to their own order. Up to that point the case had been conducted on the assumption that the document in question amounted to a bill of lading, or at any rate that there was no question raised on that point. In view of this contention on behalf of the defendants, the learned Judge allowed the plaintiff to reopen his case so as to give evidence that the document was the one contemplated by the contract, and was the usual contract of carriage in such cases. In *Wimble, Sons & Co.* v. *Rosenberg & Sons* (1) *Hamilton* L.J. spoke of "a reasonable and ordinary bill of lading or other contract of carriage," and *Ferguson* J. probably thought that such evidence as was proposed would come within the last of these terms. Evidence was then given for the plaintiff by the assistant manager of the shipping

(1) (1913) 3 K.B., at p. 757.

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company and by the accountant for a firm in the produce trade. The former said, looking at the shipping receipt, that in the inter-State and New Zealand trade practically 99 per cent. of shipments had for fully thirty years been made on this form of document. In the case of oversea shipments an actual bill of lading was used; but when a document of the kind in evidence was used in respect of cargo received no other bill of lading was ever issued unless the shipper (with whom such contracts are made) specially requested it. If the shipper made the form out " in the old style " his company signed it; and this witness said in answer to the Judge that he would deliver to the person who produced that document indorsed by the shipper; and this was so indorsed. He was not cross-examined on this answer. The other witness said that the document in evidence, at which he looked, was the ordinary contract of carriage in the inter-State produce trade; that they rarely used any other contract of carriage; that there was a usage of the trade as to acceptance of contracts of that kind. He used these words: " You always pay and receive on that contract." He said that his firm did the largest business in the inter-State and New Zealand trade. He had never known a shipping document of that kind to be objected to as a sufficient document against which cash was to be paid. It had never been questioned in his experience, and he had dealt with thousands of them. It was the document ordinarily accepted, and always accepted in his twenty years' experience in the produce trade. It had never happened to him to have a demand for a bill of lading in the face of that document. They spoke of and dealt with it as a bill of lading, and called it so. No question was asked of this witness by the defendants' counsel as to the indorsement.

The defendants again asked for a nonsuit. Their counsel's ground now was that " even assuming the defendants were bound to accept and pay, still, as they did not accept, this action should not be for the price of the chaff, but should be for damages for non-acceptance."

I emphasize that the first application for a nonsuit was really based, as the form of the plea would lead one to expect, on the contention that the contract required, and that the document was not, a bill of lading, as known to the law. For the objection that

the property had not passed was not open on the special count and the second plea, except so far as it was conveyed by the objection that nothing but a bill of lading would satisfy the word "documents"; that is, that a bill of lading was necessarily one of the documents contemplated by the parties. Any objection that the chaff was not duly shipped in accordance with the agreement was not within the plea relied on, and indeed due and agreed shipment stood admitted on the issues filed. The second application was based on the contention that the action should have been for damages for non-acceptance, but was instead for the price of the chaff.

The first of these applications, then, was only open so far as it related to the kind of document. On such application his Honor declined to nonsuit, and the defendants called no evidence.

To the jury the Judge put these questions in writing:—(1) "Is there a usage in the produce trade that under a contract 'cash against documents' for goods to be shipped from New Zealand a document in the form of that included in Exhibit C is accepted instead of an ordinary bill of lading?" (2) "Were the documents tendered within a reasonable time?" He had already asked, verbally: "Were the documents tendered, that is, the documents contemplated by the contract?" The jury answered the learned Judge's questions in the affirmative, and found a general verdict for the plaintiff for the sum already mentioned. Then the defendants moved the Supreme Court to set aside the verdict, and to enter a nonsuit or a verdict for the defendants, or to grant a new trial. The motion was refused; the plaintiff held his verdict. Defendants' counsel on that motion contended that there must be a tender of an actual bill of lading, and also contended that the plaintiff's proper claim was for damages and not for the price.

It may be that the evidence for the plaintiff did not in strict law establish a usage, but as the defendants are engaged in that produce trade in which the acceptance of such a document as Exhibit C in place of a strict bill of lading by shippers was shown to be practically universal, and as before us Mr. *Leverrier* conceded that the verdict of the jury as to usage should stand, the question whether the contemplation of the parties to the chaff contract rested on the implication flowing from usage or merely on the general practice

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of the trade became immaterial. The defendants' counsel, however, in their argument before us, urged that the first finding merely related to the form of the document, and left open the question of its sufficiency, since the chaff had not been shipped for the defendants, but for another firm from whom the plaintiff bought after its arrival, and that even a bill of lading, if it related to that chaff, would not have been a proper document. Looking back to the learned Judge's charge to the jury, which expressly put to them that they must be satisfied that the documents tendered were the documents contemplated by the contract, I am of opinion that their findings, which must be read together, include the affirmation of that proposition. But in any case the defendants at the trial really rested their defence not on the point now taken but on their own interpretation of the second plea, which plea, I am clear, they themselves construed as an objection based on the absence of any bill of lading at all. No objection was taken at the trial to any part of the summing-up. The defendants now seek to raise a new interpretation of the plea, and thereby to raise a defence which they did not raise at the trial or afterwards before the Supreme Court. I have no doubt that the belief that they could raise it was not in their minds at the time of pleading, or at the trial, or on the appeal to the Supreme Court, and that it would be both unfair and improper to allow them to raise it now. Another objection taken on the appeal to us, not earlier, was that the plaintiff, the seller, was not shown to have shipped the chaff himself or by his agent, and therefore could not sue on this contract. If this objection does not fall within the second plea, it is out of the question at this stage. But if it can be said to fall within that plea it is subject to the same answer as I have given to the last preceding objection. I might, however, say that I doubt whether either of these objections can be fairly said to come within the plea.

As to the objection that the plaintiff could only properly have sued for damages for non-acceptance, it is necessary to recall attention to the special count. That pleading states that all conditions precedent were fulfilled necessary to entitle the plaintiff to maintain the action "for the breach hereinafter alleged," and the breach alleged is failure to pay in accordance with the agreement or at all,

so that the price became and remained due. Now, the defendants, being unable to meet that count as they met the first, with a simple denial of indebtedness, were obliged to say which of the conditions precedent it was that they alleged to be unperformed, if there were any. When they plead that one condition, namely, the tender of the necessary documents, was not performed, and set that forth as the only reason why the price is not due, they must be taken to admit that, failing this plea, all conditions have been performed and therefore the price is due. If all conditions precedent were fulfilled the defendants cannot now raise the question of the passing of the property or that of its delivery as conditions precedent. They are bound by the pleadings, and their conduct in relation to the contract as disclosed in the Judge's notes does not inspire in me any sympathy with their position. The defendants do not say that on the face of the second count the plaintiff's action was wrongly conceived in law. Of course they cannot say so. They rely solely on the second plea, which is, I think, a broken reed. This puts it out of their power to raise any question as to any other condition precedent to the right to recover the contract price.

There was a further contention that the plaintiff had made his tender conditional on the payment of the price. But when the term "cash against documents" is used, if the documents are forthcoming the price must be forthcoming too. It is true that the single word "cash" may often be read to mean payment within a reasonable time. But it does not follow that such a reading is applicable to that word in a term such as "cash against documents," where the word "against" seems clearly to mean "in exchange for." If it were the law that the plaintiff was not entitled to make a conditional tender, then the answer would arise that there was a mere request for a cheque, and that a mere request does not amount to the making of a condition.

Having due regard to the pleadings and the findings, I am of opinion that the plaintiff's verdict and judgment must stand, and that the appeal must be dismissed with costs.

ISAACS AND RICH JJ. In this case Hogan sued Martin & Co. for the price of chaff sold by a contract in writing made in Sydney, and

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dated 18th June 1915. The first question is whether he is entitled to the *price* in full. The alternative question is whether he is entitled to *damages* for breach of contract by the defendants.

The case appears to us inherently simple. There is no conflict of testimony; the whole of the evidence was given on the part of the plaintiff; he has stated the whole circumstances from the making of the contract to the alleged breach. He has shown that he contracted to sell the chaff f.o.b. in New Zealand for despatch to Sydney; he has shown that the chaff for which he insists the defendants should pay, though no doubt put on board in New Zealand by its then owner, was not put on board by the plaintiff or for him, and was not put on board on account of the defendants, either unconditionally or conditionally; and that the plaintiff himself only bought it on its arrival in Sydney. On these simple facts, which are indisputable because proved by the plaintiff himself, it appears to us that both the questions above stated should, in accordance with well settled legal principles, established by the authorities, including the two ultimate tribunals of the Empire, be answered without more in favour of the defendants. Unfortunately there have been introduced into the argument at various stages a number of contentions which, like knots in a skein, require disentanglement in order so far as possible not only to clear the present case from obscuration, but also to prevent future embarrassment as to what is necessarily involved in the decision of this case.

The contract was made by brokers, and was in these terms:— "18th June, 1915.—Duplicate Contract Note.—No. 1564.—Messrs. Kershaw, Martin and Co. Sydney buy and Messrs. John Hogan and Co. Newcastle sell the undernoted goods at the prices and on the terms and conditions mentioned below Fifty (50) tons of good sound wheaten straw chaff in sound shipping bags, at six pounds five shillings (£6 5s.) per ton f.o.b. s.i. N.Z. main ports. N.Z. Government Inspector's certificate of weight and quality final. Delivery.—To be shipped from N.Z. to Sydney during the month of June and/or July 1915, as freight is available. Terms.—'Cash against documents.' Sellers not responsible for any loss or delay caused by circumstances beyond their control. Insurance.—Buyers

instruct. Brokerage.—2/6 per ton." (The letters "s.i.," it is agreed, mean "sacks included.")

The old system of pleading still prevails in New South Wales, and the *Sale of Goods Act* has not yet been adopted.

The declaration contained two counts—the first, the common count for "goods bargained and sold," and the second framed on the special contract, alleging performance of all conditions precedent to payment, and averring non-payment of the price. No allegation of damage was made, and no damages were claimed; the only claim being for the price. The defendants pleaded as to the first count "never indebted," and as to the second, non-tender and non-delivery of the bill of lading or any of the documents. Other pleas were pleaded to the second count which, in view of the course of events, have now become immaterial. At the trial the plaintiff (the present respondent) adduced evidence; the defendants offering none, but relying on the case as made for the plaintiff.

From the transcript on appeal, and from the admissions by counsel before us, the course pursued at the trial was this:—At the conclusion of the plaintiff's evidence learned counsel for the defendants moved for a nonsuit. One of the grounds they relied on was that Exhibit C was not in form a bill of lading, and therefore did not come within the term "documents" in the contract. To meet this point, the Court allowed the plaintiff to reopen his case, and call evidence to the effect that shipowners were in the habit in the inter-State Australian and New Zealand trade of issuing a document in the form of Exhibit C instead of a bill of lading, and when indorsed, said the witness representing the shipping company, "whatever the legal rights are, I deal with it as if it were a bill of lading." Evidence was also given that merchants speak of such a document, and deal with it, as a bill of lading. Then the case finally closed. Again a nonsuit was moved for and refused. But among the objections taken, as admitted by learned counsel here for the respondent, was this, that on the pleadings nothing was claimed but the price, and that if anything was recoverable it was damages only as on the evidence the property had not passed; and that his answer was that as to the first count the price was claimed, and that as to the second damages were claimed, but that

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the amount of damages recoverable was necessarily the contract price.

The learned Judge in his charge to the jury put in writing a specific question in this form: "Is there a usage in the produce trade that under a contract 'cash against documents' for goods to be shipped from New Zealand a document *in the form* of that included in Exhibit C is accepted instead of an ordinary bill of lading?" His Honor in his charge directed the jury's attention to three questions only, viz., (1) was the chaff of the stipulated quality? (2) as to the usage above mentioned, putting his language (which obviously was a brief reference to the fuller question written out) in this shape, "is there a usage in the trade that *such a document* as this should be accepted in the ordinary course?" and (3) were the documents tendered in a reasonable time?

As to the question raised by defendants' counsel that (if anything) damages and not price were recoverable, the learned Judge ruled against it; he told the jury that if necessary that would be decided by the Court, but he directed them that the "contract price" was recoverable, if the three questions above mentioned were answered in favour of the plaintiff, and he directed them that in that case the sum they were to find by their verdict was £315 5s. 3d.

The jury answered the questions in plaintiff's favour, and returned a verdict for £315 5s. 3d. as directed.

The defendants moved the Full Court for a new trial. The only grounds taken there were those taken at the trial. The Full Court, by a majority, dismissed the motion. *Cullen* C.J. and *Pring* J. held (1) that the finding of the jury as to the *form* of the shipping documents could not be disturbed, and tender of such a document was sufficient instead of a bill of lading, the language of those learned Judges making it plain that the contention before them, and their decision, regarded the jury's answer to have reference to "form" only; (2) that as on the tender of the documents the defendants' obligation under the contract to pay arose, therefore the remedy was recovery of the price. *Sly* J. differed on the last point only, holding that as there was neither a passing of the property, nor a day certain fixed for payment, irrespective of delivery, the only remedy of the plaintiff was damages, and that the case should go down for trial on that question.

The appeal from that judgment was first argued before this Court many months ago, and, in view of the general commercial importance of the rival contentions then made as to the effect of an ordinary f.o.b. contract, a reargument before a larger Bench was ordered, so that that question should be definitely settled.

On reargument it has been, for the first time, objected that that point is not open to the appellants, because, as it is said, the pleadings, and the way in which the case was conducted, preclude them from urging the true effect of the contract sued upon. If preclusion by conduct be admitted, then it should first be applied to the respondent, who by his conduct on the first argument raised no objection to the appellants' reliance on the point, which goes to the root of the claim, and who allowed the Court and his opponents, to embark without objection on the expensive course of this Full Bench hearing.

(1) *Pleadings.*—The way, however, it is said the appellants are so precluded is this:—Though the first count and the plea of never indebted left their contention open, it is said they did not raise it at the trial. As to the second count, it is said that, though it was open at the trial to rely on the contention as to the first count under the general plea to that count, no plea specifically raised it to the second count, and that the plea as to the bill of lading not being tendered among the "documents" did not include it, and therefore it was admitted that the shipment was according to the contract; or alternatively, if the plea did include it technically, it was not urged.

As to the supposed admission by the plea to the second count that the shipment was in conformity with the contract, the position is clear. Apart from the "usage" as to form (or even as to the "substance" of the shipping receipt, as it was erroneously, as we think, urged the finding means) which, without any amendment of the pleadings and without any allegation in them as to usage, the jury were permitted to find, the interpretation of the written contract is a pure matter of law for the Court. Whatever, on that interpretation, "the proper shipment" may be, that and that only is what, on the assumption made, the defendants admitted. If, therefore, on that interpretation "proper shipment" involved shipment by or on behalf of Hogan and on account of Martin, then

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that was the implied admission of the defendants, because it was *the implied allegation of the plaintiff*, so far as the pleading itself is concerned. Consequently, since if the defendants must be pinned to that allegation so must the plaintiff, the plea of non-tender of bill of lading (inasmuch as it could not mean *any* bill of lading, but *the* bill of lading, that is, one *appropriate to that shipment*) must have meant one consistent with the plaintiff's implied allegation and the defendants' implied admission, that is, one referable to a shipment by or on behalf of Hogan, and either unconditionally on Martin's account, or on his account conditionally. If that is so, the appellants' objection before us is sound—that the finding if regarded as a finding of "substance" as distinguished from "form" cannot be supported because, as will be seen, the evidence not only did not support it but is directly opposed to it.

(2) *Conduct of Parties at Trial.*—The next point for consideration is how are the defendants prejudiced by what took place at the trial, so as to be precluded from insisting on the substantial justice of having the property in return for the price. First, it is said, they did not insist on it at the trial. Now, they did insist that only the price was recoverable, under the plaintiff's claim, and that a "bill of lading" was not tendered and the property did not pass. The major premiss there is the ground that the *property did not pass*, the minor premiss is the *reason* it did not pass, namely, that there was no bill of lading to pass it. But the root objection is that the property did not pass, as an answer to the claim for the price. Since the argument we have been favoured by *Ferguson* J. with a copy of his Honor's notes of the argument on this point, which shows that it was expressly argued that the property had not passed. That objection stood for both counts. To the first count it still admittedly stands; and the respondent has not addressed any argument against it except one to be dealt with hereafter—that the passing of the property was unnecessary. But, supposing it necessary, then the point was always urged, though it was thought sufficient to support it by one reason, namely, "no bill of lading."

(3) *Finding as to Shipping Documents.*—Now, how has that been got over? The jury's finding, if limited to "form," as all the Judges of the State Supreme Court thought and as we think, clearly

does not touch the point. If, however, that finding extends to "substance," that is, that it includes a bill of lading for goods put on board by one stranger to the contract for another stranger to the contract, still, even if contrary to our opinion the evidence supports it in that sense, it does not extend further than the "document" and its contents, which is a matter affecting only the *second duty* of the seller, viz., "delivery of documents"; it does not touch the *first duty* of the seller, viz., transfer of the "property" in the goods, which is involved in the f.o.b. nature of the contract, and strengthened here by the words "Insurance.—Buyers instruct," which are senseless unless these particular goods are shipped on their account conditionally or unconditionally so as to give them an insurable interest, as Stock's goods were shipped in *Inglis* v. *Stock* (1).

Consequently, we hold that even if the plaintiff had resisted evidence at the trial, showing that the *particular goods referred to in Exhibit C*, which exhibit is not admitted in the pleadings, were not in fact shipped on account of the buyers conditionally or unconditionally, and therefore that document was not appropriate to the contract, and the goods it referred to did not correspond with the goods referred to in the declaration, namely, goods shipped on defendants' account, his resistance would have been wrong, and should have been overruled.

But, so far from resisting such evidence, *he himself proved the fact*, and so proved his own failure to perform the contract. We know of no authority so far recorded which says that a defendant is unable to rely upon the truth, if the plaintiff, deliberately giving the go-by to the pleadings, himself establishes it in evidence. That is precisely the present case, and will be clear to demonstration when we state what he did prove.

At the trial, learned counsel for the defendants thought the non-passing of the property he relied on was sufficiently shown by the absence of a bill of lading in strict form. He is met, let us suppose, by a finding that Exhibit C is a proper document to deliver. But how does that get rid of the fundamental requirement that the property must have passed in order that the plaintiff can establish

(1) 10 App. Cas., 263.

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his performance of the contract so as to succeed at all? The consensual document, Exhibit C, even if accepted, does not pass the goods as a bill of lading does. Apart from legislation—and there is none in New South Wales affecting this case—the common law attribute of a bill of lading is that upon assignment of the document the goods to which it refers are constructively delivered. No other document has this attribute at common law. Learned counsel relied on this in support of his contention that the price was not payable, the property not having passed. He still maintained that as a good reason in the Full Court, and failed. In this Court, both on the first argument and on the present argument (and it is quite as efficacious to raise it on the reargument as if it had been the only point raised on the original argument), appellants' counsel added a further reason for their central view, namely, that plaintiff's own evidence showed incontestably that the property had never passed, because the goods had never been put on board on the defendants' account, conditionally or unconditionally, and also that the document Exhibit C was not a document which would transfer the goods, as a true bill of lading would. And so it was contended that the price was not payable, and that damages were not claimed and, if claimed, were not recoverable.

(4) *Objection incurable.*—So long as a Court is supposed to exist for the purposes of securing justice, as measured by the law, so long, in our view, must it strive to see that litigants are not to be regarded as playing a game where a momentary oversight of counsel is to be necessarily fatal. If his oversight has prejudiced the opponent, his client may have to abide by it; but if not, then the penalty if any is costs, not deprivation of substantial rights. If, as here, the plaintiff, who sets up a claim, himself discloses his radical failure to observe his contract and exhibits an incurable defect in his case, the defendant, however late he points out the defect, ought not to be denied its recognition. For that there is the express authority of the Privy Council in *Connecticut Fire Insurance Co.* v. *Kavanagh* (1). Lord *Watson* speaking for the Judicial Committee says: "When a question of law is raised for the first time in a Court of last resort, upon the construction of a document, or upon facts either

(1) (1892) A.C., 473, at p. 480.

admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea." That exactly fits the present case. The instances given by his Lordship where the Court would hesitate, and where it would refuse, to follow that course are irrelevant here. In the case of *Sydney Harbour Trust Commissioners* v. *Wailes* (1) *O'Connor* J. says :—" The question always is whether, if the point had been taken at the trial, the defect could have been remedied. This point, if well founded, must have been fatal." That observation applies here. See also *Kates* v. *Jeffery* (2).

No evidence whatever could obliterate from the contract the letters " f.o.b." or the words " Insurance.—Buyers instruct." They are express terms. No evidence of usage inconsistent with or repugnant to the express terms of the written contract is admissible (*Westacott* v. *Hahn* (3)). The test of repugnancy is settled by Lord *Campbell* C.J., in *Humfrey* v. *Dale* (4), in these words : " To fall within the exception . . . of repugnancy, the incident must be such as *if expressed in the written contract* would make it insensible or inconsistent." This principle was recognized by the House of Lords in *Produce Brokers Co. Ltd.* v. *Olympia Oil and Cake Co. Ltd.* (5). See also *In re Arbitration between L. Sutro & Co. and Heilbut, Symons & Co.* (6), particularly at p. 366. The essence of any f.o.b. contract being that the seller must, by himself or another, place the goods, whether specific or unspecific in the contract, " on board " on account of the buyer conditionally or unconditionally, and that the goods when placed on board are thereby appropriated to the contract and thenceforth at the risk of the buyer, and the legal right of a buyer to insure particular goods either by himself or another being dependent on his having an insurable interest in *those very goods*, it follows that any suggested usage to the effect that none of those circumstances need exist would be repugnant to the written contract itself, and therefore the evidence would be inadmissible. We have therefore to consider what as a matter of law is the true interpretation of the contract, reading the finding of the jury as to documents,

(1) 5 C.L.R., 879, at p. 881.
(2) (1914) 3 K.B., 160, at p. 163.
(3) (1917) 1 K.B., 605, at pp. 616-617.
(4) 7 El. & Bl., 266, at 275.
(5) (1916) 1 A.C., 314, at pp. 324, 330-331, 335.
(6) (1917) 2 K.B., 348.

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whatever it means, as not inconsistent with an f.o.b. contract, and especially one which expressly entitles the *buyers* to have an insurance effected by the *sellers* for their (the buyers') benefit if they so desire. It gives an option to the buyers to instruct or not, as they please. They may, if they please, run the risk from the moment of shipment of their goods, or may cover the risk from the moment of shipment of their goods. That is, of course, inconsistent with the custom deposed to by Johnson, that the original shipper, whoever he may be, insures *his own goods*, and on every resale that insurance, and the obligation to pay for it, necessarily pass on.

There are, therefore, in our view three questions :—(1) Was the plaintiff bound in order to fulfil his contract to ship (either by himself or some person on his behalf) the goods on the defendants' account, either unconditionally or else conditionally on payment against documents ? (2) Did he do so on his own evidence ? and (3) If he did, is he entitled to contract price, or to damages; and, if to damages only, should there be a new trial ?

(5) *Construction of Contract.*—As to the first question, the contract reads to us in this way :—It was made in war time, when unexpected events might reasonably be guarded against by a seller so as to avoid an absolute undertaking to deliver at all events. First, the bare normal f.o.b. terms are inserted. Then, in order to prevent difficulties in performance, certain express stipulations are agreed to, viz. : (*a*) disputes as to quality are avoided, by providing for the finality of the New Zealand Government certificate showing that the quality when put on board, and not when arriving at Sydney, was to govern ; (*b*) the buyers' primary duty and right in ordinary circumstances of nominating a ship to any destination is determined by the provision as to " delivery " ; (*c*) terms of payment are agreed to, viz.—that the sellers are to hold the " documents " until payment, and to be entitled to payment when, besides sending the goods, they present the documents ; (*d*) the sellers undertake to insure for the buyers as instructed, thus connoting that the goods are at the buyers' risk from the time of shipment, and, if lost, the latter would still be bound to pay on delivery of " documents." Apart from those special stipulations, the contract is subject to the ordinary well-established meaning of an f.o.b. contract.

Cases have been referred to. There are only two classes of cases which appear to us to have any relevancy. One consists of those cases which state the effect of a normal f.o.b. contract, and the other is *Calcutta and Burmah Steam Navigation Co.* v. *De Mattos* (1), where Lord *Blackburn* (then *Blackburn* J.), while fully recognizing the power of parties to make their own agreements as they pleased—a power expressly recognized by the English *Sale of Goods Act*, sec. 55, not in force in New South Wales,—warns the Courts against excessive sublety in finding distinctions from well recognized types. Referring to a certain case of the c.i.f. type, the learned Judge said:—"I think it is mischievous to make refined and subtle distinctions between mercantile contracts in nearly the same terms. . . . If we once enter into refined differences, no man will be able, without unmercantile prolixity, to express his meaning." We respectfully support that observation, and, so far as we can, act upon it.

The other class of cases are those which state the meaning of an f.o.b. contract. We merely enumerate some of them: *Inglis* v. *Stock* (2); *Fram-Jee Cowas-Jee* v. *Thompson* (3); *Orient Co. Ltd.* v. *Brekke & Howlid* (4); *Arnold Karberg & Co.* v. *Blythe, Green, Jourdain & Co.* (5); *Landauer & Co.* v. *Craven & Speeding Bros.* (6); *Wimble, Sons & Co.* v. *Rosenberg & Sons* (7); *Bowden Bros. & Co. Ltd.* v. *Little* (8) (per *Griffith* C.J., at pp. 1376-1377, and per *Barton* J., at pp. 1384-1385); *Wilson* v. *King* (9) (per *Williams* J., at p. 78). We content ourselves by saying that in our opinion it clearly appears from those authorities that an f.o.b. contract requires the seller—by himself or another—to place the goods on board on the buyer's account, so that they are henceforth at his risk. And we have not been referred to any authority which, on the admitted facts here, would justify us in departing from that requirement.

(6) *Plaintiff's Non-performance.*—The second question is: Did the plaintiff so perform his contract as to comply with the implied requirement of every "f.o.b. contract," and did he also, as a

(1) 32 L.J.Q.B., at p. 331.
(2) 10 App. Cas., 263.
(3) 5 Moo. P.C.C., 173.
(4) (1913) 1 K.B., 531.
(5) (1916) 1 K.B., 495.
(6) (1912) 2 K.B., 94.
(7) (1913) 1 K.B., 279; (1913) 3 K.B., at pp. 752, 753, 756, 759.
(8) 4 C.L.R., 1364.
(9) 4 N.Z. Jur. (N.S.), 73.

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consequence, have a document—substituted for a bill of lading—in accordance with that shipment? It demonstrably appears from the evidence he himself adduced, that he failed. The material facts, on his own showing, down to tender of the document are these:—The chaff was shipped by a firm called Field & Royds, who carry on the business of selling and exporting chaff from New Zealand. They have agents there called Claude Ferrier & Co., who indorse all shipping documents for their principals. Cameron & McFadyen are a Sydney firm who sometimes act as agents for Field & Royds. In this particular instance they did not act as agents, but after its arrival in Sydney the *chaff was sold by Field & Royds to Cameron & McFadyen.* Cameron & McFadyen, by a separate independent sale, *resold to the plaintiff.* The original vendors' (Field & Royds') New Zealand agents, Claude Ferrier & Co., shipped the goods to Sydney, taking not a bill of lading but, in accordance with local usage in New Zealand and Sydney, a shipping receipt per "*Waihemo* or other vessel" to their own order, which they indorsed in blank, and so the goods were consigned. That document with the draft was sent to the bank. The goods arrived on Thursday 5th August by the *Waitemata*, and the documents were seen in Sydney by Field on the same date. On that day the plaintiff's manager went to Cameron & McFadyen's office and gave certain instructions. On Friday the 6th Field gave Cameron & McFadyen authority to alter the so-called bill of lading from "*Waihemo* or other vessel" to "*Waitemata*," and the shipping company accordingly made the alteration. What that firm did is clear. Their accountant, Bowd, received the documents on Friday the 6th. By Hogan's instructions (Hogan's purchase having therefore taken place between the arrival on the 5th and this event) he was, as he says, "to tender the documents, and collect the purchase money" from Martin. Without going through details, it may be briefly stated that an invoice was sent to Martin, who came round, inspected the documents, was asked for a cheque repeatedly, and always refused, giving no reason. On the same day and later, Field authorized *Cameron & McFadyen* (not Hogan, be it observed) to ask the shipping company to alter the so-called bill of lading from "*Waihemo* or other vessel" to "*Waitemata.*" The company did that, and in a way which would

undoubtedly satisfy any reasonable man that they were responsible for the alteration. Then Bowd re-presented the documents finally on the Monday. There is no doubt that presentation all through was a tender of documents in exchange for cash, and not independent of cash. No other finding could be supported. But whether the tender was conditional or unconditional is immaterial (*Wait* v. *Baker* (1)). The seller cannot, by making an unconditional tender, pass the property to the buyer if the latter has not contracted that the property shall pass *in that way*. The property must pass, if at all, "by the contract," as *Tindal* C.J. said in *Alexander* v. *Gardner* (2).

The seller cannot insist on substituting for the goods as sold something which he, or the Court, may think "just as good." The contract in this case, as interpreted according to the principles above stated, requires certain conditions to be satisfied that were not satisfied. The goods had not been delivered on board on account of the defendants, conditionally or unconditionally, and were not at their risk; they had been delivered on board to the order of Field & Royds, without any obligation towards the defendants, and the shipping receipt tendered would not affect the right to the goods (*Ramdas Vithaldas Durbar* v. *S. Amerchand & Co.* (3)). The property was sold to Cameron & McFadyen; and, assuming it then passed to that firm, when did it pass to Hogan? And, still further, when did it pass to the defendants? Never, as it appears to us. That established the position that the property did not pass, and consequently establishes that the plaintiff should fail altogether.

(7) *Remedy.*—But if it be held that, though the property did not pass, yet the plaintiff is entitled to succeed, the next question is: To what is he entitled? He claims the "price" on the ground that, failing the passing of property, payment was agreed to be made "upon a day certain irrespective of delivery." This fails, because "a day certain" in that sense means a day ascertained—that is, fixed—at the time of the contract, and not left to be ascertained afterwards (*Dunlop* v. *Grote* (4); *Staunton* v. *Wood* (5)). If

(1) 2 Exch., 1.
(2) 1 Bing. (N.C.), 671, at p. 676.
(3) 32 T.L.R., 594.
(4) 2 Car. & K., 153.
(5) 16 Q.B., 638.

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entitled to anything, it is clearly damages only. Sec. 49 of the *Sale of Goods Act* is not in force in New South Wales, nevertheless it represents the common law. The common law proceeds on a just principle. If the consideration for the price passes, the price can be recovered *simpliciter*. But in a sale of goods the consideration does not pass unless the property passes. If, again, there has been an agreement to pay the money on a day fixed by the contract, irrespective of the consideration passing—then, again, the sum can be recovered. But apart from that exception, the common law says, however strictly a man may have promised to pay the price on any given event, his failure to pay on that event is to be compensated for by ascertaining the amount of damage the promisee has sustained. That is fair. The contention here, on the other hand, is most unfair. It is, that though the goods were rejected, and though that rejection was met by the plaintiff selling the goods to another *as his own*, though as he says at the buyers' risk (a wrongful sale—see *Greaves* v. *Ashlin* (1)), and therefore though the buyers cannot have the goods, and though if any profit had ensued the plaintiff would have kept it, yet the buyers are to pay the contract price as if the property had passed to them. We have no hesitation in rejecting that as unsupported by principle or authority. However unjustifiably, in the opinion of the majority, the defendants may have acted, the only just penalty is damages *as contended for at the trial, and ever since*. As to the second count, the position that damages only were claimed was stated before us to have been acceded to by both parties, as already stated, but the learned trial Judge ruled that the *price* as such was recoverable, and so the finding cannot be supported unless (which is unarguable) the amount of damages is necessarily the price.

To this extent at least the appeal should succeed.

HIGGINS J. There is a verdict for £315 5s. 3d., the full price of chaff agreed to be bought; and yet the buyer has not got the chaff —does not own it or possess it. For aught that appears the seller may have given the chaff to his horses, or may have sold it and received the proceeds. At first sight this is an extraordinary position.

(1) 3 Camp., 426.

On the other hand, it is said on behalf of the buyer that he should not be ordered to pay anything, even damages for breach of contract, inasmuch as the seller has not carried out the contract on his part. It is said that, under the contract, the seller was under an obligation to ship the chaff, to be the shipper, and to ship it to the buyer distinctively; whereas here, the seller, having made the contract in question in June, merely purchased in August chaff which had been shipped by others. Now this latter view was not urged on behalf of the buyer at the trial, nor before the Full Court of New South Wales; and, in my opinion, it is not open to the defendants on the pleadings. My brother *Barton* has in his judgment set out in full the second count, and I need not repeat it. Then the second plea—the only material plea—is as follows: "The defendants as to the second count of the declaration say that it was a term of the said agreement that the plaintiff should tender and deliver to the defendants the bill of lading and other documents relating to the said chaff and the defendants say that the plaintiff did not tender or deliver to the defendants the said bill of lading and the said other documents or any of them." Therefore the averment of the declaration that "the said chaff was *duly shipped in accordance with the said agreement*" is not traversed in the defendants' plea. It is also alleged in the count that "all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to maintain this action"; and the non-fulfilment of the alleged obligation of the seller to ship the chaff and to ship it to the buyer has not been alleged. The second plea merely goes to the tender of documents; but it adds a statement that under the agreement there was to be a bill of lading among the documents to be tendered. The jury have found the issue on the second plea in favour of the plaintiff; and, in my opinion, it would be most unjust on this appeal to the High Court to allow the defendants to set aside the verdict by showing that the plaintiff did not fulfil some condition precedent other than the tender. The chaff must be treated as "duly shipped in accordance with the said agreement," and the tender of the actual documents as being sufficient. The question for us, as a Court of appeal, is whether the Supreme Court was right in its decision, on the pleadings as they stood before that

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Court with the verdict and the evidence. There was not before the Supreme Court, and there is not before us, any application on the part of the defendants for leave to amend their pleadings so as to allege non-performance of other conditions precedent; and if there were such an application the plaintiff would have to be allowed an opportunity to meet the allegation. It is not for us to say that he could not meet it.

But, apart from the state of the pleadings, I desire to be not understood as thinking that the seller could not fulfil his contract by procuring chaff from others and tendering it. Though it is not necessary to decide the point, I am at present strongly inclined to think that, under this modified f.o.b. agreement, the seller fulfilled his obligation if he tendered goods that had been shipped by somebody on the lines specified in the agreement, accounts to be adjusted between parties to the agreement on the modified f.o.b. basis. If the buyer had instructed the seller to insure the goods, or his interest in the chaff as unappropriated, and if the seller had failed to do so, there might have been some difficulty; but the buyer gave no such instructions. The goods reached Sydney without insurance and without loss.

In my opinion, therefore, the plaintiff has a cause of action against the defendants; but the question remains: Is he entitled to recover the full price even though the defendants have not got the goods, either the property or the possession? It would be absurd if a seller could keep the goods and also recover the value. As *Parke* B. said, in *Laird* v. *Pim* (1): "A party cannot recover the full value of a chattel, unless under circumstances which import that the property has passed to the defendant." The main difficulties of this case are difficulties arising from the state of the pleadings. The plaintiff's count seems to be based on the theory that because the contract said "cash against documents" the defendants bound themselves to pay the full price—for the mere documents—even if the property in the goods should never pass to the defendants. But that is absurd. The contract is to "buy" and to "sell" goods; and the passing of the property is implied by these words. The admission made by the defendants as to the fulfilment of all the

(1) 7 M. & W., 474, at p. 478.

conditions precedent (other than tender) does not affect this point; for the admission goes only to the fulfilment of all conditions precedent to a right of action—it does not go to the nature of the remedy which the Courts will grant. The plaintiff's count treats the payment of the full price of the goods as being the proper remedy for the breach of the contract; but it is wrong. The admission that all conditions precedent had been fulfilled is not an admission that the damages sought were proper. Damages are always in issue without express words in defence or plea—are in issue both as to character and as to amount. The position is clearly set forth in the English *Rules of Court* (Order XXI., r. 4); and the English rules merely declare the position which was accepted in the Courts of common law before the *Judicature Act* (*Wilby* v. *Elston* (1)).

On the pleadings and the verdict of the jury, the plaintiff must be taken as having performed his part of the contract until the defendants failed to perform their part; and it is important to see clearly in what point the defendants failed. The documents, including the shipping receipt, were clearly tendered to the defendants on 9th August, if not before; and the defendants refused to accept them, even left the envelope unopened. They offered to give a lower price, the market having collapsed. In effect, they refused to carry out their agreement, refused to pay the price, because they refused to accept the goods. The *Sale of Goods Act* 1893 (British) has not been adopted by the New South Wales Parliament, but counsel on both sides appeal to the Act as correctly stating the law of New South Wales. In sec. 50 of this Act it is provided as follows: "Where the buyer wrongfully . . . refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance"; and the measure of damages is the estimated loss resulting from the breach of contract—that is to say, *primâ facie*, the difference between the contract price and the market price at the time that the goods ought to have been accepted.

But here the verdict of the jury and the claim of the plaintiff is for the full price of the chaff: on what ground? There are two cases in which, according to the Act, the full price is recoverable

(1) 8 C.B., 142.

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(sec. 49). One is if "the property in the goods has passed to the buyer." But when and how did the property here pass to the buyer? The contract note was signed on the 18th June 1915; and although it uses the words "buy" and "sell" it must be treated as an agreement to sell, not a sale which operates to transfer the property *ipso facto* (sec. 1). The particular chaff which was to go to the defendants out of all the chaff consigned was unascertained. As Lord *Loreburn* L.C. said in *Badische Anilin und Soda Fabrik* v. *Hickson* (1), "a contract to sell unascertained goods is not a complete sale, but a promise to sell" (and see sec. 16). At the date of the contract the plaintiff did not even own the property, and he could not transfer it. Such title as the plaintiff obtained to the property he must have obtained on or after 2nd August. For Field, of Messrs. Field & Royds, the shippers, reached Sydney on the 2nd of August, sold the chaff K.Z. (referred to in the shipping receipt) to Messrs. Cameron & McFadyen, and Cameron & McFadyen sold to Hogan, the plaintiff. By tendering the shipping receipt, invoice and grading certificate to the defendants, the plaintiff did not transfer to them this property. The shipping receipt is not like a negotiable instrument. As Lord *Loreburn* said in the same passage:—"There must be added to it" (the contract to sell) "some act which completes the sale, such as delivery or the appropriation of specific goods to the contract *by the assent, express or implied, of both buyer and seller.* . . . They become the property of the buyer as soon as they are appropriated" (and see sec. 18, r. 5; *Rohde* v. *Thwaites* (2)). Even if the vendor desired, at the moment of tender, to appropriate this specific parcel of chaff to the contract, the buyer in no way assented to the appropriation. The buyer showed clearly enough that he would not accept chaff in pursuance of his contract, and an action lies for non-acceptance. The assent of the buyer is essential in the case of goods which are not ascertained at the date of contract, and no property in the goods can pass to the purchaser by the contract itself (*Heilbutt* v. *Hickson* (3); *Godts* v. *Rose* (4)). Until the shipping receipt should be produced to the shipping company duly indorsed by Field & Royds, that company held as agent for Field

(1) (1906) A.C., 419, at p. 421.
(2) 6 B. & C., 388.
(3) L.R. 7 C.P., 438, at p. 449.
(4) 17 C.B., 229.

& Royds; the company never, so to speak, attorned to the defendants, never held as agents for the defendants; the possession of the chaff never passed to the defendants (*Farina* v. *Home* (1), and see secs. 28, 29 (3), 34, 35).

There is, however, a second case in which, according to this Act, the full price is recoverable. It is the rare case where, under the agreement, the price is payable "on a day certain irrespective of delivery" although the property in the goods has not passed and the goods have not been appropriated to the contract (sec. 49 (2)). Now, in this case the contract fixed no "day certain irrespective of delivery." At the time of the contract, it could not be said that the price was to be paid on 9th August or any other particular day, delivery or no delivery. The words of the section are not "at a definite time," but "on a day certain irrespective of delivery." The case on which the learned draughtsman of the Act based the exception (see *Sale of Goods Act* 1893, by Judge *Chalmers*) is the case of *Dunlop* v. *Grote* (2). In that case the defendants had on 3rd March 1845 bought of the plaintiffs 1,000 tons of a certain kind of pig-iron to be delivered to the defendants; delivery was to be taken on or before 30th April; and *if delivery were not required by the defendants on or before 30th April, the defendants promised nevertheless to pay on that day.* The defendants presently got 600 tons and paid for it; but they did not require delivery of the remaining 400 tons on or before 30th April. Under these circumstances, the defendants were held bound by their contract to pay on 30th April. That was the day for payment, delivery or no delivery, before that day. It was as if the seller had said: "We shall not promise to give you at your price 1,000 tons of our pig-iron to be delivered as you require unless you promise to let us have all the money not later than 30th April." There is no such exceptional provision in this case, and therefore the ordinary rule would apply of payment when the goods are appropriated by the seller with the consent of the buyer, payment when the property passes. It is true that in the contract these words are used: "Terms.—Cash against documents"; but these words are consistent with the ordinary condition that, previously or simultaneously, the goods

(1) 16 M. & W., 119. (2) 2 Car. & K., 153.

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are specifically appropriated to the contract by mutual assent. If the buyers had fulfilled their promise, and accepted the documents, and assented to the appropriation of the K.Z. chaff, the goods could at once have been taken up by the defendants from the shipping company; but the buyers did not fulfil this promise. They refused to accept the documents, refused to assent to the appropriation, refused to accept the goods; and an action would lie, not for the price, but for damages from non-acceptance. In fact, the words "cash against documents" were used on the assumption that the documents would, as usual, be accepted, and the goods thereby appropriated to the buyer; but as the documents were not accepted, the seller cannot sue as if there had been an appropriation.

Much of the difficulty of this case seems to me to have arisen from the use of the words "cash against documents," words which are quite appropriate in connection with bills of lading. A bill of lading, by the common law founded upon the custom of merchants, represents the goods; and the indorsement and delivery of the bill of lading presumptively transfers the property to the indorsee; and it also "operates as a symbolical delivery of the cargo" (per *Bowen* L.J. in *Sanders Bros.* v. *Maclean & Co.*(1)). Therefore, when the bill of lading is transferred to the buyer, he gets both property and possession, and should, under the words "cash against documents," forthwith make payment. There is no need for any other appropriation of specific goods to the purposes of the contract. But I know of no ground which would justify us in treating a shipping receipt, such as in this case, as having the negotiable quality of a bill of lading. In the case of such a receipt the plaintiff cannot claim the price until he show affirmatively that the goods have been appropriated to the contract, that the property in the goods has passed.

Reference has been made to sec. 55 as affecting sec. 49: "Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived . . . by express agreement." But this section, 55, seems to me to refer merely to provisions implied by law, imported by law into the agreement, in the absence of express agreement to the contrary—such as the implied condition in sec. 12,

(1) 11 Q.B.D., 327, at p. 341.

the implied condition in sec. 13, the implied rights and duties under sec. 28, sec. 32, &c. The section does not, I think, refer to substantive legal principles as to right of action and nature of remedy, —does not apply to such a substantive principle as that the seller is not entitled to the full price unless the buyer gets the property in the goods. The exception to this rule is found in sec. 49 (2), not in sec. 55. In any event, I am of opinion that the legal principle that the price is not payable until the property has passed is in this case not "negatived by express agreement."

I have therefore come to the same conclusion as *Sly* J., that the verdict for the price of goods is erroneous, and that the plaintiff can only recover damages, the difference between the contract price and the market price at the date of defendants' refusal to accept. But as the jury was not asked to assess these damages, and as the claim made in the declaration is only for the full price, the proper order would seem to be to allow the appeal, to allow the plaintiff leave to amend (on proper terms), and to order a new trial on the question of damages.

Perhaps I should add that neither party lays any stress on the fact that the parcel of chaff tendered exceeded by some 5 cwt. the 50 tons for which the contract was made; and, further, that members of this Court, who have been summoned to sit for a rehearing of the appeal, are not to be affected in their judgments by the alleged manner in which the parties conducted their case on the previous hearing.

GAVAN DUFFY J. The defendants in this case refuse to accept and pay for certain chaff which was tendered to them by the plaintiff purporting to act under a written agreement. Their reason for refusing to accept was that the market had fallen and they were anxious to escape from a bad bargain, but, of course, they are at liberty to avoid liability by any legal means. It is possible that they might have so shaped their defence in this action as to defeat the plaintiff's claim, but on the pleadings as they stand, and in view of the issues actually fought at the trial, I think the plaintiff is entitled to hold the verdict which he has obtained from the jury.

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The second count of the declaration is as follows: "And the plaintiff also sues the defendants for that it was agreed between the plaintiff and the defendants that the plaintiff should sell to the defendants and the defendants should buy from the plaintiff fifty tons of good sound wheaten straw chaff in sound shipping bags at six pounds five shillings per ton f.o.b. s.i. New Zealand main ports, New Zealand Government Inspector's certificate of weight and quality to be final and to be shipped from New Zealand to Sydney during the month of June and/or July one thousand nine hundred and fifteen as freight was available and to be paid for by the defendants to the plaintiff by cash against documents subject to a brokerage of two shillings and sixpence (2/6) per ton and subject to certain terms and conditions as to insurance and the said chaff was duly shipped in accordance with the said agreement and the plaintiff tendered the said documents to the defendants and all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff to maintain this action for the breaches hereinafter alleged yet the defendants did not nor would pay the plaintiff for the said chaff in accordance with the said agreement or at all and the said price still remains wholly due to the plaintiff and unpaid and the plaintiff claims three hundred and sixteen pounds nine shillings and threepence (£316 9s. 3d.)." To this count the defendants pleaded that it was a term of the agreement that the plaintiff should tender, and alternatively should tender within a reasonable time, to the defendants the bill of lading and other documents relating to the said chaff, and had not done so. The plaintiff by his replication joined issue on the defendants' pleas.

At the trial the plaintiff and the presiding Judge apparently understood the defendants' allegation to mean that the plaintiff had failed to tender any documents, not that the documents tendered were informal or insufficient, but at the end of the plaintiff's case defendants' counsel asked for a nonsuit, and said that he relied on the fact that a document which had been tendered, though called a bill of lading, was not in fact what is known to the law as a bill of lading, and that the contract required the tender of such a bill of lading. The learned Judge permitted the plaintiff to reopen his case so that he might prove under his joinder of issue that the document produced

was in fact such a document as was contemplated by the contract, and that the tender of a bill of lading properly so called was not required. Such evidence was led, and the plaintiff's case again closed. The defendants did not call any evidence, but again asked for a nonsuit on the ground that "even assuming the defendants were bound to accept and pay, still, as they did not accept, this action should not be for the price of the chaff but should be for damages for non-acceptance." The presiding Judge asked the jury the following question: "Is there a usage in the produce trade that under a contract 'cash against documents' for goods to be shipped from New Zealand a document in the form of that included in Exhibit C is accepted instead of an ordinary bill of lading?" The jury answered the question in the affirmative, and found a general verdict for the plaintiff for £315 5s. 3d.

Application was made to the Supreme Court of New South Wales to set aside the verdict and to enter a nonsuit or judgment for the defendants. It was again urged that the defendants were entitled to the tender of a bill of lading and that in any case the plaintiff could not be entitled to the price of the goods but only damages for non-acceptance. The majority of the Court held that there had been a sufficient tender and that the plaintiff was entitled to recover the price. When the case came before us it was agreed that the finding of the jury as to the document must stand, but it was urged that the document was defective in another respect inasmuch as it referred to chaff which had not been put on board ship for the defendants but which had been shipped to Sydney for third persons and by them sold to the plaintiff after it had arrived in Sydney, and that the tender of a bill of lading referring to such chaff would have been insufficient. In my opinion the jury have found that the document tendered was in fact the document contemplated by the contract, but if they had found only that its form, though not that of a bill of lading, is sufficient to satisfy the contract, then in my opinion it would be unjust to allow the defendants, who at the trial were permitted to state and did state the meaning of their pleas, to now put another meaning on them in order to avail themselves of a defence to which attention was not drawn at the trial and which their pleading was not intended to set up.

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With respect to the objection that the plaintiff's remedy was "an action for non-acceptance of the chaff" it is enough to say that this question is not raised on the pleadings. It may well be that on the true construction of the contract the property in the chaff had not passed to the defendants and that there was no promise to pay until the property had passed. If that were so, and the defendants were at fault, the plaintiff's appropriate remedy would be an action to recover the damage he had sustained, namely, the loss of the difference between the contract price of the chaff and its market price. But the second count is not based on the hypothesis that either the passing of the property in the chaff or its delivery remained unperformed as a condition precedent to the recovery of the price. On the contrary, it is based on the hypothesis that the plaintiff is entitled to immediate and unconditional payment, and it definitely states that all conditions precedent have been performed necessary to entitle the plaintiff to maintain his action for the defendants' breach of their agreement to pay.

The form of the count is such that it does not permit the defendants to take a general issue, but compels them to state which, if any, of the conditions precedent have not been performed. The defendants state that the price is not due and payable because the necessary documents have not been tendered to them, but admit that except for this the plaintiff is entitled to maintain his action for failure to pay the agreed price. No point as to delivery and passing of the property is raised by defendants' pleas. The question then is not what loss the plaintiff has sustained by retaining the property in the goods and losing the contract price, but what loss he has sustained by not being paid the price to which *ex hypothesi* he was unconditionally entitled. As the breach is stated in the declaration, the plaintiff is worse by the sum of £315 5s. 3d. than he would have been had no breach occurred.

POWERS J. All my learned brothers have in their judgments dealt so fully with the facts of this case, and their reasons for arriving at the different conclusions at which they have arrived, that I do not deem it necessary to do much more than say I agree with my learned

brothers *Barton* and *Duffy* that the appeal should be dismissed, and for the most part for the reasons given by them in their judgments.

In ordinary cases of sales the property must pass before the price can be recovered and not damages only, but I do not know of any law in England, or in Australia, to prevent parties making such special agreements as they think fit, as to the time and circumstances under which the price can be recovered if the seller complies with all the conditions of the contract to be observed by him. In this case the majority of my learned brothers agree that the seller did all that he had to do to entitle him to an action against the defendants, either for the price or for damages for a breach of the contract. I understand that all agree that the full price, not only damages, could have been recovered if an ordinary bill of lading had been tendered to the defendants. In this case the "documents" referred to in the contract included a document called in the body of it a bill of lading, which from the time it was tendered would pass to the buyer an insurable interest in the goods described in the document and under which the goods would be held by the shipper for and on the buyer's account.

The agreement on the face of it was not an ordinary f.o.b. contract for delivery on board, but only a contract at f.o.b. price, delivery to be by some boat from New Zealand to Sydney. The letters "f.o.b." in the contract only referred to price f.o.b. This I think is clearly shown in the evidence at the trial. The defendant said: "I am very sorry I cannot take the documents, but without the rights or wrongs or merits of the contract I will give you £5 15s. a ton s.i. New Zealand for it." That did not mean that the goods were to be retaken to New Zealand to be shipped to his order, because the goods were in Sydney at the time, but only referred to the price. The words used were exactly the words used in the contract except the amount. In the contract the words were: "at six pounds five shillings (£6 5s.) per ton f.o.b. s.i. N.Z. main ports." The "documents" would have been accepted if the reduced price offered had been accepted, and the cash would have been paid on tender of documents. I do not see why parties cannot contract that on tender of such a document the buyer is entitled to payment of the price of the goods, and recover the price if it is not paid.

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On the facts found by the jury at the trial and on the pleadings, for the reasons referred to by my brothers *Barton* and *Gavan Duffy*, I hold—though with some doubt—that the full price was recoverable in this case on the unconditional tender of the documents referred to in the contract, and that the appeal should be dismissed.

Judgment appealed from affirmed. Appellants to pay costs of appeal.

Solicitor for the appellants, *A. G. de L. Arnold.*

Solicitor for the respondent, *G. Crichton Smith.*

B. L.

[HIGH COURT OF AUSTRALIA.]

SCOTT AND ANOTHER . . . . . APPELLANTS;
PLAINTIFFS,

AND

PAULY . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 26; *Nov.* 2.

Isaacs, Gavan Duffy and Rich JJ.

Practice—Appeal—Appeal from Judge without jury—Question of fact—Conflicting evidence—Duty of Court of appeal.

Trust—Voluntary transfer of property—Parent and child—Mother and daughter—Resulting trust—Advancement—Gift of beneficial interest—Evidence.

Although the question involved in an appeal from the decision of a Judge in an action tried without a jury turns on a matter of fact determined by him upon conflicting testimony, it is the duty of a Court of appeal to decide the matter for itself upon the evidence given at the trial where it is in as good a position to do so as the Judge of first instance.